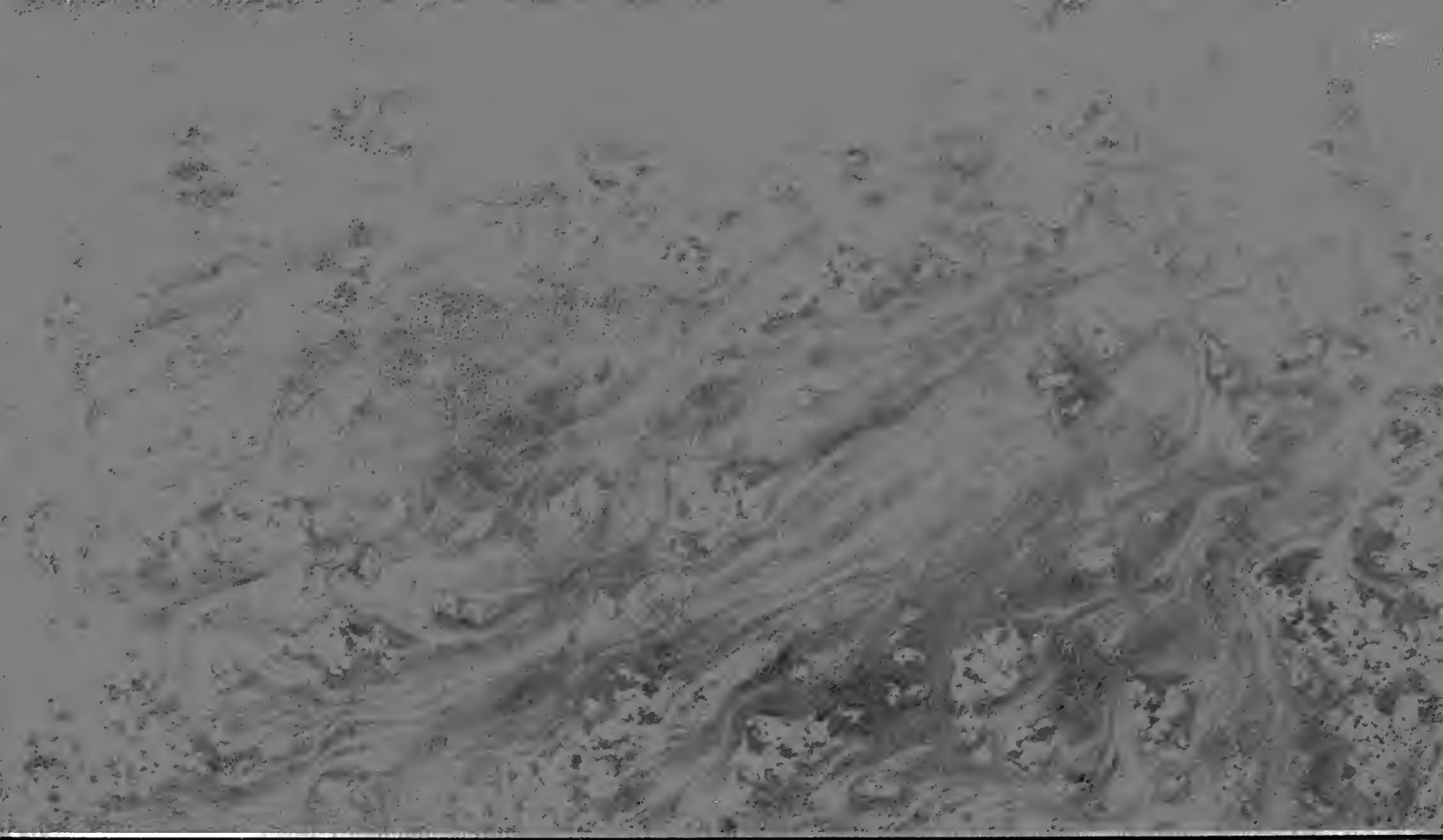

VIEW

OF THE

STATE OF EUROPE

DURING

THE MIDDLE AGES.

IN FOUR VOLUMES.

BY HENRY HALLAM, ESQ.

Εκ Χάεος δ' Ερεβός τε μέλαινά τε Νὺξ ἐγένοντο·
Νυκτὸς δ' αὖτ' Αιθήρ τε καὶ Ἡμέρη ἐξεγένοντο.

ΗΣΙΟΔΟΣ.

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CONTENTS.

CHAPTER VII.

History of Ecclesiastical Power during the Middle Ages.

CHAPTER VIII.

The Constitutional History of England.

Part I.

Part II.

The Anglo-Norman Constitution.

Part III.

The English Constitution.

VIEW

OF THE

HISTORY AND GOVERNMENTS

OF

EUROPE

DURING THE MIDDLE AGES.

CHAPTER VII.

HISTORY OF ECCLESIASTICAL POWER DURING THE MIDDLE AGES.

Wealth of the Clergy—its sources—Encroachments on Ecclesiastical Property—their Jurisdiction—arbitrative—coercive—their Political Power—Supremacy of the Crown—Charlemagne—Change after his Death, and Encroachments of the Church in the ninth Century—Primacy of the See of Rome—its early Stage—Gregory I.—Council of Frankfort—false Decretals—Progress of Papal Authority—Effects of Excommunication—Lothaire—State of the Church in the tenth Century—Marriage of Priests—Simony—Episcopal Elections—Imperial Authority over the Popes—Disputes concerning Investitures—Gregory VII. and Henry IV.—Concordat of Calixtus—Election by Chapters—general System of Gregory VII.—Progress of Papal Usurpations in the twelfth Century—Innocent III.—his Character and Schemes—continual Progress of the Papacy—Canon Law—Mendicant Orders—dispensing Power—Taxation of the Clergy by the Popes—Encroachments on Rights of Patronage—Mandats, Re-

serves, &c.—general Disaffection towards the See of Rome in the thirteenth Century—Progress of Ecclesiastical Jurisdiction—Immunity of the Clergy in Criminal Cases—Restraints imposed upon their Jurisdiction—upon their Acquisition of property—Boniface VIII.—his Quarrel with Philip the Fair—its Termination—gradual Decline of Papal Authority—Louis of Bavaria—Secession to Avignon and Return to Rome—Conduct of Avignon Popes—contested Election of Urban and Clement produces the great Schism—Council of Pisa—Constance—Basle—Methods adopted to restrain the Papal Usurpations in England, Germany and France—Liberties of the Gallican Church—Decline of the Papal Influence in Italy.

AT the irruption of the northern invaders into the Roman empire, they found the clergy already endowed with extensive possessions. Besides the spontaneous oblations upon which the ministers of the Christian church had originally subsisted, they had obtained, even under the pagan emperors, by concealment or connivance, for the Roman law did not permit a tenure of lands in mortmain, certain immoveable estates, the revenues of which were applicable to their own maintenance, and that of the poor.* These indeed were precarious, and liable to confiscation in times of persecution. But it was among the first effects of the conversion of Constantine to give not only a security, but a legal sanction to the territorial acquisitions of the church. The edict of Milan, in 313, recognizes the actual estates of ecclesi-

* Giannone, Istoria di Napoli, l. ii. c. 8. Gibbon, c. 15. and c. 20. F. Paul's Treatise on Benefices, c. 4. The last writer does not wholly confirm this position; but a comparison of the three seems to justify my text.

astical corporations.* Another, published in 321, grants to all the subjects of the empire the power of bequeathing their property to the church.† His own liberality, and that of his successors, set an example which did not want imitators. Passing rapidly from a condition of distress and persecution to the summit of prosperity, the church degenerated as rapidly from her ancient purity, and forfeited the respect of future ages in the same proportion as she acquired the blind veneration of her own. Covetousness, especially, became almost a characteristic vice. Valentinian I. in 370, prohibited the clergy from receiving the bequests of women; a modification more discreditable than any general law could have been. And several of the fathers severely reprobate the prevailing avidity of their contemporaries.‡

The devotion of the conquering nations, as it was still less enlightened than that of the subjects of the empire, so was it still more munificent. They left indeed the worship of Hesus and Taranis in their forests; but they retained the elementary principles of that, and of all barbarous idolatry, a superstitious reverence for the priesthood, a credulity that seemed to invite imposture, and a confidence in the efficacy of gifts to expiate offences. Of this temper, it is undeniable that the ministers of religion, influenced probably not so much by personal covetousness, as by zeal for the interests of their order, took advantage. Many of the peculiar and prominent charac-

* Giannone. Gibbon, ubi supra. F. Paul, c. 5. † Id. Ibid.
‡ Giannone. ubi supra. F. Paul. c. 6.

teristics in the faith and discipline of those ages appear to have been either introduced, or sedulously promoted, for the purpose of sordid fraud. To those purposes conspired the veneration for relics, the worship of images, the idolatry of saints and martyrs, the religious inviolability of sanctuaries, the consecration of cemeteries, but above all, the doctrine of purgatory, and masses for the relief of the dead. A creed thus contrived, operating upon the minds of barbarians, lavish though rapacious, and devout though dissolute, naturally caused a torrent of opulence to pour in upon the church. Donations of land were continually made to the bishops, and, in a still more ample proportion, to the monastic foundations. These had not been very numerous in the west till the beginning of the sixth century, when Benedict established his celebrated rule.* A more remarkable show of piety, a more absolute seclusion from the world, forms more impressive and edifying, prayers and masses more constantly repeated, gave to the professed in these institutions a preference over the secular clergy.

The ecclesiastical hierarchy never received any territorial endowment by law, either under the Roman empire, or the kingdoms erected upon its ruins. But the voluntary munificence of princes as well as their subjects, amply supplied the place of a more universal provision. Large private estates, or, as

* Giannone, l. iii. c. 6.; l. iv. c. 12. Treatise on Benefices, c. 8. Fleury, Huitième Discours sur l' Hist. Ecclésiastique. Muratori, Dissert. 65.

they were termed, patrimonies, not only within their own dioceses, but sometimes in distant countries, sustained the dignity of the principal sees, and especially that of Rome.* The French monarch of the first dynasty, the Carlovingian family and their great chief, the Saxon line of emperors, the kings of England and Leon, set hardly any bounds to their liberality, as numerous charters still extant in diplomatic collections attest. Many churches possessed seven or eight thousand mansi; one with only two thousand passed for only indifferently rich.† But it must be remarked, that many of these donations are of lands uncultivated and unappropriated.‡ The monasteries acquired legitimate riches by the culture of these deserted tracts, and by the prudent management of their revenues, which were less exposed to the ordinary means of dissipation than those of the laity. Their wealth, continually accumulated, enabled them to become the regular purchasers of landed estates, especially in the time of the crusades, when the fiefs of the nobility were constantly in the market for sale or mortgage.§

If the possessions of ecclesiastical communities had all been as fairly earned, we could find nothing in them to reprehend. But other sources of wealth were less pure: and they derived their wealth from many sources. Those who entered into a monastery

* St. Marc, t. i. p. 281. Giannone, l. iv. c. 12.
† Schmidt, t. ii. p. 205.
‡ Muratori, Dissert. 65. Du Cange v. Eremus.
§ Heeren, Essai sur les Croisades, p. 166. Schmidt, t. iii. p. 293.

threw frequently their whole estates into the common stock: and even the children of rich parents were expected to make a donation of land on assuming the cowl. Some gave their property to the church before entering on military expeditions; gifts were made by some to take effect after their lives, and bequests by many in the terrors of dissolution. Even those legacies to charitable purposes, which the clergy could with more decency and speciousness recommend, and of which the administration was generally confided to them, were frequently applied to their own benefit.* They failed not, above all, to inculcate upon the wealthy sinner, that no atonement could be so acceptable to Heaven, as liberal presents to its earthly delegates.† To die without allotting a portion of worldly wealth to pious uses, was accounted almost like suicide, or a refusal of the last sacraments; and hence intestacy passed for a sort of fraud

* Primò sacris pastoribus data est facultas, ut hæreditatis portio in pauperes et egenos dispergeretur; sed sensìm ecclesiæ quoque in pauperum censum venerunt, atque intestatæ gentis mens credita est proclivior in eas futura fuisse; quâ ex re pinguius illarum patrimonium evasit. Immò episcopi ipsi in rem suam ejusmodi consuetudinem interdum convertebant; ac tributum evasit, quod antea pii moris fuit. Muratori, Antiquitates Italiæ, t. v. Dissert. 67.

† Muratori, Dissert. 67. (Antiquit. Italiæ, t. v. p. 1055.) has preserved a curious charter of an Italian count, who declares, that, struck with reflections upon his sinful state, he had taken counsel with certain religious, how he should atone for his offences. Accepto consilio ab iis, excepto si renunciare sæculo possem, nullum esse melius inter eleemosinarum virtutes, quàm si de propriis meis substantiis in monasterium concederem. Hoc consilium ab iis libenter, et ardentissimo animo ego accepi.

upon the church, which she punished by taking the administration of the deceased's effects into her own hands. This however was peculiar to England, and seems to have been the case there only between the reigns of Henry III. and Edward III. when the bishop took a portion of the intestate's personal estate, for the advantage of the church and poor, instead of distributing it among his next of kin.* The canonical penances imposed upon repentant offenders, extravagantly severe in themselves, were commuted for money or for immoveable possessions; a fertile though scandalous source of monastic wealth, which the popes afterwards diverted into their own coffers, by the usage of dispensations and indulgences.† The church lands enjoyed an immunity from taxes, though not in general from military service, when of a feudal tenure. But their tenure was frequently in what was called frankalmoign, without any obligation of service. Hence it became a customary fraud of lay proprietors to grant estates to the church which they received again by way of fief or lease, exempted from public burthens. And as if all these means of accumulating what they could not legitimately enjoy were insufficient, the monks prostituted their knowledge of writing to the purpose of forging charters in their own favour, which might easily impose upon an ignorant age, since it has required a pecu-

* Selden, vol. iii. p. 1676. Prynne's Constitutions, vol. iii. p. 18. Blackstone, vol. ii. chap. 32. In France, the lord of the fief seems to have taken the whole spoil. Du Cange v. Intestatus.

† Muratori, Dissert. 68.

liar science to detect them in modern times. Such rapacity might seem incredible in men cut off from the pursuits of life, and the hope of posterity, if we did not behold every day the unreasonableness of avarice, and the fervour of professional attachment.*

As an additional source of revenue, and in imitation of the Jewish law, the payment of tithes was recommended or enjoined. These however were not applicable at first to the maintenance of a resident clergy. Parochial divisions, as they now exist, did not take place, at least in some countries, till several centuries after the establishment of christianity.† The rural churches, erected successively as the necessities of a congregation required, or the piety of a patron suggested, were in fact a sort of chapels dependent on the cathedral, and served by itinerant ministers at the bishop's discretion. The bishop himself received the tithes. and apportioned them as he thought fit. A capitulary of Charlemagne however regulates their division into three parts; one for the bishop and his clergy, a second for the poor, and a third for the support of the fabric of the church.‡

* Muratori's 65th, 67th, and 68th dissertations on the antiquities of Italy have furnished the principal materials of my text, with Father Paul's Treatise on Benefices, especially chaps. 19 and 29.; Giannone, loc. cit. and l. iv. c. 12.; l. v. c. 6.; l. x. c. 12. Schmidt, Hist. des Allemands, t. i. p. 370.; t. ii. p. 203. 462.; t. iv. p. 202. Fleury, III. Discours sur l'Hist. Ecclés. Du Cange, voc. Precaria.

† Muratori, Dissert. 74. and Fleury, Institutions au Droit ecclésiastique, t. i. p. 162. refer the origin of parishes to the fourth century; but this must be limited to the most populous parts of the empire.

‡ Schmidt, t. ii. p. 206. This seems to have been founded on an ancient canon. F. Paul, c. 7.

Some of the rural churches obtained by episcopal concessions the privileges of baptism and burial, which were accompanied with a fixed share of tithes, and seem to imply the residence of a minister. The same privileges were gradually extended to the rest; and thus a complete parochial division was finally established. But this was hardly the case in England till near the time of the conquest.*

The slow and gradual manner in which parochial churches became independent, appears to be of itself a sufficient answer to those who ascribe a great antiquity to the universal payment of tithes. There are however more direct proofs that this species of ecclesiastical property was acquired not only by degrees, but with considerable opposition. We find the payment of tithes first enjoined by the canons of a provincial council in France near the end of the sixth century. From the ninth to the end of the twelfth, or even later, it is continually enforced by similar authority.† Father Paul remarks, that most of the sermons preached about the eighth century inculcate this as a duty, and even seem to place the summit of christian perfection in its performance.‡ This reluctant submission of the people to a general and permanent tribute is perfectly consistent with the eagerness displayed by them in accumulating voluntary donations upon the church. Charlemagne was the

* Collier's Ecclesiastical History, p. 229.

† Selden's History of Tithes, vol. iii. p. 1108. edit Wilkins. Tithes are said by Giannone to have been enforced by some papal decrees in the sixth century, l. iii. c. 6.

‡ Treatise on Benefices, c. 11.

first who gave the confirmation of a civil statute to these ecclesiastical injunctions: no one at least has, so far as I know, adduced any earlier law for the payment of tithes than one of his capitularies.* But it would be precipitate to infer, either that the practice had not already gained ground to a considerable extent, through the influence of ecclesiastical authority, or, on the other hand, that it became universal in consequence of the commands of Charlemagne.† In the subsequent ages, it was very common to appropriate tithes, which had originally been payable to the bishop, either towards the support of particular churches, or, according to the prevalent superstition, to monastic foundations.‡ These arbitrary consecrations, though the subject of complaint, lasted, by a sort of prescriptive right of the land-holder, till about the year 1200. It was nearly at the same time that the obligation of paying tithes, which had been originally confined to those called predial, or

* Mably (Observations sur l'Hist. de France, t. i. p. 238. et 438.) has, with remarkable rashness, attacked the current opinion, that Charlemagne established the legal obligation of tithes, and denied that any of his capitularies bear such an interpretation. Those, which he quotes, have indeed a different meaning: but he has overlooked an express enactment in 789, (Baluzii Capitularia, t. i. p. 253.) which admits of no question; and I am pretty confident that there are others in confirmation.

† The grant of Ethelwolf in 855 seems to be the most probable origin of the right to tithes in England. Whether this law, for such it was, met with constant regard, is another question. It is said by Marina, that tithes were not legally established in Castile till the reign of Alfonso X. Ensayo sobre las siete partidas, c. 359.

‡ Selden, p. 1114 et seq. Coke, 2. Inst. p. 641.

the fruits of the earth, was extended, at least in theory, to every species of profit, and to the wages of every kind of labour.*

Yet there were many hinderances that thwarted the clergy in their acquisition of opulence, and a sort of reflux, that set sometimes very strongly against them. In times of barbarous violence, nothing can thoroughly compensate for the inferiority of physical strength and prowess. The ecclesiastical history of the middle ages presents one long contention of fraud against robbery; of acquisitions made by the church through such means as I have described, and torn from her by lawless power. Those very men who, in the hour of sickness and impending death, showered the gifts of expiatory devotion upon her altars, had passed the sunshine of their lives in sacrilegious plunder. Notwithstanding the frequent instances of extreme reverence for religious institutions among the nobility, we should be deceived in supposing this to be their general character. Rapacity, not less insatiable than that of the abbots, was commonly united with a daring fierceness that the abbots could not resist. In every country, we find continual lamentation over the plunder of ecclesiastical possessions. Charles Martel is reproached with having given the first notorious example of such spoliation. It was not, however, commonly practised by sovereigns. But the evil was not the less universally felt. The parochial tithes, especial-

* Selden's History of Tithes. Treatise on Benefices, c. 28. Giannone, l. x. c. 12.

ly, as the hand of robbery falls heaviest upon the weak, were exposed to unlawful seizure. In the tenth and eleventh centuries nothing was more common than to see the revenues of benefices in the hands of lay impropriators, who employed curates at the cheapest rate; an abuse that has never ceased in the church.* Several attempts were made to restore these tithes; but even Gregory VII. did not venture to proceed in it;† and indeed it is highly probable that they might be held in some instances by a lawful title.‡ Sometimes the property of monasteries was dilapidated by corrupt abbots, whose acts, however clandestine and unlawful, it was not easy to revoke. And both the bishops and convents were obliged to invest powerful lay protectors, under the name of advocates, with considerable fiefs, as the price of their assistance against depredators. But these advocates became too often themselves the spoilers, and oppressed the helpless ecclesiastics for whose defence they had been engaged.§

* Du Cange, voc. Abbas.

† Schmidt, t. iv. p. 204. At an assembly held at St. Denis in 997, the bishops proposed to restore the tithes to the secular clergy: but such a tumult was excited by this attempt, that the meeting was broken up. Recueil des Historiens, t. xi. præfat. p. 212.

‡ Selden's Hist. of Tithes, p. 1136. The third council of Lateran restrains laymen from transferring their impropriated tithes to other laymen. Velly, Hist. de France, t. iii. p. 235. This seems tacitly to admit that their possession was lawful, at least by prescription.

§ For the injuries sustained by ecclesiastical proprietors, see Muratori. Dissert. 72. Du Cange, v. Advocatus. Schmidt, t. ii. p. 220. 470.; t. iii. p. 290.; t. iv. p. 188. 202. Recueil des Historiens, t. xi. præfat. p. 184. Martenne, Thesaurus

If it had not been for these drawbacks, the clergy must, one would imagine, have almost acquired the exclusive property of the soil. They did enjoy nearly one half of England, and, I believe, a greater proportion in some countries of Europe.* They had reached, perhaps, their zenith in respect of territorial property, about the conclusion of the twelfth century.† After that time, the disposition to enrich the clergy by pious donations grew more languid, and was put under certain legal restraints, to which I shall hereafter advert; but they came rather more secure from forcible usurpations.

The acquisitions of wealth by the church were hardly so remarkable, and scarcely contributed so much to her greatness, as those innovations upon the ordinary course of justice, which fall under the head of ecclesiastical jurisdiction and immunity. It is hardly, perhaps, necessary to caution the reader, that rights of territorial justice, possessed by ecclesiastics in virtue of their fiefs, are by no means included in this description. Episcopal jurisdiction,

Anecdotorum, t. i. p. 595. Vaissette, Hist. de Languedoc, t. ii. p. 109. and Appendix. passim.

* Turner's Hist. of England, vol. ii. p. 413. from Avesbury. According to a calculation founded on a passage in Knyghton, the revenue of the English church in 1337 amounted to 730,000 marks per annum. Macpherson's Annals of Commerce, vol. i. p. 519. Histoire du Droit public Ecclés. François, t. i. p. 214.

† The great age of monasteries in England was the reigns of Henry I., Stephen, and Henry II. Lyttleton's Henry II., vol. ii. p. 329. David I. of Scotland, contemporary with Henry II., was also a noted founder of monasteries. Dalrymple's Annals.

properly so called, may be considered as depending upon the choice of litigant parties, upon their condition, and upon the subject matter of their differences.

1. The arbitrative authority of ecclesiastical pastors is coeval with Christianity, and was natural, or even necessary, to an insulated and persecuted society.* Accustomed to feel a strong aversion to the imperial tribunals, and even to consider a recurrence to them as hardly consistent with their profession, the early Christians retained somewhat of a similar prejudice even after the establishment of their religion. The arbitration of their bishops still seemed a less objectionable mode of settling differences. And this arbitrative jurisdiction was powerfully supported by a law of Constantine, which directed the civil magistrate to enforce the execution of episcopal awards. Another edict, ascribed to the same emperor, and annexed to the Theodosian code, extended the jurisdiction of the bishops to all causes which either party chose to refer to it, even where they had already commenced in a secular court, and declared the bishop's sentence not subject to appeal. This edict has clearly been proved to be a forgery. It is evident, by a novel of Valentinian III., about 450, that the church had still no jurisdiction in questions of a temporal nature, except by means of the joint reference of contending parties. Some expressions,

* 1 Corinth. c. vi. The word ἐξουθενημενους, rendered in our version "of no reputation," has been interpreted by some to mean, persons destitute of coercive authority, referees. The passage at least tends to discourage suits before a secular judge.

indeed, used by the emperor, seem intended to repress the spirit of encroachment upon the civil magistrates, which had probably begun to manifest itself. Charlemagne, however, deceived by the spurious constitution in the Theodosian code, repeats all its absurd and enormous provisions in one of his capitularies.* But it appears so inconceivable, that an enlightened sovereign should deliberately place in the hierarchy this absolute control over his own magistrates, that one might be justified in suspecting some kind of fraud to have been practised upon him, or at least that he was not thoroughly aware of the extent of his concession. Certain it is, that we do not find the church, in her most arrogant temper, asserting the full privileges contained in the capitulary.†

2. If it was considered almost as a general obligation upon the primitive Christians to decide their civil disputes by internal arbitration, much more would this be incumbent upon the clergy. The canons of several councils, in the fourth and fifth centuries, sentence a bishop or priest to deposition, who should bring any suit, civil or even criminal, before a secular magistrate. This must, it should appear, be confined to causes where the defendant was a clerk; since the ecclesiastical court had hitherto no coercive jurisdiction over the laity. It was not so easy to induce laymen, in their suits against clerks, to

* Baluzii Capitularia, t. i. p. 985.

† Gibbon, c. xx. Giannone, l. ii. c. 8.; l. iii. c. 6.; l. vi. c. 7. Schmidt, t. ii. p. 208. Fleury, 7me Discours, and Institutions au Droit Ecclésiastique, t. ii. p. 1. Mémoires de l'Académie des Inscriptions, t. xxxvii. p. 566.

prefer the episcopal tribunal. The emperors were not at all disposed to favour this species of encroachment till the reign of Justinian, who ordered civil suits against ecclesiastics to be carried only before the bishops. Yet this was accompanied by a provision, that a party dissatisfied with the sentence might apply to the secular magistrate, not as an appellant, but a co-ordinate jurisdiction; for if different judgements were given in the two courts, the process was ultimately referred to the emperor.* But the early Merovingian kings adopted the exclusive jurisdiction of the bishop over causes wherein clerks were interested, without any of the checks which Justinian had provided. Many laws enacted during their reigns, and under Charlemagne, strictly prohibit the temporal magistrate from entertaining complaints against the children of the church.

This jurisdiction over the civil causes of clerks was not immediately attended with an equally exclusive cognizance of criminal offences imputed to them, wherein the state is so deeply interested, and the church could inflict so inadequate a punishment. Justinian appears to have reserved such offences for trial before the imperial magistrate, though with a material provision, that the sentence against a clerk should not be executed without the consent of the bishop, or the final decision of the emperor. The bishop is not expressly invested with this controlling

* This was also established about the same time by Athalaric, king of the Ostrogoths, and of course affected the popes, who were his subjects. St. Marc, t. i. p. 60. Fleury, Hist. Ecclés. t. vii. p. 292.

power by the laws of the Merovingians; but they enact that he must be present at the trial of one of his clerks; which probably was intended to declare the necessity of his concurrence in the judgement. The episcopal order was indeed absolutely exempted from secular jurisdiction by Justinian; a privilege which it had vainly endeavoured to establish under the earlier emperors. France permitted the same immunity; Chilperic, one of the most arbitrary of her kings, did not venture to charge some of his bishops with treason, except before a council of their brethren. Finally, Charlemagne seems to have extended to the whole body of the clergy an absolute exemption from the judicial authority of the magistrate.*

3. The character of a cause, as well as of the parties engaged, might bring it within the limits of ecclesiastical jurisdiction. In all questions simply religious, the church had an original right of decision; in those of a temporal nature, the civil magistrate had, by the imperial constitutions, as exclusive an authority.† Later ages witnessed strange innovations in

* Mémoires de l'Académie, ubi supra. Giannone, l. iii. c. 6. Schmidt, t. ii. p. 236. Fleury, ubi supra.

Some of these writers do not state the law of Charlemagne so strongly. Nevertheless the words of a capitulary in 789, Ut clerici ecclesiastici ordinis si culpam incurrerint, apud ecclesiasticos judicentur, non apud sæculares, are sufficiently general: (Baluz. Capitul. t. i. p. 227.) and the same is expressed still more forcibly in the collection published by Ansegisus under Louis the Débonair. (Id. p. 904. and 1115.) See other proofs in Fleury, Hist. Ecclés. t. ix. p. 607.

† Quoties de religione agitur, episcopos oportet judicare;

this respect, when the spiritual courts usurped, under sophistical pretences, almost the whole administration of justice. But these encroachments were not, I apprehend, very striking till the twelfth century; and as about the same time measures, more or less vigorous and successful, began to be adopted in order to restrain them, I shall defer this part of the subject for the present.

In this sketch of the riches and jurisdiction of the hierarchy, I may seem to have implied their political influence, which is naturally connected with the two former. They possessed, however, more direct means of acquiring temporal power. Even under the Roman emperors they had found their road into palaces; they were sometimes ministers, more often secret counsellors; always necessary, but formidable allies, whose support was to be conciliated, and interference to be respected. But they assumed a far more decided influence over the new kingdoms of the west. They were entitled, in the first place, by the nature of those free governments, to a privilege unknown under the imperial despotism, that of assisting in the deliberative assemblies of the nation. Councils of bishops, such as had been convoked by Constantine and his successors, were limited in their functions to decisions of faith, or canons of ecclesiastical discipline. But the northern nations did not so well preserve the distinction between secular and spiritual legislation. The laity seldom, perhaps,

alteras vero causas quæ ad ordinarios cognitores vel ad usum publici juris pertinent, legibus oportet audiri. Lex Arcadii et Honorii, apud Mém. de l'Académie, t. xxxix. p. 571.

gave their suffrage to the canons of the church; but the church was not so scrupulous as to trespassing upon the province of the laity. Many provisions are found in the canons of national and even provincial councils, which relate to the temporal constitution of the state. Thus one held at Calcluith, (an unknown place in England,) in 787, enacted that none but legitimate princes should be raised to the throne, and not such as were engendered in adultery or incest. But it is to be observed that, although this synod was strictly ecclesiastical, being summoned by the pope's legate, yet the kings of Mercia and Northumberland, with many of their nobles, confirmed the canons by their signature. As for the councils held under the Visigoth kings of Spain during the seventh century, it is not easy to determine whether they are to be considered as ecclesiastical or temporal assemblies.* No kingdom was so thoroughly under the bondage of the hierarchy as Spain.† The first dynasty of France seem to have kept their national convention, called the field of March, more distinct from merely ecclesiastical councils.

The bishops acquired and retained a great part of their ascendancy by a very respectable instrument of power, intellectual superiority. They alone were acquainted with the art of writing; and they were entrusted with political correspondence, and with the framing of the laws. They alone knew the elements

* Marina, Teoria de las Cortes, t. i. p. 9.

† See instances of the temporal power of the Spanish bishops in Fleury, Hist. Ecclés. t. viii. p. 368. 397.; t. ix. p. 68. &c.

of a few sciences; and the education of royal families devolved upon them as a necessary duty. In the fall of Rome, their influence upon the barbarians wore down the asperities of conquest, and saved the provincials half the shock of that tremendous revolution. As captive Greece is said to have subdued her Roman conqueror, so Rome, in her own turn of servitude, cast the fetters of a moral captivity upon the fierce invaders of the north. Chiefly through the exertions of the bishops, whose ambition may be forgiven for its effects, her religion, her language, in part even her laws, were transplanted into the courts of Paris and Toledo, which became a degree less barbarous by imitation.*

Notwithstanding, however, the great authority and privileges of the church, it was decidedly subject to the supremacy of the crown, both during the continuance of the western empire, and after its subversion. The emperors convoked, regulated, and dissolved universal councils; the kings of France and Spain exercised the same right over the synods of their national churches.† The Ostrogoth kings of Italy fixed by their edicts the limits within which matrimony was prohibited on account of consanguin-

* Schmidt, t. i. p. 365.

† Encyclopédia, Art. Concile. Schmidt, t. i. p. 384. De Marca, De Concordantiâ Sacerdotii et Imperii, l. ii. c. 9. 11.; et l. iv. passim.

The last of these sometimes endeavours to extenuate the royal supremacy, but his own work furnishes abundant evidence of it; especially l. vi. c. 19., &c. For the ecclesiastical independence of Spain, down to the eleventh century, see Marina, Ensayo sobre las siete partidas, c. 322. &c. and De Marca, l. vi. c. 23.

ity, and granted dispensations from them.* Though the Roman emperors left episcopal elections to the clergy and people of the diocess, in which they were followed by the Ostrogoths and Lombards, yet they often interfered so far as to confirm a decision, or to determine a contest. The kings of France went further, and seem to have invariably either nominated the bishops, or, what was nearly tantamount, recommended their own candidate to the electors.

But the sovereign who maintained with the greatest vigour his ecclesiastical supremacy was Charlemagne. Most of the capitularies relate to the discipline of the church; principally indeed taken from the ancient canons, but not the less receiving an additional sanction from his authority.† Some of his regulations, which appear to have been original, are such as men of high church principles would, even in modern times, deem infringements of spiritual independence; that no legend of doubtful authority should be read in the churches, but only the canonical books, and that no saint should be honoured whom the whole church did not acknowledge. These were not passed in a synod of bishops, but enjoined by the sole authority of the emperor, who seems to have arrogated a legislative power over the church, which he did not possess in temporal affairs. Many of his other laws relating to the ecclesiastical constitution are enacted in a general council of the lay

* Giannone, l. iii. c. 6.

† Baluzii Capitularia, passim. Schmidt, t. ii. p. 239. Gaillard, Vie de Charlemagne, t. iii.

nobility as well as of prelates, and are so blended with those of a secular nature, that the two orders may appear to have equally consented to the whole. His father Pepin, indeed, left a remarkable precedent in a council held in 744, where the Nicene faith is declared to be established, and even a particular heresy condemned, with the consent of the bishops and nobles. But whatever share we may imagine the laity in general to have had in such matters, Charlemagne himself did not consider even theological decisions as beyond his province; and, in more than one instance, manifested a determination not to surrender his own judgement, even in questions of that nature, to any ecclesiastical authority.

This part of Charlemagne's conduct is duly to be taken into the account, before we censure his vast extension of ecclesiastical privileges. Nothing was more remote from his character than the bigotry of those weak princes, who have suffered the clergy to reign under their names. He acted upon a systematic plan of government, conceived by his own comprehensive genius, but requiring too continual an application of similar talents for durable execution. It was the errour of a superior mind, zealous for religion and learning, to believe that men, dedicated to the functions of the one, and possessing what remained of the other, might, through strict rules of discipline, enforced by the constant vigilance of the sovereign, become fit instruments to reform and civilize a barbarous empire. It was the errour of a magnanimous spirit to judge too favourably of hu-

man nature, and to presume, that great trusts would be fulfilled, and great benefits remembered.

It is highly probable, indeed, that an ambitious hierarchy did not endure without reluctance this imperial supremacy of Charlemagne, though it was not expedient for them to resist a prince so formidable, and from whom they had so much to expect. But their dissatisfaction at a scheme of government incompatible with their own objects of perfect independence, produced a violent recoil under Louis the Debonair, who attempted to act the censor of ecclesiastical abuses with as much earnestness as his father, though with very inferior qualifications for so delicate an undertaking. The bishops accordingly were among the chief instigators of those numerous revolts of his children, which harassed this emperor. They set, upon one occasion, the first example of an usurpation which was to become very dangerous to society, the deposition of sovereigns by ecclesiastical authority. Louis, a prisoner in the hands of his enemies, had been intimidated enough to undergo a public penance; and the bishops pretended that, according to a canon of the church, he was incapable of returning afterwards to a secular life, or preserving the character of sovereignty.* Circumstances enabled

* Habitû sæculi se exuens habitum pœnitentis per impositionem manuum episcoporum suscepit; ut post tantam talemque pœnitentiam nemo ultra ad militiam sæcularem redeat. Acta exauctorationis Ludovici, apud Schmidt, t. ii. p. 68. There was a sort of precedent, though not, I think, very apposite, for this doctrine of implied abdication, in the case of one Wamba, king of the Visigoths in Spain, who, having been clothed with a monastic dress, according to a common super-

him to retain the empire, in defiance of this sentence; but the church had tasted the pleasure of trampling upon crowned heads, and was eager to repeat the experiment. Under the disjointed and feeble administration of his posterity in their several kingdoms, the bishops availed themselves of more than one opportunity to exalt their temporal power. Those weak Carlovingian princes, in their mutual animosities, encouraged the pretensions of a common enemy. Thus Charles the Bald, and Louis of Bavaria, having driven their brother Lothaire from his dominions, held an assembly of some bishops, who adjudged him unworthy to reign, and, after enacting a promise from the two allied brothers to govern better than he had done, permitted and commanded them to divide his territories.* After concurring in this unprecedented encroachment, Charles the Bald had little right to complain when, some years afterwards, an assembly of bishops declared himself to have forfeited his crown, released his subjects from their allegiance, and transferred his kingdom to

stition, during a dangerous illness, was afterwards adjudged by a council incapable of resuming his crown; to which he voluntarily submitted. This story, as told by an original writer, quoted in Baronius ad A. D. 681, is too obscure to warrant any positive inference; though I think we may justly suspect a fraudulent contrivance between the bishops and Ervigius the successor of Wamba. The latter, besides his monastic attire, had received the last sacraments; after which he might be deemed civilly dead. Fleury, 5me Discours sur l'Hist. Ecclésiast. puts this case too strongly, when he tells us, that the bishops *deposed* Wamba; it may have been a voluntary abdication, influenced by superstition, or, perhaps, by disease.

* Schmidt, t. ii. p. 77. Velly, t. ii. p. 61. See too, p. 74.

Louis of Bavaria. But, in truth, he did not pretend to deny the principle which he had contributed to maintain. Even in his own behalf, he did not appeal to the rights of sovereigns, and of the nations whom they represent. "No one," says this degenerate grandson of Charlemagne, "ought to have degraded me from the throne to which I was consecrated, until at least I had been heard and judged by the bishops, through whose ministry I was consecrated, who are called the thrones of God, in which God sitteth, and by whom he dispenses his judgements; to whose paternal chastisement I was willing to submit, and do still submit myself.*

These passages are very remarkable, and afford a decisive proof that the power obtained by national churches, through the superstitious prejudices then received, and a train of favourable circumstances, was as dangerous to civil government, as the subsequent usurpations of the Roman pontiff, against which Protestant writers are apt too exclusively to direct their animadversions. Voltaire, I think, has remarked, that the ninth century was the age of the bishops, as the eleventh and twelfth were of the popes. It seemed as if Europe was about to pass under as absolute a domination of the hierarchy, as had been exercised by the priesthood of ancient Egypt, or the druids of Gaul. There is extant a remarkable instrument, recording the election of Boson, king of Arles, by which the bishops alone ap-

* Schmidt, t. ii. p. 217. Voltaire, Velly, Gaillard, &c.

pear to have elevated him to the throne, without any concurrence of the nobility.* But it is inconceivable that such could have really been the case; and if the instrument is genuine, we must suppose it to have been framed in order to countenance future pretensions. For the clergy, by their exclusive knowledge of Latin, had it in their power to mould the language of public documents for their own purposes; a circumstance which should be cautiously kept in mind when we peruse instruments drawn up during the dark ages.

It was with an equal defiance of notorious truth, that the bishop of Winchester, presiding as papal legate at an assembly of the clergy in 1141, during the civil war of Stephen and Matilda, asserted the right of electing a king of England to appertain principally to that order; and by virtue of this unprecedented claim raised Matilda to the throne.† England, indeed, had been obsequious, beyond most other countries, to the arrogance of her hierarchy; especially during the Anglo-Saxon period, when the nation was sunk in ignorance and effeminate superstition. Every one knows the story of King Edwy, in some form or other, though I believe it impossible to ascertain the real circumstances of that con-

* Recueil des Historiens, t. ix. p. 304.

† Ventilata est causa, says the legate, coram majori parte cleri Angliæ, ad cujus jus potissimùm spectat principem eligere, simulque ordinare. Invocatâ itaque primo in auxilium divinitate, filiam pacifici regis, &c. in Angliæ Normanniæque dominam eligimus, et ei fidem et manutenementum promittimus. Gul. Malmsb. p. 188.

troverted anecdote. But, upon the supposition least favourable to the king, the behaviour of Archbishop Odo and St. Dunstan was an intolerable outrage of spiritual tyranny.*

* Two living writers, of the Roman Catholic communion, Dr. Milner, in his History of Winchester, and Mr. Lingard, in his Antiquities of the Anglo-Saxon Church, contend that Elgiva, whom some protestant historians are willing to represent as the queen of Edwy, was but his mistress; and seem inclined to justify the conduct of Odo and Dunstan towards this unfortunate couple. They are unquestionably so far right, that few, if any, of those writers, who have been quoted as authorities in respect of this story, speak of the lady as a queen or lawful wife. I must, therefore, strongly reprobate the conduct of Dr. Henry, who, calling Elgiva queen, and asserting that she was married, refers, at the bottom of his page, to William of Malmsbury, and other chroniclers, who give a totally opposite account; especially as he does not intimate, by a single expression, that the nature of her connexion with the king was equivocal. Such a practice, when it proceeds, as I fear it did in this instance, not from oversight, but from prejudice, is a glaring violation of historical integrity, and tends to render the use of references, that great improvement of modern history, a sort of fraud upon the reader. But the fact itself, one certainly of little importance, is, in my opinion, not capable of being proved or disproved. The authorities, as they are called, that is, the passages in monkish writers which mention this transaction, are neither sufficiently circumstantial, nor consistent, nor impartial, nor contemporaneous, to afford ground for rational belief. The earliest is William of Malmsbury, nearly two hundred years after the event. And it is plain, that different editions of the story prevailed, so as to induce a critic of Mr. Lingard (Edinburgh Review, No. L.) to imagine, that there were two Elgivas, one queen, the other concubine. But the monkish chroniclers, *experto credite*, are not entitled to so much ceremony. Antiquaries who are pleased to dignify every scrap of such worthy wights, as are preserved in the Anglia Sacra, with the name of historical testimonies, may amuse themselves with making out the story of Edwy and Elgiva. I am contented to think that, queen or no queen, wife or no wife, it was not the business of a priest to tear his sovereign from her society, and much less to maim or murder her.

But while the prelates of these nations, each within his respective sphere, were prosecuting their system of encroachment upon the laity, a new scheme was secretly forming within the bosom of the church, to inthrall both that and the temporal governments of the world under an ecclesiastical monarch. Long before the earliest epoch that can be fixed for *modern* history, and, indeed, to speak fairly, almost as far back as ecclesiastical testimonies can carry us, the bishops of Rome had been venerated as first in rank among the rulers of the church. The nature of this primacy is, as may be supposed, a very controverted subject. It is, however, reduced by some moderate Catholics to little more than a precedency attached to the see of Rome in consequence of its foundation by the chief of the apostles, as well as the dignity of the imperial city.* A sort of general superintendence was admitted as an attribute of this primacy, so that the bishops of Rome were entitled, and indeed bound to remonstrate, when any errour

* These foundations of the Roman primacy are indicated by Valentinian III. a great favourer of that see, in a novel of the year 455: Cum igitur sedis apostolicæ primatum B. Petri meritum, qui est princeps sacerdotalis coronæ, et Romanæ dignitas civitatis, sacræ etiam synodi firmavit auctoritas. The last words allude to the sixth canons of the Nicene council, which establish, or recognize, the patriarchal supremacy, in their respective districts, of the churches of Rome, Antioch, and Alexandria. De Marca, de Concordantiâ Sacerdotii et Imperii, l. i. c. 8. At a much earlier period, Irenæus rather vaguely, and Cyprian more positively, admit, or rather assert, the primacy of the church of Rome, which the latter seems even to have considered as a kind of centre of Catholic unity, though he resisted every attempt of that church to arrogate a controlling power. See his treatise De Unitate Ecclesiæ.

or irregularity came to their knowledge, especially in the western churches, a greater part of which had been planted by them, and were connected, as it were by filiation, with the common capital of the Roman empire and of Christendom.* Various causes had a tendency to prevent the bishops of Rome from augmenting their authority in the east, and even to diminish that which they had occasionally exercised; the institution of patriarchs at Antioch, Alexandria, and afterwards at Constantinople, with extensive rights of jurisdiction; the difference of rituals and discipline; but above all, the many disgusts taken by the Greeks, which ultimately produced an irreparable schism between the two churches in the ninth century. But within the pale of the Latin church, every succeeding age enhanced the power and dignity of the Roman see. By the constitution of the church, such at least as it became in the fourth century, its divisions being arranged in conformity to those of the empire, every province had its metropolitan, and every vicariate its ecclesiastical exarch or primate. The bishop of Rome presided, in the latter capacity, over the Roman vicariate, comprehending southern Italy, and the three chief Medi-

* Dupin, De antiquâ Ecclesiæ Disciplinâ, p. 306, and seq. Histoire du Droit public ecclésiastique François, p. 149. The opinion of the Roman see's supremacy, though apparently rather a vague and general notion, as it still continues in those Catholics who deny its infallibility, seems to have prevailed very much in the fourth century. Fleury brings remarkable proofs of this from the writings of Socrates, Sozomen, Ammianus Marcellinus, and Optatus. Hist. Ecclés. t. iii. p. 282. 320. 449.; t. iv. p. 227.

terranean islands. But, as it happened, none of the ten provinces forming this division had any metropolitan; so that the popes exercised all metropolitical functions within them, such as the consecration of bishops, the convocation of synods, the ultimate decision of appeals, and many other sorts of authority. These provinces are sometimes called the Roman patriarchate; the bishop of Rome having always been reckoned one, generally indeed the first, of the patriarchs; each of whom was at the head of all the metropolitans within his limits, but without exercising those privileges which by the ecclesiastical constitution appertained to the latter. Though the Roman patriarchate, properly so called, was comparatively very small in extent, it gave its chief, for the reason mentioned, advantages in point of authority which the others did not possess.*

I may perhaps appear to have noticed circumstances interesting only to ecclesiastical scholars. But it is important to apprehend this distinction of the patriarchate from the primacy of Rome, because it was by extending the boundaries of the former, and by applying the maxims of her administration in the south of Italy to all the western churches, that she accomplished the first object of her scheme of usur-

* Dupin, De antiquâ Eccles. Disciplinâ, p. 39, &c. Giannone, di Ist Napoli, l. ii. c. 8.; l. iii. c. 6. De Marca, l. i. c. 7. et alibi. There is some disagreement among these writers as to the extent of the Roman patriarchate, which some suppose to have even at first comprehended all the western churches, though they admit that, in a more particular sense, it was confined to the vicariate of Rome.

pation, in subverting the provincial system of government under the metropolitans. Their first encroachment of this kind was in the province of Illyricum, which they annexed in a manner to their own patriarchate, by not permitting any bishops to be consecrated without their consent.* This was before the end of the fourth century. Their subsequent advances were, however, very gradual. About the middle of the sixth century, we find them confirming the elections of archbishops of Milan.† They came by degrees to exercise, though not always successfully, and seldom without opposition, an appellant jurisdiction over the causes of bishops, deposed or censured in provincial synods. This, indeed, had been granted, if we believe the fact, by the canons of a very early council, that of Sardica in 347, so far as to permit the pope to order a revision of the process, but not to annul the sentence.‡ Valentinian III. influenced by Leo the Great, one of the most

* Dupin, p. 66. Fleury, Hist. Ecclés. t. v. p. 373. The ecclesiastical province of Illyricum included Macedonia. Siricius, the author of this encroachment, seems to have been one of the first usurpers. In a letter to one of the Spanish bishops, (A. D. 375.) he exalts his own authority very high. De Marca, l. i. c. 8.

† St. Marc, t. i. p. 139. 153.

‡ Dupin, p. 109. De Marca, l. vi. c. 14. These canons have been questioned, and Dupin does not seem to lay much stress on their authority, though I do not perceive that either he or Fleury, (Hist. Ecclés. t. iii. p. 372.) doubts their genuineness. Sardica was a city of Illyricum, which the translator of Mosheim has confounded with Sardes.

Consultations, or references to the bishop of Rome, in difficult cases of faith or discipline, had been common in early ages, and were even made by provincial and national councils.

ambitious of pontiffs, had gone a great deal farther, and established almost an absolute judicial supremacy in the Holy See.* But the metropolitans were not inclined to surrender their prerogatives; and, upon the whole, the papal authority had made no decisive progress in France, or perhaps any where beyond Italy, till the pontificate of Gregory I.

This celebrated person was not distinguished by learning, which he affected to depreciate, nor by his literary performances, which the best critics consider as below mediocrity, but by qualities more necessary for his purpose, intrepid ambition and unceasing

But these were also made to other bishops, eminent for personal merit, or the dignity of their sees. The popes endeavoured to claim this as a matter of right. Innocent I. asserts (A. D. 402.) that he was to be consulted, quoties fidei ratio ventilator; and Gelasius (A. D. 492.) quantum ad religionem pertinet, non nisi apostolicæ sedi, juxta canones, debetur summa judicii totius. As the oak is in the acorn, so did these maxims contain the system of Bellarmine. De Marca, l. i. c. 10.; and l. vii. 12.: Dupin.

* Some bishops belonging to the province of Hilary, metropolitan of Arles, appealed from his sentence to Leo, who not only entertained their appeal, but presumed to depose Hilary. This assumption of power would have had little effect, if it had not been seconded by the emperor in very unguarded language; hoc perenni sanctione decernimus, ne quid tam episcopis Gallicanis, quam aliarum provinciarum, contra consuetudinem veterem liceat sine viri venerabilis papæ urbis æternæ tentare; sed illis omnibusque pro lege sit, quidquid sanxit vel sanxerit apostolicæ sedis auctoritas. De Marca, De Concordantiâ Sacerdotii et Imperii, l. i. c. 8. The same emperor enacted, that any bishop who refused to attend the tribunal of the pope when summoned, should be compelled by the governor of his province: ut quisquis episcoporum ad judicium Romani episcopi evocatus venire neglexerit, per moderatorem ejusdem provinciæ adesse cogatur. Id. l. vii. c. 13. Dupin, De Ant. Discipl. p. 29. et 171.

activity. He maintained a perpetual correspondence with the emperors and their ministers, with the sovereigns of the western kingdoms, with all the hierarchy of the catholic church; employing, as occasion dictated, the language of devotion, arrogance, or adulation.* Claims hitherto disputed, or half preferred, assumed under his hands a more definite form; and nations too ignorant to compare precedents, or discriminate principles, yielded to assertions confidently made by the authority which they most respected. Gregory dwelt more than his predecessors upon the power of the keys, exclusively or at least principally committed to St. Peter, which had been supposed in earlier times, as it is now by the Gallican catholics, to be inherent in the general body of bishops, joint shares of one indivisible episcopacy. And thus the patriarchal rights, being manifestly of mere ecclesiastical institution, were artfully confounded, or as it were merged, in the more permanent supremacy of the papal chair. From the time of Gregory, the popes appear in a great measure to have thrown away that scaffolding, and relied in preference on the pious veneration of the people, and on the opportunities which might occur for

* The flattering style in which this pontiff addressed Brunehaut and Phocas, the most flagitious monsters of his time, is mentioned in all civil and ecclesiastical histories. Fleury quotes a remarkable letter to the patriarchs of Antioch and Alexandria, wherein he says that St. Peter has one see, divided into three, Rome, Antioch and Alexandria; stooping to this absurdity, and inconsistence with his real system, in order to conciliate their alliance against his more immediate rival, the patriarch of Constantinople. Hist. Eccles. t. viii. p. 124.

enforcing their dominion with the pretence of divine authority.*

It cannot, I think, be said, that any material acquisitions of ecclesiastical power were obtained by the successors of Gregory for nearly one hundred and fifty years.† As none of them possessed vigour

* Gregory seems to have established the appellant jurisdiction of the see of Rome, which had been long in suspense. Stephen, a Spanish bishop, having been deposed, appealed to Rome. Gregory sent a legate to Spain, with full powers to confirm or rescind the sentence. He says in his letter on this occasion; "à sede apostolicâ, quæ omnium ecclesiarum caput est, causa hæc audienda ac dirimenda fuerat. De Marca, l. vii. c. 18. In writing to the bishops of France, he enjoins them to obey Virgilius bishop of Arles, whom he has appointed his legate in France, secundùm antiquam consuetudinem; so that if any contention should arise in the church, he may appease it by his authority, as vicegerent of the apostolic see: auctoritatis suæ vigore, vicibus nempe apostolicæ sedis functus, discretâ moderatione compescat. Gregorii Opera, t. ii. p. 783. (edit. Benedict.) Dupin, p. 34. Pasquier, Recherches de la France, l. iii. c. 9.

† I observe that some modern publications annex considerable importance to a supposed concession of the title of Universal Bishop, made by the emperor Phocas in 606 to Boniface III., and even appear to date the papal supremacy from this epoch. Those who have imbibed this notion may probably have been misled by a loose expression in Mosheim's Ecclesiastical History, vol. ii. p. 169.; though the general tenour of that passage by no means gives countenance to their opinion. But there are several strong objections to our considering this as a leading fact, much less as marking an æra in the history of the papacy. 1. Its truth, as commonly stated, appears more than questionable. The Roman pontiffs, Gregory I. and Boniface III., had been vehemently opposing the assumption of this title by the patriarch of Constantinople, not as due to themselves, but as one to which no bishop could legitimately pretend. There would be something almost ridiculous in the emperors' immediately conferring an appellation on themselves, which they had just disclaimed; and though this objection would not stand against evidence, yet when we find no better

and reputation equal to his own, it might even appear that the papal influence was retrograde. But in effect the principles which supported it were taking deeper root, and acquiring strength by occasional, though not very frequent, exercise. Appeals

authority quoted for the fact than Baronius, who is no authority at all, it retains considerable weight. And indeed the want of testimony is so decisive an objection to any alleged historical fact, that but for the strange prepossessions of some men, one might rest the case here. Fleury takes no notice of this part of the story, though he tells us that Phocas compelled the patriarch of Constantinople to resign his title. 2. But if the strongest proof could be advanced for the authenticity of this circumstance, we might well deny its importance. The concession of Phocas could have been of no validity in Lombardy, France, and other western countries, where nevertheless the papal supremacy was incomparably more established than in the east. 3. Even within the empire, it could have had no efficacy after the violent death of that usurper, which followed soon afterwards. 4. The title of Universal Bishop is not very intelligible; but whatever it meant, the patriarchs of Constantinople had borne it before, and continued to bear it ever afterwards. (Dupin, De Antiquâ Disciplinâ, p. 329.) 5. The preceding popes, Pelagius II. and Gregory I., had constantly disclaimed the appellation, though it had been adopted by some towards Leo the Great in the council of Chalcedon; (Fleury, t. viii. p. 95.) nor does it appear to have been retained by the successors of Boniface, at least for some centuries. It is even laid down in the decretum of Gratian, that the pope is not styled universal: Nec etiam Romanus pontifex universalis appellatur; (p. 303. edit. 1591.) though some refer its assumption to the ninth century. Nouveau Traité de Diplomatique, t. v. p. 93.) 6. The popes had unquestionably exercised a species of supremacy for more than two centuries before this time, which had lately reached a high point of authority under Gregory I. The rescript of Valentinian III., in 455, quoted in a former note, would certainly be more to the purpose than the letter of Phocas. 7. Lastly, there are no sensible marks of this supremacy making a more rapid progress for a century and a half after the pretended grant of that emperor.

to the pope were sometimes made by prelates dissatisfied with a local sentence; but his judgement of reversal was not always executed, as we perceive by the instance of Bishop Wilfrid.* National councils were still convoked by princes, and canons enacted under their authority by the bishops who attended. Though the church of Lombardy was under great subjection during this period, yet those of France and even of England, planted as the latter had been by Gregory, continued to preserve a tolerable measure of independence.† The first striking infringement of this was made through the influence of an Englishman, Winfrid, better known as St. Boniface, the apostle of Germany. Having undertaken the conversion of Thuringia, and other still heathen countries, he applied to the pope for a commission, and was consecrated bishop without any determinate see. Upon this occasion he took an oath of obedience, and became ever afterwards a zealous upholder of the apostolical chair. His success in the conversion of Germany was great, his reputation eminent, which enabled him to effect a material revolution in ecclesiastical government. Pelagius II. had, about 580, sent a pallium, or vest peculiar to metropolitans, to the bishop of Arles, per-

* I refer to the English historians for the history of Wilfrid, which neither altogether supports, nor much impeaches, the independency of our Anglo-Saxon church in 700; a matter hardly worth so much contention as Usher and Stillingfleet seem to have thought. The consecration of Theodore by Pope Vitalian in 668 is a stronger fact, and cannot be got over by those injudicious protestants, who take the bull by the horns.

† Schmidt, t. i. p. 386. 394.

petual vicar of the Roman see in Gaul.* Gregory I. had made a similar present to other metropolitans. But it was never supposed that they were obliged to wait for this favour before they received consecration, until a synod of the French and German bishops, held at Frankfort in 742 by Boniface, as legate of Pope Zachary. It was here enacted, that, as a token of their willing subjection to the see of Rome, all metropolitans should request the pallium at the hands of the pope, and obey his lawful commands.† This was construed by the popes to mean a promise of obedience before receiving the pall,

* Ut ad instar suum, in Galliarum partibus primi sacerdotis locum obtineat, et quidquid ad gubernationem vel dispensationem ecclesiastici status gerendum est, servatis patrum regulis et sedis apostolicæ constitutis, faciat. Preterea, pallium illi concedit, &c. Dupin, p. 34. Gregory I. confirmed this vicariat to Virgilius, bishop of Arles, and gave him the power of convoking synods. De Marca, l. vi. c. 7.

† Decrevimus, says Boniface, in nostro synodali conventu, et confessi sumus fidem catholicam, et unitatem et subjectionem Romanæ ecclesiæ fine tenus servare, S. Petro et vicario ejus velle subjici, metropolitanos pallia ab illâ sede quærere, et per omnia, præcepta S. Petri canonicè sequi. De Marca, l. vi. c. 7. Schmidt, t. i. p. 424. 438. 446. This writer justly remarks the obligation which Rome had to St. Boniface, who anticipated the system of Isidore. We have a letter from him to the English clergy, with a copy of canons passed in one of his synods, for the exaltation of the apostolic see, but the church of England was not then inclined to acknowledge so great a supremacy in Rome. Collier's Eccles. History, p. 128.

In the eighth general council, that of Constantinople in 872, this prerogative of sending the pallium to metropolitans was not only confirmed to the pope, but extended to the other patriarchs, who had every disposition to become as great usurpers as their more fortunate elder brother.

which was changed in aftertimes by Gregory VII. into an oath of fealty.*

This council of Frankfort claims a leading place as an epoch in the history of the papacy. Several events ensued, chiefly of a political nature, which rapidly elevated that usurpation almost to its greatest height. Subjects of the throne of Constantinople, the popes had not as yet interfered, unless by mere admonition, with the temporal magistrate. The first instance, wherein the civil duties of a nation and the rights of a crown appear to have been submitted to his decision, was in that famous reference as to the deposition of Childeric. It is impossible to consider this in any other light than as a point of casuistry laid before the first religious judge in the church. Certainly the Franks who raised the king of their choice upon their shields, never dreamed that a foreign priest had conferred upon him the right of governing. Yet it was easy for succeeding advocates of Rome to construe this transaction very favourably for its usurpation over the thrones of the earth.†

I shall but just glance at the subsequent political

* De Marca, ubi supra. Schmidt, t. ii. p. 262. According to the latter, this oath of fidelity was exacted in the ninth century; which is very probable, since Gregory VII. himself did but fill up the sketch which Nicholas I. and John VIII. had delineated. I have since found this confirmed by Gratian, p. 305.

† Eginhard says, that Pepin was made king per *auctoritatem* Romani pontificis; an ambiguous word, which may rise to *command*, or sink to *advice*, according to the disposition of the interpreter.

revolutions of that period; the invasion of Italy by Pepin, his donation of the exarchate to the Holy See, the conquest of Lombardy by Charlemagne, the patriciate of Rome conferred upon both these princes, and the revival of the western empire in the person of the latter. These events had a natural tendency to exalt the papal supremacy, which it is needless to indicate. But a circumstance of a very different nature contributed to this in a still greater degree. About the conclusion of the eighth century, there appeared, under the name of one Isidore, an unknown person, a collection of ecclesiastical canons, now commonly denominated the False Decretals.* These purported to be rescripts or decrees of the early bishops of Rome; and their effect was to diminish the authority of metropolitans over their suffragans, by establishing an appellant jurisdiction of the Roman see in all causes, and by forbidding national councils to be holden without its consent. Every bishop, according to the decretals of Isidore,

* The æra of the False Decretals has not been precisely fixed; they have seldom been supposed, however, to have appeared much before 800. But there is a genuine collection of canons published by Adrian I. in 785, which contain nearly the same principles, and many of which are copied by Isidore, as well as Charlemagne in his Capitularies. De Marca, l. vii. c. 20. Giannone, l. v. c. 6. Dupin, De Antiquâ Disciplinâ, p. 133. Fleury, Hist. Ecclés. t. ix. p. 500, seems to consider the Decretals as older than this collection of Adrian; but I have not observed the same opinion in any other writer. The right of appeal from a sentence of the metropolitan deposing a bishop to the Holy See, is positively recognized in the Capitularies of Louis the Debonair; (Baluze, p. 1000.) the three last books of which, according to the collection of Ansegisus, are said to be apostolicâ auctoritate roborata, quia his cudendis maximè apostolica interfuit legatio. p. 1132.

was amenable only to the immediate tribunal of the pope; by which one of the most ancient rights of the provincial synod was abrogated. Every accused person might not only appeal from an inferior sentence, but remove an unfinished process before the supreme pontiff. And the latter, instead of directing a revision of the proceedings by the original judges, might annul them by his own authority; a strain of jurisdiction beyond the canons of Sardica, but certainly warranted by the more recent practice of Rome. New sees were not to be erected, nor bishops translated from one see to another, nor their resignations accepted, without the sanction of the pope. They were still indeed to be consecrated by the metropolitan, but in the pope's name. It has been plausibly suspected, that these decretals were forged by some bishop, in jealousy or resentment; and their general reception may at least be partly ascribed to such sentiments. The archbishops were exceedingly powerful, and might often abuse their superiority over inferior prelates; but the whole episcopal aristocracy had abundant reason to lament their acquiescence in a system of which the metropolitans were but the earliest victims. Upon these spurious decretals was built the great fabric of papal supremacy over the different national churches; a fabric which has stood after its foundation crumbled beneath it; for no one has pretended to deny, for the last two centuries, that the imposture is too palpable for any but the most ignorant ages to credit.*

* I have not seen any account of the decretals so clear and judicious as in Schmidt's History of Germany, t. ii. p. 249.

The Gallican church made for some time a spirited, though unavailing struggle against this rising despotism. Gregory IV. having come into France to abet the children of Louis the Debonair in their rebellion, and threatened to excommunicate the bishops who adhered to the emperor, was repelled with indignation by those prelates. If he comes here to excommunicate, said they, he shall depart hence excommunicated.* In the subsequent reign of Charles the Bald, a bold defender of ecclesiastical independence was found in Hincmar, archbishop of Rheims, the most distinguished statesman of his age. Appeals to the pope even by ordinary clerks had become common, and the provincial councils, hitherto the supreme spiritual tribunal as well as legislature, were falling rapidly into decay. The frame of church government, which had lasted from the third or fourth century, was nearly dissolved; a refractory bishop was sure to invoke the supreme court of appeal, and generally met there with a more favourable judicature. Hincmar, a man equal in ambition, and almost in public estimation, to any pontiff, sometimes came off successfully in his con-

Indeed all the ecclesiastical part of that work is executed in a very superior manner. See also De Marca, l. iii. c. 5.; l. vii. c. 20. The latter writer, from whom I have derived much information, is by no means a strenuous adversary of ultra-montane pretensions. In fact, it was his object to please both in France and at Rome, to become both an archbishop and a cardinal. He failed nevertheless of the latter hope; it being impossible at that time (1650) to satisfy the papal court, without sacrificing altogether the Gallican church and the crown.

* De Marca, l. iv. c. 11. Velly, &c.

tentions with Rome.* But time is fatal to the unanimity of coalitions; the French bishops were accessible to superstitious prejudice, to corrupt influence, to mutual jealousy. Above all, they were conscious, that a persuasion of the pope's omnipotence had taken hold of the laity. Though they complained loudly, and invoked, like patriots of a dying state, names and principles of a freedom that was no more, they submitted in almost every instance to the continual usurpations of the Holy See. One of those, which most annoyed their aristocracy, was the concession to monasteries of exemption from episcopal authority. These had been very uncommon till about the eighth century, after which they were studiously multiplied.† It was naturally a favourite

* De Marca, l. iv. c. 68. &c. l. vi. c. 14. 28.; l. vii. c. 21. Dupin, p. 133. &c. Hist. du Droit Ecclés. François, p. 188. 224. Velly, &c. Hincmar however was not consistent; for having obtained the see of Rheims in an equivocal manner, he had applied for confirmation at Rome, and in other respects impaired the Gallican rights. Pasquier, Recherches de la France, l. iii. c. 12.

† The earliest instance of a papal exemption is in 455, which indeed is a respectable antiquity. Others scarcely occur till the pontificate of Zachary in the middle of the eighth century, who granted an exemption to Monte Casino, ita ut nullius juri subjaceat, nisi solius Romani pontificis. See this discussed in Giannone, l. v. c. 6. Precedents for the exemption of monasteries from episcopal jurisdiction occur in Marculfus's forms, compiled towards the end of the ninth century; but these were by royal authority. The kings of France were supreme heads of their national church. Schmidt, t. i. p. 382. De Marca, l. iii. c. 16. Fleury, Institutions au Droit, t. i. p. 228. Muratori, Dissert. 70. (t. iii. p. 404. Italian) is of opinion that exemptions of monasteries from episcopal visitation did not become frequent in Italy till the eleventh century; and that many charters of this kind are forgeries. It is held also by some Eng-

object with the abbots; and sovereigns, in those ages of blind veneration for monastic establishments, were pleased to see their own foundations rendered, as it would seem, more respectable by privileges of independence. The popes had a closer interest in granting exemptions, which attached to them the regular clergy, and lowered the dignity of the bishops. In the eleventh and twelfth centuries, whole orders of monks were declared exempt at a single stroke; and the abuse began to awaken loud complaints, though it did not fail to be aggravated afterwards.

The principles of ecclesiastical supremacy were readily applied by the popes to support still more insolent usurpations. Chiefs by divine commission of the whole church, every earthly sovereign must be subject to their interference. The bishops indeed had, with the common weapons of their order, kept their own sovereigns in check; and it could not seem any extraordinary stretch in their supreme head to assert an equal prerogative. Gregory IV. as I have mentioned, became a party in the revolt against Louis I.; but he never carried his threats of excommunication into effect. The first instance, where the Roman pontiffs actually tried the force of their arms

lish antiquaries, that no Anglo-Saxon monastery was exempt, and that the first instance is that of Battle Abbey under the Conqueror; the charters of an earlier date having been forged. Hody on Convocations, p. 20. and 170. It is remarkable that this grant is made by William, and confirmed by Lanfranc. Collier, p. 256. Exemptions became very usual in England afterwards. Henry, vol. v. p. 337.

against a sovereign, was the excommunication of Lothaire, king of Lorraine, and grandson of Louis the Debonair. This prince had repudiated his wife, upon unjust pretexts, but with the approbation of a national council, and subsequently married his concubine. Nicholas I. the actual pope, despatched two legates to investigate this business, and decide according to the canons. They hold a council at Metz, and confirm the divorce and marriage. Enraged at this conduct of his ambassadors, the pope summons a council at Rome, annuls the sentence, deposes the archbishops of Treves and Cologne, and directs the king to discard his mistress. After some shuffling on the part of Lothaire, he is excommunicated; and, in a short time, we find both the king and his prelates, who had begun with expressions of passionate contempt towards the pope, suing humbly for absolution at the feet of Adrian II. successor of Nicholas, which was not granted without difficulty. In all its most impudent pretensions, the Holy See has attended to the circumstances of the time. Lothaire had powerful neighbours, the kings of France and Germany, eager to invade his dominions on the first intimation from Rome; while the real scandalousness of his behaviour must have intimidated his conscience, and disgusted his subjects.

Excommunication, whatever opinions may be entertained as to its religious efficacy, was originally nothing more in appearance than the exercise of a right which every society claims, the expulsion of refractory members from its body. No direct tem-

poral disadvantages attended this penalty for several ages; but as it was the most severe of spiritual censures, and tended to exclude the object of it not only from a participation in religious rites, but, in a considerable degree, from the intercourse of Christian society, it was used sparingly, and upon the gravest occasions. Gradually, as the church became more powerful and more imperious, excommunications were issued upon every provocation, rather as a weapon of ecclesiastical warfare, than with any regard to its original intention. There was certainly a fair apology for many of these censures, as the only means of defence within the reach of the clergy, when their possessions were lawlessly violated.* Others were founded upon the necessity of enforcing their contentious jurisdiction, which, while it was rapidly extending itself over almost all persons and causes, had not acquired any proper coercive process. The spiritual courts in England, whose jurisdiction is so multifarious, and, in general, so little of a religious nature, had till lately no means even of compelling an appearance, much less of enforcing a sentence, but by excommunication.† Princes, who felt the inadequacy of their own laws to secure obedience, called in the assistance of more formidable

* Schmidt, t. iv. p. 217. Fleury, Institutions au Droit, t. ii. p. 192.

† By a recent statute, 53 G. III. c. 127. the writ De excommunicato capiendo, as a process in contempt, was abolished in England, but retained in Ireland; though the laws of the two countries must be much the same, and I do not remember that any reason was alleged for making an alteration in one rather than the other.

sanctions. Several capitularies of Charlemagne denounce the penalty of excommunication against incendiaries, or deserters from the army. Charles the Bald procured similar censures against his revolted vassals. Thus the boundary between temporal and spiritual offences grew every day less distinct; and the clergy were encouraged to fresh encroachments, as they discovered the secret of rendering them successful.*

The civil magistrate ought undoubtedly to protect the just rights and lawful jurisdiction of the church. It is not so evident that he should attach temporal penalties to her censures. Excommunication has never carried such a presumption of moral turpitude, as to disable a man, upon any solid principles, from the usual privileges of society. Superstition and tyranny however decided otherwise. The support due to church censures by temporal judges is vaguely declared in the capitularies of Pepin and Charlemagne. It became, in later ages, a more established principle in France and England, and, I presume, in other countries. By our common law, an excommunicated person is incapable of being a witness, or of bringing an action; and he may be retained in prison until he obtains absolution. By the establishments of St. Louis, his estate, or person, might be attached by the magistrate.†

* Mém. de l'Acad. des Inscript. t. xxxix. p. 596. &c.

† Ordonnances des Rois, t. i. p. 121. But an excommunicated person might sue in the lay, though not in the spiritual, court. No law seems to have been so severe in this respect as that of England; though it is not strictly accurate to say

These actual penalties were attended by marks of abhorrence and ignominy still more calculated to make an impression on ordinary minds. They were to be shunned, like men infected with leprosy, by their servants, their friends, and their families. Two attendants only, if we may trust a current history, remained with Robert king of France, who, on account of an irregular marriage, was put to this ban by Gregory V.; and these threw all the meats which had passed his table into the fire.* Indeed the mere intercourse with a proscribed person incurred what was called the lesser excommunication, or privation of the sacraments, and required penitence and absolution. In some places, a bier was set before the door of an excommunicated individual, and stones thrown at his windows; a singular method of compelling his submission.† Every where, the excommunicated were debarred of regular sepulture, which, though obviously a matter of police, has, through the superstition of consecrating burial-grounds, been treated as belonging to ecclesiastical control. Their carcasses were supposed to be incapable of corruption, which seems to have been thought a privilege unfit for those who had died in so irregular a manner.‡

with Dr. Cosens, (Gibson's Codex, p. 1102.) that the writ De excommun. capiendo is a privilege peculiar to the English church.

* Velly, t. ii.

† Vaissette, Hist. de Languedoc, t. iii. Appendix, p. 350. Du Cange, v. Excommunicatio.

‡ Du Cange, v. Imblocatus: where several authors are referred to, for the constant opinion among the members of the

But as excommunication, which attacked only one and perhaps a hardened sinner, was not always efficacious, the church had recourse to a more comprehensive punishment. For the offence of a nobleman, she put a county, for that of a prince, his entire kingdom, under an interdict, or suspension of religious offices. No stretch of her tyranny was perhaps so outrageous as this. During an interdict, the churches were closed, the bells silent, the dead unburied, no rite but those of baptism and extreme unction performed. The penalty fell upon those who had neither partaken nor could have prevented the offence; and the offence was often but a private dispute, in which the pride of a pope or bishop had been wounded. Interdicts were so rare before the time of Gregory VII. that some have referred them to him as their author; instances may however be found of an earlier date, and especially that which accompanied the above-mentioned excommunication of Robert king of France. They were afterwards issued not unfrequently against kingdoms; but in particular districts, they continually occurred.*

This was the main spring of the machinery that

Greek church, that the bodies of excommunicated persons remain in statu quo. I remember to have read in an old English divine the same story, with a sage observation, that as, on the one hand, so well attested a miracle could not decently be questioned, so might it be deemed a fit dispensation to give such supernatural aid to the censures of that afflicted church, which has no writ de excommunicato capiendo wherewith to hold the living sinner in durance.

* Giannone, l. vii. c. 1. Schmidt, t. iv. p. 220. Dupin, De antiquâ Eccl. Disciplinâ, p. 288. St. Marc, t. ii. p. 535. Fleury, Institutions, t. ii. p. 200.

the clergy set in motion the lever by which they moved the world. From the moment that these interdicts and excommunications had been tried, the powers of the earth might be said to have existed only by sufferance. Nor was the validity of such denunciations supposed to depend upon their justice. The imposer indeed of an unjust excommunication was guilty of a sin; but the party subjected to it had no remedy but submission. He who disregards such a sentence, says Beaumanoir, renders his good cause bad.† And indeed, without annexing so much importance to the direct consequences of an ungrounded censure, it is evident, that the received theory of religion concerning the indispensable obligation and mysterious efficacy of the rites of communion and confession must have induced scrupulous minds to make any temporal sacrifice rather than incur their privation. One is rather surprised at the instances of failure, than of success in the employment of these spiritual weapons against sovereigns, or the laity in general. It was perhaps a fortunate circumstance for Europe, that they were not introduced, upon a large scale, during the darkest ages of superstition. In the eighth or ninth centuries they would probably have met with a more implicit obedience. But after Gregory VII. as the spirit of ecclesiastical usurpation became more violent, there grew up by slow degrees an opposite feeling in the laity, which ripened into an alienation of sentiment from the church, and a conviction of that

† p. 261.

sacred truth, which superstition and sophistry have endeavoured to eradicate from the heart of man, that no tyrannical government can be founded on a divine commission.

Excommunications had very seldom, if ever, been levelled at the head of a sovereign, before the instance of Lothaire. His ignominious submission, and the general feebleness of the Carlovingian line, produced a repetition of the menace at least, and in cases more evidently beyond the cognizance of a spiritual authority. Upon the death of this Lothaire, his uncle Charles the Bald having possessed himself of Lorraine, to which the emperor Louis II. had juster pretensions, the pope Adrian II. warned him to desist, declaring that any attempt upon that country would bring down the penalty of excommunication. Sustained by the intrepidity of Hincmar, the king did not exhibit his usual pusillanimity, and the pope in this instance failed of success.* But John VIII. the next occupier of the chair of St. Peter, carried his pretensions to a height which none of his predecessors had reached. The Carlovingian princes had formed an alliance against Boson, the usurper of the kingdom of Arles. The pope writes to Charles the Fat: I have adopted the illustrious prince Boson as my son; be content therefore with your own kingdom; for I shall instantly excommunicate all who attempt to injure my son.† In another letter to the same king, who had taken some property from a convent, he enjoins him to restore it within

* De Marca, l. iv. c. 11. † Schmidt, t. ii. p. 260.

sixty days, and to certify by an envoy that he had obeyed the command; else an excommunication would immediately ensue, to be followed by still severer castigation, if the king should not repent upon the first punishment.* These expressions seems to intimate a sentence of deposition from his throne, and thus anticipate by two hundred years the famous æra of Gregory VII. at which we shall soon arrive. In some respects, John VIII. even advanced pretensions beyond those of Gregory. He asserts very plainly a right of choosing the emperor, and may seem indirectly to have exercised it in the election of Charles the Bald, who had not primogeniture in his favour.† This prince, whose restless ambition was united with meanness as well as insincerity, consented to sign a capitulation on his coronation at Rome, in favour of the pope and church, a precedent which was improved upon in subsequent ages.‡ Rome was now prepared to rivet her fetters upon sovereigns, and at no period have the condition of society and the circumstances of civil government been so favourable for her ambition. But the consummation was still suspended, and even her progress arrested, for more than a hundred and fifty years. This dreary interval is filled up, in the annals of the papacy, by a series of revolutions and crimes. Six popes were deposed, two murdered,

* Durioribus deinceps sciens te verberibus erudiendum. Schmidt, p. 261.

† Baluz. Capitularia, t. ii. p. 251. Schmidt, t. ii. p. 197.

‡ Id. p. 199.

one mutilated. Frequently two or even three competitors, among whom it is not always possible by any genuine criticism to distinguish the true shepherd, drove each other alternately from the city. A few respectable names appear thinly scattered through this darkness; and sometimes, perhaps, a pope who had acquired estimation by his private virtues, may be distinguished by some encroachment on the rights of princes, or the privileges of national churches. But in general the pontiffs of that age had neither leisure nor capacity to perfect the great system of temporal supremacy, and looked rather to a vile profit from the sale of episcopal confirmations, or of exemptions to monasteries.*

The corruption of the head extended naturally to all other members of the church. All writers concur in stigmatizing the dissoluteness and neglect of decency that prevailed among the clergy. Though several codes of ecclesiastical discipline had been compiled by particular prelates, yet neither these nor the ancient canons were much regarded. The bishops indeed, who were to enforce them, had most occasion to dread their severity. They were obtruded upon their sees, as the supreme pontiffs were upon that of Rome by force or corruption. A child of five years old was made archbishop of Rheims. The see of Narbonne was purchased for another at the age of ten.† By this relaxation of morals the priesthood

* Schmidt, t. ii. p. 414. Mosheim. St. Marc. Muratori, Ann. d'Italia, passim.

† Vaissette, Hist. de Languedoc, t. ii. p. 252. It was al-

began to lose its hold upon the prejudices of mankind. These are nourished chiefly indeed by shining examples of piety and virtue, but also, in a superstitious age, by ascetic observances, by the fasting and watching of monks and hermits; who have obviously so bad a lot in this life, that men are induced to conclude, that they must have secured a better reversion in futurity. The regular clergy accordingly, or monastic orders, who practised, at least apparently, the specious impostures of self-mortification, retained at all times a far greater portion of respect than ordinary priests, though degenerated themselves, as was admitted, from their primitive strictness.

Two crimes, or at least violations of ecclesiastical law, had become almost universal in the eleventh century, and excited general indignation; the marriage or concubinage of priests, and the sale of benefices. By an effect of those prejudices in favour of austerity, to which I have just alluded, celibacy had been, from very early times, enjoined as an obligation upon the clergy. Some of the fathers permitted those already married for the first time, and to a virgin, to retain their wives after ordination, as a kind of indulgence of which it was more laudable not to take advantage ;* and this, after prevailing for

most general in the church to have bishops under twenty years old. Id. p. 149. Even the pope Benedict IX. is said to have been only twelve, but this has been doubted.

* There are two descriptions of controversialists whom the authority of the fathers must terribly perplex; an Italian Jesuit maintaining the pope's infallibility, and an English high-churchman defending the matrimony of the clergy. Not a single lawful precedent, I believe, has ever been produced for

a length of time in the Greek church, was sanctioned by the council of Trullo in 691,* and has ever since continued one of the distinguishing features of its discipline. The Latin Church, however, did not receive these canons; and has uniformly persevered in excluding the three orders of priests, deacons, and sub-deacons, not only from contracting matrimony, but from cohabiting with wives espoused before their ordination. The prohibition, however, during some ages, existed only in the letter of her canons.† In every country, the secular or parochial clergy kept women in their houses, upon more or less acknowledged terms of intercourse, by a connivance of their

the latter, from St. Paul to Luther, except under the modification permitted in the Greek church. I observe that a respectable living prelate (Elements of Christian Theology, vol. ii.) has overlooked this distinction, referring to Bingham's Ecclesiastical Antiquities for proofs of a position which Bingham assuredly would not have explicitly maintained. See Bingham, and Fleury, Hist. Ecclés. t. iii. p. 140. I trust that every reader, quisque presbyter cum suâ suavi, as Walter de Mapes has it, will do me the justice to understand, that I am not vindicating the prohibition.

* This council was held at Constantinople in the dome of the palace, called Trullus by the Latins. The word Trullo, though solœcistical, is used, I believe, by ecclesiastical writers in English. St. Marc, t. i. p. 294. Art de vérifier les Dates, t. i. p. 157. Fleury, Hist. Ecclés. t. ix. p. 110. Bishops are not within this permission, and cannot retain their wives by the discipline of the Greek church.

† This prohibition is sometimes repeated in Charlemagne's capitularies; but I have not observed that he notices its violation as a notorious abuse. It is probable, therefore, that the open concubinage or marriage of the clergy was not general until a later period. And Fleury declares, that he has found no instance of it before 893, in the case of a parish priest at Chalons, who gave great scandal by publicly marrying. Hist. Ecclés. t. xi. p. 594.

ecclesiastical superiors, which almost amounted to a positive toleration. The sons of priests were capable of inheriting by the law of France, and also of Castile.* Some vigorous efforts had been made in England by Dunstan with the assistance of King Edgar to dispossess the married canons, if not the parochial clergy, of their benefices; but the abuse, if such it is to be considered, made incessant progress, till the middle of the eleventh century. There was certainly much reason for the church to reform this part of their discipline, since it is by cutting off her members from the charities of domestic life, that she secures their entire affection to her cause, and renders them, like veteran soldiers, independent of every feeling but that of fidelity to their commander, and regard to the interests of their body. Leo IX. accordingly, one of the first pontiffs who retrieved the honour of the apostolical chair, after its long period of ignominy, began in good earnest the difficult work of enforcing celibacy among the clergy.† His successors never lost sight of this essential point of discipline. It was a struggle against the natural rights and strongest affections of mankind, which lasted for several ages, and succeeded only by the toleration of greater evils than those it was intended

* Recueil des Historiens, t. xi. preface. Marina, Ensayo sobre las siete partidas, c. 221. 223. This was by virtue of the general indulgence shown by the customs of that country to concubinage, or *barragania*; the children of such a union always inheriting in default of those born in solemn wedlock. Ibid.

† St. Marc, t. iii. p. 152. 164. 219. 602. &c.

to remove. The laity, in general, took part against the married priests, who were reduced to infamy and want, or obliged to renounce their dearest connexions. In many parts of Germany, no ministers were left to perform divine services.* But perhaps there was no country where the rules of celibacy met with so little attention as in England. It was acknowledged in the reign of Henry I. that the greater and better part of the clergy were married; and that prince is said to have permitted them to retain their wives.† But the hierarchy never relaxed in their efforts; and all the councils, general or provincial, of the twelfth century, utter denunciations against *concubinary* priests.‡ After that age, we do not

* Schmidt, t. iii. p. 279. Martenne, Thesaurus Anecdotorum, t. i. p. 230. A Danish writer draws a still darker picture of the tyranny exercised towards the married clergy, which, if he does not exaggerate, was severe indeed: alii membris truncabantur, alii occidebantur, alii de patriâ expellebantur, pauci sua retinuere. Langebek, Script. Rerum Danicarum, t. i. p. 380. The prohibition was repeated by Waldemir II. in 1222, so that there seems to have been much difficulty found. Id. p. 287. and p. 272.

† Wilkins, Concilia, p. 387. Chronicon Saxon. Collier, p. 248. 286. 294. Lyttleton, vol. iii. p. 328. The third Lateran council fifty years afterwards speaks of the detestable custom of keeping concubines, long used by the English clergy. Cum in Angliâ parvâ et detestabili consuetudine et longo tempore fuerit obtentum, ut clerici in domibus suis fornicarias habeant. Labbé, Concilia, t. x. p. 1633. Eugenius IV. sent a legate to impose celibacy on the Irish clergy. Lyttleton's Henry II. vol. ii. p. 42.

‡ Quidam sacerdotes Latini, says Innocent III., in domibus suis habent concubinas, et nonnulli aliquas sibi non metuunt desponsare. Opera Innocent. III. p. 558. See also p. 300. and 407. The latter cannot be supposed a very common case, after so many prohibitions; the more usual practice was to

find them so frequently mentioned; and the abuse by degrees, though not suppressed, was reduced within limits at which the church might connive.

Simony, or the corrupt purchase of spiritual benefices, was the second characteristic reproach of the clergy in the eleventh century. The measures taken to repress it deserve particular consideration, as they produced effects of the highest importance in the history of the middle ages. According to the primitive custom of the church, an episcopal vacancy was filled up by election of the clergy and people belonging to the city or diocess. The subject of their choice was, after the establishment of the federate or provincial system, to be approved or rejected by the metropolitan and his suffragans; and, if approved, he was consecrated by them.* It is probable, that in almost every case the clergy took a leading part in the selection of their bishops; but the consent of the laity

keep a female in their houses, under some pretence of relationship or servitude, as is still said to be usual in Catholic countries. Du Cange, v. Focaria. A writer of respectable authority asserts, that the clergy frequently obtained a bishop's license to cohabit with a mate; but I have never happened to meet with an instance of this. Harmer's [Wharton's] observations on Burnet, p. 11. What comes nearest to it, is a passage on Nicholas de Clemangis about 1400, quoted in Lewis's life of Pecock, p. 30. Plerisque in diocesibus, rectores parochiarum ex certo et conducto cum his prælatis pretio, passim et publicè concubinas tenent. This, however, does not amount to a direct license.

The marriages of English clergy are noticed and condemned in some provincial constitutions of 1237. Matt. Paris, p. 381. And there is, even so late as 1404, a mandate by the bishop of Exeter against married priests. Wilkins, Concilia, t. iii. p. 277.

* Marca, De Concordantiâ, &c. l. vi. c. 2.

was absolutely necessary to render it valid.* They were however by degrees excluded from any real participation, first in the Greek, and finally in the western church. But this was not effected till pretty late times; the people fully preserved their elective rights at Milan in the eleventh century; and traces of their concurrence may be found both in France and Germany in the next age.†

It does not appear that the early Christian emperors interposed with the freedom of choice any farther than to make their own confirmation necessary in the great patriarchal sees, such as Rome and Constantinople, which were frequently the objects of violent competition, and to decide in controverted elections.‡ The Gothic and Lombard kings of Italy followed the same line of conduct.§ But in the French monarchy a more extensive authority was assumed by the sovereign. Though the practice was subject to some variation, it may be said generally, that the Merovingian kings, the line of Charlemagne, and the German emperors of the house of Saxony, conferred bishoprics either by direct nomination, or, as

* Father Paul on Benefices, c. 7.

† De Marca, ubi supra. Schmidt, t. iv. p. 173. The form of election of a bishop of Puy in 1033 runs thus: clerus, populus, et militia elegimus. Vaissette, Hist. de Languedoc, t. ii. Appendix, p. 220. Even Gratian seems to admit in one place, that the laity had a sort of share, though no decisive voice, in filling up an episcopal vacancy. Electio clericorum est, petitio plebis. Decret. l. i. distinctio 62. And other subsequent passages confirm this.

‡ Gibbon, c. 20. St. Marc, Abrégé Chronologique, t. i. p. 7.

§ Fra Paolo on Benefices, c. ix. Giannone, l. iii. c. 6.; l. iv. c. xii. St. Marc, t. i. p. 37.

was more regular, by recommendatory letters to the electors.* In England, also, before the conquest, bishops were appointed in the wittenagemot; and even in the reign of William, it is said that Lanfranc was raised to the see of Canterbury by consent of parliament.† But, independently of this prerogative, which length of time and the tacit sanction of the people had rendered unquestionably legitimate, the sovereign had other means of controlling the election of a bishop. Those estates and honours which compose the temporalities of the see, and without which the naked spiritual privileges would not have tempted an avaricious generation, had chiefly been granted by former kings, and were assimilated to lands held on a beneficiary tenure. As they seemed to partake of the nature of fiefs, they required similar formalities; investiture by the lord, and an oath of fealty by the tenant. Charlemagne is said to have introduced this practice; and, by way of

* Schmidt, t. i. p. 386.; t. ii. p. 245. 487. This interference of the kings was perhaps not quite conformable to their own laws, which only reserved to them the confirmation. Episcopo decedente, says a constitution of Clotaire II. in 615, in loco ipsius, qui a metropolitano ordinari debet, a provincialibus, a clero et populo eligatur: et si persona condigna fuerit, per ordinationem principis ordinetur. Baluz. Capitul. t. i. p. 21. Charlemagne is said to have adhered to this limitation, leaving elections free, and only approving the person, and conferring investiture on him. F. Paul on Benefices, c. xv. But a more direct influence was restored afterwards. Ivon, bishop of Chartres, about the year 1100, thus concisely expresses the several parties concurring in the creation of a bishop: eligente clero, suffragante populo, *dono* regis, per manum metropolitani, approbante Romano pontifice. Du Chesne, Script. Rerum Gallicarum, t. iv. p. 174.

† Lyttleton's Hist. of Henry II. vol. iv. p. 144.

visible symbol, as usual in feudal institutions, to have put the ring and crosier into the hands of the newly consecrated bishop. And this continued for more than two centuries afterwards, without exciting any scandal or resistance.*

The church has undoubtedly surrendered part of her independence in return for ample endowments and temporal power; nor could any claim be more reasonable, than that of feudal superiors to grant the investiture of dependent fiefs. But the fairest right may be sullied by abuse; and the sovereigns, the lay-patrons, the prelates of the tenth and eleventh centuries made their powers of nomination and investiture subservient to the grossest rapacity.† According to the ancient canons, a benefice was avoided by any simoniacal payment or stipulation. If these were to be enforced, the church must almost be cleared of its ministers. Either through bribery in places where elections still prevailed, or through corrupt agreements with princes, or, at least, customary presents to their wives and ministers, a large proportion of the bishops had no valid tenure in their sees. The case was perhaps worse with inferior clerks: in the church of Milan, which was notorious for this corruption, not a single ecclesiastic could

* De Marca, p. 416. Giannone, l. vi. c. 7.

† Boniface, marquis of Tuscany, father of the countess Matilda, and by far the greatest prince in Italy, was flogged before the altar by an abbot, for selling benefices. Muratori, ad ann. 1046. The offence was much more common than the punishment, but the two combined furnish a good specimen of the eleventh century.

stand the test, the archbishop exacting a price for the collation of every benefice.*

The bishops of Rome, like those of inferior sees, were regularly elected by the citizens, laymen as well as ecclesiastics. But their consecration was deferred until the popular choice had received the sovereign's sanction. The Romans regularly despatched letters to Constantinople or to the exarchs of Ravenna, praying that their election of a pope might be confirmed. Exceptions, if any, are infrequent while Rome was subject to the eastern empire.† This, among other imperial prerogatives, Charlemagne might consider as his own. He possessed the city, especially after his coronation as emperor, in full sovereignty; and even before that event, had investigated, as supreme chief, some accusations preferred against the pope Leo III. No vacancy of the papacy took place after Charlemagne became emperor; and it must be confessed, that, in the first which happened under Louis the Debonair, Stephen IV. was consecrated in haste without that prince's approbation.‡ But Gregory IV., his successor, waited till his election had been confirmed; and, upon the whole, the Carlovingian emperors,

* St. Marc, t. iii. p. 65. 188. 219. 296. 230. 568. Muratori. A. D. 958. 1057. &c. Fleury, Hist. Ecclés. t. xiii. p. 73. The sum however appears to have been very small; rather like a fee than a bribe.

† Le Blanc. Dissertation sur l'Autorité des Empereurs. This is subjoined to his Traité des Monnoyes; but not in all copies, which makes those that want it less valuable. St. Marc and Muratori, passim.

‡ Muratori, A. D. 817. St. Marc.

though less uniformly than their predecessors, retained that mark of sovereignty.* But during the disorderly state of Italy which followed the last reigns of Charlemagne's posterity, while the sovereignty and even the name of an emperor were in abeyance, the supreme dignity of Christendom was conferred only by the factious rabble of its capital. Otho the Great, in receiving the imperial crown, took upon him the prerogatives of Charlemagne. There is even extant a decree of Leo VIII., which grants to him and his successors the right of naming future popes. But the authenticity of this instrument is denied by the Italians.† It does not appear that the Saxon emperors went to such a length as nomination, except in one instance; (that of Gregory V. in 996;) but they sometimes, not uniformly, confirmed the election of a pope, according to ancient custom. An explicit right of nomination was however conceded to the emperor Henry III. in 1047, as the only means of rescuing the Roman church from the disgrace and depravity into which it had fallen. Henry appointed two or three very good popes; acting in this against the warnings of a self-

* Le Blanc. Schmidt, t. ii. p. 186. St. Marc, t. i. p. 387. 393. &c.

† St. Marc has defended the authenticity of this instrument in a separate dissertation, t. iv. p. 1167., though admitting some interpolations. Pagi, in Baronium, t. iv. p. 8. seemed to me to have urged some weighty objections; and Muratori, Annali d'Italia, A. D. 962, speaks of it as a gross imposture, in which he probably goes too far. It obtained credit rather early, and is admitted into the decretum of Gratian, notwithstanding its obvious tendency. p. 211. edit. 1591.

ish policy, as fatal experience soon proved, to his family.*

This high prerogative was perhaps not designed to extend beyond Henry himself. But, even if it had been transmissible to his successors, the infancy of his son Henry IV. and the factions of that minority precluded the possibility of its exercise. Nicholas II., in 1059, published a decree, which restored the right of election to the Romans; but with a remarkable variation from the original form. The cardinal bishops (seven in number, holding sees in the neighbourhood of Rome, and consequently suffragans of the pope as patriarch or metropolitan) were to choose the supreme pontiff, with the concurrence first of the cardinal priests and deacons, (or ministers of the parish churches of Rome,) and afterwards of the laity. Thus elected, the new pope was to be presented for confirmation to Henry, "now king and hereafter to become emperor," and to such of his successors as should personally obtain that privilege.† This decree is the foundation of that celebrated mode of election in a conclave of cardinals which has ever since determined the headship of the church. It was intended not only to exclude the citizens, who had indeed justly forfeited their primitive right, but as far as possible to prepare the way for an absolute emancipation of the papacy from the

* St. Marc. Muratori. Schmidt. Struvius.

† St. Marc, t. iii. p. 276. The first canon of the third Lateran council makes the consent of two-thirds of the college necessary for a pope's election. Labbé, Concilia, t. x, p. 1508.

imperial control; reserving only a precarious and personal concession to the emperors, instead of their ancient legal prerogative of confirmation.

The real author of this decree, and of all other vigorous measures adopted by the popes of that age, whether for the assertion of their independence, or the restoration of discipline, was Hildebrand, archdeacon of the church of Rome, by far the most conspicuous person of the eleventh century. Acquiring by his extraordinary qualities an unbounded ascendency over the Italian clergy, they regarded him as their chosen leader, and the hope of their common cause. He had been empowered singly to nominate a pope, on the part of the Romans, after the death of Leo IX., and compelled Henry III. to acquiesce in his choice of Victor II.* No man could proceed more fearlessly towards his object than Hildebrand, nor with less attention to conscientious impediments. Though the decree of Nicholas II., his own work, had expressly reserved the right of confirmation of the young king of Germany, yet on the death of the pope, Hildebrand procured the election and consecration of Alexander II. without waiting for any authority.† During this pontificate, he was considered as something greater than the pope, who acted entirely by his counsels. On Alexander's decease, Hildebrand, long since the real head of the church, was raised with enthusiasm to its chief dignity, and assumed the name of Gregory VII.

Notwithstanding the late precedent at the election

* St. Marc, p. 97. † Id. p. 306.

of Alexander II., it appears that Gregory did not yet consider his plans sufficiently mature to throw off the yoke altogether, but declined to receive consecration until he had obtained the consent of the king of Germany.* This moderation was not of long continuance. The situation of Germany speedily afforded him an opportunity of displaying his ambitious views. Henry IV., through a very bad education, was arbitrary and dissolute; the Saxons were engaged in a desperate rebellion; and secret disaffection had spread among the princes, to an extent of which the pope was much better aware than the king.† He began by excommunicating some of Henry's ministers on pretence of simony, and made it a ground of remonstrance, that they were not instantly dismissed. His next step was to publish a decree, or rather to renew one of Alexander II., against lay-investitures.‡ The abolition of these was a favourite object of Gregory, and formed an essential part of his general scheme for emancipating the spiritual, and subjugating the temporal power. The ring and crosier, it was asserted by the papal advocates, were the emblems of that power which no monarch could bestow; but even if a less offensive symbol were adopted in investitures, the dignity of the church was lowered, and her purity contaminated, when

* p. 552. He acted however as pope, corresponding in that character with bishops of all countries, from the day of his election. p. 554.

† Schmidt. St. Marc. These two are my principal authorities for the contest between the church and the empire.

‡ St. Marc, t. iii. p. 670.

her highest ministers were compelled to solicit the patronage or the approbation of laymen. Though the estates of bishops might, strictly, be of temporal right, yet as they had been inseparably annexed to their spiritual office, it became just that what was first in dignity and importance should carry with it those accessary parts. And this was more necessary than in former times, on account of the notorious traffic which sovereigns made of their usurped nomination to benefices, so that scarcely any prelate sat by their favour whose possession was not invalidated by simony.

The contest about investitures, though begun by Gregory VII., did not occupy a very prominent place during his pontificate; its interest being suspended by other more extraordinary and important dissentions between the church and empire. The pope, after tampering some time with the disaffected party in Germany, summoned Henry to appear at Rome, and vindicate himself from the charges alleged by his subjects. Such an outrage naturally exasperated a young and passionate monarch. Assembling a number of bishops and other vassals at Worms, he procured a sentence that Gregory should no longer be obeyed as lawful pope. But the time was past for those arbitrary encroachments, or at least high prerogatives of former emperors. The relations of dependency between church and state were now about to be reversed. Gregory had no sooner received accounts of the proceedings at Worms, than he summoned a council in the Lateran

palace, and by a solemn sentence, not only excommunicated Henry, but deprived him of the kingdoms of Germany and Italy, releasing his subjects from their allegiance, and forbidding them to obey him as sovereign. Thus Gregory VII. obtained the glory of leaving all his predecessors behind, and astonishing mankind with an act of audacity and ambition, which the most emulous of his successors could hardly surpass.*

The first impulses of Henry's mind on hearing

* The sentence of Gregory VII. against the emperor Henry was directed, we should always remember, to persons already well disposed to reject his authority. Men are glad to be told, that it is their duty to resist a sovereign against whom they are in rebellion, and will not be very scrupulous in examining conclusions which fall in with their inclinations and interests. Allegiance was in those turbulent ages easily thrown off, and the right of resistance was in continual exercise. To the Germans of the eleventh century, a prince unfit for Christian communion would easily appear unfit to reign over them; and though Henry had not given much real provocation to the pope, his vices and tyranny might seem to challenge any spiritual censure, or temporal chastisement. A nearly contemporary writer combines the two justifications of the rebellious party. Nemo Romanorum pontificem reges a regno deponere posse denegabit, quicunque decreta sanctissimi papæ Gregorii non proscribenda judicabit. Ipse enim vir apostolicus.... Præterea, liberi homines Henricum eo pacto sibi præposuerunt in regem, ut electores suos justè judicare et regali providentiâ gubernare satageret, quod pactum ille postea prævaricari et contemnere non cessavit, &c. Ergo, et absque sedis apostolicæ judicio principes eum pro rege meritò refutare possent, cum pactum adimplere contemserit, quod iis pro electione suâ promiserat; quo non adimpleto, nec rex esse poterat Vita Greg. VII. in Muratori, Script. Rer. Ital. t. iii. p. 342.

Upon the other hand, the friends and supporters of Henry, though ecclesiastics, protested against this novel stretch of prerogative in the Roman see. Several proofs of this are adduced by Schmidt, t. iii. p. 315.

this denunciation were indignation and resentment. But, like other inexperienced and misguided sovereigns, he had formed an erroneous calculation of his own resources. A conspiracy long prepared, of which the dukes of Swabia and Carinthia were the chiefs, began to manifest itself; some were alienated by his vices, and others jealous of his family; the rebellious Saxons took courage; the bishops, intimidated by excommunications, withdrew from his side; and he suddenly found himself almost insulated in the midst of his dominions. In this desertion, he had recourse, through panic, to a miserable expedient. He crossed the Alps, with the avowed determination of submitting, and seeking absolution from the pope. Gregory was at Canossa, a fortress near Reggio, belonging to his faithful adherent, the countess Matilda. It was in a winter of unusual severity. The emperor was admitted, without his guards, into an outer court of the castle, and three successive days remained from morning till evening, in a woollen shirt and with naked feet, while Gregory, shut up with the countess, refused to admit him to his presence. On the fourth day, he obtained absolution; but only upon condition of appearing on a certain day to learn the pope's decision, whether or no he should be restored to his kingdom, until which time he promised not to assume the ensigns of royalty.

This base humiliation, instead of conciliating Henry's adversaries, forfeited the attachment of his friends. In his contest with the pope, he had found

a zealous support in the principal Lombard cities, among whom the married and simoniacal clergy had great influence.* Indignant at his submission to Gregory, whom they affected to consider as an usurper of the papal chair, they now closed their gates against the emperor, and spoke openly of deposing him. In this singular position between opposite dangers, Henry retrod his late steps, and broke off his treaty with the pope; preferring, if he must fall, to fall as the defender rather than the betrayer of his imperial rights. The rebellious princes of Germany chose another king, Rodolph duke of Swabia, on whom Gregory, after some delay, bestowed the crown, with a Latin verse, importing that it was given by virtue of the original commission of St. Peter.† But the success of this pontiff, in his immediate designs, was not answerable to his intrepidity. Henry both subdued the German rebellion, and carried on the war with so much vigour, or rather so little resistance, in Italy, that he was crowned in Rome by

* There had been a kind of civil war at Milan for about twenty years before this time, excited by the intemperate zeal of some partisans who endeavoured to execute the papal decrees against irregular clerks by force. The history of these feuds has been written by two contemporaries, Arnulf and Landulf, published in the 4th volume of Muratori's Scriptores Rerum Italicarum; sufficient extracts from which will be found in St. Marc, t. iii. p. 230. &c., and in Muratori's Annals. The Milanese clergy set up a pretence to marry, under the authority of their great archbishop, St. Ambrose, who, it seems, has spoken with more indulgence of this practice than most of the fathers. Both Arnulf and Landulf favour the married clerks; and were perhaps themselves of that description. Muratori.

† Petra dedit Petro, Petrus diadema Rodolpho.

the antipope Guibert, whom he had raised, in a council of his partisans, to the government of the church instead of Gregory. The latter found an asylum under the protection of Roger Guiscard at Salerno; where he died an exile. His mantle, however, descended upon his successors, especially Urban II. and Paschal II., who strenuously persevered in the great contest for ecclesiastical independence; the former with a spirit and policy worthy of Gregory VII., the latter with steady, but disinterested prejudice.* They raised up enemies against Henry IV. out of the bosom of his family, instigating the ambition of two of his sons successively, Conrad and Henry, to mingle in the revolts of Germany. But Rome, under whose auspices the latter had not scrupled to engage in an almost parricidal rebellion, was soon disappointed by his unexpected tenaciousness of that obnoxious prerogative which had occasioned so much of his father's misery. He steadily refused to part with the right of investiture; and the empire

* Paschal II. was so conscientious in his abhorrence of investitures, that he actually signed an agreement with Henry V. in 1110, whereby the prelates were to resign all the lands and other possessions which they held in fief of the emperor, on condition of the latter renouncing the right of investiture, which indeed, in such circumstances, would fall of itself. This extraordinary concession, as may be imagined, was not very satisfactory to the cardinals and bishops about Paschal's court, more worldly-minded than himself, nor to those of the emperor's party, whose joint clamours soon put a stop to the treaty. St. Marc, t. iv. p. 976. A letter of Paschal to Anselm (Schmidt, t. iii. p. 304.) seems to imply, that he thought it better for the church to be without riches, than to enjoy them on condition of doing homage to laymen.

was still committed in open hostility with the church for fifteen years of his reign. But Henry V. being stronger in the support of his German vassals than his father had been, none of the popes with whom he was engaged had the boldness to repeat the measures of Gregory VII. At length, each party grown weary of this ruinous contention, a treaty was agreed upon between the emperor and Calixtus II., which put an end by compromise to the question of ecclesiastical investitures. By this compact, the emperor resigned for ever all pretence to invest bishops by the ring and crosier, and recognized the liberty of elections. But, in return, it was agreed, that elections should be made in his presence, or that of his officers; and that the new bishop should receive his temporalities from the emperor by the sceptre.*

Both parties, in the concordat of Worms, receded from so much of their pretensions, that we might almost hesitate to determine which is to be considered as victorious. On the one hand, in restoring the freedom of episcopal elections, the emperors lost a prerogative of very long standing, and almost necessary to the maintenance of authority over not the least turbulent part of their subjects. And though the form of investiture by the ring and crosier seemed in itself of no importance, yet it had been in effect a collateral security against the election of obnoxious persons. For the emperors, detaining this necessary part of the pontificals until they should confer investiture,

* St. Marc, t. iv. p. 1093. Schmidt, t. iii. p. 178. The latter quotes the Latin words.

prevented a hasty consecration of the new bishop, after which, the vacancy being legally filled, it would not be decent for them to withhold the temporalities. But then, on the other hand, they preserved by the concordat their feudal sovereignty over the estates of the church, in defiance of the language which had recently been held by its rulers. Gregory VII. had positively declared in the Lateran council of 1080, that a bishop or abbot receiving investiture from a layman should not be reckoned as a prelate.* The same doctrine had been maintained by all his successors, without any limitation of their censures to the formality of the ring and crosier. But Calixtus II. himself had gone much farther, and absolutely prohibited the compelling ecclesiastics to render any service to laymen on account of their benefices.† It is evident, that such a general immunity from feudal obligations for an order who possessed nearly half the lands in Europe, struck at the root of those institutions by which the fabric of society was principally held together. This complete independency had been the aim of Gregory's disciples; and by yielding to the continuance of lay-investitures in any shape, Calixtus may, in this point of view, appear to have relinquished the principal object of contention. But

* St. Marc, t. iv. p. 774. A bishop of Placentia asserts that prelates dishonoured their order by putting their hands, which held the body and blood of Christ, between those of impure laymen, p. 956. The same expressions are used by others, and are levelled at the form of feudal homage, which, according to the principles of that age, ought to have been as obnoxious as investiture.

† Id. p. 1061. 1067.

as there have been battles, in which though immediate success may seem pretty equally balanced, yet we learn from subsequent effects to whom the intrinsic advantages of victory belonged, so is it manifest from the events that followed the settlement of this great controversy about investitures, that the see of Rome had conquered.

The emperors were not the only sovereigns whose practice of investiture excited the hostility of Rome, although they sustained the principal brunt of the war. A similar contest broke out under the pontificate of Paschal II. with Henry I. of England; for the circumstances of which, as they contain nothing peculiar, I refer to our own historians. It is remarkable, that it ended in a compromise not unlike that adjusted at Worms; the king renouncing all sort of investitures, while the pope consented that the bishop should do homage for his temporalities. This was exactly the custom of France, where investiture by the ring and crosier is said not to have prevailed;* and it answered the main end of sovereigns by keeping up the feudal dependency of ecclesiastical estates. But the kings of Castile were more fortunate than the rest; discreetly yielding to the pride of Rome, they obtained what was essential to their own authority, and have always possessed, by the concession of Urban II., an absolute privilege of nomination to bishoprics in their domin-

* Histoire du Droit public ecclésiastique François, p. 261. I do not fully rely on this authority.

ions.* An early evidence of that indifference of the popes towards the real independence of national churches, to which subsequent ages were to lend abundant confirmation.

When the emperors had surrendered their pretensions to interfere in episcopal elections, the primitive mode of collecting the suffrages of clergy and laity in conjunction, or at least of the clergy with the laity's assent and ratification, ought naturally to have revived. But in the twelfth century, neither the people, nor even the general body of the diocesan clergy, were considered as worthy to exercise this function. It soon devolved altogether upon the chapters of cathedral churches.† The original of these may be traced very high. In the earliest ages, we find a college of presbytery consisting of the priests and deacons, assistants as a council of advice or even a kind of parliament to their bishop. Parochial divi-

* F. Paul on Benefices, c. 24. Zurita, Anales de Aragon, t. iv. p. 305. Fleury says that the kings of Spain nominate to bishoprics by virtue of a particular indulgence, renewed by the pope for the life of each prince. Institutions au Droit, t. i. p. 106.

† Fra Paolo (Treatise of Benefices, c. 24.) says that between 1122 and 1145, it became a rule almost every where established, that bishops should be chosen by the chapter. Schmidt, however, brings a few instances, where the consent of the nobility and other laics is expressed, though perhaps little else than a matter of form. Innocent III. seems to have been the first who declared, that whoever had the majority of the chapter in his favour should be deemed duly elected: and this was confirmed by Otho IV. in the capitulation upon his accession. Hist. des Allemands, t. iv. p. 175. Fleury thinks that chapters had not an exclusive election till the end of the twelfth century. The second Lateran council in 1139 represses their attempts to engross it. Institutions au Droit Ecclés. t. i. p. 100.

sions, and fixed ministers attached to them, were not established till a later period. But the canons, or cathedral clergy, acquired afterwards a more distinct character. They were subjected by degrees to certain strict observances, little differing, in fact, from those imposed on monastic orders. They lived at a common table, they slept in a common dormitory, their dress and diet were regulated by peculiar laws. But they were distinguished from monks by the right of possessing individual property, which was afterwards extended to the enjoyment of separate prebends or benefices. These strict regulations, chiefly imposed by Louis the Debonair, went into disuse through the relaxation of discipline; nor were they ever effectually restored. Meantime the chapters became extremely rich; and as they monopolized the privilege of electing bishops, it beame an object of ambition with noble families to obtain canonries for their younger children, as the surest road to ecclesiastical honours and opulence. Contrary, therefore, to the general policy of the church, persons of inferior birth have been rigidly excluded from these foundations.*

The object of Gregory VII., in attempting to redress those more flagrant abuses which for two centuries had deformed the face of the Latin church, is not incapable, perhaps, of vindication, though no sufficient apology can be offered for the means he em-

* Schmidt, t. ii. 224. 473.; t. iii. p. 281. Encyclopédie, Art. Chanoine. F. Paul on Benefices, c. 16. Fleury, 8me Discours sur l'Hist. Ecclés.

ployed. But the disinterested love of reformation, to which candour might ascribe the contention against investitures, is belied by the general tenor of his conduct, exhibiting an arrogance without parallel, and an ambition that grasped at universal and unlimited monarchy. He may be called the common enemy of all sovereigns, whose dignity as well as independence mortified his infatuated pride. Thus we find him menacing Philip I. of France, who had connived at the pillage of some Italian merchants and pilgrims, not only with an interdict, but a sentence of deposition.* Thus too he asserts, as a known historical fact, that the kingdom of Spain had formerly belonged, by special right, to St. Peter; and by virtue of this imprescriptible claim, he grants to a certain Count de Rouci all territories which he should reconquer from the Moors, to be held in fief from the Holy See by a stipulated rent.† A similar

* St. Marc, t. iii. p. 628. Fleury, Hist. Ecclés. t. xiii. p. 281. 284.

† The language he employs is worth quoting, as a specimen of his style: Non latere vos credimus, regnum Hispaniæ ab antiquo juris sancti Petri fuisse, et adhuc licet diu a paganis sit occupatum, lege tamen justitiæ non evacuatâ, nulli mortalium, sed soli apostolicæ sedi ex æquo pertinere. Quod enim auctore Deo semel in proprietates ecclesiarum justè pervenerit, manente Eo, ab usu quidem, sed ab earum jure, occasione transeuntis temporis, sine legitimâ concessione divelli non poterit. Itaque Comes Evalus de Roceio, cujus famam apud vos haud obscuram esse putamus, terram illam ad honorem Sti. Petri ingredi, et a paganorum manibus eripere cupiens, hanc concessionem ab apostolicâ sede obtinuit, ut partem illam, unde paganos suo studio et adjuncto sibi aliorum auxilio expellere possit, sub conditione inter nos factæ pactionis ex parte Sti. Petri possideret. Labbé, Concilia, t. x. p. 10. Three instances occur in the Corps Diplomatique of Dumont,

pretension he makes to the kingdom of Hungary, and bitterly reproaches its sovereign Solomon, who had done homage to the emperor, in derogation of St. Peter, his legitimate lord.* It was convenient to treat this apostle as a great feudal suzerain, and the legal principles of that age were dexterously applied to rivet more forcibly the fetters of superstition.†

While temporal sovereigns were opposing so inadequate a resistance to a system of usurpation, contrary to all precedent, and to the common principles of society, it was not to be expected, that national churches should persevere in opposing pretensions, for which several ages had paved the way. Gregory VII. completed the destruction of their liberties. The principles contained in the decretals of Isidore, hostile as they were to ecclesiastical independence, were set aside as insufficient to establish the absolute monarchy of Rome. By a constitution of Alexander II., during whose pontificate Hildebrand himself was deemed the effectual pope, no bishop in the catholic church was permitted to exercise his functions, until he had received the confirmation of the Holy See.‡ A provision of vast importance, through which, beyond perhaps any other means, Rome has

where a duke of Dalmatia, (t. i. p. 53.) a count of Provence, (p. 58.) and a count of Barcelona, (ibid.) put themselves under the feudal superiority and protection of Gregory VII. The motive was sufficiently obvious.

* St. Marc, t. iii. p. 624. 674. Schmidt, p. 73.

† The character and policy of Gregory VII. are well discussed by Schmidt, t. iii. p. 307. &c.

‡ St. Marc, p. 460.

sustained, and still sustains, her temporal influence, as well as her ecclesiastical supremacy! The national churches, long abridged of their liberties by gradual encroachments, now found themselves subject to an undisguised and irresistible despotism. Instead of affording protection to bishops against their metropolitans, under an insidious pretence of which the popes of the ninth century had subverted the authority of the latter, it became the favourite policy of their successors to harass all prelates with citations to Rome.* Gregory obliged metropolitans to attend in person for the pallium.† Bishops were summoned even from England and the northern kingdoms to receive the commands of the spiritual monarch. William the Conqueror having made a difficulty about permitting his prelates to obey these citations, Gregory, though in general on good terms with that prince, and treating him with a deference which marks the effect of a firm character in repressing the ebullitions of overbearing pride,‡ complains of this as a persecution unheard of among pagans.§ The great quarrel between Archbishop Anselm and his two sovereigns, William Rufus and Henry I., was originally founded upon a similar refusal to permit his departure for Rome.

This perpetual control exercised by the popes over ecclesiastical, and in some degree over temporal affairs, was maintained by means of their legates, at

* Schmidt, t. iii. p. 80. 322. † Id. t. iv. p. 170.
‡ St. Marc, p. 628. 781. Schmidt, t. iii. p. 82.
§ St. Marc, t. iv. p. 768. Collier, p. 252.

once the ambassadors and the lieutenants of the Holy See. Previously to the latter part of the tenth age, these had been sent not frequently and upon special occasions. The legatine, or vicarial commission, had generally been entrusted to some eminent metropolitan of the nation within which it was to be exercised; as the archbishop of Canterbury was perpetual legate in England. But the special commissioners, or legates a latere, suspending the pope's ordinary vicars, took upon themselves an unbounded authority over the national churches, holding councils, promulgating canons, deposing bishops, and issuing interdicts at their discretion. They lived in splendour at the expense of the bishops of the province. This was the more galling to the hierarchy, because simple deacons were often invested with this dignity, which set them above primates. As the sovereigns of France and England acquired more courage, they considerably abridged this prerogative of the Holy See, and resisted the entrance of any legates into their dominions without their consent.*

From the time of Gregory VII., no pontiff thought of awaiting the confirmation of the emperor, as in early ages, before he was installed in the throne of St. Peter. On the contrary, it was pretended that the emperor was himself to be confirmed by the pope. This had indeed been broached by John VIII. two hundred years before Gregory.† It was still a doc-

* De Marca, l. vi. c. 28. 30, 31. Schmidt, t. ii. p. 498. t. iii. p. 312. 320. Hist. du Droit Public Eccl. François, p. 250. Fleury, 4me Discours sur l'Hist. Ecclés. c. 10.

† V. supra. It appears manifest, that the scheme of tem-

trine not calculated for general reception; but the popes availed themselves of every opportunity which the temporizing policy, the negligence, or bigotry of sovereigns threw into their hands. Lothaire coming to receive the imperial crown at Rome, this circumstance was commemorated by a picture in the Lateran palace, in which, and in two Latin verses subscribed, he was represented as doing homage to the pope.* When Frederic Barbarossa came upon the same occasion, he omitted to hold the stirrup of Adrian IV., who, in his turn, refused to give him the usual kiss of peace; nor was the contest ended but by the emperor's acquiescence, who was content to follow the precedents of his predecessors. The same Adrian, expostulating with Frederic upon some slight grievance, reminded him of the imperial crown which he had conferred, and declared his willingness to bestow, if possible, still greater benefits. But the phrase employed (majora beneficia) suggested the idea of a fief; and the general insolence which

poral sovereignty was only suspended by the disorders of the Roman See in the tenth century. Peter Damian, a celebrated writer of the age of Hildebrand and his friend, puts these words into the mouth of Jesus Christ, as addressed to Pope Victor II. Ego claves totius universalis ecclesiæ meæ tuis manibus tradidi, et super eam te mihi vicarium posui, quam proprii sanguinis effusione redemi. Et si pauca sunt ista, etiam monarchias addidi: immo sublato rege de medio totius Romani imperii vacantis tibi jura permisi. Schmidt, t. iii. p. 78.

* Rex venit ante fores, jurans prius urbis honores:
Post homo fit papæ, sumit quo dante coronam.
Muratori, Annali, A. D. 1157.

There was a pretext for this artful line. Lothaire had received the estate of Matilda in fief from the pope, with a reversion to Henry the Proud his son-in-law. Schmidt, p. 349.

pervaded Adrian's letter confirming this interpretation, a ferment arose among the German princes, in a congress of whom this letter was delivered. "From whom then," one of the legates was rash enough to say, "does the emperor hold his crown, except from the pope?" which so much irritated a prince of Wittelsbach, that he was with difficulty prevented from cleaving the priest's head with his sabre.* Adrian IV. was the only Englishman that ever sat in the papal chair. It might, perhaps, pass for a favour bestowed on his natural sovereign, when he granted to Henry II. the kingdom of Ireland; yet the language of this donation, wherein he asserts all islands to be the exclusive property of St. Peter, should not have had a very pleasing sound to an insular monarch.

I shall not wait to comment on the support given to Becket by Alexander III., which must be familiar to the English reader, nor on his speedy canonization; a reward which the church has always held out to its most active friends, and which may be compared to titles of nobility granted by a temporal sovereign.† But the epoch when the spirit of papal usurpation was most strikingly displayed was the pontificate of Innocent III. In each of the 1194–1216

* Muratori, ubi supra. Schmidt, t. iii. p. 393.

† The first instance of a solemn papal canonization is that of St. Udalric by John XVI., in 993. However the metropolitans continued to meddle with this sort of apotheosis till the pontificate of Alexander III., who reserved it, as a choice prerogative, to the Holy See. Art. de Vérifier les Dates, t. i. p. 274. and 290.

three leading objects which Rome has pursued, independent sovereignty, supremacy over the Christian church, control over the princes of the earth, it was the fortune of this pontiff to conquer. He realized, as we have seen in another place, that fond hope of so many of his predecessors, a dominion over Rome and the central parts of Italy. During his pontificate, Constantinople was taken by the Latins; and however he might seem to regret a diversion of the crusaders, which impeded the recovery of the Holy Land, he exulted in the obedience of the new patriarch, and the reunion of the Greek church. Never perhaps, either before or since, was the great eastern schism in so fair a way of being healed; even the kings of Bulgaria and of Armenia acknowledged the supremacy of Innocent, and permitted his interference with their ecclesiastical institutions.

The maxims of Gregory VII. were now matured by more than a hundred years, and the right of trampling upon the necks of kings had been received, at least among churchmen, as an inherent attribute of the papacy. "As the sun and the moon are placed in the firmament," (such is the language of Innocent,) "the greater as the light of the day, and the lesser of the night; thus are there two powers in the church; the pontifical, which, as having the charge of souls, is the greater, and the royal, which is the less, and to which the bodies of men only are trusted."* Intoxicated with these conceptions, (if we

* Vita Innocentii Tertii in Muratori, Scriptores Rerum Ital. t. iii. pars i. p. 488. This life is written by a contemporary. St. Marc, t. v. p. 325. Schmidt, t. iv. p. 227.

may apply such a word to *successful* ambition,) he thought no quarrel of princes beyond the sphere of his jurisdiction. "Though I cannot judge of the right to a fief," said Innocent to the kings of France and England, "yet it is my province to judge where sin is committed, and my duty to prevent all public scandals." Philip Augustus, who had at that time the worse in his war with Richard, acquiesced in this sophism; the latter was more refractory, till the papal legate began to menace him with the rigour of the church.* But the king of England, as well as his adversary, condescended to obtain temporary ends by an impolitic submission to Rome. We have a letter from Innocent to the king of Navarre, directing him, on pain of spiritual censures, to restore some castles which he detained from Richard.† And the latter appears to have entertained hopes of recovering his ransom paid to the emperor and duke of Austria, through the pope's interference.‡ By such blind sacrifices of the greater to the less, of the future to the present, the sovereigns of Europe played continually into the hands of their subtle enemy.

* Philippus rex Franciæ in manu ejus datâ fide promisit se ad mandatum ipsius pacem vel treugas cum rege Angliæ initurum. Richardus autem rex Angliæ se difficilem ostendebat. Sed cum idem legatus ei *cepit rigorem ecclesiasticum intentare*, saniori ductus consilio acquievit. Id. p. 503.

† Innocentii Opera, (Coloniæ, 1574.) p. 124.

‡ Id. p. 134. Innocent actually wrote some letters for this purpose, but without any effect, nor was he probably at all solicitous about it. p. 139. and 141. Nor had he interfered to procure Richard's release from prison; though Eleanor wrote him a letter, in which she asks, "Has not God given you the power to govern nations and kings?" Velly, Hist. de France, t. iii. p. 382.

Though I am not aware that any pope before Innocent III. had thus announced himself as the general arbiter of differences and conservator of the peace throughout Christendom, yet the scheme had been already formed, and the public mind was in some degree prepared to admit it. Gerohus, a writer who lived early in the twelfth century, published a theory of perpetual pacification, as feasible certainly as some that have been planned in later times. All disputes among princes were to be referred to the pope. If either party refused to obey the sentence of Rome, he was to be excommunicated and deposed. Every Christian sovereign was to attack the refractory delinquent, under pain of a similar forfeiture.* A project of this nature had not only a magnificence flattering to the ambition of the church, but was calculated to impose upon benevolent minds, sickened by the cupidity and oppression of princes. No control but that of religion appeared sufficient to restrain the abuses of society; while its salutary influence had already been displayed both in the Truce of God, which put the first check on the custom of private war, and more recently in the protection afforded to crusaders against all aggression during the continuance of their engagement. But reasonings from the excesses of liberty in favour of arbitrary government, or from the calamities of national wars in favour of universal monarchy, involve the tacit fallacy that perfect, or at least superior wisdom

* Schmidt, t. iv. p. 232.

and virtue will be found in the restraining power. The experience of Europe was not such as to authorize so candid an expectation in behalf of the Roman See.

There were certainly some instances, where the temporal supremacy of Innocent III. however usurped, may appear to have been exerted beneficially. He directs one of his legates to compel the observance of peace between the kings of Castile and Portugal, if necessary, by excommunication and interdict.* He enjoins the king of Aragon to restore his coin which he had lately debased, and of which great complaint had arisen in his kingdom.† Nor do I question his sincerity in these, or in many other cases of interference with civil government. A great mind, such as Innocent III. undoubtedly possessed, though proné to sacrifice every other object to ambition, can never be indifferent to the beauty of social order, and the happiness of mankind. But, if we may judge by the correspondence of this remarkable person, his foremost gratification was the display of unbounded power. His letters, especially to ecclesiastics, are full of unprovoked rudeness. As impetuous as Gregory VII., he is unwilling to owe any thing to favour; he seems to anticipate denial, heats himself into anger as he proceeds, and where he commences with solicitation, seldom concludes without a menace.‡ An extensive learning in ecclesiastical law, a close observation of whatever was

* Innocent. Opera, p. 146. † p. 378.
‡ Id. p. 31. 73. 76. &c. &c.

passing in the world, an unwearied diligence, sustained his fearless ambition.* With such a temper, and with such advantages, he was formidable beyond all his predecessors, and perhaps beyond all his successors. On every side, the thunder of Rome broke over the heads of princes. A certain Swero is excommunicated for usurping the crown of Norway. A legate, in passing through Hungary, is detained by the king: Innocent writes in tolerably mild terms to this potentate, but fails not to intimate that he might be compelled to prevent his son's succession to the throne. The king of Leon had married his cousin, a princess of Castile. Innocent subjects the kingdom to an interdict. When the clergy of Leon petition him to remove it, because when they ceased to perform their functions, the laity paid no tithes, and listened to heretical teachers when orthodox mouths were mute, he consented that di-

* The following instance may illustrate the character of this pope, and his spirit of governing the whole world, as much as those of a more public nature. He writes to the chapter of Pisa, that one Rubeus, a citizen of that place, had complained to him, that having mortgaged a house and garden for two hundred and fifty-two pounds, on condition that he might redeem it before a fixed day, within which time he had been unavoidably prevented from raising the money, the creditor had now refused to accept it; and directs them to inquire into the facts, and if they prove truly stated, to compel the creditor by spiritual censures to restore the premises, reckoning their rent during the time of his mortgage as part of the debt, and to receive the remainder. Id. t. ii. p. 17. It must be admitted, that Innocent III. discouraged in general those vexatious and dilatory appeals from inferior ecclesiastical tribunals to the court of Rome, which had gained ground before his time, and especially in the pontificate of Alexander III.

vine service with closed doors, but not the rites of burial, might be performed.* The king at length gave way, and sent back his wife. But a more illustrious victory of the same kind was obtained over Philip Augustus, who, having repudiated Isemburga of Denmark, had contracted another marriage. The conduct of the king, though not without the usual excuse of those times, nearness of blood, was justly condemned; and Innocent did not hesitate to visit his sins upon the people by a general interdict. This, after a short demur from some bishops, was enforced throughout France; the dead lay unburied, and the living were cut off from the offices of religion, till Philip, thus subdued, took back his divorced wife. The submission of such a prince, not feebly superstitious, like his predecessor Robert, nor vexed with seditions, like the emperor Henry IV., but brave, firm and victorious, is perhaps the proudest trophy in the stutcheon of Rome. Compared with this, the subsequent triumph of Innocent over our pusillanimous John seems cheaply gained, though the surrender of a powerful kingdom into the vassalage of the pope may strike us as a proof of stupendous baseness on one side, and audacity on the other.† Yet, under this very pontificate, it was not

* Id. p. 411. Vita Innocent III.

† The stipulated annual payment of 1000 marks was seldom made by the kings of England; but one is almost ashamed that it should ever have been so. Henry III. paid it occasionally, when he had any object to attain, and even Edward I. for some years; the latest payment on record is in the seventeenth of his reign. After a long discontinuance, it was demanded

unparalleled. Peter II. king of Aragon, received at Rome the belt of knighthood and the royal crown from the hands of Innocent III.; he took an oath of perpetual fealty and obedience to him and his successors; he surrendered his kingdom, and accepted it again to be held by an annual tribute, in return for the protection of the Apostolic See.* This strange conversion of kingdoms into spiritual fiefs was intended as the price of security from ambitious neighbours, and may be deemed analogous to the change of alodial into feudal, or, more strictly, to that of lay into ecclesiastical tenure, which was frequent during the turbulence of the darker ages.

I have mentioned already, that among the new pretensions advanced by the Roman see, was that of confirming the election of an emperor. It had however been asserted rather incidentally, than in a peremptory manner. But the doubtful elections of Philip and Otho after the death of Henry VI. gave Innocent III. an opportunity of maintaining more positively this pretended right. In a decretal epistle addressed to the duke of Zahringen, the object of which is to direct him to transfer his allegiance from Philip to the other competitor, Innocent, after stating the mode in which a regular election ought to

in the fortieth of Edward III., (1366) but the parliament unanimously declared that John had no right to subject the kingdom to a superior without their consent; which put an end for ever to the applications. Prynne's Constitutions, vol. iii.

* Zurita, Anales de Aragon, t. i. f. 91. This was not forgotten towards the latter part of the same century, when Peter III. was engaged in the Sicilian war, and served as a pretence for the pope's sentence of deprivation.

be made, declares the pope's immediate authority to examine, confirm, anoint, crown and consecrate the elect emperor, provided he shall be worthy; or to reject him, if rendered unfit by great crimes, such as sacrilege, heresy, perjury, or persecution of the church; in default of election to supply the vacancy; or, in the event of equal suffrages, to bestow the empire upon any person at his discretion.* The princes of Germany were not much influenced by this hardy assumption, which manifests the temper of Innocent III. and of his court, rather than their power. But Otho IV. at his coronation by the pope signed a capitulation, which cut off several privileges enjoyed by the emperors, ever since the concordat of Calixtus, in respect of episcopal elections and investitures.†

The noon-day of papal dominion extends from the pontificate of Innocent III. inclusively to that of Boniface VIII.; or, in other words, through the thirteenth century. Rome inspired during this age all the terror of her ancient name. She was once more the mistress of the world, and kings were her vassals. I have already anticipated the two most con-

* Decretal. l. i. tit. 6. c. 34. commonly cited Venerabilem. The rubric, or synopsis of this epistle asserts the pope's right electum imperatorem examinare, approbare, et inungere, consecrare et coronare, si est dignus: vel rejicere si est indignus, ut quia sacrilegus, excommunicatus, tyrannus, fatuus et hæreticus, paganus, perjurus, vel ecclesiæ persecutor. Et electoribus nolentibus eligere, Papa supplet. Et data paritate vocum eligentium, nec accedente majore concordiâ, Papa potest gratificari cui vult. The epistle itself is, if possible, more strongly expressed.

† Schmidt, t. iv. p. 149. 175.

spicuous instances when her temporal ambition displayed itself, both of which are inseparable from the civil history of Italy.* In the first of these, her long contention with the house of Swabia, she finally triumphed. After his deposition by the council of Lyons, the affairs of Frederic II. went rapidly into decay. With every allowance for the enmity of the Lombards, and the jealousies of Germany, it must be confessed, that the proscription of Innocent IV. and Alexander IV. was the main cause of the ruin of his family. There is however no other instance, to the best of my judgement, where the pretended right of deposing kings has been successfully exercised. Martin IV. absolved the subjects of Peter of Aragon from their allegiance, and transferred his crown to a prince of France; but they did not cease to obey their lawful sovereign. This is the second instance which the thirteenth century presents of interference on the part of the popes in a great temporal quarrel. As feudal lords of Naples and Sicily, they had indeed some pretext for engaging in the hostilities between the houses of Anjou and Aragon, as well as for their contest with Frederic II. But the pontiffs of that age, improving upon the system of Innocent III., and sanguine with past success, aspired to render every European kingdom formally dependent upon the see of Rome. Thus Boniface VIII., at the instigation of some emissaries from Scotland, claimed that monarchy as paramount lord, and interposed, though vainly, the sacred panoply of

* See above, chapter iii.

ecclesiastical rights to rescue it from the arms of Edward I.*

This general supremacy affected by the Roman church over mankind in the twelfth and thirteenth centuries, derived material support from the promulgation of the canon law. The foundation of this jurisprudence is laid in the decrees of councils, and in the rescripts or decretal epistles of popes to questions propounded upon emergent doubts relative to matters of discipline and ecclesiastical economy. As the jurisdiction of the spiritual tribunals increased, and extended to a variety of persons and causes, it became almost necessary to establish a uniform system for the regulation of their decisions. After several minor compilations had appeared, Gratian, an Italian monk, published, about the year 1140, his decretum, or general collection of canons, papal epistles, and sentences of fathers, arranged and digested into titles and chapters, in imitation of the Pandects, which very little before had begun to be studied again with great diligence. This work of Gratian, though it seems rather an extraordinary performance for the age when it appeared, has been censured for notorious incorrectness as well as inconsistency, and especially for the authority given in it to the false decretals of Isidore, and consequently to the papal supremacy. It fell however short of what was required in the progress of that usurpation. Gregory IX. caused the five books of Decretals to be published by Raimond da Pennafort in 1234. These consist

* Dalrymple's Annals of Scotland, vol. i. p. 267.

almost entirely of the rescripts issued by the latter popes, especially Alexander III., Innocent III., Honorious III., and Gregory himself. They form the most essential part of the canon law, the Decretum of Gratian being comparatively obsolete. In these books we find a regular and copious system of jurisprudence, derived in a great measure from the civil law, but with considerable deviation, and possibly improvement. Boniface VIII. added a sixth part, thence called the Sext, itself divided into five books, in the nature of a supplement to the other five, of which it follows the arrangement, and composed of decisions promulgated since the pontificate of Gregory IX. New constitutions were subjoined by Clement V. and John XXII., under the name of Clementines and Extravagantes Joannis: and a few more of later pontiffs are included in the body of canon law, arranged as a second supplement after the manner of the Sext, and called Extravagantes Communes.

The study of this code became of course obligatory upon ecclesiastical judges. It produced a new class of legal practitioners, or canonists; of whom a great number added, like their brethren the civilians, their illustrations and commentaries, for which the obscurity and discordance of many passages, more especially in the Decretum, gave ample scope. From the general analogy of the canon law to that of Justinian, the two systems became, in a remarkable manner, collateral and mutually intertwined, the tribunals governed by either of them borrowing their rules

of decision from the other in cases where their peculiar jurisprudence is silent or of dubious interpretation.* But the canon law was almost entirely founded upon the legislative authority of the pope; the decretals are in fact but a new arrangement of the bold epistles of the most usurping pontiffs, and especially of Innocent III., with titles or rubrics, comprehending the substance of each in the compiler's language. The superiority of ecclesiastical to temporal power, or at least the absolute independence of the former, may be considered as a sort of key-note which regulates every passage in the canon law.† It is expressly declared, that subjects owe no allegiance to an excommunicated lord, if after admonition he is not reconciled to the church.‡ And the rubric prefixed to the declaration of Frederic II.'s deposition in the council of Lyons asserts that the pope may dethrone the emperor for lawful causes.§ These rubrics to the decretals are not perhaps of direct authori-

* Duck, De Usu Juris Civilis, l. i. c. 8.

† Constitutiones principum ecclesiasticis constitutionibus non præeminent, sed obsequuntur. Decretum, distinct. 10. Statutum generale laicorum ad ecclesias, vel ecclesiasticas personas, vel eorum bona in earum præjudicium non extenditur. Decretal. l. i. tit. 2. c. 10. Quæcunque à principibus in ordinibus, vel in ecclesiasticis rebus decreta inveniuntur, nullius auctoritatis esse monstrantur. Decretum, distinct. 96.

‡ Domino excommunicato manente, subditi fidelitatem non debent; et si longo tempore in eâ perstiterint, et monitus non pareat ecclesiæ, ab ejus debito absolvuntur. Decretal. l. v. tit. 37. c. 13. I must acknowledge, that the decretal epistle of Honorius III. scarcely warrants this general proposition of the rubric, though it seems to lead to it.

§ Papa imperatorem deponere potest ex causis legitimis. l. ii. tit. 13. c. 2.

ty as part of the law; but they express its sense, so as to be fairly cited instead of it.* By means of her new jurisprudence, Rome acquired in every country a powerful body of advocates, who, though many of them were laymen, would, with the usual bigotry of lawyers, defend every pretension or abuse, to which their received standard of authority gave a sanction.†

Next to the canon law, I should reckon the institution of the mendicant orders among those circumstances which principally contributed to the aggrandizement of Rome. By the acquisition, and in some respects the enjoyment, or at least ostentation of immense riches, the ancient monastic orders had forfeited much of the public esteem.‡ Austere principles as to the obligation of evangelical poverty were

* If I understand a bull of Gregory XIII., prefixed to his recension of the canon law, he confirms the rubrics or glosses along with the text; but I cannot speak with certainty as to his meaning.

† For the canon law, I have consulted, besides the Corpus Juris Canonici, Tiraboschi, Storia della Litteratura, t. iv. and v.; Giannone, l. xiv. c. 3.; l. xix. c. 3.; l. xxii. c. 8. Fleury, Institutions au Droit Ecclésiastique, t. i. p. 10. and 5me Discours sur l'Histoire Ecclés. Duck, De Usu Juris Civilis, l. i. c. 8. Schmidt, t. iv. p. 39. F. Paul, Treatise of Benefices, c. 31. I fear that my few citations from the canon law are not made scientifically; the proper mode of reference is to the first word; but the book and title are rather more convenient; and there are not *many* readers in England who will detect this impropriety.

‡ It would be easy to bring evidence from the writings of every successive century to the general viciousness of the regular clergy, whose memory it is sometimes the fashion to treat with respect. See particularly Muratori, Dissert. 65. and Fleury, 8me Discours. The latter observes that their great wealth was the cause of this relaxation in discipline.

inculcated by the numerous sectaries of that age, and eagerly received by the people, already much alienated from an established hierarchy. No means appeared so efficacious to counteract this effect, as the institution of religious societies, strictly debarred from the insidious temptations of wealth. Upon this principle were founded the orders of Mendicant Friars, incapable, by the rules of their foundation, of possessing estates, and maintained only by alms and pious remunerations. Of these the two most celebrated were formed by St. Dominic and St. Francis of Assisa, and established by the authority of Honorius III. in 1216 and 1223. These great reformers, who have produced so extraordinary an effect upon mankind, were of very different characters; the one, active and ferocious, had taken a prominent part in the crusade against the unfortunate Albigeois, and was among the first who bore the terrible name of inquisitor; while the other, a harmless enthusiast, pious and sincere, but hardly of sane mind, was much rather accessary to the intellectual than to the moral degradation of his species. Various other mendicant orders were instituted in the thirteenth century; but most of them were soon suppressed, and besides the two principal, none remain but the Augustins and the Carmelites.*

These new preachers were received with astonishing approbation by the laity, whose religious zeal usually depends a good deal upon their opinion of

* Mosheim's Ecclesiastical History. Fleury, 8me Discours. Crevier, Histoire de l'Université de Paris, t. i. p. 318.

sincerity and disinterestedness in their pastors. And the progress of the Dominican and Franciscan friars in the thirteenth century bears a remarkable analogy to that of our English Methodists. Not deviating from the faith of the church, but professing rather to teach it in greater purity, and to observe her ordinances with greater regularity, while they imputed supineness and corruption to the secular clergy, they drew round their sermons a multitude of such listeners as in all ages are attracted by similar means. They practised all the stratagems of itinerancy, preaching in public streets, and administering the communion on a portable altar. Thirty years after their institution, an historian complains that the parish churches were deserted, that none confessed except to these friars, in short, that the regular discipline was subverted.* This uncontrolled privilege of performing sacerdotal functions, which their modern antitypes assume for themselves, was conceded to the mendicant orders by the favour of Rome. Aware of the powerful support they might receive in turn, the pontiffs of the thirteenth century accumulated benefits upon the disciples of Francis and Dominic. They were exempted from episcopal authority; they were permitted to preach or hear confessions without leave of the ordinary,† to accept of legacies, and to

* Matt. Paris, p. 607.

† Another reason for preferring the friars is given by archbishop Peckham; quoniam casus episcopales reservati episcopis ab homine, vel a jure, communiter a Deum timentibus episcopis ipsis fratribus committuntur, et non presbyteris, *quorum simplicitas non sufficit aliis dirigendis.* Wilkins, Concilia, t. ii. p. 169.

inter in their churches. Such privileges could not be granted without resistance from the other clergy; the bishops remonstrated, the university of Paris maintained a strenuous opposition; but their reluctance served only to protract the final decision. Boniface VIII. appears to have peremptorily established the privileges and immunities of the mendicant orders in 1295.*

It was naturally to be expected, that the objects of such extensive favours would repay their benefactors by a more than usual obsequiousness and alacrity in their service. Accordingly, the Dominicans and Franciscans vied with each other in magnifying the papal supremacy. Many of these monks became eminent in canon law and scholastic theology, The great lawgiver of the schools, Thomas Aquinas, whose opinions the Dominicans especially treat as almost infallible, went into the exaggerated principles of his age in favour of the see of Rome.† And as the professors of those sciences took nearly all the learning and logic of the times to their own share, it was hardly

* Crevier, Hist. de l'Université de Paris, t. i. et t. ii. passim. Fleury, ubi supra. Hist. du Droit Ecclésiastique François, t. i. p. 394. 396. 446. Collier's Ecclesiastical History, vol. i. p. 437. 448. 452. Wood's Antiquities of Oxford, vol. i. p. 376. 480. (Gutch's edition.)

† It was maintained by the enemies of the mendicants, especially William St. Amour, that the pope could not give them a privilege to preach or perform the other duties of the parish priests. Thomas Aquinas answered, that a bishop might perform any spiritual function within his diocess, or commit the charge to another instead, and that the pope, being to the whole church, what a bishop is to his diocess, might do the same every where. Crevier, t. i. p. 474.

possible to repel their arguments by any direct reasoning. But this partiality of the new monastic orders to the popes must chiefly be understood to apply to the thirteenth century, circumstances occurring in the next, which gave in some degree a different complexion to their dispositions in respect of the Holy See.

We should not overlook, among the causes that contributed to the dominion of the popes, their prerogative of dispensing with ecclesiastical ordinances. The most remarkable exercise of this was as to the canonical impediments of matrimony. Such strictness as is prescribed by the Christian religion with respect to divorce was very unpalatable to the barbarous nations. They in fact paid it little regard; under the Merovingian dynasty, even private men put away their wives at pleasure.* In many capitularies of Charlemagne, we find evidence of the prevailing license of repudiation and even polygamy.† The principles which the church inculcated were in appearance the very reverse of this laxity; yet they

* Marculfi Formulæ, l. ii. c. 30.

† Although a man might not marry again, when his wife had taken the veil, he was permitted to do so, if she was infected with the leprosy. Compare Capitularia Pippini, A. D. 752 and 755. If a woman conspired to murder her husband he might re-marry. Id. A. D. 753. A large proportion of Pepin's laws relate to incestuous connexions and divorces. One of Charlemagne seems to imply, that polygamy was not unknown even among priests. Si sacerdotes plures uxores habuerint, sacerdotio priventur; quia sæcularibus deteriores sunt. Capitul. A. D. 769. This seems to imply that their marriage with one was allowable, which nevertheless is contradicted by other passages in the Capitularies.

led indirectly to the same effect. Marriages were forbidden, not merely within the limits which nature, or those inveterate associations which we call nature, have rendered sacred, but as far as the seventh degree of collateral consanguinity, computed from a common ancestor.* Not only was affinity, or relationship by marriage, put upon the same footing as that by blood; but a fantastical connexion, called spiritual affinity, was invented in order to prohibit marriage between a sponsor and godchild. A union, however innocently contracted, between parties thus circumstanced might at any time be dissolved, and their subsequent cohabitation forbidden; though their children, I believe, in cases where there had been no knowledge of the impediment, were not illegitimate. One readily apprehends the facilities of abuse to which all this led; and history is full of dissolutions of marriage, obtained by fickle passion or cold-hearted ambition, to which the church has not scrupled to pander on some suggestion of relationship. It is so difficult to conceive, I do not say any reasoning, but any honest superstition, which could have pro-

* See the canonical computation explained in St. Marc, t. iii. p. 376. Also in Blackstone's Law Tracts, Treatise on Consanguinity. In the eleventh century, an opinion began to gain ground in Italy, that third cousins might marry, being in the seventh degree according to the civil law. Peter Damian, a passionate abettor of Hildebrand and his maxims, treats this with horror, and calls it a heresy. Fleury, t. xiii. p. 152. St. Marc, ubi supra. This opinion was supported by a reference to the Institutes of Justinian; a proof, among several others, how much earlier that book was known than is vulgarly supposed.

duced these monstrous regulations, that I was at first inclined to suppose them designed to give, by a side wind, that facility of divorce which a licentious people demanded, but the church could not avowedly grant. This refinement would however be unsupported by facts. The prohibition is very ancient, and was really derived from the ascetic temper which introduced so many other absurdities.* It was not until the time of Innocent III. that either this, or any other established rules of discipline were supposed liable to arbitrary dispensation; at least the stricter churchmen had always denied that the pope could infringe canons, nor had he asserted any right to do so.† But Innocent laid down as a maxim, that out of the plenitude of his power, he might lawfully dispense with the law; and accordingly granted, among other instances of this prerogative, dispensations from impediments of marriage to the emperor Otho IV.‡ Similar indulgences were given by his successors, though they did not become usual for some

* Gregory I. pronounces matrimony to be unlawful as far as the seventh degree; and even, if I understand his meaning, as long as any relationship could be traced; which seems to have been the maxim of strict theologians, though not absolutely enforced. Du Cange, v. Generatio. Fleury, Hist. Ecclés. t. ix. p. 211.

† De Marca, l. iii. cc. 7. 8. 14. Schmidt, t. iv. p. 235. Dispensations were originally granted only as to canonical penances, but not prospectively to authorize a breach of discipline. Gratian asserts that the pope is not bound by the canons; in which Fleury observes, he goes beyond the False Decretals. Septième Discours, p. 291.

‡ Secundùm plenitudinem potestatis de jure possumus supra jus dispensare. Schmidt, t. iv. p. 235.

ages. The fourth Lateran Council in 1215 removed a great part of the restraint, by permitting marriages beyond the fourth degree, or what we call third cousins;* and dispensations have been made more easy, when it was discovered that they might be converted into a source of profit. They served a more important purpose by rendering it necessary for the princes of Europe, who seldom could marry into one another's houses without transgressing the canonical limits, to keep on good terms with the court of Rome, which, in several instances that have been mentioned, fulminated its censures against sovereigns who lived without permission in what was considered an incestuous union.

The dispensing power of the popes was exerted in several cases of a temporal nature, particularly in the legitimation of children, for purposes even of succession. Thus Innocent III. claimed as an indirect consequence of his right to remove the canonical impediment which bastardy offered to ordination; since it would be monstrous, he says, that one who is legitimate for spiritual functions, should continue otherwise in any civil matter.† But the most important and mischievous species of dispensations was from the observance of promissory oaths. Two principles are laid down in the decretals; that an oath disadvantageous to the church is not binding; and that one extorted by force was of slight obligation, and might be annulled by ecclesiastical authori-

* Fleury, Institutions au Droit Ecclésiastique, t. i. p. 296.
† Decretal. l. iv. tit. 17. c. 13.

ty.* As the first of these maxims gave the most unlimited privilege to the popes of breaking all faith of treaties which thwarted their interest or passion, a privilege which they continually exercised,† so the

* Juramentum contra utilitatem ecclesiasticam præstitum non tenet. Decretal. l. ii. tit. 24. c. 27. et Sext. l. i. tit. ii. c. 1. A juramento per metum extorto ecclesia solet absolvere, et ejus transgressores, ut peccantes mortaliter non punientur. Eodem lib. et tit. c. 15. The whole of this title in the decretals upon oaths seems to have given the first opening to the lax casuistry of succeeding times.

† Take one instance out of many.—Piccinino, the famous condottiere of the fifteenth century, had promised not to attack Francis Sforza, at that time engaged against the pope. Eugenius IV. (the same excellent person who had annulled the compactata with the Hussites, releasing those who had sworn to them, and who afterwards made the king of Hungary break his treaty with Amurath II.) absolves him from his promise, on the express ground that a treaty disadvantageous to the church ought not to be kept. Sismondi, t. ix. p. 196. The church, in that age, was synonymous with the papal territories in Italy.

It was in conformity to this sweeping principle of ecclesiastical utility, that Urban VI. made the following solemn and general declaration against keeping faith with heretics. Attendentes quod hujusmodi confœderationes, colligationes, et ligæ seu conventiones factæ cum hujusmodi hæreticis seu schismaticis, postquam tales effecti erant, sunt temerariæ, illicitæ, et ipso jure nullæ, (etsi forte ante ipsorum lapsum in schisma, seu hæresin initæ, seu factæ fuissent,) etiam si forent juramento vel fide datâ firmatæ, aut confirmatione apostolicâ vel quâcunque firmitate aliâ roboratæ, postquam tales, ut præmittitur, sunt effecti. Rymer, t. vii. p. 352.

It was of little consequence that all divines and sound interpreters of canon law maintain that the pope cannot dispense with the divine or moral law, as De Marca tells us, l. iii. c. 15. though he admits that others of less sound judgement assert the contrary; as was common enough, I believe, among the Jesuits at the beginning of the seventeenth century. His power of interpreting the law was of itself a privilege of dispensing with it.

second was equally convenient to princes, weary of observing engagements towards their subjects or their neighbours. They reclaimed with a bad grace against the absolution of their people from allegiance by an authority to which they did not scruple to repair in order to bolster up their own perjuries. Thus Edward I. the strenuous asserter of his temporal rights, and one of the first who opposed a barrier to the encroachments of the clergy, sought at the hands of Clement V. a dispensation from his oath to observe the great statute against arbitrary taxation.

In all the earlier stages of papal dominion, the supreme head of the church had been her guardian and protector; and this beneficent character appeared to receive its consummation in the result of that arduous struggle which restored the ancient practice of free election to ecclesiastical dignities. Not long however after this triumph had been obtained, the popes began by little and little to interfere with the regular constitution. Their first step was conformable indeed to the prevailing system of spiritual independency. By the concordat of Calixtus, it appears that the decision of contested elections was reserved to the emperor, assisted by the metropolitan and suffragans. In a few cases during the twelfth century, this imperial prerogative was exercised, though not altogether undisputed.* But it was con-

* Schmidt, t. iii. p. 299.; t. iv. p. 149. According to the concordat, elections ought to be made in the presence of the emperor, or his officers; but the chapters contrived to exclude them by degrees, though not perhaps till the thirteenth century. Compare Schmidt, t. iii. p. 296.; t. iv. p. 146.

sonant to the prejudices of that age to deem the supreme pontiff a more natural judge, as in other cases of appeal. The point was early settled in England, where a doubtful election to the archbishopric of York, under Stephen, was referred to Rome, and there kept five years in litigation.* Otho IV. surrendered this among other rights of the empire to Innocent III. by his capitulation;† and from that pontificate the papal jurisdiction over such controversies became thoroughly recognized. But the real aim of Innocent, and perhaps of some of his predecessors, was to dispose of bishoprics, under pretext of determining contests, as a matter of patronage. So many rules were established, so many formalities required by their constitutions, incorporated afterwards into the canon law, that the court of Rome might easily find means of annulling what had been done by the chapter, and bestowing the see on a favourite candidate.‡ The popes soon assumed not only a right of decision, but of devolution; that is of supplying the want of election, or the unfitness of the elected, by a nomination of their own.§ Thus Archbishop Lang-

* Henry's Hist. of England, vol. v. p. 324. Lyttleton's Henry II. vol. i. p. 356.

† Schmidt, t. iv. p. 149. One of these was the *spolium*, or moveable estate of a bishop, which the emperor was used to seize upon his decease. p. 154. It was certainly a very *leonine* prerogative; but the popes did not fail at a subsequent time to claim it for themselves. Fleury, Institutions au Droit, t. i. p. 425. Lenfant, Concile de Constance, t. ii. p. 130.

‡ F. Paul, c. 30. Schmidt, t. iv. p. 177. 247.

§ Thus we find it expressed, as captiously as words could be devised, in the decretals, l. i. tit. 6. c. 22. Electus a majori et saniori parte capituli, si est, et erat idoneus tempore elec-

ton, if not absolutely nominated, was at least chosen in an invalid and compulsory manner, by the order of Innocent III.; as we may read in our English historians. And several succeeding archbishops of Canterbury equally owed their promotion tot he papal prerogative. Some instances of the same kind occurred in Germany, and it became the constant practice in Naples.*

While the popes were thus artfully depriving the chapters of their right of election to bishoprics, they interfered in a more arbitrary manner with the collation of inferior benefices. This began, though in so insensible a manner as to deserve no notice but for its consequences, with Adrian IV., who requested some bishops to confer the next benefice that should become vacant on a particular clerk.† Alexander III. used to solicit similar favours.‡ These recommendatory letters were called mandats. But though such requests grew more frequent than was acceptable to patrons, they were preferred in moderate language, and could not decently be refused to the apostolic chair. Even Innocent III. seems in general to be aware that he is not asserting a right; though in one instance I have observed his violent temper break out

tionis, confirmabitur: si autem erit indignus in ordinibus scientiâ vel ætate, et fuit scienter electus, electus a minori parte, si est dignus, confirmabitur.

A person canonically disqualified when presented to the pope for confirmation was said to be *postulatus*, not *electus*.

* Giannone, l. xiv. c. 6.; l. xix. c. 5.

† St. Marc, t. v. p. 41. Art de vérifier les Dates, t. i. p. 288. Encyclopédie, Art. Mandats.

‡ Schmidt, t. iv. p. 239.

against the chapter of Poitiers, who had made some demur to the appointment of his clerk, and whom he threatens with excommunication and interdict.* But, as we find in the history of all usurping governments, time changes anomaly into system, and injury into right; examples beget custom, and custom ripens into law; and the doubtful precedent of one generation becomes the fundamental maxim of another. Honorius III. requested that two prebends in every church might be reserved for the holy see; but neither the bishops of France or England, to whom he preferred this petition, were induced to comply with it.† Gregory IX. pretended to act generously in limiting himself to a single expectative, or letter directing a particular clerk to be provided with a benefice, in every church.‡ But his practice went much farther. No country was so intolerably treated by this pope and his successors as England, throughout the ignominious reign of Henry III. Her church seemed to have been so richly endowed only as the free pasture of Italian priests, who were placed, by the mandatory letters of Gregory IX. and Innocent IV. in all the best benefices. If we may trust a solemn remonstrance in the name of the whole nation, they drew from England, in the middle of the thirteenth century, sixty or seventy thousand marks every year; a sum far exceeding the royal revenue.§ This was asserted by the English envoys at the council of

* Innocent. III. Opera, p. 502.
† Matt. Paris, p. 276. De Marca, l. iv. c. 9.
‡ F. Paul on Benefices, c. 30.
§ M. Paris, p. 579. 740.

Lyons. But the remedy was not to be sought in remonstrances to the court of Rome, which exulted in the success of its encroachments. There was no defect of spirit in the nation to oppose a more adequate resistance; but the individual upon the throne sacrificed the public interest sometimes through habitual timidity, sometimes through silly ambition. If England however suffered more remarkably, yet other countries were far from being untouched. A German writer about the beginning of the fourteenth century mentions a cathedral, where out of about thirty-five vacancies of prebends that had occurred within twenty years, the regular patron had filled only two.* The case was not very different in France, where the continual usurpations of the popes are said to have produced the celebrated Pragmatic Sanction of St. Louis. This edict, which is not of undisputed authority, contains three important provisions; namely, that all prelates and other patrons shall enjoy their full rights as to the collation of benefices, according to the canons; that churches shall possess freely their rights of election; and that no tax or pecuniary exaction shall be levied by the pope, without consent of the king, and of the national church.†

* Schmidt, t. vi. p. 104

† Ordonnances des Rois de France, t. i. p. 97. There are several material objections to the authenticity of this edict, and in particular that we do not find the king to have had any previous differences with the see of Rome; on the contrary he was just indebted to Clement IV. for bestowing the crown of Naples on his brother the count of Provence. Velly has defended it, Hist. de France, t. vi. p. 57. and in the opinion of the learned Benedictine editors of L'Art de vérifier les Dates,

We do not find, however, that the French government acted up to the spirit of this ordinance, if it be genuine; and the holy see continued to invade the rights of collation with less ceremony than they had hitherto used. Clement IV. published a bull in 1266, which, after asserting an absolute prerogative of the supreme pontiff to dispose of all preferments, whether vacant or in reversion, confines itself in the enacting words to the reservation of such benefices as belong to persons dying at Rome (vacantes in curiâ.)* These had for some time been reckoned as a part of the pope's special patronage; and their number, when all causes of importance were drawn to his tribunal, when metropolitans were compelled to seek their pallium in person, and even, by a recent constitution, exempt abbots to repair to Rome for confirmation,† not to mention the multitude who flocked thither as mere courtiers and hunters after promotion, must have been very considerable. Boniface VIII. repeated this law of Clement IV. in a still more positive tone;‡ and Clement V. laid down as a maxim, that the pope might freely bestow, as universal pa-

t. i. p. 585. cleared up all difficulties as to its genuineness. In fact, however, the Pragmatic Sanction of St. Louis stands by itself, and can only be considered as a protestation against abuses which it was still impossible to suppress.

* Sext. Decretal. l. iii. t. iv. c. 2. F. Paul on Benefices, p. 35. This writer thinks the privilege of nominating benefices vacant in curiâ to have been among the first claimed by the popes, even before the usage of mandats. c. 30.

† Matt. Paris. p. 817.

‡ Sext. Decretal. l. iii. t. iv. c. 3. He extended the vacancy in curiâ to all places within two days journey of the papal court.

tron, all ecclesiastical benefices.* In order to render these tenable by their Italian courtiers, the canons against pluralities and non-residence were dispensed with; so that individuals were said to have accumulated fifty or sixty preferments.† It was a consequence from this extravagant principle, that the pope might prevent the ordinary collator upon a vacancy; and as this could seldom be done with sufficient expedition in places remote from his court, that he might make reversionary grants during the life of an incumbent, or reserve certain benefices specifically for his own nomination.

The persons as well as estates of ecclesiastics were secure from arbitrary taxation, in all the kingdoms founded upon the ruins of the empire, both by the common liberties of freemen, and more particularly by their own immunities and the horror of sacrilege.‡ Such at least was their legal security, whatever violence might occasionally be practised by tyrannical princes. But this exemption was compensated by annual donatives, probably to a large amount, which the bishops and monasteries were accustomed, and as it were compelled, to make their sovereigns.§ They were subject also, generally speaking, to the feudal services and prestations. Henry I. is said to have extorted a sum of money from the English church.‖ But the first eminent instance of a general tax required

* F. Paul. c. 35.
† Id. c. 33. 34. 35. Schmidt, t. vi. p. 104.
‡ Muratori, Dissert. 70. Schmidt, t. iii. p. 211.
§ Id. ibid. Du Cange, v. Dona.
‖ Eadmer, p. 83.

from the clergy was the famous Saladine tithe; a tenth of all moveable estate, imposed by the kings of France and England upon all their subjects, with the consent of their great councils of prelates and barons, to defray the expense of their intended crusade. Yet even this contribution, though called for by the imminent peril of the Holy Land after the capture of Jerusalem, was not paid without reluctance; the clergy doubtless anticipating the future extension of such a precedent.* Many years had not elapsed, when a new demand was made upon them, but from a different quarter. Innocent III. (the name continually recurs when we trace the commencement of an usurpation) imposed in 1199 upon the whole church a tribute of one-fortieth of moveable estate, to be paid to his own collectors; but strictly pledging himself that the money should only be applied to the purposes of a crusade.† This crusade ended, as is well known, in the capture of Constantinople. But the word had lost much of its original meaning; or rather that meaning had been extended by ambition and bigotry. Gregory IX. preached a crusade against the emperor Frederic, in a quarrel which only concerned his temporal principality; and the church of England was taxed by his authority to carry on this holy war.‡ After some

* Schmidt, t. iv. p. 212. Lyttleton's Henry II. vol. iii. p. 472. Velly, t. iii. p. 316.

† Innocent. Opera, p. 266.

‡ M. Paris. p. 470. It was hardly possible for the clergy to make any effective resistance to the pope, without unravelling a tissue which they had been assiduously weaving. One

opposition the bishops submitted; and from that time no bounds were set to the rapacity of papal exactions. The usurers of Cahors and Lombardy, residing in London, took up the trade of agency for the pope; and in a few years, he is said, partly by levies of money, partly by the revenues of benefices, to have plundered the kingdom of 950,000 marks; a sum equivalent, I think, to not less than fifteen millions sterling at present. Innocent IV., during whose pontificate the tyranny of Rome, if we consider her temporal and spiritual usurpations together, reached perhaps its zenith, hit upon the device of ordering the English prelates to furnish a certain number of men at arms to defend the church at their expense. This would soon have been commuted into a standing escuage instead of military service.* But

English prelate distinguished himself in this reign by his strenuous protestation against all abuses of the church. This was Robert Grosstete, bishop of Lincoln, who died in 1253, the most learned Englishman of his time, and the first who had any tincture of Greek literature. Matthew Paris gives him a high character, which he deserved for his learning and integrity; one of his commendations is for keeping a good table. But Grosstete appears to have been imbued in a great degree with the spirit of his age as to ecclesiastical power, though unwilling to yield it up to the pope; and it is a strange thing to reckon him among the precursors of the Reformation. M. Paris. p. 754. Berington's Literary History of the Middle Ages, p. 378.

* M. Paris, p. 613. It would be endless to multiply proofs from Matthew Paris, which indeed occur in almost every page. His laudable zeal against papal tyranny, on which some protestant writers have been so pleased to dwell, was a little stimulated by personal feelings for the abbey of St. Albans; and the same remark is probably applicable to his love of civil liberty.

the demand was perhaps not complied with, and we do not find it repeated. Henry III.'s pusillanimity would not permit any effectual measures to be adopted; and indeed he sometimes shared in the booty, and was indulged with the produce of taxes imposed upon his own clergy to defray the costs of his projected war against Sicily.* A nobler example was set by the kingdom of Scotland: Clement IV. having, in 1267, granted the tithes of its ecclesiastical revenues for one of his mock crusades, King Alexander III., with the concurrence of the church, stood up against this encroachment, and refused the legate permission to enter his dominions.† Taxation of the clergy was not so outrageous in other countries; but the popes granted a tithe of benefices to St. Louis for each of his own crusades, and also for the expedition of Charles of Anjou against Manfred.‡ In the council of Lyons held by Gregory X. in 1274, a general tax of the same proportion was imposed on all the Latin church, for the pretended purpose of carrying on a holy war.§

These gross invasions of ecclesiastical property, however submissively endured, produced a very general disaffection towards the court of Rome. The reproach of venality and avarice was not indeed cast for the first time upon the sovereign pontiffs; but it

* Rymer, t. i. p. 599. &c. The substance of English ecclesiastical history during the reign of Henry III. may be collected from Henry, and still better from Collier.

† Dalrymple's Annals of Scotland, vol. i. p. 179.

‡ Velly, t. iv. p. 343.; t. v. p. 343.; t. vi. p. 47.

§ Idem, t. vi. p. 308. St. Marc, t. vi. p. 347.

had been confined in earlier ages, to particular instances, not affecting the bulk of the catholic church. But, pillaged upon every slight pretence, without law and without redress, the clergy came to regard their once paternal monarch as an arbitrary oppressor. All writers of the thirteenth and following centuries complain in terms of unmeasured indignation, and seem almost ready to reform the general abuses of the church. They distinguished however clearly enough between the abuses which oppressed them, and those which it was their interest to preserve, nor had the least intention of waving their own immunities and authority. But the laity came to more universal conclusions. A spirit of inveterate hatred grew up among them, not only towards the papal tyranny, but the whole system of ecclesiastical independence. The rich envied and longed to plunder the estates of the superior clergy; the poor learned from the Waldenses and other sectaries to deem such opulence incompatible with the character of evangelical ministers. The itinerant minstrels invented tales to satirize vicious priests, which a predisposed multitude eagerly swallowed. If the thirteenth century was an age of more extravagant ecclesiastical pretensions than any which had preceded, it was certainly one in which the disposition to resist them acquired greater consistence.

To resist had indeed become strictly necessary, if the temporal governments of Christendom would occupy any better station than that of officers to the hierarchy. I have traced already the first stage of

that ecclesiastical jurisdiction, which, through the partial indulgence of sovereigns, especially Justinian and Charlemagne, had become nearly independent of the civil magistrate. Several ages of confusion and anarchy ensued, during which the supreme regal authority was literally suspended in France, and not much respected in some other countries. It is natural to suppose, that ecclesiastical jurisdiction, so far as even that was regarded in such barbarous times, would be esteemed the only substitute for coercive law, and the best security against wrong. But I am not aware that it extended itself beyond its former limits, till about the beginning of the twelfth century. From that time it rapidly encroached upon the secular tribunals, and seemed to threaten the usurpation of an exclusive supremacy over all persons and causes. The bishops gave the tonsure indiscriminately, in order to swell the list of their subjects. This sign of a clerical state, though below the lowest of their seven degrees of ordination, implying no spiritual office, conferred the privileges and immunities of the profession on all who wore an ecclesiastical habit, and had only once been married.*

* Clerici qui cum unicis et virginibus contraxerunt, si tonsuram et vestes deferant clericales, privilegium retineant—— præsenti declaramus edicto, hujusmodi clericos conjugatos pro commissis ab iis excessibus vel delictis, trahi non posse criminaliter aut civiliter ad judicium sæculare. Bonifacius Octavus, in Sext. Decretal. l. iii. tit. 2. c. 1. Philip the Bold, however had subjected these married clerks to taxes, and later ordinances of the French kings rendered them amenable to temporal jurisdiction; from which, in Naples, by various provisions of the Angevin line, they always continued free. Giannone, l. xix. c. 5.

Orphans and widows, the stranger and the poor, the pilgrim and the leper, under the appellation of persons in distress (miserabiles personæ), came within the peculiar cognizance and protection of the church; nor could they be sued before any lay tribunal. And the whole body of crusaders, or such as merely took the vow of engaging in a crusade, enjoyed the same clerical privileges.

But where the character of the litigant parties could not, even with this large construction, be brought within their pale, the bishops found a pretext for their jurisdiction in the nature of the dispute. Spiritual causes alone, it was agreed, could appertain to the spiritual tribunal. But the word was indefinite; and according to the interpreters of the twelfth century, the church was always bound to prevent and chastise the commission of sin. By this sweeping maxim, which we have seen Innocent III. apply to vindicate his control over national quarrels, the common differences of individuals, which generally involve some charge of wilful injury, fell into the hands of a religious judge. One is almost surprised to find that it did not extend more universally, and might praise the moderation of the church. Real actions, or suits relating to property of land, were always the exclusive province of the lay court, even where a clerk was the defendant.* But the ecclesiastical tribunals

* Decretal. l. ii. tit. ii. Ordonnances des Rois, t. i. p. 40. (A. D. 1189.) In the council of Lambeth in 1261, the bishops claim a right to judge inter clericos suos, vel inter laicos conquerentes et clericos defendentes, in personalibus actionibus super contractibus, aut delictis, aut quasi. i. e. quasi delictis, Wilkins, Concilia, t. i. p. 747.

took cognizance of breaches of contract, at least where an oath had been pledged, and of personal trusts.* They had not only an exclusive jurisdiction over questions immediately matrimonial, but a concurrent one with the civil magistrate in France, though never in England, over matters incident to the nuptial contract, as claims of marriage portion, and of dower.† They took the execution of testaments into their hands, on account of the legacies to pious uses, which testators were advised to bequeath.‡ In process of time, and under favourable circumstances, they made still greater strides. They pretended a right to supply the defects, the doubts, or the negligence of temporal judges; and invented a class of mixed causes, whereof the lay or ecclesiastical jurisdiction took possession according to priority. Besides this extensive authority in civil disputes, they judged of some offences, which naturally belong to the criminal law, as well as of some others, which participate of a civil and criminal nature. Such were perjury, sacrilege, usury, incest, and adultery;§ from

* Ordonnances des Rois, p. 319. (A. D. 1290.)

† Idem, p. 40. 121. 220. 319. This is a remarkable exception to the general rule, that the spiritual court had no cognizance of real actions.

‡ Id. p. 319. Glanvil, l. vii. c. 7. Sancho IV. gave the same jurisdiction to the clergy of Castile, Teoria de las Cortes, t. iii. p. 20.; and in other respects followed the example of his father Alfonso X. in favouring their encroachments. The church of Scotland seems to have had nearly the same jurisdiction as that of England. Pinkerton's Hist. of Scotland, vol. i. p. 173.

§ It was a maxim of the canon, as well as the common law, that no person should be punished twice for the same offence;

the punishment of all which the secular magistrate refrained, at least in England, after they had become the province of a separate jurisdiction. Excommunication still continued the only chastisement which the church could directly inflict. But the bishops acquired a right of having their own prisons for lay offenders,* and the monasteries were the appropriate prisons of clerks. Their sentences of excommunication were enforced of necessity by the temporal magistrate with imprisonment or sequestration of effects; in some cases with confiscation or death.†

The clergy did not forget to secure along with this jurisdiction their own absolute exemption from the criminal justice of the state. This, as I have above mentioned, had been conceded to them by Charlemagne; but how far the same privilege existed in countries not subject to his empire, such as England,

therefore, if a clerk had been degraded, or a penance imposed on a layman, it was supposed unjust to proceed against him in a temporal court.

* Charlemagne is said by Giannone to have permitted the bishops to have prisons of their own. l. vi. c. 7.

† Giannone, l. xix. c. 5. t. iii. Schmidt, t. iv. p. 195.; t. vi. p. 125. Fleury, 7me Discours, Mém. de l'Acad. des Inscript. t. xxxix. p. 603. Ecclesiastical jurisdiction not having been uniform in different ages and countries, it is difficult, without much attention, to distinguish its general and permanent attributes from those less completely established. Its description as given in the Decretals, lib. ii. tit. ii. De foro competenti, does not support the pretensions made by the canonists; nor come up to the sweeping definition of ecclesiastical jurisdiction by Boniface VIII. in the Sext. l. iii. tit. xxiii. c. 40. sive ambæ partes hoc voluerint, sive una super causis ecclesiasticis, sive quæ ad forum ecclesiasticum ratione personarum, negotiorum, vel rerum de jure vel de antiquâ consuetudine pertinere noscuntur.

or even in France and Germany during the three centuries after his reign, is what I am not able to assert. The False Decretals contain some passages in favour of ecclesiastical immunity, which Gratian repeats in his collection.* About the middle of the twelfth century the principle obtained general reception, and Innocent III. decided it to be an inalienable right of the clergy, whereof they could not be divested even by their own consent.† Much less were any constitutions of princes, or national usages deemed of force to abrogate such an important privilege.‡ These, by the canon law, were invalid when they affected the rights and liberties of the holy church.§ But the spiritual courts were charged with scandalously neglecting to visit the most atrocious offences of clerks with such punishment as they could inflict. The church could always absolve from her own censures; and confinement in a monastery, the usual sentence upon criminals, was frequently slight and temporary. Several instances are mentioned of heinous outrages that remained nearly unpunished through the shield of ecclesiastical privilege.‖ And as the temporal courts refused their assistance to a rival jurisdiction,

* Fleury, 7me Discours.

† Id. Institutions au Droit Ecclés. t. ii. p. 8.

‡ In criminalibus causis in nullo casu possunt clerici ab aliquo quàm ab ecclesiastico judice condemnari, etiamsi consuetudo regia habeat ut fures a judicibus sæcularibus judicentur. Decretal. l. i. tit. i. c. 8.

§ Decret. distinct. 96.

‖ Collier, vol. i. p. 351. It is laid down in the canon laws that a layman cannot be a witness in a criminal case against a clerk. Decretal. l. ii. tit. xx. c. 14.

the clergy had no redress for their own injuries, and even the murder of a priest at one time, as we are told, was only punishable by excommunication.*

Such an incoherent medley of laws and magistrates, upon the symmetrical arrangement of which all social economy mainly depends, could not fail to produce a violent collision. Every sovereign was interested in vindicating the authority of the constitutions which had been formed by his ancestors, or by the people whom he governed. But the first who undertook this arduous work, the first who appeared openly against ecclesiastical tyranny, was our Henry II. The Anglo-Saxon church, not so much connected as some others with Rome, and enjoying a sort of barbarian immunity from the thraldom of canonical discipline, though rich, and highly respected by a devout nation, had never, perhaps, desired the thorough independence upon secular jurisdiction at which the continental hierarchy aimed. William the Conqueror first separated the ecclesiastical from the civil tribunal, and forbad the bishops to judge of spiritual causes in the hundred court.† His language

* Lyttleton's Henry II., vol. iii. p. 332. This must be restricted to that period of open hostility between the church and state.

† Ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in Hundret placita teneant, nec causam que ad regimen animarum pertinet, ad judicium sæcularium hominum adducant. Wilkins, Leges Anglo-Saxon, p. 230.

Before the conquest, the bishop and earl sat together in the court of the county or hundred; and as we may infer from the tenor of this charter, ecclesiastical matters were decided loosely, and rather by the common law than according to the canons. This practice had been already forbidden by

is however, too indefinite to warrant any decisive proposition as to the nature of such causes; probably they had not yet been carried much beyond their legitimate extent. Of clerical exemption from the secular arm we find no earlier notice than in the coronation oath of Stephen; which, though vaguely expressed, may be construed to include it.* But I am not certain, that the law of England had unequivocally recognized that claim at the time of the constitutions of Clarendon. It was at least an innovation, which the legislature might without scruple or transgression of justice abolish. Henry II., in that famous statute, attempted in three respects to limit the jurisdiction assumed by the church; asserting for his own judges the cognizance of contracts, however confirmed by oath, and of rights of advowson, and also that of offences committed by clerks, whom, as it is gently expressed, after conviction or confession the church ought not to protect.† These constitutions were the leading subject of difference between the king and Thomas Becket. Most of them were annulled by the pope, as derogatory to ecclesiastical

some canons enacted under Edgar, id. p. 83.; but apparently with little effect. The separation of the civil and ecclesiastical tribunals was not made in Denmark till the reign of Nicholas, who ascended the throne in 1105. Langebek, Script. Rer. Danic. t. iv. p. 380. Others refer the law to St. Canut, about 1080. t. ii. p. 209.

* Ecclesiasticarum personarum et omnium clericorum, et rerum eorum justitiam et potestatem, et distributionem honorum ecclesiasticorum, in manu episcoporum esse perhibeo, et confirmo. Wilkins, Leges Anglo-Saxon. p. 310.

† Wilkins, Leges Anglo-Saxon, p. 323. Lyttleton's Henry II. Collier, &c.

liberty. It is not improbable, however, that if Louis VII. had played a more dignified part, the see of Rome, which an existing schism rendered dependent upon the favour of those two monarchs, might have receded in some measure from her pretensions. But France implicitly giving way to the encroachments of ecclesiastical power, it became impossible for Henry completely to withstand them.

The constitutions of Clarendon, however, produced some effect, and, in the reign of Henry III., more unremitted and successful efforts began to be made to maintain the independence of temporal government. The judges of the king's courts had until that time been themselves principally ecclesiastics, and consequently tender of spiritual privileges.* But now abstaining from the exercise of temporal jurisdiction, in obedience to the strict injunctions of their canons,† the clergy gave place to common lawyers, professors of a system very discordant from their own. These soon began to assert the supremacy of their jurisdiction by issuing writs of prohibition, whenever the ecclesiastical tribunals passed the boundaries which approved use had established.‡

* Dugdale's Origines Juridicales, c. 8.

† Decretal, l. i. tit. xxxvii. c. 1. Wilkins, Concilia, t. ii. p. 4.

‡ Prynne has produced several extracts from the pipe-rolls of Henry II. where a person has been fined quia placitavit de laico feodo in curiâ christianitatis. And a bishop of Durham is fined five hundred marks quia tenuit placitum *de advocatione cujusdam ecclesiæ* in curiâ christianitatis. Epistle dedicatory to Prynne's Records, vol. iii. Glanvil gives the form of a writ of prohibition to the spiritual court for inquiring de feodo laico; for it had jurisdiction over lands in frankalmoign. This is conformable to the constitutions of Clarendon; and

Little accustomed to such control, the proud hierarchy chafed under the bit; several provincial synods reclaim against the pretensions of laymen to judge the anointed ministers, whom they were bound to obey;* the cognizance of rights of patronage and breaches of contract is boldly asserted;† but firm and cautious, favoured by the nobility, though not much by the king, the judges receded not a step, and ultimately fixed a barrier which the church was forced to respect.‡ In the ensuing reign of Edward I., an archbishop acknowledges the abstract right of the king's bench to issue prohibitions;§ and the statute entitled Circumspectè agatis, in the thirteenth year of that prince, while by its mode of expression it seems designed to guarantee the actual privileges of spiritual jurisdiction, precludes by enumerating them

shows that they were still in force; though Collier has the assurance to say, that they were repealed soon after Becket's death, supporting this also by a false quotation from Glanvil. Ecclesiast. Hist. vol. i. p. 380. Lyttleton's Henry II. vol. iii. p. 97.

* Cum judicandi Christos domini nulla sit laicis attributa potestas, apud quos manet necessitas obsequendi. Wilkins, Concilia, t. i. p. 747.

† Id. ibid.; et t. ii. p. 90.

‡ Vide Wilkins, Concilia, t. ii. passim.

§ Licet prohibitiones hujusmodi a curiâ christianissimi regis nostri justè proculdubio, ut diximus, concedantur. Id. t. ii. p. 100. and p. 115. Yet after such an acknowledgement by Archbishop Peckham in the height of ecclesiastical power, and after a practice deducible from the age of Henry II., some protestant high churchmen, as Archbishop Bancroft, (2 Inst. 609.); Gibson, (preface to Codex, Jur. Eccl.); Collier, Ecclesiast. Hist. vol. i. p. 522.) have not been ashamed to complain that the court of king's bench should put any limits to their claims of spiritual jurisdiction.

the assertion of any more. Neither the right of advowson nor any temporal contract are specified in this act as pertaining to the church; and accordingly the temporal courts have ever since maintained an undisputed jurisdiction over them.* They succeeded also partially in preventing the impunity of crimes perpetrated by clerks. It was enacted by the statute of Westminster, in 1275, or rather a construction was put upon that act which is obscurely worded, that clerks indicted for felony should not be delivered to their ordinary, until an inquest had been taken of the matter of accusation; and, if they were found guilty, that their real and personal estate should be forfeited to the crown. In later times, the clerical privilege was not allowed till the party had pleaded to the indictment, and been duly convict, as is the practice at present.†

The civil magistrates of France did not by any means exert themselves so vigorously for their eman-

* The statute Circumspectè agatis, for it is acknowledged as a statute, though not drawn up in the form of one, is founded upon an answer of Edward I. to the prelates who had petitioned for some modification of prohibitions. Collier, always prone to exaggerate church authority, insinuates that the jurisdiction of the spiritual court over breaches of contract, even without oath, is preserved by this statute; but the express words of the king show that none whatever was intended; and the archbishop complains bitterly of it afterwards. Wilkins, Concilia, t. ii. p. 118. Collier's Ecclesiast. History, vol. i. p. 487. So far from having any cognizance of civil contracts not confirmed by oath, to which I am not certain that the church ever pretended in any country, the spiritual court had no jurisdiction at all even where an oath had intervened, unless there was a deficiency of proof by writing or witnesses. Glanvil, l. x. c. 12. Constitut. Clarendon. art. 15.

† 2 Inst. p. 163.

cipation. The same or rather worse usurpations existed, and the same complaints were made under Philip Augustus, St. Louis, and Philip the Bold; but the laws of those sovereigns tend much more to confirm, than to restrain ecclesiastical encroachments.* Some limitations were attempted by the secular courts; and an historian gives us the terms of a confederacy among the French nobles in 1246, binding themselves by oath not to permit the spiritual judges to take cognizance of any matter, except heresy, marriage and usury.† Unfortunately, Louis IX. was almost as little disposed as Henry III. to shake off the yoke of ecclesiastical dominion. But other sovereigns in the same period, from various motives, were equally submissive. Frederic II. explicitly adopts the exemption of clerks from criminal as well as civil jurisdiction of seculars.‡ And Alfonso X. introduced the same system in Castile; a kingdom where neither the papal authority nor the independ-

* It seems deducible from a law of Philip Augustus, Ordonnances des Rois, t. i. p. 39. that a clerk convicted of some heinous offences might be capitally punished after degradation; yet a subsequent ordinance, p. 43. renders this doubtful; and the theory of clerical immunity became afterwards more fully established.

† Matt. Paris. p. 629.

‡ Statuimus, ut nullus ecclesiasticam personam, in criminali quæstione vel civili, trahere ad judicium sæculare præsumat. Ordonnances des Rois de France, t. i. p. 611. where this edict is recited and approved by Louis Hutin. Philip the Bold had obtained leave from the pope to arrest clerks accused of heinous crimes, on condition of remitting them to the bishop's court for trial. Hist. du Droit. Eccl. Franc. t. i. p. 426. A council at Bourges held in 1276 had so absolutely condemned all interference of the secular power with clerks, that the king was obliged to solicit this moderate favour. p. 421.

ence of the church had obtained any legal recognition until the promulgation of his code, which teems with all the principles of the canon law.* It is almost needless to mention, that all ecclesiastical powers and privileges were incorporated with the jurisprudence of the kingdom of Naples, which, especially after the accession of the Angevin line, stood in a peculiar relation of dependence upon the holy see.†

The vast acquisitions of landed wealth made for many ages by bishops, chapters and monasteries, began at length to excite the jealousy of sovereigns. They perceived that, although the prelates might send their stipulated proportion of vassals into the field, yet there could not be that active co-operation which the spirit of feudal tenures required, and that the national arm was palsied by the diminution of military nobles. Again, the reliefs upon succession, and similar dues upon alienation, incident to fiefs, were entirely lost when they came into the hands of these undying corporations, to the serious injury of the feudal superior. Nor could it escape reflecting men, during the contest about investitures, that if the church peremptorily denied the supremacy of the

* Marina, Ensayo Historico-Critico sobre las siete Partidas, c. 320. &c. Hist. du Droit Ecclés. Franc. t. i. p. 442.

† Giannone, l. xix. c. 5.; l. xx. c. 8. One provision of Robert king of Naples is remarkable; it extends the immunity of clerks to their *concubines*. ibid.

Villani strongly censures a law made at Florence, in 1345, taking away the personal immunity of clerks in criminal cases. Though the state could make such a law, he says, it had no right to do so against the liberties of the holy church. l. xii. c. 43.

state over her temporal wealth, it was but a just measure of retaliation or rather self-defence that the state should restrain her further acquisitions. Prohibitions of gifts in mortmain, though unknown to the lavish devotion of the new kingdoms, had been established by some of the Roman emperors, to check the overgrown wealth of the hierarchy.* The first attempt at a limitation of this description in modern times was made by Frederic Barbarossa, who, in 1158, enacted that no fief should be transferred, either to the church or otherwise, without the permission of the superior lord. Louis IX. inserted a provision of the same kind in his Establishments.† Castile had also laws of a similar tendency.‡ A license from the crown is said to have been necessary in England before the conquest for alienations in mortmain; but however that may be, there seems no reason to imagine that any restraint was put by the common law before Magna Charta; a clause of which statute was construed to prohibit all gifts to religious houses without the consent of the lord of the fee. And by the 7th Edw. I. alienations in mortmain are absolutely taken away; though the king might always exercise his prerogative of granting a license, which was not supposed to be affected by the statute.§

* Giannone, l. iii.

† Ordonnances des Rois, p. 213. See too p. 303. and alibi. Du Cange, v. Manus morta. *Amortissement*, in Denisart, and other French law books. Fleury, Instit. au Droit, t. i. p. 350.

‡ Marina, Ensayo sobre las siete partidas, c. 235.

§ 2 Inst. p. 74. Blackstone, vol. ii. c. 18.

It must appear, I think, to every careful inquirer, that the papal authority, though manifesting outwardly more show of strength every year, had been secretly undermined, and lost a great deal of its hold upon public opinion, before the accession of Boniface VIII. in 1294 to the pontifical throne. The clergy were rendered sullen by demands of money, invasions of the legal right of patronage, and unreasonable partiality to the mendicant orders; a part of the mendicants themselves had begun to declaim against the corruptions of the papal court; while the laity, subjects alike and sovereigns, looked upon both the head and the members of the hierarchy with jealousy and dislike. Boniface, full of inordinate arrogance and ambition, and not sufficiently sensible of this gradual change in human opinion, endeavoured to strain to a higher pitch the despotic pretensions of former pontiffs. As Gregory VII. appears the most usurping of mankind till we read the history of Innocent III., so Innocent III. is thrown into shade by the superior audacity of Boniface VIII. But, independently of the less favourable dispositions of the public, he wanted the most essential quality for an ambitious pope, reputation for integrity. He was suspected of having procured through fraud the resignation of his predecessor Celestine V., and his harsh treatment of that worthy man afterwards seems to justify the reproach. His actions however display the intoxication of extreme self-confidence. If we may credit some historians, he appeared at the Jubilee in 1300, a festival successfully instituted by

himself to throw lustre around his court and fill his treasury,* dressed in imperial habits, with the two swords borne before him, emblems of his temporal as well as spiritual dominion over the earth.†

It was not long after his elevation to the pontificate, before Boniface displayed his temper. The two most powerful sovereigns of Europe, Philip the Fair and Edward the First, began at the same moment to attack in a very arbitrary manner the revenues of the church. The English clergy had, by their own voluntary grants, or at least those of the prelates in their name, paid frequent subsidies to the crown, from the beginning of the reign of Henry III. They had nearly in effect waved their ancient exemption, and retained only the common privilege of English freemen to tax themselves in a constitutional manner. But Edward I. came upon them with demands so frequent and exorbitant, that they were compelled to take advantage of a bull issued by Bo-

* The jubilee was a centenary commemoration, in honour of St. Peter and St. Paul, established by Boniface VIII. on the faith of an imaginary precedent a century before. The period was soon reduced to fifty years, and from thence to twenty-five, as it still continues. The court of Rome at the next jubilee will however read with a sigh the description given of that in 1300. Papa innumerabilem pecuniam ab iisdem recepit, quia die et nocte duo clerici stabant ad altare Sancti Pauli, tenentes in eorum manibus rastellos, rastellantes pecuniam infinitam. Muratori, Annali. Plenary indulgences were granted by Boniface to all who should keep their jubilee at Rome, and I suppose are still to be had on the same terms. Matteo Villani gives a curious account of the throng at Rome in 1350.

† Giannone, l. xxi. c. 3. Velly, t. vii. p. 149. I have not observed any good authority referred to for this fact, which is, however, in the character of Boniface.

niface forbidding them to pay any contribution to the state. The king disregarded every pretext, and seizing their goods into his hands, with other tyrannical proceedings, ultimately forced them to acquiesce in his extortion. It is remarkable, that the pope appears to have been passive throughout this contest of Edward I. with his clergy. But it was far otherwise in France. Philip the Fair had imposed a tax on the ecclesiastical order without their consent, a measure perhaps unprecedented, yet not more odious than the similar exactions of the king of England. Irritated by some previous differences, the pope issued his bull known by the initial words Clericis laicos, absolutely forbidding the clergy of every kingdom to pay, under whatever pretext of voluntary grant, gift or loan, any sort of tribute to their government without his special permission. Though France was not particularly named, the king understood himself to be intended, and took his revenge by a prohibition to export money from the kingdom. This produced angry remonstrances on the part of Boniface; but the Gallican church adhered so faithfully to the crown, and showed indeed so much willingness to be spoiled of their money, that he could not insist upon the most unreasonable propositions of his bull, and ultimately allowed that the French clergy might assist their sovereign by voluntary contributions, though not by way of tax.

For a very few years after these circumstances, the pope and king of France appeared reconciled to each other; and the latter even referred his disputes

with Edward I. to the arbitration of Boniface, "as a private person, Benedict of Gaeta, (his proper name,) and not as pontiff;" an almost nugatory precaution against his encroachment upon temporal authority.* But a terrible storm broke out in the first year of the fourteenth century. A bishop of Pamiers, who had been sent as legate from Boniface with some complaint, displayed so much insolence, and such disrespect towards the king, that Philip, considering him as his own subject, was provoked to put him under arrest, with a view to institute a criminal process. Boniface, incensed beyond measure at this violation of ecclesiastical and legatine privileges, published several bulls addressed to the king and clergy of France, charging the former with a variety of offences, some of them not at all concerning the church, and commanding the latter to attend a council which he had summoned to meet at Rome. In one of these instruments, the genuineness of which does not seem liable to much exception, he declares in concise and

* Walt. Hemingford, p. 150. The award of Boniface, which he expresses himself to make both as pope and Benedict of Gaeta, is published in Rymer, t. ii. p. 819. and is very equitable. Nevertheless, the French historians agree to charge him with partiality toward Edward, and mention several proofs of it, which do not appear in the bull itself. Previous to its publication, it was allowable enough to follow common fame; but Velly, a writer always careless and not always honest, has repeated mere falsehoods from Mezeray and Baillet, which he refers to the instrument itself in Rymer, which disproves them. Hist. de France, t. vii. p. 139. M. Gaillard, one of the most candid critics in history that France ever produced, pointed out the errour of her common historians in the Mém. de l'Académie des Inscriptions, t. xxxix. p. 642.; and the editors of L'Art de vérefier les Dates have also rectified it.

clear terms that the king was subject to him in temporal as well as spiritual matters. This proposition had not hitherto been explicitly advanced, and it was now too late to advance it. Philip replied by a short letter in the rudest language, and ordered his bulls to be publicly burned at Paris. Determined, however, to show the real strength of his opposition, he summoned representatives from the three orders of his kingdom. This is commonly reckoned the first assembly of the States General. The nobility and commons disclaimed with firmness the temporal authority of the pope, and conveyed their sentiments to Rome through letters addressed to the college of cardinals. The clergy endeavoured to steer a middle course, and were reluctant to enter into an engagement not to obey the pope's summons; yet they did not hesitate unequivocally to deny his temporal jurisdiction.

The council however opened at Rome; and notwithstanding the king's absolute prohibition, many French prelates held themselves bound to be present. In this assembly Boniface promulgated his famous constitution, denominated Unam Sanctam. The church is one body, he therein declares, and has one head. Under its command are two swords, the one spiritual, the other temporal; that to be used by the supreme pontiff himself, this by kings and soldiers, by his license and at his will. But the lesser sword must be subject to the greater, and the temporal to the spiritual authority. He concludes by declaring the subjection of every human being to the see of Rome

to be an article of necessary faith.* Another bull pronounces all persons of whatever rank obliged to appear when personally cited before the audience or apostolical tribunal at Rome; "since such is our pleasure, who by divine permission rule the world." Finally, as the rupture with Philip grew more evidently irreconcileable, and the measures pursued by that monarch more hostile, he not only excommunicated him, but offered the crown of France to the emperor Albert I. This arbitrary transference of kingdoms was, like many other pretensions of that age, an improvement upon the right of deposing excommunicated sovereigns. Gregory VII. would not have denied, that a nation, released by his authority from its allegiance, must re-enter upon its original right of electing a new sovereign. But Martin IV. had assigned the crown of Aragon to Chales of Valois, the first instance, I think, of such a usurpation of power; but which was defended by the homage of Peter II., who had rendered his kingdom feudally dependent, like Naples, upon the holy see.†

* Uterque est in potestate ecclesiæ, spiritalis scilicet gladius et materialis. Sed is quidem pro ecclesiâ, ille vero ab ecclesiâ exercendus; ille sacerdotis, is manu regum ac militum, sed ad nutum et patientiam sacerdotis. Oportet autem gladium esse sub gladio, et temporalem auctoritatem spirituali subjici potestati.—Porro subesse Romano pontifici omni humanæ creaturæ declaramus, dicimus, definimus et pronunciamus omnino esse de necessitate fidei. Extravagant. l. i. tit. viii. c. 1.

† Innocent IV. had, however, in 1245, appointed one Bolon, brother to Sancho II., king of Portugal, to be a sort of coadjutor in the government of that kingdom, enjoining the barons to honour him as their sovereign, at the same time de-

Albert felt no eagerness to realize the liberal promises of Boniface; who was on the point of issuing a bull, absolving the subjects of Philip from their allegiance, and declaring his forfeiture, when a very unexpected circumstance interrupted all his projects.

It is not surprising, when we consider how unaccustomed men were in those ages to disentangle the artful sophisms, and detect the falsehoods in point of fact, whereon the papal supremacy had been established, that the king of France should not have altogether pursued the course most becoming his dignity and the goodness of his cause. He gave too much the air of a personal quarrel with Boniface, to what should have been a resolute opposition to the despotism of Rome. Accordingly, in an assembly of his states at Paris, he preferred virulent charges against the pope, denying him to have been legitimately elected, imputing to him various heresies, and ultimately appealing to a general council and a lawful head of the church. These measures were not very happily planned; and experience had always shown, that Europe would not submit to change the common

claring that he did not intend to deprive the king, or his lawful issue, if he should have any, of the kingdom. But this was founded on the request of the Portuguese nobility themselves, who were dissatisfied with Sancho's administration. Sext. Decretal. l. i. tit. viii. c. 2. Art de vérifier les Dates, t. i. p. 778.

Boniface invested James II. of Aragon with the crown of Sardinia, over which however the see of Rome had always pretended to a superiority, by virtue of the concession (probably spurious) of Louis the Debonair. He promised Frederic king of Sicily the empire of Constantinople, which, I suppose, was not a fief of the holy see. Giannone, l. xxi. c. 3.

chief of her religion for the purposes of a single sovereign. But Philip succeeded in an attempt apparently more bold and singular. Nogaret, a minister who had taken an active share in all the proceedings against Boniface, was secretly despatched into Italy, and joining with some of the Colonna family, proscribed as Ghibelins, and rancorously persecuted by the pope, arrested him at Anagnia, a town in the neighbourhood of Rome, to which he had gone without guards. This violent action was not, one would imagine, calculated to place the king in an advantageous light; yet it led accidentally to a favourable termination of his dispute. Boniface was soon rescued by the inhabitants of Anagnia; but rage brought on a fever, which ended in his death; and the first act of his successor, Benedict XI., was to reconcile the king of France to the holy see.*

The sensible decline of the papacy is to be dated from the pontificate of Boniface VIII., who had strained its authority to a higher pitch than any of his predecessors. There is a spell wrought by uninterrupted good fortune, which captivates men's understanding, and persuades them, against reasoning and analogy, that violent power is immortal and irresistible. That spell is broken by the first change of success. *We* have seen the working and the dissipation of this charm with a rapidity to which the events of former times bear as remote a relation as

* Velly, Hist. de France, t. vii. p. 109—258. Crevier, Hist. de l'Univ. de Paris, t. ii. p. 170. &c. I regret the not having met with the works of Du Puy and Baillet, on this celebrated difference between Philip the Fair and Boniface.

the gradual processes of nature to her deluges and her volcanoes. In tracing the papal empire over mankind, we have no such marked and definite crisis of revolution. But slowly, like the retreat of waters, or the stealthy pace of old age, that extraordinary power over human opinion has been subsiding for five centuries. I have already observed, that the symptoms of internal decay may be traced farther back. But as the retrocession of the Roman terminus under Adrian gave the first overt proof of decline in the ambitious energies of that empire, so the tacit submission of the successors of Boniface VIII. to the king of France might have been hailed by Europe as a token that their influence was beginning to abate. Imprisoned, insulted, deprived eventually of life by the violence of Philip, a prince excommunicated, and who had gone all lengths in defying and despising the papal jurisdiction, Boniface had every claim to be avenged by the inheritors of the same spiritual dominion. When Benedict XI. rescinded the bulls of his predecessor, and admitted Philip the Fair to communion without insisting on any concessions, he acted perhaps prudently, but gave a fatal blow to the temporal authority of Rome.

Benedict XI. lived but a few months, and his successor Clement V., at the instigation, as is commonly supposed, of the king of France, by whose influence he had been elected, took the extraordinary step of removing the papal chair to Avignon. 1305
In this city it remained for more than seventy years; a period which Petrarch and other writers of

Italy compare to that of the Babylonish captivity. The majority of the cardinals was always French, and the popes were uniformly of the same nation. Timidly dependent upon the court of France, they neglected the interests, and lost the affections of Italy. Rome, forsaken by her sovereign, nearly forgot her allegiance; what remained of papal authority in the ecclesiastical territories was exercised by cardinal legates, little to the honour or advantage of the holy see. Yet the series of Avignon pontiffs were far from insensible to Italian politics. These occupied on the contrary the greater part of their attention. But engaging in them from motives too manifestly selfish, and being regarded as a sort of foreigners from birth and residence, they aggravated that unpopularity and bad reputation which from various other causes attached itself to their court.

Though none of the supreme pontiffs after Boniface VIII. ventured upon such explicit assumptions of a general jurisdiction over sovereigns by divine right as he had made in his controversy with Philip, they maintained one memorable struggle for temporal power against the emperor Louis of Bavaria. Maxims long boldly repeated without contradiction, and ingrafted upon the canon law, passed almost for articles of faith among the clergy, and those who trusted in them; and in despite of all ancient authorities, Clement V. laid it down, that the popes, having transferred the Roman empire from the Greeks to the Germans, and delegated the right of nominating an emperor to certain electors, still re-

served the prerogative of approving the choice, and of receiving from its subject upon his coronation an oath of fealty and obedience.* This had a regard to Henry VII., who denied that his oath bore any such interpretation, and whose measures, much to the alarm of the court of Avignon, were directed towards the restoration of his imperial rights in Italy. Among other things he conferred the rank of vicar of the empire upon Matteo Visconti, lord of Milan. The popes had for some time pretended to possess that vicariate, during the vacancy of the empire; and after Henry's death, insisted upon Visconti's surrender of the title. Several circumstances, for which I refer to the political history of Italy, produced a war between the pope's legate and the Visconti family. The emperor Louis sent assistance to the latter, as heads of the Ghibelin or imperial party. This interference cost him above twenty years of trouble. John XXII., a man as passionate and ambitious as Boniface himself, immediately published a bull, in which he asserted the right of administering the empire during its vacancy, (even in Germany, as it seems from the

* Romani principes, &c.....Romano pontifici, a quo approbationem personæ ad imperialis celsitudinis apicem assumendæ, necnon unctionem, consecrationem et imperii coronam accipiunt, sua submittere, capita non reputârunt indignum, seque illi et eidem ecclesiæ, quæ a Græcis imperium transtulit in Germanos, et a quâ ad certos eorum principes jus et potestas eligendi regem, in imperatorem postmodum promovendum, pertinet, adstringere vinculo juramenti, &c. Clement. l. ii. tit. ix. The terms of the oath, as recited in this constitution, do not warrant the pope's interpretation, but imply only that the emperor shall be the advocate or defender of the church.

generality of his expression,) as well as of deciding in a doubtful choice of the electors, to appertain to the holy see; and commanded Louis to lay down his pretended authority, until the supreme jurisdiction should determine upon his election. Louis's election had indeed been questionable, but that controversy was already settled in the field of Muhldorf, where he had obtained a victory over his competitor the duke of Austria; nor had the pope ever interfered to appease a civil war during several years that
1323 Germany had been internally distracted by the dispute. The emperor not yielding to this peremptory order was excommunicated; his vassals were absolved from their oath of fealty, and all treaties of alliance between him and foreign princes annulled. Germany however remained firm; and if Louis himself had manifested more decision of mind, and uniformity in his conduct, the court of Avignon must have signally failed in a contest, from which it did not in fact come out very successful. But while at one time he went intemperate lengths against John XXII., publishing scandalous accusations in an assembly of the citizens of Rome, and causing a Franciscan friar to be chosen in his room, after an irregular sentence of deposition, he was always anxious to negotiate terms of accommodation, to give up his own active partisans, and to make concessions the most derogatory to his independence and dignity. From John indeed he had nothing to expect; but Benedict XII. would gladly have been reconciled, if he had not feared the kings of France

and Naples, political adversaries of the emperor, who kept the Avignon popes in a sort of servitude. His successor Clement VI. inherited the implacable animosity of John XXII. towards Louis, who died without obtaining the absolution he had long abjectly solicited.*

Though the want of firmness in this emperor's character gave sometimes a momentary triumph to the popes, it is evident that their authority lost ground during the continuance of this struggle, which is indeed the last of any great continuance that they have ventured to make against temporal governments. Their right of confirming imperial elections was expressly denied by a diet held at Frankfort in 1338, which established as a fundamental principle, that the imperial dignity depended upon God alone, and that whoever should be chosen by a majority of the electors became immediately both king and emperor, with all prerogatives of that station, and did not require the approbation of the pope.† This law, con-

* Schmidt, Hist. des Allemands, t. iv. p. 446—536. seems the best modern authority for this contest between the empire and papacy. See also Struvius, Corp. Hist. German. p. 591.

† Quòd imperialis dignitas et potestas immediatè ex solo Deo, et quòd de jure et imperii consuetudine antiquitùs approbatâ postquam aliquis eligitur in imperatorem sive regem ab electoribus imperii concorditer, vel majori parte eorundem statim ex solâ electione est rex verus et imperator Romanorum censendus et nominandus, et eidem debet ab omnibus imperio subjectis obediri, et administrandi jura imperii, et cætera faciendi, quæ ad imperatorem verum pertinent, plenariam habet potestatem, nec Papæ sive sedis apostolicæ aut alicujus alterius approbatione, confirmatione, auctoritate indiget vel consensu. Schmidt, p. 513.

firmed as it was by subsequent usage, emancipated the German empire, which was immediately concerned in opposing the papal claims. But some who were actively engaged in these transactions took more extensive views, and assailed the whole edifice of temporal power which the Roman see had been constructing for more than two centuries. Several men of learning, among whom Dante, Ockham, and Marsilius of Padua are the most conspicuous, investigated the foundations of this superstructure, and exposed their insufficiency.* Literature, too long the passive hand-maid of spiritual despotism, began to assert her nobler birth-right of ministering to liberty and truth. Though the writings of these opponents of Rome are not always reasoned upon very solid principles, they at least taught mankind to scrutinize what had been received with implicit respect, and prepared the way for more philosophical discussions. About this time, a new class of enemies had unexpectedly risen up against the rulers of the church. These were a part of the Franciscan order, who had seceded from the main body, on ac-

* Giannone, l. xxii. c. 8. Schmidt, t. vi. p. 152. Dante was dead before these events, but his principles were the same. Ockham had already exerted his talents in the same cause by writing, in behalf of Philip IV. against Boniface, a dialogue between a knight and a clerk on the temporal supremacy of the church. This is published among other tracts of the same class in Goldastus, Monarchia Imperii, p. 13. This dialogue is transcribed entire into the Songe du Vergier, a more celebrated performance ascribed to Raoul de Presles under Charles V.; the plagiarism of which seems to have escaped observation, though in fact the author has added only an ornamental fiction to the learning and logic of our countryman.

count of alleged deviations from the rigour of their primitive rule. Their schism was chiefly founded upon a quibble about the right of property in things consummable, which they maintained to be incompatible with the absolute poverty prescribed to them. This frivolous sophistry was united with the wildest fanaticism; and as John XXII. attempted to repress their follies by a cruel persecution, they proclaimed aloud the corruption of the church, fixed the name of Antichrist upon the papacy, and warmly supported the emperor Louis throughout all his contention with the holy see.*

Meanwhile the popes who sat at Avignon continued to invade with surprising rapaciousness the patronage and revenues of the church. The mandats or letters directing a particular clerk to be preferred, seem to have given place in a great degree to the more effectual method of appropriating benefices by reservation or provision, which was carried to an enormous extent in the fourteenth century. John XXII., the most insatiate of pontiffs, reserved to himself all the bishoprics in Christendom.† Benedict XII. assumed the privilege for his own life of disposing of all benefices vacant by cession, deprivation, or translation. Clement VI. naturally thought

* The schism of the rigid Franciscans or Fratricelli is one of the most singular parts of ecclesiastical history, and had a material tendency both to depress the temporal authority of the papacy, and to pave the way for the Reformation. It is fully treated by Mosheim, cent. 13. and 14.; and by Crevier, Hist. de l'Université de Paris, t. ii. p. 233—264. &c.

† Fleury, Institutions, &c. t. i. p. 368. F. Paul on Benefices, c. 37.

that his title was equally good with his predecessor's, and prorogued the same right for his own time; which soon became a permanent rule of the Roman chancery.* Hence the appointment of a prelate to a rich bishopric was generally but the first link in a chain of translation, which the pope could regulate according to his interest. Another capital innovation was made by John XXII. in the establishment of the famous tax, called Annates, or first fruits of ecclesiastical benefices, which he imposed for his own benefit. These were one year's value, estimated according to a fixed rate in the books of the Roman chancery, and payable to the papal collectors throughout Europe.† Various other devices were invented to obtain money, which these degenerate popes, abandoning the magnificent schemes of their predecessors, were content to seek as their principal object. John XXII. is said to have accumulated an almost incredible treasure, exaggerated perhaps by the ill-will of his contemporaries ;‡ but it may be doubted whe-

* F. Paul, c. 38. Translations of bishops had been made by the authority of the metropolitan, till Innocent III. reserved this prerogative to the holy see. De Marca, l. vi. c. 8.

† F. Paul, c. 38. Fleury, p. 424. De Marca, l. vi. c. 10. Pasquier, l. iii. c. 23. The popes had long been in the habit of receiving a pecuniary gratuity when they granted the pallium to an archbishop, though this was reprehended by strict men, and even condemned by themselves. De Marca, ibid. It is noticed as a remarkable thing of Innocent IV., that he gave the pall to a German archbishop, without accepting any thing. Schmidt, t. iv. p. 172. The original and nature of annates is copiously treated in Lenfant, Concile de Constance, t. ii. p. 133.

‡ G. Villani puts this at 25,000,000 of florins, which it is hardly possible to believe. The Italians were credulous

ther even his avarice reflected greater dishonour on the church, than the licentious profuseness of Clement VI.*

These exactions were too much encouraged by the kings of France, who participated in the plunder, or at least required the mutual assistance of the popes for their own imposts on the clergy. John XXII. obtained leave of Charles the Fair to levy a tenth of ecclesiastical revenues ;† and Clement VI., in return, granted two-tenths to Philip of Valois for the expenses of his war. A similar tax was raised by the same authority towards the ransom of John.‡ These were contributions for national purposes unconnected with religion, which the popes had never before pretended to impose, and which the king might properly have levied with the consent of his clergy, according to the practice of England. But that consent might not always be obtained with ease, and it seemed a more expeditious method to call in the authority of the pope. A manlier spirit was displayed by our ancestors. It was the boast of England to have placed the first legal barrier to the usur-

enough to listen to any report against the popes of Avignon. l. xi. c. 20. Giannone, l. xxii. c. 8.

* For the corruption of morals at Avignon during the secession, see De Sade, Vie de Pétrarque, t. i. p. 70. and several other passages.

† Continuator Gul. de Nangis, in Spicilegio d'Achery, t. iii. p. 86. (folio edition) ita miscram ecclesiam, says this monk, unus tondet, alter excoriat.

‡ Fleury, Institut. au Droit ecclésiastique, t. ii. p. 245. Villaret, t. ix. p. 431. It became a regular practice for the king to obtain the pope's consent to lay a tax on his clergy ; though he sometimes applied first to themselves. Garnier, t. xx. p. 141.

pations of Rome, if we except the dubious and insulated Pragmatic Sanction of St. Louis, from which the practice of succeeding ages in France entirely deviated. The English barons had, in a letter addressed to Boniface VIII., absolutely disclaimed his temporal supremacy over their crown, which he had attempted to set up by intermeddling in the quarrel of Scotland.* This letter, it is remarkable, is nearly coincident in point of time with that of the French nobility; and the two combined may be considered as a joint protestation of both kingdoms, and a testimony to the general sentiment among the superior ranks of the laity. A very few years afterwards, the parliament of Carlisle wrote a strong remonstrance to Clement V. against the system of provisions and other extortions, including that of first fruits, which it was rumoured, they say, he mas meditating to demand.† But the court of Avignon was not to be moved by remonstrances; and the feeble administration of Edward II. gave way to ecclesiastical usurpations, at home as well as abroad.‡ His magnanimous son took a bolder line. After complaining ineffectually to Clement VI. of the enormous abuse

* Rymer, t. ii. p. 373. Collier, vol. i. p. 725.

† Rotuli Parliamenti, vol. i. p. 204. This passage, hastily read, has deceived Collier and other English writers, such as Henry and Blackstone, into the supposition that annates were imposed by Clement V. But the concurrent testimony of foreign authors refers this tax to John XXII., as the canon law also shows. Extravagant. Communes, l. iii. t. ii. c. 11.

‡ The statute called Articuli cleri, in 1316, was directed rather towards confirming than limiting the clerical immunity in criminal cases.

which reserved almost all English benefices to the pope, and generally for the benefit of aliens,* he passed in 1350 the famous statute of provisors. This act, reciting one supposed to have been made at the parliament of Carlisle, which however does not appear,† and complaining in strong language of the mischief sustained through continual reservations of benefices, enacts that all elections and collations shall be free, according to law, and that, in case any provision or reservation should be made by the court of Rome, the king should for that turn have the collation of such benefice, if it be of ecclesiastical election or patronage.‡ This devolution to the crown, which seems a little arbitrary, was the only remedy that could be effectual against the connivance and timidity of chapters and spiritual patrons. We cannot assert, that a statute so nobly planned was executed with equal steadiness. Sometimes by royal dispensation, sometimes by neglect or evasion, the papal bulls of provision were still obeyed, though fresh

* Collier, p. 546.

† It is singular, that Sir E. Coke should assert, that this act recites, and is founded upon the statute 35 E. I. De asportatis religiosorum; (2 Inst. 580.) whereas there is not the least resemblance in the words, and very little, if any, in the substance. Blackstone, in consequence, mistakes the nature of that act of Edward I., and supposes it to have been made against papal provisions, to which I do not perceive even an allusion. Whether any such statute was really made in the Carlisle parliament of 35 E. I. as is asserted both in 25 E. III. and in the roll of another parliament, 17 E. III. (Rot. Parl. t. ii. p. 144.) is hard to decide; and perhaps those who examine this point will have to choose between wilful suppression and wilful interpolation.

‡ 25 E. III. stat. 6.

laws were enacted to the same effect as the former. It was found on examination in 1367, that some clerks enjoyed more than twenty benefices by the pope's dispensation.* And the parliaments both of this and of Richard II.'s reign invariably complain of the disregard shown to the statutes of provisors. This led to other measures, which I shall presently mention.

The residence of the popes at Avignon gave very general offence to Europe, and they could not themselves avoid perceiving the disadvantage of absence from their proper diocess, the city of St. Peter, the source of all their claims to sovereign authority. But Rome, so long abandoned, offered but an inhospitable reception: Urban V. returned to Avignon, after a short experiment of the capital; and it was not till 1376, that the promise, often repeated and long delayed, of restoring the papal chair to the metropolis of Christendom, was ultimately fulfilled by Gregory XI. His death, which happened soon afterwards, prevented, it is said, a second flight that he was preparing. This was followed by the great schism, an
1377 event the most remarkable, except the Reformation, in ecclesiastical history. It is a difficult and by no means an interesting question to determine the validity of that contested election, which distracted the Latin church for so many years. All contemporary testimonies are subject to the suspicion of partiality in a cause where no one was permitted to be neutral. In one fact however there is a common

* Collier, p. 568.

agreement, that the cardinals, of whom the majority were French, having assembled in conclave for the election of a successor to Gregory XI., were disturbed by a tumultuous populace, who demanded with menaces a Roman, or at least, an Italian pope. This tumult appears to have been sufficiently violent to excuse, and in fact did produce a considerable degree of intimidation. After some time, the cardinals made choice of the archbishop of Bari, a Neapolitan, who assumed the name of Urban VI. His election satisfied the populace, and tranquillity was restored. The cardinals announced their choice to the absent members of their college, and behaved towards Urban as their pope for several weeks. But his uncommon harshness of temper giving them offence, they withdrew to a neighbouring town, and protesting that his election had been compelled by the violence of the Roman populace, annulled the whole proceeding, and chose one of their own number, who took the pontifical name of Clement VII. Such are the leading circumstances which produced the famous schism. Constraint is so destructive of the essence of election, that suffrages given through actual intimidation ought, I think, to be held invalid, even without minutely inquiring whether the degree of illegal force was such as might reasonably overcome the constancy of a firm mind. It is improbable that the free votes of the cardinals would have been bestowed on the archbishop of Bari; and I should not feel much hesitation in pronouncing his election to have been void. But the sacred college unques-

tionably did not use the earliest opportunity of protesting against the violence they had suffered; and we may infer almost with certainty, that, if Urban's conduct had been more acceptable to that body, the world would have heard little of the transient riot at his election. This however opens a delicate question in jurisprudence; namely, under what circumstances acts, not only irregular, but substantially defective, are capable of receiving a retro-active confirmation by the acquiescence and acknowledgement of parties concerned to oppose them. And upon this, I conceive, the great problem of legitimacy between Urban and Clement will be found to depend.*

Whatever posterity may have judged about the pretensions of these competitors, they at that time shared the obedience of Europe in nearly equal proportions. Urban remained at Rome; Clement resumed the station of Avignon. To the former adhered Italy, the Empire, England, and the nations of the north; the latter retained in his allegiance, France, Spain, Scotland, and Sicily. Fortunately for the church, no question of religious faith intermixed itself with this schism; nor did any other impediment to re-union exist, than the obstinacy and

* Lenfant has collected all the original testimonies on both sides in the first book of his Concile de Pise. No positive decision has ever been made on the subject, but the Roman popes are numbered in the commonly received list, and those of Avignon are not. The modern Italian writers express no doubt about the legitimacy of Urban; the French at most intimate, that Clement's pretensions were not to be wholly rejected. But I am saying too much on a question so utterly unimportant.

selfishness of the contending parties. As it was impossible to come to any agreement on the original merits, there seemed to be no means of healing the wound, but by the abdication of both popes, and a fresh undisputed election. This was the general wish of Europe, but urged with particular zeal by the court of France, and, above all, by the university of Paris, which esteems this period the most honourable in her annals. The cardinals however of neither obedience would recede so far from their party as to suspend the election of a successor upon a vacancy of the pontificate, which would have at least removed one half of the obstacle. The roman conclave accordingly placed three pontiffs successively, Boniface IX., Innocent VI., and Gregory XII. in the seat of Urban VI.; and the cardinals at Avignon upon the death of Clement in 1394, elected Benedict XIII., (Peter de Luna,) famous for his inflexible obstinacy in prolonging the schism. He repeatedly promised to sacrifice his dignity for the sake of union. But there was no subterfuge to which this crafty pontiff had not recourse, in order to avoid compliance with his word, though importuned, threatened, and even besieged in his palace at Avignon. Fatigued by his evasions, France withdrew her obedience, and the Gallican church continued for a few years without acknowledging any supreme head. But this step, which was rather the measure of the university of Paris than of the nation, it seemed advisable to retract; and Benedict was again obeyed, though France continued to urge his resignation. A second sub-

traction of obedience, or at least, declaration of neutrality, was resolved upon, as preparatory to the convocation of a general council. On the other hand, those who sat at Rome displayed not less insincerity. Gregory XII. bound himself by oath on his accession to abdicate when it should appear necessary. But while these rivals were loading each other with the mutual reproach of schism, they drew on themselves the suspicion of at least a virtual collusion in order to retain their respective stations. At length, the cardinals of both parties, wearied with so much dissimulation, deserted their masters, and summoned a general council to meet at Pisa.*

1409 The council assembled at Pisa deposed both Gregory and Benedict, without deciding in any respect as to their pretensions, and elected Alexander V. by its own supreme authority. This authority, however, was not universally recognized; the schism, instead of being healed, became more desperate; for as Spain adhered firmly to Benedict, and Gregory was not without supporters, there were now three contending pontiffs in the church. A general council was still, however, the favourite and indeed the sole remedy; and John XXIII., successor of Alexander V., was reluctantly prevailed upon, or perhaps trepanned into convoking one to meet at

1414 Constance. In this celebrated assembly he was himself deposed; a sentence which he incurred by that tenacious clinging to his dignity, af-

* Villaret. Lenfant, Concile de Pise. Crevier, Hist. de l'Université de Paris, t. iii.

ter repeated promises to abdicate, which had already proved fatal to his competitors. The deposition of John, confessedly a legitimate pope, may strike us as an extraordinary measure. But, besides the opportunity it might afford of restoring union, the council found a pretext for this sentence in his enormous vices, which indeed they seem to have taken upon common fame without any judicial process. The true motive, however, of their proceedings against him, was a desire to make a signal display of a new system which had rapidly gained ground, and which I may venture to call the whig principles of the Catholic church. A great question was at issue, whether the polity of that establishment should be an absolute, or an exceedingly limited monarchy. The papal tyranny, long endured and still increasing, had excited an active spirit of reformation which the most distinguished ecclesiastics of France and other countries encouraged. They recurred, as far as their knowledge allowed, to a more primitive discipline than the canon law, and elevated the supremacy of general councils. But in the formation of these they did not scruple to introduce material innovations. The bishops have usually been considered the sole members of ecclesiastical assemblies. At Constance, however, sat and voted not only the chiefs of monasteries, but the ambassadors of all Christian princes, the deputies of universities, with a multitude of inferior theologians, and even doctors of law.* These

* Lenfant, Concile de Constance, t. i. p. 107. (edit. 1727.) Crevier, t. iii. p. 405. It was agreed, that the ambassadors

were naturally accessible to the pride of sudden elevation, which enabled them to control the strong, and to humiliate the lofty. In addition this, the adversaries of the court of Rome carried another not less important innovation. The Italian bishops, almost universally in the papal interests, were so numerous, that if suffrages had been taken by the head, their preponderance would have impeded any measures of the transalpine nations towards reformation. It was determined, therefore, that the council should divide itself into four nations, the Italian, the German, the French and the English; each with equal rights, and that every proposition, having been separately discussed, the majority of the four should prevail.* This revolutionary spirit was very unacceptable to the cardinals, who submitted reluctantly, and with a de-

could not vote upon articles of faith, but only on questions relating to the settlement of the church. But the second order of ecclesiastics were allowed to vote generally.

* This separation of England, as a coequal limb of the council, gave great umbrage to the French, who maintained that, like Denmark and Sweden, it ought to have been reckoned along with Germany. The English deputies came down with a profusion of authorities to prove the antiquity of their monarchy, for which they did not fail to put in requisition the immeasurable pedigrees of Ireland. Joseph of Arimathea who planted Christianity and his stick at Glastonbury did his best to help the cause. The recent victory of Azincourt, I am inclined to think, had more weight with the council. Lenfant, t. ii. p. 46.

At a time when a very different spirit prevailed, the English bishops under Henry II. and Henry III. had claimed as a right, that no more than four of their number should be summoned to a general council. Hoveden, p. 320.; Carte, vol. ii. p. 84. This was like boroughs praying to be released from sending members to parliament.

termination, that did not prove altogether unavailing, to save their papal monarchy by a dexterous policy. They could not, however, prevent the famous resolutions of the fourth and fifth sessions, which declare that the council has received, by divine right, an authority to which every rank, even the papal, is obliged to submit in matters of faith, in the extirpation of the present schism, and in the reformation of the church both in its head and its members; and that every person, even a pope, who shall obstinately refuse to obey that council, or any other lawfully assembled, is liable to such punishment as shall be necessary.* These decrees are the great pillars of that moderate theory with respect to the papal authority, which distinguished the Gallican church, and is embraced, I presume, by almost all laymen and the major part of ecclesiastics on this side of the Alps. They embarrass the more popish churchmen as the revolution does our English tories; some boldly impugn the authority of the council of Constance, while others chichane upon the interpretation of its decrees. Their practical importance is not, indeed, direct; universal councils exist only in possibility; but the acknowledgement of a possible authority paramount to the see of Rome has contributed, among other means, to check its usurpations.

The purpose for which these general councils had been required, next to that of healing the schism, was the reformation of abuses. All the rapacious exactions, all the scandalous venality of which Eu-

* Id. p. 164. Crevier, t. iii. p. 417.

rope had complained, while unquestioned pontiffs ruled at Avignon, appeared light in comparison of the practices of both rivals during the schism. Tenths repeatedly levied upon the clergy, annates rigorously exacted and enhanced by new valuations, fees annexed to the complicated formalities of the papal chancery, were the means by which each half of the church was compelled to re-imburse its chief for the subtraction of the other's obedience. Boniface IX., one of the Roman line, whose fame is a little worse than that of his antagonists, made a gross traffic of his patronage; selling the privileges of exemption from ordinary jurisdiction, and holding benefices in commendam, and other dispensations invented for the benefit of the holy see.* Nothing had been attempted at Pisa towards reformation. At Constance the majority were ardent and sincere; the representatives of the French, German, and English churches met with a determined and, as we have seen, not always unsuccessful resolution to assert their ecclesiastical liberties. They appointed a committee of reformation, whose recommendations, if carried into effect, would have annihilated almost entirely that artfully constructed machinery by which Rome had absorbed so much of the revenues and patronage of the church. But men, interested in perpetuating these abuses, especially the cardinals, improved the advantages which a skilful government always enjoys in playing against a popular assembly. They

† Lenfant, Hist. du Concile de Pise, passim. Crevier, Villaret, Schmidt, Collier.

availed themselves of the jealousies arising out of the division of the council into nations, which exterior political circumstances had enhanced. France, then at war with England, whose pretensions to be counted as a fourth nation, she had warmly disputed, and not well disposed towards the emperor Sigismund, joined with the Italians against the English and German members of the council in a matter of the utmost importance, the immediate election of a pope before the articles of reformation should be finally concluded. These two nations, in return, united with the Italians to choose the cardinal Colonna, against the advice of the French divines, who objected to any member of the sacred college. The court of Rome were gainers in both questions. Martin V., the new pope, soon evinced his determination to elude any substantial reform. After publishing a few constitutions tending to redress some of the abuses that had arisen during the schism, he contrived to make separate conventions with the several nations, and as soon as possible dissolved the council.*

By one of the decrees past at Constance, another general council was to be assembled in five years, a second at the end of seven more, and from that time a similar representation of the church was to meet every ten years. Martin V. accordingly convoked

* Lenfant, Concile de Constance. The copiousness as well as impartiality of this work justly render it an almost exclusive authority. Crevier (Hist. de l'Université de Paris, t. iii.) has given a good abridgement: and Schmidt, (Hist. des Allemands, t. v.) is worthy of attention.

a council at Pavia, which, on account of the plague, was transferred to Siena; but nothing of importance was transacted by this assembly.* That which he summoned seven years afterwards to the city of Basle had very different results. The pope dying before the meeting of this council, was succeeded by Eugenius IV., who, anticipating the spirit of its discussions, attempted to crush its independence in the outset, by transferring the place of session to an Italian city. No point was reckoned so material in the contest between the popes and reformers, as whether a council should sit in Italy or beyond the Alps. The council of Basle began, as it proceeded, in open enmity to the court of Rome. Eugenius, after several years had elapsed in more or less hostile discussions, exerted his prerogative of removing the assembly to Ferrara, and from thence to Florence. For this he had a specious pretext in the negotiation, then apparently tending to a prosperous issue, for the re-union of the Greek church; a triumph, however transitory, of which his council at Florence obtained the glory. On the other hand the assembly at Basle, though much weakened by the defection of those who adhered to Eugenius, entered into compacts with the Bohemian insurgents, more essential to the interests of the church than any union with the Greeks, and completed the work begun at Constance by abolishing the annates, the reservations of benefices, and other abuses of papal authority. In this it received the approbation of most princes; but when, provoked by

* Lefant, Guerre des Hussites, t. i. p. 223.

the endeavours of the pope to frustrate its decrees, it proceeded so far as to suspend and even to depose him, neither France nor Germany concurred in the sentence. Even the council of Constance had not absolutely asserted a right of deposing a lawful pope, except in case of heresy, though their conduct towards John could not otherwise be justified.* This question indeed of ecclesiastical public law seems to be still undecided. The fathers at Basle acted however with greater intrepidity than discretion, and not perhaps sensible of the change that was taking place in public opinion, raised Amadeus, a retired duke of Savoy, to the pontifical dignity by the name of Felix V. They thus renewed the schism, and divided the obedience of the Catholic church for a few years. The empire however as well as France observed a singular and not very consistent neutrality, respecting Eugenius as lawful pope, and the assembly at Basle as a general council. England warmly supported Eugenius, and even adhered to his council at Florence; Aragon and some countries of smaller note acknowledged Felix. But the partisans of Basle became every year weaker; and Nicholas V., the

* The council of Basle endeavoured to evade this difficulty, by declaring Eugenius a relapsed heretic. Lenfant, Guerre des Hussites, t. ii. p. 98. But, as the church could discover no heresy in his disagreement with that assembly, the sentence of deposition gained little strength by this previous decision. The bishops were unwilling to take this violent step against Eugenius; but the minor theologians, the democracy of the catholic church, whose right of suffrage seems rather an anomalous infringement of episcopal authority, pressed it with much heat and rashness. See a curious passage on this subject in a speech of the Cardinal of Arles. Lenfant, t. ii. p. 225.

successor of Eugenius, found no great difficulty in obtaining the cession of Felix, and terminating this schism. This victory of the court of Rome over the council of Basle nearly counterbalanced the disadvantageous events at Constance, and put an end to the project of fixing permanent limitations upon the head of the church by means of general councils. Though the decree that prescribed the convocation of a council every ten years was still unrepealed, no absolute monarchs have ever more dreaded to meet the representatives of their people, than the Roman pontiffs have abhorred the name of those ecclesiastical synods; once alone, and that with the utmost reluctance, has the catholic church been convoked since the council of Basle; but the famous assembly to which I allude does not fall within the scope of my present undertaking.*

It is a natural subject of speculation, what would have been the effects of these universal councils, which were so popular in the fifteenth century, if the decree passed at Constance for their periodical assembly had been regularly observed. Many catholic writers, of the moderate or cisalpine school, have lamented their disuse, and ascribed it to that irreparable breach which the Reformation has made in the fabric of

* There is not, I believe, any sufficient history of the council of Basle. Lenfant designed to write it from the original acts, but finding his health decline, intermixed some rather imperfect notices of its transactions with his history of the Hussite war, which is commonly quoted under the title of History of the Council of Basle. Schmidt, Crevier, Villaret, are still my other authorities.

their church. But there is almost an absurdity in conceiving their permanent existence. What chemistry could have kept united such heterogeneous masses, furnished with every principle of mutual repulsion? Even in early times, when councils, though nominally general, were composed of the subjects of the Roman empire, they had been marked by violence and contradiction; what then could have been expected from the delegates of independent kingdoms, whose ecclesiastical polity, whatever may be said of the spiritual unity of the church, had long been far too intimately blended with that of the state, to admit of any general control without its assent? Nor, beyond the zeal, unquestionably sincere, which animated their members, especially at Basle, for the abolition of papal abuses, is there any thing to praise in their conduct, or to regret in their cessation. The statesman, who dreaded the encroachment of priests upon the civil government, the christian, who panted to see his rites and faith purified from the corruption of ages, found no hope of improvement in the councils. They took upon themselves the pretensions of the popes whom they attempted to supercede. By a decree of the fathers at Constance, all persons, including princes, who should oppose any obstacle to a journey undertaken by the emperor Sigismund, in order to obtain the cession of Benedict, are declared excommunicated, and deprived of their dignities, whether secular or ecclesiastical.* Their condemnation of Huss and Jerome of Prague, and the

* Lenfant, t. i. p. 439.

scandalous breach of faith which they induced Sigismund to commit on that occasion, are notorious. But perhaps it is not equally so, that this celebrated assembly recognized by a solemn decree, the flagitious principle which it had practised, declaring that Huss was unworthy, through his obstinate adherence to heresy, of any privilege; nor ought any faith or promise to be kept with him, by natural, divine, or human law, to the prejudice of the catholic religion.*

* Nec aliqua sibi fides aut promissio, de jure naturali, divino, et humano fuerit in prejudicium Catholicæ fidei observanda. Lenfant, t. i. p. 491.

This proposition is the great disgrace of the council in the affair of Huss. But the violation of his safe conduct being a famous event in ecclesiastical history, and which has been very much disputed with some degree of erroneous statement on both sides, it may be proper to give briefly an impartial summary. 1. Huss came to Constance with a safe-conduct of the emperor, very loosely worded, and not directed to any individuals. Lenfant, t. i. p. 59. 2. This pass however was binding upon the emperor himself, and was so considered by him, when he remonstrated against the arrest of Huss. Id. p. 73. 83. 3. It was not binding on the council, who possessed no temporal power, but had a right to decide upon the question of heresy. 4. It is not manifest by what civil authority Huss was arrested, nor can I determine how far the imperial safe-conduct was a legal protection within the city of Constance. 5. Sigismund was persuaded to acquiesce in the capital punishment of Huss, and even to make it his own act, Lenfant, p. 409. by which he manifestly broke his engagement. 6. It is evident, that in this he acted by the advice and sanction of the council, who thus became accessary to the guilt of his treachery.

The great moral to be drawn from the story of John Huss's condemnation is, that no breach of faith can be excused by our opinion of ill desert in the party, or by a narrow interpretation of our own engagements. Every capitulation ought to be construed favourably for the weaker side. In such cases, it is emphatically true, that if the letter killeth, the spirit should give life.

It will be easy to estimate the claims of this congress of theologicians to our veneration, and to weigh the retrenchment of a few abuses against the formal sanction of an atrocious maxim.

It was not however necessary for any government of tolerable energy to seek the reform of those abuses which affected the independence of national churches, and the integrity of their regular discipline at the hands of a general council. Whatever difficulty there might be in overturning the principles founded on the decretals of Isidore, and sanctioned by the prescription of many centuries, the more flagrant encroachments of papal tyranny were fresh innovations, some within the actual generation, others easily to be traced up, and continually disputed. The principal European nations determined, with different degrees indeed of energy, to make a stand against the despotism of Rome. In this resistance England was not only the first engaged, but the most consistent; her free parliament preventing, as far as the times permitted, that wavering policy to which a court is liable. We have already seen, that a foundation was laid in the statute of provisors under Edward III. In the next reign, many other measures tending to repress the interference of Rome were adopted; especially the great statute of præmunire, which subjects all persons bringing papal bulls for

Gerson, the most eminent theologian of his age, and the coryphæus of the party that opposed the transalpine principles, was deeply concerned in this atrocious business. Crevier, p. 432.

translation of bishops and other enumerated purposes into the kingdom to the penalties of forfeiture and perpetual imprisonment.* This act received, and probably was designed to receive, a larger interpretation than its language appears to warrant. Combined with the statute of provisors, it put a stop to the pope's usurpation of patronage, which had impoverished the church and kingdom of England for nearly two centuries. Several attempts were made to overthrow these enactments; the first parliament of Henry IV. gave a very large power to the king over the statute of provisors, enabling him even to annul it at his pleasure.† This however does not appear in the statutes. Henry indeed, like his predecessors, exercised rather largely his prerogative of dispensing with the law against papal provisions; a prerogative which, as to this point, was itself taken away by an act of his own, and another of his son Henry V.‡ But the statute always stood unrepealed; and it is a satisfactory proof of the ecclesiastical supremacy of the legislature, that in the concordat made by Martin V. at the council of Constance with the English nation, we find no mention of reservations or benefices, of annates, and the other principal

* 16 Ric. II. c. 5.

† Rot. Parl. vol. iii. p. 428.

‡ 7 H. IV. c. 8.; 3 H. V. c. 4. Martin V. published an angry bull against the 'execrable statute' of præmunire; enjoining Archbishop Chicheley to procure its repeal. Collier, p. 653. Chicheley did all in his power; but the commons were always inexorable on this head. p. 636.; and the archbishop even incurred Martin's resentment by it. Wilkins, Concilia, t. iii. p. 483.

grievances of that age;* our ancestors disdaining to accept by compromise with the pope any modification or even confirmation of their statute law. They had already restrained another flagrant abuse, the increase of first fruits by Boniface IX.; an act of Henry IV. forbidding any greater sum to be paid on that account than had been formerly accustomed.†

It will appear evident to every person acquainted with the contemporary historians, and the proceedings of parliament, that besides partaking in the general resentment of Europe against the papal court, England was under the influence of a peculiar hostility to the clergy, arising from the dissemination of the principles of Wickliffe.‡ All ecclesiastical possessions were marked for spoliation by the system of this reformer; and the house of commons more than once endeavoured to carry it into effect, pressing Henry IV. to seize the temporalities of the church for public exigencies§. This recommenda-

* Lenfant, t. ii. p. 444.

† 6 H. IV. c. i.

‡ See among many other passages, the articles exhibited by the Lollards to parliament against the clergy in 1395. Collier gives the substance of them, and they are noticed by Henry; but they are at full length in Wilkins, t. iii. p. 221.

§ Walsingham, p. 371. 379. Rot. Parl. 11. H. IV. vol. iii. p. 645. The remarkable dialogue between the archbishop of Canterbury and the speaker of the commons, detailed by Walsingham in the former passage, is not corroborated by any thing in the records. But as it is unlikely that so circumstantial a narrative should have no foundation, Hume has plausibly conjectured that the roll has been wilfully mutilated. As this suspicion occurs in other instances, it would be desirable to ascertain by examination of the original rolls, whether they bear any external marks of injury. The mutilators,

tion, besides its injustice, was not likely to move Henry, whose policy had been to sustain the prelacy against their new adversaries. Ecclesiastical jurisdiction was kept in better control than formerly by the judges of common law, who through rather a strained construction of the statute of præmunire, extended its penalties to the spiritual courts, when they transgressed their limits.* The privilege of clergy in criminal cases still remained; but it was acknowledged not to comprehend high treason.†

Germany, as well as England, was disappointed of her hopes of general reformation by the Italian party at Constance; but she did not supply the want of the council's decrees with sufficient decision. A

however, if such they were, have left a great deal. The rolls of Henry IV. and V.'s parliaments are quite full of petitions against the clergy.

* 3 Inst. p. 121. Collier, vol. i. p. 668.

† 2 Inst. p. 634. where several instances of priests executed for coining and other treasons are adduced. And this may also be inferred from 25 E. III. stat. 3. c. 4; and from 4 H. IV. c. 3. Indeed the benefit of clergy has never been taken away by statute from high treason. This renders it improbable that Chief Justice Gascoyne should, as Carte tells us, vol. ii. p. 664. have refused to try Archbishop Scrope for treason, on the ground that no one could lawfully sit in judgement on a bishop for his life. Whether he might have declined to try him as a peer, is another question. The pope excommunicated all who were concerned in Scrope's death, and it cost Henry a large sum to obtain absolution. But Boniface IX. was no arbiter of the English law. Edward IV. granted a strange charter to the clergy, not only dispensing with the statutes of præmunire, but absolutely exempting them from temporal jurisdiction in cases of treason as well as felony. Wilkins, Concilia, t. iii. p. 583. Collier, p. 678. This, however, being an illegal grant, took no effect, at least after his death.

concordat with Martin V. left the pope in possession of too great a part of his recent usurpations.* This however was repugnant to the spirit of Germany, which called for a more thorough reform with all the national roughness and honesty. The diet of Mentz during the continuance of the council of Basle adopted all those regulations hostile to the papal interests which occasioned the deadly quarrel between that assembly and the court of Rome.† But the German empire was betrayed by Frederic III., and deceived by an accomplished but profligate statesman, his secretary Æneas Sylvius. Fresh concordats, settled at Aschaffenburg in 1448, nearly upon the footing of those concluded with Martin V., surrendered great part of the independence for which Germany had contended. The pope retained his annates, or at least a sort of tax in their place; and instead of reserving benefices arbitrarily, he obtained the positive right of collation during six alternate months of every year. Episcopal elections were freely restored to the chapters, except in case of translation, when the pope still continued to nominate; as he did also, if any person, canonically unfit, were presented to him for confirmation.‡ Such is the concordat of Aschaffenburg, by which the catholic principalities of the em-

* Lenfant, t. ii. p. 428. Schmidt, t. v. p. 131.

† Schmidt, t. v. p. 221. Lenfant.

‡ Schmidt, t. v. p. 250.; t. vi. p. 94. &c. He observes that there is three times as much money at present as in the fifteenth century; if therefore the annates are now felt as a burthen, what must they have been? p. 113. To this Rome would answer; if the annates were but sufficient for the pope's maintenance at that time, what must they be now?

pire have always been governed, though reluctantly acquiescing in its disadvantageous provisions. Rome, for the remainder of the fifteenth century, not satisfied with the terms she had imposed, is said to have continually encroached upon the right of election.* But she purchased too dearly her triumph over the weakness of Frederic III.; and the Hundred Grievances of Germany, presented to Adrian VI. by the diet of Nuremburg in 1522, manifested the workings of a long-treasured resentment, that had made straight the path before the Saxon reformer.

I have already taken notice that the Castilian church was in the first ages of that monarchy nearly independent of Rome. But after many gradual encroachments, the code of laws promulgated by Alfonso X. had incorporated a great part of the decretals, and thus given the papal jurisprudence an authority, which it no where else possessed, in national tribunals.† That richly endowed hierarchy was a tempting spoil. The popes filled up its benefices by means of expectatives and reserves with their own Italian dependents. We find the cortes of Palencia in 1388 complaining that strangers are beneficed in Castile, through which the churches are ill supplied, and native scholars cannot be provided, and requesting the king to take such measures in relation to this as the kings of France, Aragon and Navarre, who do

* Schmidt, p. 98. Æneas Sylvius, Epist. 369 and 371; and De Moribus Germanorum, p. 1041. 1061. Several little disputes with the pope indicate the spirit that was fermenting in Germany throughout the fifteenth century. But this is the proper subject of a more detailed ecclesiastical history, and should form an introduction to that of the Reformation.

† Marina, Ensayo Historico Critico, c. 330. &c.

not permit any but natives to hold benefices in their kingdoms. The king answered to this petition that he would use his endeavours to that end.* And this is expressed with greater warmth by a cortes of 1473, who declare it to be the custom of all Christian nations that foreigners should not be promoted to benefices, urging the discouragement of native learning, the decay of charity, the bad performance of religious rites, and other evils arising from the non-residence of beneficed priests, and request the king to notify to the court of Rome, that no expectative or provision in favour of foreigners can be received in future.† This petition seems to have passed into a law; but I am ignorant of the consequences. Spain certainly took an active part in restraining the abuses of pontifical authority at the councils of Constance and Basle; to which I might add the name of Trent, if that assembly were not beyond my province.

France, dissatisfied with the abortive termination of her exertions during the schism, rejected the concordat offered by Martin V. which held out but a promise of imperfect reformation.‡ She suffered in consequence of the papal exactions for some years; till the decrees of the council of Basle prompted her to more vigorous efforts for independence, and Charles VII. enacted the famous Pragmatic Sanction of Bourges.§ This has been deemed a sort of Magna

* Id. Teoria de las Cortes, t. iii. p. 126.

† Id. t. ii. p. 364. Mariana, Hist. Hispan. l. xix. c. 1.

‡ Villaret, t. xv. p. 126.

§ Idem, p. 263. Hist. du Droit Public Ecclés. François, t. ii. p. 234. Fleury, Institutions au Droit. Crevier, t. iv. p. 100. Pasquier, Recherches de la France, l. iii. c. 27.

Charta of the Gallican church; for though the law was speedily abrogated, its principle has remained fixed as the basis of ecclesiastical liberties. By the Pragmatic Sanction a general council was declared superior to the pope; elections of bishops were made free from all control; mandats or grants in expectancy, and reservations of benefices were taken away; first fruits were abolished. This defalcation of wealth, which had now become dearer than power, could not be patiently borne at Rome. Pius II., the same Æneas Sylvius who had sold himself to oppose the council of Basle in whose service he had been originally distinguished, used every endeavour to procure the repeal of this ordinance. With Charles VII. he had no success; but Louis XI., partly out of blind hatred to his father's memory, partly from a delusive expectation that the pope would support the Angevin faction in Naples, repealed the Pragmatic Sanction.* This may be added to other proofs, that Louis XI., even according to the measures of worldly wisdom, was not a wise politician. His people judged from better feelings; the parliament of Paris constantly refused to enregister the revocation of that favourite law, and it continued in many respects to be acted upon till the reign of Francis I.† At the States General of Tours, in 1484, the inferior clergy, seconded by the two other orders, earnestly requested that the Pragmatic Sanction might be confirmed;

* Villaret, and Garnier, t. xvi. Crevier, t. iv. p. 256. 274.

† Garnier, t. xvi. p. 432.; t. xvii. p. 222. et alibi. Crevier, t. iv. p. 318. et alibi.

but the prelates were timid or corrupt, and the regent Anne was unwilling to risk a quarrel with the holy see.* This unsettled state continued, the Pragmatic Sanction neither quite enforced nor quite repealed, till Francis I., having accommodated the differences of his predecessor with Rome, agreed upon a final concordat with Leo X., the treaty that subsisted for almost three centuries between the papacy and the kingdom of France.† Instead of capitular election or papal provision, a new method was devised for filling the vacancies of episcopal sees. The king was to nominate a fit person, whom the pope was to collate. The one obtained an essential patronage, the other preserved his theoretical supremacy. Annates were restored to the pope; a concession of great importance. He gave up his indefinite prerogative of reserving benefices, and received only a small stipulated patronage. This convention met with strenuous opposition in France; the parliament of Paris yielded only to force; the university hardly stopped short of sedition; the zealous Gallicans have ever since deplored it, as a fatal wound to their liberties. There is much exaggeration in this, as far as the relation of the Gallican church to Rome is concerned: but the royal nomination to bishoprics impaired of course the independence of the hierarchy. Whether this prerogative of the crown were upon the whole beneficial to France, is a problem

* Garnier, t. xix. p. 216. and 321.

† Garnier, t. xxiii. p. 151. Hist. du Droit Public Ecclés. Fr. t. ii. p. 243. Fleury, Institutions au Droit, t. i. p. 107.

that I cannot affect to solve; in this country there seems little doubt, that capitular elections, which the statute of Henry VIII. has reduced to a name, would long since have degenerated into the corruption of close boroughs; but the circumstances of the Gallican establishment may not have been entirely similar, and the question opens a variety of considerations, that do not belong to my present subject.

From the principles established during the schism, and in the Pragmatic Sanction of Bourges, arose the far-famed liberties of the Gallican church, which honourably distinguished her from other members of the Roman communion. These have been referred by French writers to a much earlier era; but, except so far as that country participated in the ancient ecclesiastical independence of all Europe, before the papal encroachments had subverted it, I do not see that they can be properly traced above the fifteenth century. Nor had they acquired even at the expiration of that age the precision and consistency which was given in later times by the constant spirit of the parliaments and universities, as well as by the best ecclesiastical authors, with little assistance from the crown, which, except in a few periods of disagreement with Rome, has rather been disposed to restrain the more zealous Gallicans. These liberties therefore do not strictly fall within my limits; and it will be sufficient to observe, that they depended upon two maxims; one, that the pope does not possess any direct or indirect temporal authority; the other, that his spiritual jurisdiction can only be exercised in con-

formity with such parts of the canon law as are received by the kingdom of France. Hence, the Gallican church rejected a great part of the Sext and Clementines, and paid little regard to modern papal bulls, which in fact obtained validity only by the king's approbation.*

The pontifical usurpations which were thus restrained, affected, at least in their direct operation, rather the church than the state; and temporal governments would only have been half emancipated, if their national hierarchies had preserved their enormous jurisdiction.† England, in this also, began the work, and had made a considerable progress, while the mistaken piety or policy of Louis IX. and

* Fleury, Institutions au Droit, t. ii. p. 226. &c. and Discours sur les Libertés de l'Eglise Gallicane. The last editors of this dissertation go far beyond Fleury, and perhaps reach the utmost point in limiting the papal authority which a sincere member of that communion can attain. See notes, p. 417. and 445.

† It ought always to be remembered, that *ecclesiastical*, and not merely *papal* encroachments are what civil governments and the laity in general have had to resist; a point, which some very zealous opposers of Rome have been willing to keep out of sight. The latter arose out of the former, and perhaps were in some respects less objectionable. But the true enemy is what are called High-Church principles; be they maintained by a pope, a bishop, or a presbyter. Thus Archbishop Stratford writes to Edward III.; Duo sunt, quibus principaliter regitur mundus, sacra pontificalis auctoritas, et regalis ordinata potestas; in quibus est pondus tanto gravius et sublimius sacerdotum, quanto et de regibus illi in divino reddituri sunt examine rationem; et ideo scire debet regia celsitudo ex illorum vos dependere judicio, non illos ad vestram dirigi posse voluntatem. Wilkins, Concilia, t. ii. p. 663. This amazing impudence towards such a prince as Edward did not succeed; but it is interesting to follow the track of the star which was now rather receding, though still fierce.

his successors had laid France open to vast encroachments. The first method adopted in order to check them was rude enough; by seizing the bishop's effects, when he exceeded his jurisdiction.* This jurisdiction, according to the construction of churchmen, became perpetually larger; even the reforming council of Constance give an enumeration of ecclesiastical causes far beyond the limits acknowledged in England, or perhaps in France.† But the parliament of Paris, instituted in 1304, gradually established a paramount authority over ecclesiastical as well as civil tribunals. Their progress was indeed very slow. At a famous assembly in 1329 before Philip of Valois, his advocate general, Peter de Cugnieres, pronounced a long harangue against the excesses of spiritual jurisdiction. This is a curious illustration of that branch of legal and ecclesiastical history. It was answered at large by some bishops, and the king did not venture to take any active measures at that time.‡ Several regulations were however made in the fourteenth century, which took away the ecclesiastical cognizance of adultery, of the execution of testaments, and other causes which had

* De Marca, de Concordantiâ, l. iv. c. 18.

† Id. c. 15. Lenfant, Conc. de Constance, t. i. p. 331. De Marca, l. iv. c. 15. gives us passages from one Durandus about 1309, complaining that the lay judges invaded ecclesiastical jurisdiction, and reckoning the cases subject to the latter, under which he includes feudal and criminal causes in some circumstances, and also those in which the temporal judges are in doubt; si quid ambiguum inter judices sæculares oriatur.

‡ Velly, t. viii. p. 234. Fleury, Institutions, t. ii. p. 12. Hist. du Droit Eccles. Franc. t. ii. p. 86.

been claimed by the clergy.* Their immunity in criminal matters was straitened by the introduction of privileged cases, to which it did not extend; such as treason, murder, robbery, and other heinous offences.† The parliament began to exercise a judicial control over episcopal courts. It was not however till the beginning of the sixteenth century, according to the best writers, that it devised its famous form of procedure, the appeal because of abuse.‡ This, in the course of time, and through the decline of ecclesiastical power, not only proved an effectual barrier against encroachments of spiritual jurisdiction, but drew back again to the lay court the greater part of those causes which by prescription, and indeed by law, had appertained to a different cognizance. Thus testamentary, and even, in a great degree, matrimonial causes were decided by the parliament; and in many other matters, that body, being the judge of its own competence, narrowed, by means of the appeal because of abuse, the boundaries of the opposite jurisdiction.§ This remedial

* Villaret, t. xi. p. 182.

† Fleury, Institutions au Droit, t. ii. p. 138. In the famous case of Balue, a bishop and cardinal, whom Louis XI. detected in a treasonable intrigue, it was contended by the king that he had a right to punish him capitally. Du Clos, Vie de Louis XI. t. i. p. 422. Garnier, Hist. de France, t. xvii. p. 330. Balue was confined for many years in a small iron cage, which till lately was shown in the castle of Loches.

‡ Pasquier, l. iii. c. 33. Hist. du Droit Ecclés. François, t. ii. p. 119. Fleury, Institutions au Droit Ecclés. François, t. ii. p. 221. De Marca, De Concordantiâ Sacerdotii et Imperii, l. iv. c. 19. The last author seems to carry it higher.

§ Fleury, Institutions, t. ii. p. 42. &c.

process appears to have been more extensively applied than our English writ of prohibition. The latter merely restrains the interference of the ecclesiastical courts in matters which the law has not committed to them. But the parliament of Paris considered itself, I apprehend, as conservator of the liberties and discipline of the Gallican church; and interposed the appeal because of abuse whenever the spiritual court, even in its proper province, transgressed the canonical rules by which it ought to be governed.*

While the bishops of Rome were losing their general influence over Europe, they did not gain more estimation in Italy. It is indeed a problem of some difficulty, whether they derived any substantial advantage from their temporal principality. For the last three centuries, it has certainly been conducive to the maintenance of their spiritual supremacy, which, in the complicated relations of policy, might have been endangered by their becoming the subjects of any particular sovereign. But I doubt whether their real authority over Christendom in the middle ages was not better preserved by a state of nominal dependence upon the empire, without much effective control on one side, or many temptations to worldly ambition on the other. That covetousness of temporal sway which, having long prompted their mea-

* De Marca, De Concordantiâ, l. iv. c. 9. Fleury, t. ii. p. 224. In Spain even now, says De Marca, bishops or clerks not obeying royal mandates that inhibit the excesses of ecclesiastical courts, are expelled from the kingdom and deprived of the rights of denizenship.

sures of usurpation and forgery, seemed, from the time of Innocent III. and Nicholas III., to reap its gratification, impaired the more essential parts of the papal authority. In the fourteenth and fifteenth centuries, the popes degraded their character by too much anxiety about the politics of Italy. The veil woven by religious awe was rent asunder, and the features of ordinary ambition appeared without disguise. For it was no longer that magnificent and original system of spiritual power, which made Gregory VII., even in exile, a rival of the emperor, which held forth redress where the law could not protect, and punishment where it could not chastise; which fell in sometimes with superstitious feeling, and sometimes with political interest. Many might believe that the pope could depose a schismatic prince, who were disgusted at his attacking an unoffending neighbour. As the cupidity of the clergy in regard to worldly estate had lowered their character every where, so the similar conduct of their head undermined the respect felt for him in Italy. The censures of the church, those excommunications and interdicts, which had made Europe tremble, became gradually despicable as well as odious, when they were lavished in every squabble for territory, which the pope was pleased to make his own.* Even crusades, which

* In 1290, Pisa was put under an interdict for having conferred the signiory on the count of Montefeltro, and he was ordered on pain of excommunication to lay down the government within a month. Muratori, ad ann. A curious style for the pope to adopt towards a free city! Six years before the Venetians had been interdicted, because they would

had already been tried against the heretics of Languedoc, were now preached against all who espoused a different party from the Roman see in the quarrels of Italy. Such were those directed at Frederic II., at Manfred, and at Matteo Visconti, accompanied by the usual bribery, indulgences and remission of sins. The papal interdicts of the fourteenth century wore a different complexion from those of former times. Though tremendous to the imagination, they had hitherto been confined to spiritual effects, or to such as were connected with religion, as the prohibition of marriage and sepulture. But Clement V., on account of an attack made by the Venetians upon Ferrara in 1309, proclaimed the whole people infamous, and incapable for three generations of any office, their goods, in every part of the world, subject to confiscation, and every Venetian, wherever he might be found, liable to be reduced into slavery.* A bull in the same terms was published by Gregory XI. in 1376 against the Florentines.

From the termination of the schism, as the popes found their ambition thwarted beyond the Alps, it was diverted more and more towards schemes of temporal sovereignty. In these we do not perceive that consistent policy, which remarkably actuated their conduct as supreme heads of the church. Men generally advanced in years, and born of noble Italian families, made the papacy subservient to the ele-

not allow their gallies to be hired by the king of Naples. But it would be almost endless to quote every instance.

* Muratori, &c.

vation of their kindred, or to the interests of a local faction. For such ends they mingled in the dark conspiracies of that bad age, distinguished only by the more scandalous turpitude of their vices from the petty tyrants and intriguers with whom they were engaged. In the latter part of the fifteenth century, when all favourable prejudices were worn away, those who occupied the most conspicuous station in Europe disgraced their name by more notorious profligacy, than could be paralleled in the darkest ages that had preceded; and at the moment beyond which this work is not carried, the invasion of Italy by Charles VIII., I must leave the pontifical throne in the possession of Alexander VI.

It has been my object in the present chapter to bring within the compass of a few hours' perusal the substance of a great and interesting branch of history; not certainly with such extensive reach of learning as the subject might require, but from sources of unquestioned credibility. Unconscious of any partialities, that could give an oblique bias to my mind, I have not been very solicitous to avoid offence, where offence is so easily taken. Yet there is one misinterpretation of my meaning which I would gladly obviate. I have not designed, in exhibiting without disguise the usurpations of Rome during the middle ages, to furnish materials for unjust prejudice or unfounded distrust. It is an advantageous circumstance for the philosophical inquirer into the history of ecclesiastical dominion, that, as it spreads itself over the vast extent of fifteen centuries, the dependence of

events upon general causes, rather than on transitory combinations or the character of individuals, is made more evident, and the future more probably foretold from a consideration of the past, than we are apt to find in political history. Five centuries have now elapsed, during every one of which the authority of the Roman see has successively declined. Slowly and silently receding from their claims to temporal power, the pontiffs hardly protect their dilapidated citadel from the revolutionary concussions of modern times, the rapacity of governments, and the growing averseness to ecclesiastical influence. But if thus bearded by unmannerly and threatening innovation, they should occasionally forget that cautious policy which necessity has prescribed, if they should attempt, an unavailing expedient! to revive institutions which can be no longer operative, or principles that have died away, their defensive efforts will not be unnatural, nor ought to excite either indignation or alarm. A calm, comprehensive study of ecclesiastical history, not in such scraps and fragments as the ordinary partisans of our ephemeral literature obtrude upon us, is perhaps the best antidote to extravagant apprehensions. Those who know what Rome has once been are best able to appreciate what she is; those who have seen the thunderbolt in the hands of the Gregories and the Innocents, will hardly be intimidated at the sallies of decrepitude, the impotent dart of Priam amidst the crackling ruins of Troy.

CHAPTER VIII.

THE CONSTITUTIONAL HISTORY OF ENGLAND.

PART I.

The Anglo-Saxon Constitution—Sketch of Anglo-Saxon History—Succession to the Crown—orders of Men—Thanes and Ceorls—Wittenagemot—Judicial System—Division into Hundreds—County Court—Trial by Jury—its Antiquity investigated—Law of Frank-Pledge—its several Stages—Question of Feudal Tenures before the Conquest.

NO unbiassed observer, who derives pleasure from the welfare of his species, can fail to consider the long and uninterruptedly increasing prosperity of England as the most beautiful phenomenon in the history of mankind. Climates more propitious may impart more largely the mere enjoyments of existence; but in no other region have the benefits that political institutions can confer been diffused over so extended a population; nor have any people so well reconciled the discordant elements of wealth, order, and liberty. These advantages are surely not owing to the soil of this island, nor to the latitude in which it is placed; but to the spirit of its laws, from which, through various means, the characteristic independence and industriousness of our nation have been derived. The constitution, therefore, of England,

must be to inquisitive men of all countries, far more to ourselves, an object of superior interest; distinguished, especially, as it is from all free governments of powerful nations which history has recorded, by its manifesting, after the lapse of several centuries, not merely no symptom of irretrievable decay, but a more expansive energy. Comparing long periods of time, it may be justly asserted that the administration of government has progressively become more equitable, and the privileges of the subject more secure; and, though it would be both presumptuous and unwise to express an unlimited confidence as to the durability of liberties, which owe their greatest security to the constant suspicion of the people, yet, if we calmly reflect on the present aspect of this country, it will probably appear, that whatever perils may threaten our constitution are rather from mischiefs altogether unconnected with it than from any intrinsic defect of its own. It will be the object of the ensuing chapter to trace the gradual formation of this system of government. Such an investigation, impartially conducted, will detect errours diametrically opposite; those intended to impose on the populace, which, on account of their palpable nature and the ill faith with which they are usually proposed, I have seldom thought it worth while directly to repel; and those which better informed persons are apt to entertain, caught from transient reading, and the misrepresentations of late historians, but easily refuted by the genuine testimony of ancient times.

The seven very unequal kingdoms of the Saxon

Heptarchy, formed successively out of the countries wrested from the Britons, were originally independent of each other. Several times, however, a powerful sovereign acquired a preponderating influence over his neighbours, marked perhaps by the payment of tribute. Seven are enumerated by Bede as having thus reigned over the whole of Britain; an expression which must be very loosely interpreted. Three kingdoms became at length predominant; those of Wessex, Mercia and Northumberland. The first rendered tributary the small states of the South-East, and the second that of the Eastern Angles. But Egbert, king of Wessex, not only incorporated with his own monarchy the dependent kingdoms of Kent and Essex, but obtained an acknowledgement of his superiority from Mercia and Northumberland; the latter of which, though the most extensive of any Anglo-Saxon state, was too much weakened by its internal divisions to offer any resistance.* Still however the kingdoms of Mercia, East Anglia, and Northumberland remained under their ancient line of sovereigns; nor did either Egbert or his five immediate successors assume the title of any other crown than Wessex.†

The destruction of those minor states was reserved for a different enemy. About the end of the

* Chronicon Saxonicum, p. 70.

† Alfred denominates himself in his will, Occidentalium Saxorum rex; and Asserius never gives him any other name. But his son Edward the Elder takes the title of rex Anglorum on his coins. vid. Numismata Anglo-Saxon. in Hicks's Thesaurus, vol. ii.

eighth century the northern pirates began to ravage the coasts of England. Scandinavia exhibited in that age a very singular condition of society. Her population, continually redundant in those barren regions which gave it birth, was cast out in search of plunder upon the ocean. Those who loved riot rather than famine embarked in large armaments under chiefs of legitimate authority, as well as approved valour. Such were the Sea-kings, renowned in the stories of the North; the younger branches commonly of royal families, who inherited, as it were, the sea for their patrimony. Without any territory but on the bosom of the waves, without any dwelling but their ships, these princely pirates were obeyed by numerous subjects, and intimidated mighty nations.* Their invasions of England became continually more formidable; and, as their confidence increased, they began first to winter, and ultimately to form permanent settlements in the country. By their command of the sea, it was easy for them to harass every part of an island presenting such an extent of coast as Britain; the Saxons, after a brave resistance, gradually gave way, and were on the brink of the same servitude or extermination which their own arms had already brought upon the ancient possessors.

From this imminent peril, after the three dependent kingdoms, Mercia, Northumberland, and East

* For these Vikingr, or Sea-kings, a new and interesting subject, I would refer to Mr. Turner's History of the Anglo-Saxons, in which valuable work almost every particular that can illustrate our early annals will be found.

Anglia, had been overwhelmed, it was the glory of Alfred to rescue the Anglo-Saxon monarchy. Nothing less than the appearance of a hero so undesponding, so enterprising, and so just, could have prevented the entire conquest of England. Yet he never subdued the Danes, nor became master of the whole kingdom. The Thames, the Lea, the Ouse, and the Roman road called Walting-street, determined the limits of Alfred's dominion.* To the north-east of this boundary were spread the invaders, still denominated the *armies* of East Anglia and Northumberland;† a name terribly expressive of foreign conquerors, who retained their warlike confederacy, without melting into the mass of their subject population. Three able and active sovereigns, Edward, Athelstan and Edmund, the successors of Alfred, pursued the course of victory, and finally rendered the English monarchy co-extensive with the present limits of England. Yet even Edgar, the most powerful of the Anglo-Saxon kings, did not venture to interfere with the legal customs of his Danish subjects.‡

Under this prince, whose rare fortune as well as judicious conduct procured him the surname of Peaceable, the kingdom appears to have reached

* Wilkins, Leges Anglo Saxon. p. 47. Chron. Saxon. p. 99.

† Chronicon Saxon. passim.

‡ Wilkins, Leges Anglo-Saxon. p. 80. In 1064, after a revolt of the Northumbrians, Edward the Confessor renewed the laws of Canute. Chronic. Saxon. It seems now to be ascertained by the comparison of dialects, that the inhabitants from the Humber, or at least the Tyne, to the Firth of Forth were chiefly Danes.

its zenith of prosperity. But his premature death changed the scene. The minority and feeble character of Ethelred II. provoked fresh incursions of our enemies beyond the German sea. A long series of disasters, and the inexplicable treason of those to whom the public safety was entrusted, overthrew the Saxon line, and established Canute of Denmark upon the throne.

The character of the Scandinavian nations was in some measure changed from what it had been during their first invasions. They had embraced the Christian faith; they were consolidated into great kingdoms; they had lost some of that predatory and ferocious spirit which a religion invented, as it seemed, for pirates had stimulated. Those too who had long been settled in England became gradually more assimilated to the natives, whose laws and language were not radically different from their own. Hence the accession of a Danish line of kings produced neither any evil, nor any sensible change of polity. But the English still outnumbered their conquerors, and eagerly returned, when an opportunity arrived, to the ancient stock. Edward the Confessor, notwithstanding his Norman favourites, was endeared by the mildness of his character to the English nation; and subsequent miseries gave a kind of posthumous credit to a reign not eminent either for good fortune or wise government.

In a stage of civilization so little advanced as that of the Anglo-Saxons, and under circumstances of such incessant peril, the fortunes of a nation chiefly

depend upon the wisdom and valour of its sovereigns. No free people, therefore, would entrust their safety to blind chance, and permit a uniform observance of hereditary succession to prevail against strong public expediency. Accordingly the Saxons, like most other European nations, while they limited the inheritance of the crown exclusively to one royal family, were not very scrupulous about its devolution upon the nearest heir. 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. Thus, not to mention those instances which the obscure times of the Heptarchy exhibit, Ethelred I., as some say, but certainly Alfred, excluded the progeny of their elder brother from the throne.† Alfred, in

* Vol. i. p. 365. Blackstone has laboured the same proposition; but his knowledge of English history was rather superficial.

† Chronicon Saxon. p. 99. Hume says, that Ethelwald, who attempted to raise an insurrection against Edward the

his testament, dilates upon his own title, which he builds upon a triple foundation, the will of his father, the compact of his brother Ethelred, and the consent of the West-Saxon nobility.* A similar objection to the government of an infant seems to have rendered Athelstan, notwithstanding his reputed illegitimacy, the public choice upon the death of Edward the Elder. Thus too the sons of Edmund I. were postponed to their uncle Edred, and, again, preferred to his issue. And happy might it have been for England if this exclusion of infants had always obtained. But upon the death of Edgar, the royal family wanted some prince of mature years to prevent the crown from resting upon the head of a child ;† and hence the minorities of Edward II. and Ethelred II. led to misfortunes which overwhelmed for a time both the house of Cerdic and the English nation.

The Anglo-Saxon monarchy, during its earlier period, seems to have suffered but little from that insubordination among the superior nobility, which ended in dismembering the empire of Charlemagne. Such kings as Alfred and Athelstan were not likely to permit it. And the English counties, each under its own alderman, were not of a size to encourage the usurpation of their governors. But when the whole

Elder, was son of Ethelbert. The Saxon Chronicle only calls him the king's cousin; which he would be as the son of Ethelred.

* Spelman, Vita Alfredi, Appendix.

† According to the historian of Ramsey, a sort of interregnum took place on Edgar's death; his son's birth not being thought sufficient to give him a clear right during infancy. 3 Gale, xv. Script. p. 413.

kingdom was subdued, there arose, unfortunately, a fashion of entrusting great provinces to the administration of a single earl. Notwithstanding their union, Mercia, Northumberland and East Anglia were regarded in some degree as distinct parts of the monarchy. A difference of laws, though probably but slight, kept up this separation. Alfred governed Mercia by the hands of a nobleman who had married his daughter Ethelfleda; and that lady, after her husband's death, held the reins with a masculine energy till her own; when her brother Edward took the province into his immediate command.* But from the era of Edward II.'s accession, the provincial governors began to overpower the royal authority, as they had done upon the continent. England under this prince was not far removed from the condition of France under Charles the Bald. In the time of Edward the Confessor, the whole kingdom seems to have been divided among five earls,† three of whom were Godwin and his sons Harold and Tostig. It cannot be wondered at, that the royal line was soon supplanted by the most powerful and popular of these leaders, a prince well worthy to have founded a new dynasty, if his eminent qualities had not yielded to those of a still more illustrious enemy.

* Chronicon Saxon.

† The word earl (eorl) meant originally a man of noble birth, as opposed to the ceorl. It was not a title of office till the eleventh century, when it was used as synonymous to alderman, for a governor of a county or province. After the conquest, it superseded altogether the ancient title. Selden's Titles of Honour, vol. iii. p. 638. (edit. Wilkins,) and Anglo-Saxon writings passim.

There were but two denominations of persons above the class of servitude, Thanes and Ceorls; the owners and the cultivators of land, or rather perhaps, as a more accurate distinction, the gentry and the inferior people. Among all the northern nations, as is well known, the weregild, or compensation for murder, was the standard measure of the gradations of society. In the Anglo-Saxon laws, we find two ranks of freeholders; the first called King's Thanes, whose lives were valued at 1200 shillings; the second of inferior degree, whose composition was half that sum.* That of a ceorl was 200 shillings. The nature of this distinction between royal and lesser thanes is very obscure; and I shall have something more to say of it presently. However the thanes in general, or Anglo-Saxon gentry, must have been very numerous. A law of Ethelred directs the sheriff to take twelve of the chief thanes in every hundred, as his assessors on the bench of justice.† And from Domesday-book we may collect that they had formed a pretty large class, at least in some counties, under Edward the Confessor.‡

The composition for the life of a ceorl was, as has

* Wilkins, p. 40. 64. 72. 101.

† Wilkins, p. 117.

‡ Domesday Book having been compiled by different sets of commissioners, their language has sometimes varied in describing the same class of persons. The *liberi homines*, of whom we find continual mention in some counties, were perhaps not different from the *thaini*, who occur in other places. But this subject is very obscure; and a clear apprehension of the classes of society mentioned in Domesday seems at present unattainable.

been said, 200 shillings. If this proportion to the value of a thane points out the subordination of ranks, it certainly does not exhibit the lower freemen in a state of complete abasement. The ceorl was not bound, as far as appears, to the land which he cultivated;* he was occasionally called upon to bear arms for the public safety;† he was protected against personal injuries, or trespass on his land;‡ he was capable of property, and of the privileges which it conferred. If he came to possess five hydes of land, (or about 600 acres,) with a church and mansion of his own, he was entitled to the name and rights of a thane.§ I am however inclined to suspect, that the ceorl were sliding more and more towards a state of servitude before the conquest.‖ The natural tendency of such times of rapine, with the analogy of a similar change in France, leads to this conjecture. And as it was part of those singular regulations which were devised for the preservation of internal peace, that every man should be enrolled in some tithing, and be dependent upon some lord, it was not very easy for the ceorl to exercise the privilege (if he possessed it) of quitting the soil upon which he lived.

* Leges Alfredi, c. 33. in Wilkins. This text is not unequivocal; and I confess that a law of Ina (c. 39.) has rather a contrary appearance.

† Leges Inæ, c. 51. ibid.

‡ Leges Alfredi, c. 31. 35.

§ Leges Athelstani, ibid. p. 70, 71.

‖ If the laws that bear the name of William are, as is generally supposed, those of his predecessor Edward, they were already annexed to the soil. p. 225.

Notwithstanding this, I doubt whether it can be proved, by any authority earlier than that of Glanvil, whose treatise was written about 1180, that the peasantry of England were reduced to that extreme debasement, which our law-books call villenage, a condition which left them no civil rights with respect to their lord. For, by the laws of William the Conqueror, there was still a composition fixed for the murder of a villein or ceorl, the strongest proof of his being, as it was called, law-worthy, and possessing a rank, however subordinate, in political society. And this composition was due to his kindred, not to the lord.* Indeed, it seems positively declared in another passage, that the cultivators, though bound to remain upon the land, were only subject to certain services.† Again, the treatise denominated the laws of Henry I., which, though not deserving that appellation, must be considered as a contemporary document, expressly mentions the twyhinder or villein as a freeman ‡ Nobody can doubt that the *villani* and *bordarii* of Domesday Book, who are always distinguished from the serfs of the demesne, were the ceorls of Anglo-Saxon law.§ And I presume that the socmen, who so frequently occur in that record, though far more in some counties than in others, were ceorls more fortunate than the rest, who by purchase had acquired freeholds, or by prescription and the indulgence of their lords had obtained such a property

* Wilkins, p. 221. † Ibid, p. 225.
‡ Leges Henr. I. c. 70. and 76. in Wilkins.
§ Somner on Gavelkind, p. 74.

in the outlands allotted to them, that they could not be removed, and in many instances might dispose of them at pleasure. They are the root of a noble plant, the free socage tenants, or English yeomanry, whose independence has stamped with peculiar features both our constitution and our national character.

Beneath the ceorls in political estimation were the conquered natives of Britain. In a war so long and so obstinately maintained as that of the Britons against their invaders, it is natural to conclude, that in a great part of the country the original inhabitants were pretty much extirpated, and that the remainder were reduced into servitude. This, till lately, has been the concurrent opinion of our antiquaries; and with some qualification, I do not see why it should not still be received. In every kingdom of the continent, which was formed by the northern nations out of the Roman empire, the Latin language preserved its superiority, and has much more been corrupted through ignorance and want of a standard, than intermingled with their original idiom. But our own language is, and has been from the earliest times after the Saxon conquest, essentially Teutonic, and of the most obvious affinity to those dialects which are spoken in the aboriginal countries of our forefathers. With such as are extravagant enough to controvert so evident a truth, it is idle to contend; and those who believe great part of our language to be borrowed from the Welsh may doubtless infer that great part of our population is derived from the same source. If we look through the subsisting Anglo-

Saxon records, there is not very frequent mention of British subjects. But some undoubtedly there were in a state of freedom, and possessed of landed estate. A Welshman, (that is, a Briton,) who held five hydes, was raised, like a ceorl, to the dignity of thane.* In the composition, however, for their lives, and consequently in their rank in society, they were inferior to the meanest Saxon freeman. The slaves, who were frequently the objects of legislation, rather for the purpose of ascertaining their punishments, than of securing their rights, may be presumed, at least in early times, to have been part of the conquered Britons. For though his own crimes, or the tyranny of others, might possibly reduce a Saxon ceorl to this condition,† it is inconceivable 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.

The great council by which an Anglo-Saxon king was guided in all the main acts of government bore the appellation of Wittenagemot, or the assembly of the wise men. All their laws express the assent of this council; and there are instances, where grants made without its concurrence have been revoked. It was composed of prelates and, abbots, of the aldermen of shires, and, as it is generally expressed, of the noble and wise men of the kingdom.‡ Whether the lesser thanes, or inferior proprietors of land,

* Leges Inæ, p. 18. Leg. Athelst. p. 71.
† Leges Inæ, c. 24.
‡ Leges Anglo-Saxon. in Wilkins, passim.

were entitled to a place in the national council, as they certainly were in the shire-gemot, or county-court, is not easily to be decided. Many writers have concluded, from a passage in the History of Ely, that no one, however nobly born, could sit in the wittenagemot, so late at least as the reign of Edward the Confessor, unless he possessed forty hydes of land, or about five thousand acres.* But the passage in question does not unequivocally relate to the wittenagemot; and being vaguely worded by an ignorant monk, who perhaps had never gone beyond his fens, ought not to be assumed as an incontrovertible testimony. Certainly so very high a qualification cannot be supposed to have been requisite in the kingdoms of the Heptarchy; nor do we find any collateral evidence to confirm the hypothesis. If, however, all the body of thanes or freeholders were admissible to the wittenagemot, it is unlikely that the privilege should have been fully exercised. No one, I believe, at present imagines that there was any representative system in that age; much less that the ceorls or inferior freemen had the smallest share in the deliberations of the national assembly. Every argument, which a spirit of controversy once pressed into this service, has long since been victoriously refuted.

It has been justly remarked by Hume, that among a people who lived in so simple a manner as the

* Quoniam ille quadraginta hydarum terræ dominium minimè obtineret, licet nobilis esset, inter proceres tunc numerari non potuit. 3 Gale Scriptores, p. 513.

Anglo-Saxons, the judicial power is always of more consequence than the legislative. The liberties of these Anglo-Saxon thanes were chiefly secured, next to their swords and their free spirits, by the inestimable right of deciding civil and criminal suits in their own county-court; an institution which having survived the Conquest, and contributed in no small degree to fix the liberties of England upon a broad and popular basis, by limiting the feudal aristocracy, deserves attention in following the history of the British constitution.

The division of the kingdom into counties, and of these into hundreds and decennaries, for the purpose of administering justice, was not peculiar to England. In the early laws of France and Lombardy, frequent mention is made of the hundred-court, and now and then of those petty village-magistrates, who in England were called tithing-men. It has been usual to ascribe the establishment of this system among our Saxon ancestors to Alfred, upon the authority of Ingulfus, a writer contemporary with the Conquest. But neither the biographer of Alfred, Asserius, nor the existing laws of that prince bear testimony to the fact. With respect indeed to the division of counties, and their government by aldermen and sheriffs, it is certain that both existed long before his time;* and the utmost that can be supposed, is that he might in some instances have ascertained an unsettled boundary. There does not seem to be

* Counties, as well as the alderman who presided over them, are mentioned in the laws of Ina, c. 36.

equal evidence as to the antiquity of the minor divisions. Hundreds, I think, are first mentioned in a law of Edgar, and tithings in one of Canute.* But as Alfred, it must be remembered, was never master of more than half the kingdom, the complete distribution of England into these districts cannot, upon any supposition, be referred to him.

There is, indeed, a circumstance observable in this division which seems to indicate that it could not have taken place at one time, nor upon one system: I mean the extreme inequality of hundreds in different parts of England. Whether the name be conceived to refer to the number of free families, or of land-holders, or of petty vills, forming so many associations of mutual assurance or frank-pledge, one can hardly doubt that, when the term was first applied, a hundred of one or other of these were comprised, at an average reckoning, within the district. But it is impossible to reconcile the varying size of hundreds to any single hypothesis. The county of Sussex contains sixty-five; that of Dorset forty-three; while Yorkshire has only twenty-six; and Lancashire but six. No difference of population, though the south of England was undoubtedly far the best peopled, can be conceived to account for so prodigious a disparity. I know of no better solution, than that the divisions of the north, properly called wapentakes,† were planned upon a different system,

* Wilkins, p. 87. 136. The former, however, refers to them as an ancient institution: quæratur centuriæ conventus, sicut antea institutum erat.

† Leges Edwardii Confess. c. 33.

and obtained the denomination of hundreds incorrectly, after the union of all England under a single sovereign.

Assuming, therefore, the name and partition of hundreds to have originated in the southern counties, it will rather, I think, appear probable, that they contained only an hundred free families, including the ceorls as well as their landlords. If we suppose none but the latter to have been numbered, we should find six thousand thanes in Kent, and six thousand five hundred in Sussex; a reckoning totally inconsistent with any probable estimate.* But though we have little direct testimony as to the population of those times, there is one passage which falls in very sufficiently with the former supposition. Bede says, that the kingdom of the South Saxons, comprehending Surrey as well as Sussex, contained seven thousand families. The county of Sussex alone is divided into sixty-five hundreds, which comes at least close enough to prove, that free families, rather than proprietors, were the subjects of that numeration. And this is the interpretation of Du Cange and Muratori, as to the Centenæ and Decaniæ of their own ancient laws.

I cannot but feel some doubt, notwithstanding a passage in the laws ascribed to Edward the Confessor,† whether the tithing-man ever possessed any judicial magistracy over his small district. He was,

* It would be easy to mention particular hundreds in these counties, so small as to render this supposition quite ridiculous.

† p. 103. Nothing, as far as I know, confirms this passage, which hardly tallies with what the genuine Anglo-Saxon documents contain as to the judicial arrangements of that period.

more probably, little different from a petty constable, as is now the case, I believe, wherever that denomination of office is preserved. The court of the hundred, not held, as on the continent, by its own centenarius, but by the sheriff of the county, is frequently mentioned in the later Anglo-Saxon laws. It was, however, to the county-court that an English freeman chiefly looked for the maintenance of his civil rights. In this assembly, held monthly, or at least more than once in the year, (for there seems some ambiguity or perhaps fluctuation as to this point,) by the bishop and the earl, or in his absence, the sheriff, the oath of allegiance was administered to all freemen, breaches of the peace were inquired into, crimes were investigated, and claims were determined. I assign all these functions to the county-court, upon the supposition that no other subsisted during the Saxon times, and that the separation of the sheriff's tourn for criminal jurisdiction had not yet taken place, which, however, I cannot pretend to determine.*

A very ancient Saxon instrument, recording a suit in the county-court under the reign of Canute, has been published by Hickes, and may be deemed worthy of a literal translation in this place. "It is made known by this writing, that in the shire-gemot (county-court) held at Agelnothes-stane, (Aylston in Herefordshire,) in the reign of Canute, there sat Athelstan the bishop, and Ranig the alderman, and Edwin his

* This point is obscure; but I do not perceive that the Anglo-Saxon laws distinguish the civil from the criminal tribunal.

son, and Leofwin Wulfig's son; and Thurkil the White and Tofig came there on the king's business; and there were Bryning the sheriff, and Athelweard of Frome, and Leofwin of Frome, and Goodric of Stoke, and all the thanes of Herefordshire. Then came to the mote Edwin son of Enneawne, and sued his mother for some lands, called Weolintun and Cyrdeslea. Then the bishop asked, who would answer for his mother. Then answered Thurkil the White, and said that he would, if he knew the facts, which he did not. Then were seen in the mote three thanes, that belong to the Feligly, (Fawley, five miles from Aylston,) Leofwin of Frome, Ægelwig the Red, and Thinsig Stægthman; and they went to her, and inquired what she had to say about the lands which her son claimed. She said that she had no land which belonged to him, and fell into a noble passion against her son, and calling for Leofleda her kinswoman, the wife of Thurkil, thus spake to her before them: 'This is Leofleda my kinswoman, to whom I give my lands, money, clothes, and whatever I possess after my life:' and this said, she thus spake to the thanes; 'Behave like thanes, and declare my message to all the good men in the mote, and tell them to whom I have given my lands, and all my possessions, and nothing to my son;' and bade them be witnesses to this. And thus they did, rode to the mote, and told all the good men what she had enjoined them. Then Thurkil the White addressed the mote, and requested all the thanes to let his wife have the lands, which her kinswoman had

given her; and thus they did, and Thurkil rode to the church of St. Ethelbert with the leave and witness of all the people, and had this inserted in a book in the church."*

It may be presumed from the appeal made to the thanes present at the county-court, and is confirmed by other ancient authorities,† that all of them, and they alone, to the exclusion of inferior freemen, were the judges of civil controversies. The latter indeed were called upon to attend its meetings, or, in the language of our present law, were suitors to the court, and it was penal to be absent. But this was on account of other duties, the oath of allegiance which they were to take, or the frank-pledges into which they were to enter, not in order to exercise any judicial power; unless we conceive, that the disputes of the ceorls were decided by judges of their own rank. It is more important to remark the crude state of legal process and inquiry, which this instrument denotes. Without any regular method of instituting or conducting causes, the county-court seems to have

* Hickes, Dissertatio Epistolaris, p. 4. in Thesaurus Antiquititatum Septentrion. vol. iii. Before the conquest, says Gurdon, (on Courts-Baron, p. 589.) grants were enrolled in the shire-book in public shire mote, after proclamation made for any to come in that could claim the lands conveyed; and this was as irreversible as the modern fine with proclamations, or recovery. This may be so; but the county-court has at least long ceased to be a court of record; and one would ask for proof of the assertion. The book kept in the church of St. Ethelbert, wherein Thurkil is said to have inserted the proceedings of the county-court, may, or may not have been a public record.

† Id. p. 3. Leges Henr. Primi, c. 29.

had nothing to recommend it but, what indeed is no trifling matter, its security from corruption and tyranny; and in the practical jurisprudence of our Saxon ancestors, even at the beginning of the eleventh century, we perceive no advance of civility and skill from the state of their own savage progenitors on the banks of the Elbe. No appeal could be made to the royal tribunal, unless justice was denied in the county-court.* This was the great constitutional judicature in all questions of civil right. In another instrument, published by Hickes, of the age of Ethelred II., the tenant of lands which were claimed in the king's court, refused to submit to the decree of that tribunal, without a regular trial in the county; which was accordingly granted.† There were, however, royal judges who either by way of appeal from the lower courts, or in excepted cases, formed a paramount judicature; but how their court was composed under the Anglo-Saxon sovereigns, I do not pretend to assert.‡

* Leges Eadgari, p. 77.; Canuti, p. 136.; Henrici Primi, c. 34. I quote the latter freely as Anglo-Saxon, though long posterior to the conquest; their spirit being perfectly of the former period.

† Dissertatio Epistolaris, p. 5.

‡ Madox, History of the Exchequer, p. 65. will not admit the existence of any court analogous to the Curia Regis before the conquest; all pleas being determined in the county. There are however several instances of decisions before the king; and in some cases, it seems that the wittenagemot had a judicial authority. Leges Canuti, p. 135, 136. Hist. Eliensis, p. 469. Chron. Sax. p. 169. In the Leges Henr. I. c. 10. the limits of the royal and local jurisdictions are defined, as to criminal matters, and seem to have been little changed since the reign of Canute. p. 135.

It has been a prevailing opinion, that trial by jury may be referred to the Anglo-Saxon age, and common tradition has ascribed it to the wisdom of Alfred. In such an historical deduction of the English government as I have attempted, an institution so peculiarly characteristic deserves every attention to its origin; and I shall therefore produce the evidence, which has been supposed to bear upon this most eminent part of our judicial system. The first text of the Saxon laws which may appear to have such a meaning is in those of Alfred. "If any one accuse a king's thane of homicide, if he dare to purge himself (ladian), let him do it along with twelve king's thanes. If any one accuse a thane of less rank (læssa maga) than a king's thane, let him purge himself along with eleven of his equals, and one king's thane."* This law, which, Nicholson contends, can mean nothing but trial by jury, has been referred by Hickes to that ancient usage of compurgation, where the accused sustained his own oath by those of a number of his friends, who pledged their knowledge, or at least their belief of his innocence.†

In the canons of the Northumbrian clergy, we read as follows: "If a king's thane deny this, (the practice of heathen superstitions,) let twelve be appointed for him, and let him take twelve of his kindred, (or equals, *maga*,) and twelve British strangers; and if he fail, then let him pay for his breach

* Leges Alfredi, p. 47.

† Nicholson, Præfatio ad Leges Anglo-Saxon. Wilkinsii, p. 10. Hickes, Dissertatio Epistolaris.

of law twelve half-marcs: If a land-holder (or lesser thane) deny the charge, let as many of his equals, and as many strangers be taken as for a royal thane; and if he fail, let him pay six half-marcs: If a ceorl deny it, let as many of his equals, and as many strangers be taken for him as for the others; and if he fail, let him pay twelve oræ for his breach of law."* It is difficult at first sight to imagine, that these thirty-six so selected were merely compurgators, since it seems absurd that the judge should name indifferent persons, who with inquiry were to make oath of a party's innocence. Some have therefore conceived, that in this, and other instances where compurgators are mentioned, they were virtually jurors, who, before attesting the facts, were to inform their consciences by investigating them. There are however passages in the Saxon laws nearly parallel to that just quoted, which seem imcompatible with this interpretation. Thus, by a law of Athelstan, if any one claimed a strayed ox as his own, five of his neighbours were to be assigned, of whom one was to maintain the claimant's oath.† Perhaps the principle of these regulations, and indeed of the whole law of compurgation, is to be found in that stress laid upon general character, which pervades the Anglo-Saxon jurisprudence. A man of ill-reputation was compelled to undergo a triple ordeal, in cases where a single one sufficed for persons of credit; a provision rather inconsistent with the trust in a miraculous providence which was the basis of that superstition.

* Wilkins, p. 100. † Leges Athelstani, p. 58.

And the law of frank-pledge proceeded upon the maxim that the best guarantee of every man's obedience to the government was to be sought in the confidence of his neighbours. Hence, while some compurgators were to be chosen by the sheriff, to avoid partiality and collusion, it was still intended, that they should be residents of the vicinage, witnesses of the defendant's previous life, and competent to estimate the probability of his exculpatory oath. For the British strangers, in the canon quoted above, were certainly the original natives, more intermingled with their conquerors, probably, in the provinces north of the Humber than elsewhere, and still denominated strangers, as the distinction of races was not done away.

If in this instance we do not feel ourselves warranted to infer the existence of trial by jury, still less shall we find even an analogy to it in an article of the treaty between England and Wales, during the reign of Ethelred II. "Twelve persons skilled in the law (lahmen,) six English and six Welsh, shall instruct the natives of each country, on pain of forfeiting their possessions, if, except through ignorance, they give false information."* This is obviously but a regulation intended to settle disputes among the Welsh and English, to which their ignorance of each other's customs might give rise.

By a law of the same prince, a court was to be held in every wapentake, where the sheriff and twelve principal thanes should swear that they would nei-

* Leges Ethelredi, p. 125.

ther acquit any criminal nor convict any innocent person.* It seems more probable, that these thanes were permanent assessors to the sheriff, like the scabini so frequently mentioned in the early laws of France and Italy, than jurors indiscriminately selected. This passage, however, is stronger than those which have been already adduced; and it may be thought, perhaps, with justice, that at least the seeds of our present form of trial are discoverable in it. In the History of Ely, we twice read of pleas held before twenty-four judges in the court at Cambridge; which seems to have been formed out of several neighbouring hundreds. †

But the nearest approach to a regular jury, which has been preserved in our scanty memorials of the Anglo-Saxon age, occurs in the History of the monastery of Ramsey. A controversy relating to lands between that society and a certain nobleman was brought into the county-court; when each party was heard in his own behalf. After this commencement, on account probably of the length and difficulty of the investigation, it was referred by the court to thirty-six thanes, equally chosen by both sides.‡ And here we begin to perceive the manner, in which those tumultuous assemblies, the mixed body of freeholders in their county-court, slid gradually into a more steady and more diligent tribunal. But this was not the work of a single age. In the Conqueror's reign,

* p 117.
† Hist. Eliensis, in Gale's Scriptores, t. iii. p. 471. and 476.
‡ Hist. Ramsey. id. p. 415.

we find a proceeding very similar to the case of Ramsey, in which the suit had been commenced in the county-court, before it was found expedient to remit it to a select body of freeholders. In the reign of William Rufus, and down to that of Henry II. when the trial of writs of right by the grand assize was introduced, Hickes has discovered other instances of the original usage.* The language of Domesday book lends some confirmation to its existence at the time of that survey; and even our common legal expression of trial by the country seems to be derived from a period when the form was literally popular.

In comparing the various passages which I have quoted, it is impossible not to be struck with the preference given to twelve, or some multiple of it, in fixing the number either of judges or compurgators. This was not peculiar to England. Spelman has produced several instances of it in the early German laws. And that number seems to have been regarded with equal veneration in Scandinavia.† It is very immaterial from what caprice or superstition this predilection arose. But its general prevalence shows that, in searching for the origin of trial by jury, we cannot rely for a moment upon any analogy which the mere number affords. I am induced to make this observation, because some of the passages which have been alleged by eminent men for the purpose of establishing the existence of that institution

* Hickesii Dissertatio Epistolaris, p. 33. 36.

† Spelman's Glossary, voc. Jurata. Du Cange, voc. Nembda.

before the conquest, seem to have little else to support them.

There is certainly no part of the Anglo-Saxon polity which has attracted so much the notice of modern times as the law of frank-pledge, or mutual responsibility of the members of a tithing for each other's abiding the course of justice. This, like the distribution of hundreds and tithings themselves, and like trial by jury, has been generally attributed to Alfred; and of this, I suspect, we must also deprive him. It is not surprising, that the great services of Alfred to his people in peace and in war should have led posterity to ascribe every institution, of which the beginning was obscure, to his contrivance, till his fame has become almost as fabulous in legislation as that of Arthur in arms. The English nation redeemed from servitude, and their name from extinction; the lamp of learning refreshed, when scarce a glimmer was visible; the watchful observance of justice and public order; these are the genuine praises of Alfred, and entitle him to the rank he has always held in men's esteem, as the best and greatest of English kings. But of his legislation there is little that can be asserted with sufficient evidence; the laws of his time that remain are neither numerous nor particularly interesting; and a loose report of late writers is not sufficient to prove that he compiled a dom-boc, or general code for the government of his kingdom.

An ingenious and philosophical writer has endeavoured to found the law of frank-pledge upon one of

those general principles to which he always loves to recur. "If we look upon a tithing," he says, "as regularly composed of ten families, this branch of its police will appear in the highest degree artificial and singular; but if we consider that society as of the same extent with a town or village, we shall find that such a regulation is conformable to the general usage of barbarous nations, and is founded upon their common notions of justice."* A variety of instances are then brought forward, drawn from the customs of almost every part of the world, wherein the inhabitants of a district have been made answerable for crimes and injuries imputed to one of them. But none of these fully resemble the Saxon institution of which we are treating. They relate either to the right of reprisals, exercised with respect to the subjects of foreign countries, or to the indemnification exacted from the district, as in our modern statutes which give an action in certain cases of felony against the hundred, for crimes which its internal police was supposed capable of preventing. In the Irish custom, indeed, which bound the head of a sept to bring forward every one of his kindred who should be charged with any heinous crime, we certainly perceive a strong analogy to the Saxon law, not as it latterly subsisted, but under one of its prior modifications. For I think that something of a gradual progression may be traced in the history of this famous police, by following the indications afforded by those laws through which alone we become acquainted with its existence.

* Millar on the English government, vol. i. p. 189.

The Saxons brought with them from their original forests at least as much roughness as any of the nations which overturned the Roman empire; and their long struggle with the Britons could not contribute to polish their manners. The royal authority was weak; and little had been learned of that regular system of government, which the Franks and Lombards acquired from the provincial Romans, among whom they were mingled. No people were so much addicted to robbery, to riotous frays, and to feuds arising out of family revenge, as the Anglo-Saxons. Their statutes are filled with complaints that the public peace was openly violated, and with penalties which seem, by their repetition, to have been disregarded. The vengeance taken by the kindred of a murdered man was a sacred right, which no law ventured to forbid, though it was limited by those which established a composition, and by those which protected the family of the murderer from their resentment. Even the author of the laws ascribed to the Confessor speaks of this family warfare, where the composition had not been paid, as perfectly lawful.* But the law of composition tended probably to increase the number of crimes. Though the sums imposed were sometimes heavy, men paid them with the help of their relations, or entered into voluntary associations, the purposes whereof might often be lau-

* Parentibus occisi fiat emendatio, vel guerra eorum portetur. Wilkins, p. 199. This, like many other parts of that spurious treatise, appears to have been taken from some older laws, or at least traditions. I do not conceive that this private revenge was tolerated by law after the conquest.

dable, but which were certainly susceptible of this kind of abuse. And many led a life of rapine, forming large parties of ruffians, who committed murder and robbery with little dread of punishment.

Against this disorderly condition of society, the wisdom of our English kings, with the assistance of their great councils, was employed in devising remedies, which ultimately grew up into a peculiar system. No man could leave the shire to which he belonged without the permission of its alderman.* No man could be without a lord on whom he depended; though he might quit his present patron, it was under the condition of engaging himself to another. If he failed in this, his kindred were bound to present him in the county-court, and to name a lord for him themselves. Unless this were done, he might be seized by any one who met him as a robber.† Hence, notwithstanding the personal liberty of the peasants, it was not very practicable for one of them to quit his place of residence. A stranger guest could not be received more than two nights as such; on the third the host became responsible for his inmate's conduct.‡

The peculiar system of frank-pledges seems to have passed through the following very gradual stages. At first an accused person was obliged to find bail for standing his trial.§ At a subsequent period, his relations were called upon to become

* Leges Alfredi, c. 33.
† Leges Athelstani, p. 56.
‡ Leges Edwardi Confess. p. 202.
§ Leges Lotharii [regis Cantii], p. 8.

sureties for payment of the composition and other fines to which he was liable.* They were even subject to be imprisoned until payment was made; and this imprisonment was commutable for a certain sum of money. The next stage was to make persons already convicted, or of suspicious repute, give sureties for their future behaviour.† It is not till the reign of Edgar that we find the first general law, which places every man in the condition of the guilty or suspected, and compels him to find a surety, who shall be responsible for his appearance when judicially summoned.‡ This is perpetually repeated and enforced in later statutes, during his reign and that of Ethelred. Finally, the laws of Canute declare the necessity of belonging to some hundred and tithing, as well as of providing sureties;§ and it may, perhaps, be inferred, that the custom of rendering every member of a tithing answerable for the appearance of all the rest, as it existed after the conquest, is as old as the reign of this Danish monarch.

It is by no means an accurate notion which the writer to whom I have already adverted has conceived, that "the members of every tithing were responsible for the conduct of one another; and that the society, or their leader, might be prosecuted and compelled to make reparation for an injury committed by any individual." Upon this false apprehension of the nature of frank-pledges the whole of his analogi-

* Leges Edwardi Senioris, p. 53.
† Leges Athelstani, p. 57. c. 6, 7, 8.
‡ Leges Eadgardi, p. 78. § Leges Canuti, p. 137.

cal reasoning is founded. It is indeed an errour very current in popular treatises, and which might plead the authority of some whose professional learning should have saved them from so obvious a misstatement. But in fact the members of a tithing were no more than perpetual bail for each other. "The greatest security of the public order (say the laws ascribed to the Confessor) is that every man must bind himself to one of those societies which the English in general call freeborgs, and the people of Yorkshire ten men's tale."* This consisted in the responsibility of ten men, each for the other, throughout every village in the kingdom; so that if one of the ten committed any fault, the nine should produce him in justice; where he should make reparation by his own property or by personal punishment. If he fled from justice, a mode was provided, according to which the tithing might clear themselves from participation in his crime or escape; in default of such exculpation, and the malefactor's estate proving deficient, they were compelled to make good the penalty. And it is equally manifest from every other passage in which mention is made of this ancient institution, that the obligation of the tithing was merely that of permanent bail, responsible only indirectly for the good behaviour of their members.

Every freeman, above the age of twelve years, was required to be enrolled in some tithing.† In order to enforce this essential part of police, the courts

* Leges Edwardi in Wilkins, p. 201.

† Leges Canuti, p. 136.

of the tourn and leet were erected, or rather perhaps separated from that of the county. The periodical meetings of these, whose duty it was to inquire into the state of tithings, whence they were called the view of frank-pledge, are regulated in Magna Charta. But this custom, which seems to have been in full vigour when Bracton wrote, and is enforced by a statute of Edward II., gradually died away in succeeding times.* According to the laws ascribed to the Confessor, which are perhaps of insufficient authority to fix the existence of any usage before the conquest, lords, who possessed a baronial jurisdiction, were permitted to keep their military tenants and the servants of their household under their own peculiar frank-pledge.† Nor was any freeholder, in the age of Bracton, bound to be enrolled in a tithing.

It remains only, before we conclude this sketch of the Anglo-Saxon system, to consider the once famous question respecting the establishment of feudal tenures in England before the conquest. The position asserted by Sir Henry Spelman in his Glossary, that lands were not held feudally before that period, having been denied by the Irish judges in the great case of tenures, he was compelled to draw up his treatise

* Stat. 18 E. II. Traces of the actual view of frank-pledge appear in Cornwall as late as the 10th of Henry VI. Rot. Parl. vol. iv. p. 403. And indeed Selden tells us, (Janus Anglorum, t. ii. p. 993.) that it was not quite obsolete in his time. The form may, for aught I know, be kept up in some parts of England at this day. For some reason which I cannot explain, the distribution by tens was changed into one by dozens. Britton, c. 29. and Stat. 18 E. II.

† p. 202.

on Feuds, in which it is more fully maintained. Several other writers, especially Hickes, Madox, and Sir Martin Wright, have taken the same side. But names equally respectable might be thrown into the opposite scale: and I think the prevailing bias of modern antiquaries is in favour of at least a modified affirmative as to this question.

Lands are commonly supposed to have been divided, among the Anglo-Saxons, into bocland and folkland. The former was held in full propriety, and might be conveyed by boc or written grant: the latter was occupied by the common people, yielding rent or other service, and perhaps without any estate in the land, but at the pleasure of the owner. These two species of tenure might be compared to freehold and copyhold, if the latter had retained its original dependence upon the will of the lord.* Bocland was devisable by will; it was equally shared among the children; it was capable of being entailed by the person under whose grant it was originally taken; and in case of a treacherous or cowardly desertion from the army, it was forfeited to the crown.†

* This supposition may plead the great authorities of Somner and Lye, the Anglo-Saxon lexicographers, and appears to me far more probable than the theory of Sir John Dalrymple, in his Essay on Feudal property, or that of the author of a discourse on the Bocland and Folkland of the Saxons, 1775, whose name, I think, was Ibbetson. The first of these supposes bocland to have been feudal, and folkland alodial; the second most strangely takes folkland for feudal. I cannot satisfy myself whether thainland and reveland, which occur sometimes in Domesday book, merely correspond with the other two denominations.

† Wilkins, p. 43. 145. The latter law is copied from one of Charlemagne's Capitularies. Baluze, p. 767.

It is an improbable, and even an extravagant supposition, that all these hereditary estates of the Anglo-Saxon freeholders were originally parcels of the royal demesne, and consequently that the king was once the sole proprietor in his kingdom. Whatever partitions were made upon the conquest of a British province, we may be sure that the shares of the army were coeval with those of the general. The great mass of Saxon property could not have been held by actual beneficiary grants from the crown. However, the royal demesnes were undoubtedly very extensive. They continued to be so, even in the time of the Confessor, after the donations of his predecessors. And several instruments granting lands to individuals, besides those in favour of the church, are extant. These are generally couched in that style of full and unconditional conveyance, which is observable in all such charters of the same age upon the continent. Some exceptions, however, occur; the lands bequeathed by Alfred to certain of his nobles were to return to his family in default of male heirs; and Hickes is of opinion that the royal consent which seems to have been required for the testamentary disposition of some estates, was necessary on account of their beneficiary tenure.*

All the freehold lands of England, except some of those belonging to the church, were subject to three great public burthens; military service in the king's expeditions, or at least in defensive war,† the repair

* Dissertatio Epistolaris, p. 60.

† This duty is by some expressed rata expeditio; by others,

of bridges, and that of royal fortresses. These obligations, and especially the first, have been sometimes thought to denote a feudal tenure. There is, however, a confusion into which we may fall by not sufficiently discriminating the rights of a king as chief lord of his vassals, and as sovereign of his subjects. In every country, the supreme power is entitled to use the arm of each citizen in the public defence. The usage of all nations agree with common reason in establishing this great principle. There is nothing therefore peculiarly feudal in this military service of land-holders; it was due from the alodial proprietors upon the continent, it was derived from their German ancestors, it had been fixed, probably, by the legislatures of the heptarchy upon the first settlement in Britain.

It is material however to observe, that a thane forfeited his hereditary freehold by misconduct in battle; a penalty more severe than was inflicted upon alodial proprietors on the continent. We even find in the earliest Saxon laws, that the sithcundman, who seems to have corresponded to the inferior thane of later times, forfeited his land by neglect of attendance in war; for which an alodialist in France would only have paid his heribannum, or penalty.* Nevertheless, as the policy of different states may enforce

hostis propulsio, which seems to make no small difference. But, unfortunately, most of the military service which an Anglo-Saxon freeholder had to render was of the latter kind.

* Leges Inæ, p. 23. Du Cange, voc. Heribannum. By the laws of Canute, p. 135. a fine only was imposed for this offence.

the duties of subjects by more or less severe sanctions, I do not know that a law of forfeiture in such cases is to be considered as positively implying a feudal tenure.

But a much stronger presumption is afforded by passages that indicate a mutual relation of lord and vassal among the free proprietors. The most powerful subjects have not a natural right to the service of other freemen. But in the laws enacted during the Heptarchy, we have a hint or two that the sithcundman, or petty gentleman, might be dependent on a superior lord.* This is more distinctly expressed in some ecclesiastical canons, apparently of the tenth century, which distinguish the king's thane from the landholder, who depended upon a lord.† Other proofs of this might be brought from the Anglo-Saxon laws.‡ 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, as I have mentioned more fully in another place, and bore the name of commendation. And no nation was so rigorous as the English in compelling every man, from the king's thane to the ceorl, to place himself under a lawful superior. Hence the question is not to be hastily decided on the credit of a few passages that express this gradation of dependence; feudal vassalage, the object of our inquiry, being of a *real*, not a *personal* nature, and resulting

* p. 10. 23.
† Wilkins, p. 101.
‡ p. 71. 144, 145.

entirely from the tenure of particular lands. But it is not unlikely, that the personal relation of client, if I may use that word, might in a multitude of cases be changed into that of vassal. And certainly many of the motives which operated in France to produce a general commutation of alodial into feudal tenure, might have a singular influence in England, where the disorderly condition of society made it the interest of every man to obtain the protection of some potent lord.

The word thane corresponds in its derivation to vassal; and the latter term is used by Asserius, the contemporary biographer of Alfred, in speaking of the nobles of that prince.* In their attendance, too, upon the royal court, and the fidelity which was expected from them, the king's thanes seem exactly to have resembled that class of followers, who, under different appellations, were the guards as well as courtiers of the Frank and Lombard sovereigns. But I have remarked that the word thane is not applied to the whole body of gentry in the more ancient laws, where the word *eorl* is opposed to the *ceorl* or roturier, and that of *sithcundman*† to the

* Alfredus cum paucis suis nobilibus, et etiam cum quibusdam militibus et Vassallis. p. 166. Nobiles Vassalli Sumertuensis pagi. p. 167. Yet Hickes objects to the authenticity of a charter ascribed to Edgar, because it contains the word Vassallus, 'quam à Nortmannis Angli habuerunt.' Dissertatio Epistol. p. 7.

† Wilkins, p. 3. 7. 23, &c. This is an obscure word, occurring only, I believe, during the Heptarchy. Wilkins translates it, præpositas paganus, which gives a wrong idea. But *gesith*, which is plainly the same word, is used in Alfred's translation of Bede for a gentleman or nobleman. Where

royal thane. It would be too much to infer from the extension of this latter word to a large class of persons, that we should interpret it with a close attention to etymology, a very uncertain guide in almost all investigations.

For the age immediately preceding the Norman invasion, we cannot have recourse to a better authority than Domesday Book. That incomparable record contains the names of every tenant, and the conditions of his tenure, under the Confessor, as well as at the time of its compilation; and seems to give little countenance to the notion, that a radical change in the system of our laws had been effected during the interval. In almost every page we meet with tenants either of the crown, or of other lords, denominated thanes, freeholders (liberi homines,) or socagers (socmanni.) Some of these, it is stated, might sell their lands to whom they pleased; others were restricted from alienation. Some, as it is expressed, might go with their lands whither they would; by which I understand the right of commending themselves to any patron at their choice. These of course could not be feudal tenants in any proper notion of that term. Others could not depart from the lord whom they served; not certainly, that they were personally bound to the soil, but that so long as they retained it, the seigniority of the superior could not be defeated.* But I am not aware that military ser-

Bede uses comes, the Saxon is always gesith or gesithman; wh re princeps or dux occurs, the version is ealdorman. Selden's Titles of Honour, p. 643.

* It sometimes weakens a proposition, which is capable of

vice is specified in any instance to be due from one of these tenants; though it is difficult to speak as to a negative proposition of this kind with any confidence.

No direct evidence appears as to the ceremony of homage or the oath of fealty before the conquest. The feudal exaction of aid in certain prescribed cases seems to have been unknown. Still less could those of wardship and marriage prevail, which were no parts of the great feudal system, but introduced, and perhaps invented, by our rapacious Norman tyrants. The English lawyers, through an imperfect acquaintance with the history of feuds upon the continent, have treated these unjust innovations as if they had formed essential parts of the system, and sprung naturally from the relation between lord and vassal. And, with reference to the present question, Sir Henry Spelman has certainly laid too much stress upon them in concluding that feudal tenures did not exist among the Anglo-Saxons, because their lands

innumerable proofs, to select a very few at random: yet the following casual specimens will illustrate the common language of Domseday Book.

Hæc tria maneria tenuit Ulveva tempore regis Edwardi, et potuit ire cum terrâ quò volebat. p. 85.

Toti emit eam T. R. E. (temp. regis Edwardi) de ecclesiâ Malmsburiensi ad ætatem trium hominum; et infra hunc terminum poterat ire cum eâ ad quem vellet dominum. p. 72.

Tres Angli tenuerunt Darneford T. R. E. et non poterant ab ecclesiâ separari. Duo ex iis reddebant v solidos, et tertius serviebat sicut Thainus. p. 68.

Has terras qui tenuerunt T. R. E. quò voluerunt ire potuerunt, præter unum Seric vocatum, qui in Ragendal tenuit iii carucatas terræ; sed non poterat cum eâ alicubi recedere. p. 235.

were not in ward, nor their persons sold in marriage. But I cannot equally concur with this eminent person in denying the existence of reliefs during the same period. If the heriot, which is first mentioned in the time of Edgar,* (though it may probably have been an established custom long before,) were not identical with the relief, it bore at least a very strong analogy to it. A charter of Ethelred's interprets one word by the other.† In the laws of William, which re-enact those of Canute concerning heriots, the term relief is employed as synonymous.‡ Though the heriot was in latter times paid in chattels, the relief in money, it is equally true, that originally the law fixed a sum of money in certain cases for the heriot, and a chattel for the relief. And the most plausible distinction alleged by Spelman, that the heriot is by law due from the personal estate, but the relief from the heir, seems hardly applicable to that remote age, when the law of succession as to real and personal estate was not different.

It has been shown, in another place, how the right of territorial jurisdiction was generally, and at last inseparately, connected with feudal tenure. Of this right we meet frequent instances in the laws and records of the Anglo-Saxons, though not in those of an early date. A charter of Edred grants to the monastery of Croyland soc, sac, toll, team and infangthef; words which generally went together in

* Selden's Works, vol. ii. p. 1620.
† Hist. Ramseyens. p. 430.
‡ Leges Canuti, p. 144. Leges Gulielmi. p. 223.

the description of these privileges, and signify, the right of holding a court to which all freemen of the territory should repair, and of deciding pleas therein, as well as of imposing amercements according to law; of taxing tolls upon the sale of goods; and of punishing capitally a thief taken in the fact within the limits of the manor.* Another charter from the Confessor grants to the abbey of Ramsey similar rights over all who were suitors to the sheriff's court, subject to military service, and capable of landed possessions; that is, as I conceive, all who were not in servitude.† By a law of Ethelred, none but the king could have jurisdiction over a royal thane.‡ And Domesday Book is full of decisive proofs, that the English lords had their courts wherein they rendered justice to their suitors, like the continental nobility; privileges which are noticed with great precision in that record, as part of the statistical survey. For the right of jurisdiction, at a time when punishments were almost wholly pecuniary, was a matter of property, and sought from motives of rapacity as well as pride.

Whether therefore the law of feudal tenures can

* Ingulfus, p. 35. I do not pretend to assert the authenticity of these charters, which at all events are as old as the conquest. Hickes calls most of them in question. Dissert. Epist. p. 66.: but some later antiquaries seem to have been more favourable. Archæologia, vol. xviii. p. 49. Nouveau Traité de Diplomatique, t. i. p. 348.

† Hist. Ramsey. p. 454.

‡ p. 118. This is the earliest allusion, if I am not mistaken, to territorial jurisdiction in the Saxon laws. Probably it was not frequent till near the end of the tenth century.

be said to have existed in England before the conquest must be left to every reader's determination. Perhaps any attempt to decide it positively would end in a verbal dispute. In every political institution, three things are to be considered, the principle, the form, and the name. The last will probably not be found in any genuine Anglo-Saxon record*. Of the form, or the peculiar ceremonies and incidents of a regular fief, there is some, though not much appearance. But those who reflect upon the dependence in which free and even noble tenants held their estates of other subjects, and upon the privileges of territorial jurisdiction, will, I think, perceive much of the intrinsic character of the feudal relation, though in a less mature and systematic shape than it assumed after the Norman conquest.

* Feodum twice occurs in the testament of Alfred; but it does not appear to be used in its proper sense, nor do I apprehend that instrument to have been originally written in Latin. It was much more consonant to Alfred's practice to employ his own language.

PART II.

THE ANGLO-NORMAN CONSTITUTION.

The Anglo-Norman Constitution—Causes of the Conquest—Policy and Character of William—his Tyranny—Introduction of Feudal Services—Difference between the Feudal Governments of France and England—Causes of the Great Power of the first Norman Kings—Arbitrary Character of their Government—Great Council—Resistance of the Barons to John—Magna Charta—its principal Articles—Reign of Henry III.—the Constitution acquires a more liberal Character—Judicial System of the Anglo-Normans—Curia Regis, Exchequer, &c.—Establishment of the Common Law—its Effect in fixing the Constitution—Remarks on the Limitation of Aristocratical Privileges in England.

IT is deemed by William of Malmsbury an extraordinary work of providence, that the English should have given up all for lost after the battle of Hastings, where only a small though brave army had perished.* It was indeed the conquest of a great kingdom by the prince of a single province, an event not easily paralleled, where the vanquished were little, if at all, less courageous than their enemies, and where no domestic factions exposed the country to an invader. Yet William was so advan-

* Malmsb. p. 53. And Henry of Huntingdon says emphatically; Millesimo et sexagesimo sexto anno gratiæ, perfecit dominator Deus de gente Anglorum quod diu cogitaverat. Genti namque Normannorum asperæ et callidæ tradidit eos ad exterminandum. p. 210.

tageously situated, that his success seems neither unaccountable nor any matter of discredit to the English nation. The heir of the house of Cerdic had been already set aside at the election of Harold; and his youth, joined to a mediocrity of understanding which excited neither esteem nor fear,* gave no encouragement to the scheme of placing him upon the throne in those moments of imminent peril which followed the battle of Hastings. England was peculiarly destitute of great men. The weak reigns of Ethelred and Edward had rendered the government a mere oligarchy, and reduced the nobility into the state of retainers to a few leading houses, the representatives of which were every way unequal to meet such an enemy as the duke of Normandy. If indeed the concurrent testimony of historians does not exaggerate his forces, it may be doubted whether England possessed military resources sufficient to have resisted so numerous and well appointed an army.

This forlorn state of the country induced, if it did not justify the measure of tendering the crown to William, which he had a pretext of title to claim, arising from the intentions, perhaps the promise, perhaps even the testament of Edward, which had more weight in those times than it deserved, and was at least better than the naked title of conquest. And

* Edgar, after one or two ineffectual attempts to recover the kingdom, was treated by William with a kindness which could only have proceeded from contempt of his understanding; for he was not wanting in courage. He became the intimate friend of Robert duke of Normandy, whose fortunes, as well as character, much resembled his own.

this supported by an oath exactly similar to that taken by the Anglo-Saxon kings, and by the assent of the multitude, English as well as Normans, on the day of his coronation, gave as much appearance of a regular succession, as the circumstances of the times would permit. Those who yielded to such circumstances could not foresee, and were unwilling to anticipate, the bitterness of that servitude which William and his Norman followers were to bring upon their country.

The commencement of his administration was tolerably equitable. Though many confiscations took place, in order to gratify the Norman army, yet the mass of property was left in the hands of its former possessors. Offices of high trust were bestowed upon Englishmen; even upon those whose family renown might have raised the most aspiring thoughts.* But partly through the insolence and injustice of William's Norman vassals, partly through the suspiciousness natural to a man conscious of having overturned the national government, his yoke soon became more heavy. The English were oppressed; they rebelled, were subdued and oppressed again. All their risings were without concert, and desperate; they wanted men fit to head them, and fortresses to sustain their revolt.† After a very few years, they sank

* Ordericus Vitalis, p. 520. (in Du Chesne, Hist. Norm. Script.)

† Ordericus notices the want of castles in England, as one reason why rebellions were easily quelled. p. 511. Failing in their attempts at a generous resistance, the English endeavoured to get rid of their enemies by assassination, to which many

in despair, and yielded for a century to the indignities of a comparatively small body of strangers without a single tumult. So possible is it for a nation to be kept in permanent servitude, even without losing its reputation for individual courage, or its desire of freedom!

The tyranny of William 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 rivetting such fetters upon the conquered nation, that all resistance should become impracticable. Those who had obtained honourable offices were successively deprived of them; even the bishops and abbots of English birth were deposed;† a stretch of power very singular in that age, and which marks how much the great talents of William made him feared by the church, in the moment of her highest pretensions, for Gregory VII. was in the papal chair.

Normans became victims. William therefore enacted, that in every case of *murder*, which strictly meant the killing of any one by an unknown hand, the hundred should be liable in a fine, unless they could prove the person murdered to be an Englishman. This was tried by an inquest, upon what was called a presentment of Englishry. But from the reign of Henry II., the two nations having been very much intermingled, this inquiry, as we learn from the Dialogue de Scaccario, p. 26. ceased, and in every case of a freeman murdered by persons unknown, the hundred was fined. See however Bracton, l. iii. c. 15.

* Malmsbury, p. 104. † Hoveden, p. 453.

Morcar, one of the most illustrious English, suffered perpetual imprisonment. Waltheoff, a man of equal conspicuous birth, lost his head upon a scaffold by a very harsh if not iniquitous sentence. It was so rare in those times to inflict judicially any capital punishment upon persons of such rank, that his death seems to have produced more indignation and despair in England than any single circumstance. 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.

This exclusion of the English from political privileges was accompanied with such a confiscation of

* Becket is said to have been the first Englishman who reached any considerable dignity. Lord Lyttleton's Hist. of Henry II. vol. ii. p. 22. And Eadmer declares, that Henry I. would not place a single Englishman at the head of a monastery. Si Anglus erat, nulla virtus, ut honore aliquo dignus judicaretur, eum poterat adjuvare. p. 110.

† Ingulfus, p. 61. Tantum tunc Anglicos abominati sunt, ut quantocunque merito pollerent, de dignitatibus repellebantur; et multo minus habiles alienigenæ de quâcunque aliâ natione, quæ sub cœlo est, extitissent, gratanter assumerentur. Ipsum etiam idioma tantum abhorrebant, quod leges terræ, statutaque Anglicorum regum linguâ Gallicâ tractarentur; et pueris etiam in scholis principia literarum grammatica Gallicè, ac non Anglicè traderentur; modus etiam scribendi Anglicus omitteretur, et modus Gallicus in chartis, et in libris omnibus admitteretur.

property as never perhaps has proceeded from any government, not avowedly founding its title upon the sword. In twenty years from the accession of William, almost the whole soil of England had been divided among foreigners. Of the native proprietors many had perished in the scenes of rapine and tyranny which attended this convulsion; many were fallen into the utmost poverty; and not a few, certainly, still held their lands as vassals of Norman lords. Several English nobles, desperate of the fortunes of their country, sought refuge in the court of Constantinople, and approved their valour in the wars of Alexius against another Norman conqueror scarcely less celebrated than their own, Robert Guiscard. Under the name of Varangians, those true and faithful supporters of the Byzantine empire preserved to its dissolution their ancient Saxon idiom.*

The extent of this spoliation of property is not to be gathered merely from historians, whose language might be accused of vagueness and amplification. In the great national survey of Domesday Book, we have an indisputable record of this vast territorial revolution during the reign of the Conqueror. I am indeed surprised at Brady's position, that the English had suffered an indiscriminate deprivation of

* Gibbon, vol. x. p. 223. No writer, except perhaps the Saxon Chronicler, is so full of William's tyranny as Ordericus Vitalis. See particularly pp. 507. 5 2. 514. 521. 523. in Du Chesne, Hist. Norm Script. Ordericus was an Englishman, but passed at ten years old, A. D. 1084, into Normandy, where he became professed in the monastery of Eu. ibid. p. 924.

their lands. Undoubtedly, there were a few left in almost every county, who still enjoyed the estates which they held under Edward the Confessor, free from any superiority but that of the crown, and were denominated, as in former times, the king's thanes.* Cospatric, son perhaps of one of that name who had possessed the earldom of Northumberland, held forty-one manors in Yorkshire, though many of them are stated in Domesday to be waste. Inferior freeholders were probably much less disturbed in their estates than the higher class. Though few of English birth continued to enjoy entire manors, even by a mesne tenure, it is reasonable to suppose that the greater part of those who appear, under various denominations, to have possessed small freeholds and parcels of manors, were no other than the original natives.

Besides the severities exercised upon the English after every insurrection, two instances of William's unsparing cruelty are well known, the devastation of Yorkshire and of the New Forest. In the former, which had the tyrant's plea, necessity, for its pretext, an invasion being threatened from Denmark, the whole country between the Tyne and the Hum-

* Brady, whose unfairness always keeps pace with his ability, pretends that all these were menial officers of the king's household. But notwithstanding the difficulty of disproving these gratuitous suppositions, it is pretty certain, that many of the English proprietors in Domesday could not have been of this description. See p. 99. 153. 218. 219. and other places. The question however was not worth a battle, though it makes a figure in the controversy of Normans and Anti-Normans, between Dugdale and Brady on the one side, and Tyrrell, Petyt and Atwood on the other.

ber was laid so desolate, that for nine years afterwards there was not an inhabited village, and hardly an inhabitant left; the wasting of this district having been followed by a famine, which swept away the whole population.* That of the New Forest, though undoubtedly less calamitous in its effects, seems even more monstrous, from the frivolousness of the cause.† He afforested several other tracts. And these favourite demesnes of the Norman kings were protected by a system of iniquitous and cruel regulations, called the Forest Laws, which it became afterwards a great object with the assertors of liberty to correct. The penalty for killing a stag or a boar was loss of eyes: for William loved the great game, says the Saxon Chronicle, as if he had been their father.‡

A still more general proof of the ruinous oppression of William the Conqueror may be deduced from the comparative condition of the English towns in the reign of Edward the Confessor, and at the compilation of Domesday. At the former epoch there were in York 1607 inhabited houses, at the latter 967; at the former there were in Oxford 721, at the latter 243; of 172 houses in Dorchester, 100 were destroyed; of 243 in Derby 103; of 487 in Chester, 205. Some other towns had suffered less, but scarce-

* Malmsbury, p. 103. Hoveden, p. 451. Orderic. Vitalis, p. 514. The desolation of Yorkshire continued in Malmsbury's time, sixty or seventy years afterwards; nudum omnium solum usque ad hoc etiam tempus.

† Malmsbury, p. 111.

‡ Chron. Saxon, p. 191.

ly any one fails to exhibit marks of a decayed population. As to the relative numbers of the peasantry and value of lands at these two periods, it would not be easy to assert any thing without a laborious examination of Domesday Book.

The demesne lands of the crown, extensive and scattered over every county, were abundantly sufficient to support its dignity and magnificence;* and William, far from wasting this revenue by prodigal grants, took care to let them at the highest rate to farm, little caring how much the cultivators were racked by his tenants.† Yet his exactions, both feudal, and in the way of tallage from his burgesses and the tenants of his vassals, were almost as violent as his confiscations. No source of income was neglected by him, or indeed by his successors, however trifling, unjust or unreasonable. His revenues, if we could trust Ordericus Vitalis, amounted to £1060 a day. This, in mere weight of silver, would be equal to nearly £1,200,000 a year at present. But the arithmetical statements of these writers are not implicitly to be relied upon. He left at his death a treasure of £60,000 which, in conformity to his dying request, his successor distributed among the church and poor of the kingdom, as a feeble expiation of the crimes by which it had been accumulated;‡ an act of disinterestedness, which seems to prove

* They consisted of 1422 manors. Lyttleton's Henry II. vol. ii. p. 288.

† Chron. Saxon, p. 188.

‡ Huntingdon, p. 371. Ordericus Vitalis puts a long penitential speech into William's mouth on his death-bed, p. 656.

that Rufus, amidst all his vices, was not destitute of better feelings than historians have ascribed to him. It might appear that William had little use for his extorted wealth. By the feudal constitution, as established during his reign, he commanded the service of a vast army at its own expense, either for domestic or continental warfare. But this was not sufficient for his purpose: like other tyrants, he put greater trust in mercenary obedience. Some of his predecessors had kept bodies of Danish troops in pay; partly to be secure against their hostility, partly from the convenience of a regular army, and the love which princes bear to it. But William carried this to a much greater length. He had always stipendiary soldiers at his command. Indeed his army at the conquest could not have been swelled to such numbers by any other means. They were drawn, by the allurement of high pay, not from France and Britany alone, but Flanders, Germany, and even Spain. When Canute of Denmark threatened an invasion in 1085, William, too conscious of his own tyranny to use the arms of his English subjects, collected a mercenary force so vast, that men wondered, says the Saxon Chronicler, how the country could maintain it. This he quartered upon the people, according to the proportion of their estates.*

Whatever may be thought of the Anglo-Saxon tenures, it is certain, that those of the feudal system

Though this may be his invention, yet facts seem to show the compunctions of the tyrant's conscience.

* Chron. Saxon. p. 185. Ingulfus, p. 79.

were thoroughly established in England under the conqueror. It has been observed, in another part of this work, that the rights, or feudal incidents, of wardship and marriage were nearly peculiar to England and Normandy. They certainly did not exist in the former before the conquest; but whether they were ancient customs of the latter cannot be ascertained, unless we had more incontestable records of its early jurisprudence. For the Great Customary of Normandy is a compilation as late as the reign of Richard Cœur de Lion, when the laws of England might have passed into a country so long and intimately connected with it. However, it seems that the seizure of the lands in wardship, the selling of the heiress in marriage, were originally deemed rather acts of violence than conformable to law. For Henry I.'s charter expressly promises, that the mother or next of kin shall have the custody of the lands as well as person of the heir.* And as the charter of Henry II. refers to and confirms that of his grandfather, it seems to follow, that what is called guardianship in chivalry had not yet been established. However, it is not till the assize of Clarendon, confirmed at Northampton in 1176,† that the custody of the heir is clearly reserved to the lord. With respect to the right of consenting to the marriage of a female vassal, it seems to have been, as I have else-

* Terræ et liberorum custos erit sive uxor, sive alius propinquorum, qui justus esse debebit; et præcipio ut barones mei similiter se contineant ergà filios vel filias vel uxores hominum meorum. Leges Anglo-Saxonicæ, p. 234.

† Leges Anglo-Saxonicæ, p. 330.

where observed, pretty general in feudal tenures. But the sale of her person in marriage, or the exaction of a sum of money in lieu of this scandalous tyranny, was only the law of England, and was not perhaps fully authorized as such till the statute of Merton in 1236.

One innovation made by William upon the feudal law is very deserving of attention. By the leading principle of feuds, an oath of fealty was due from the vassal to the lord of whom he immediately held his land, and to no other. The king of France, long after this period, had no feudal and scarcely any royal authority over the tenants of his own vassals. But William received at Salisbury, in 1085, the fealty of all land-holders in England, both those who held in chief, and their tenants;* thus breaking in upon the feudal compact in its most essential attribute, the exclusive dependence of a vassal upon his lord. And this may be reckoned among the several causes, which prevented the continental notions of independence upon the crown from ever taking root among the English aristocracy.

The best measure of William was the establishment of public peace. He permitted no rapine but his own. The feuds of private revenge, the lawlessness of robbery, were repressed. A girl loaded with gold, if we believe contemporary writers, might have passed safely through the kingdom.† But this was

* Chron. Saxon. p. 187.

† Id. p. 190. Matt. Paris, p. 10. I will not omit one other circumstance, apparently praiseworthy, which Ordericus men-

the tranquillity of an imperious and vigilant despotism, the degree of which may be measured by these effects, in which no improvement of civilization had any share. There is assuredly nothing to wonder at in the detestation with which the English long regarded the memory of this tyrant.* Some advantages undoubtedly, in the course of human affairs, eventually sprang from the Norman conquest. The invaders, though without perhaps any intrinsic superiority in social virtues over the native English, degraded and barbarous as these are represented to us, had at least that exterior polish of courteous and chivalric manners, and that taste for refinement and magnificence, which serve to elevate a people from mere savage rudeness. Their buildings, sacred as well as domestic, became more substantial and elegant. The learning of the clergy, the only class to whom that word could at all be applicable, became infinitely more respectable in a short time after the conquest. And though this may by some be ascribed to the general improvements of Europe in that point during the twelfth century, yet I think it was partly owing to the more free intercourse with France and the closer dependence upon Rome which that revolution produced. This circumstance was, however, of no great moment to the English of those times,

tions of William, that he tried to learn English, in order to render justice by understanding every man's complaints, but failed on account of his advanced age. p. 520. This was in the early part of his reign, before the reluctance of the English to submit had exasperated his disposition.

* W. Malmsb. Præf. ad l. iii.

whose happiness could hardly be affected by the theological reputation of Lanfranc and Anselm. Perhaps the chief benefit which the natives of that generation derived from the government of William and his successors, next to that of a more vigilant police, was the security they found from invasion on the side of Denmark and Norway. The high reputation of the Conqueror and his sons, with the regular organization of a feudal militia, deterred those predatory armies, which had brought such repeated calamity on England in former times.

The system of feudal policy, though derived to England from a French source, bore a very different appearance in the two countries. France, for about two centuries after the house of Capet had usurped the throne of Charlemagne's posterity, could hardly be deemed a regular confederacy, much less an entire monarchy. But in England a government, feudal indeed in its form, but arbitrary in its exercise, not only maintained subordination, but almost extinguished liberty. Several causes seem to have conspired towards this radical difference. In the first place a kingdom, comparatively small, is much more easily kept under control than one of vast extent. And the fiefs of Anglo-Norman barons after the conquest were far less considerable, even relatively to the size of the two countries, than those of France. The earl of Chester held, indeed, almost all that county ;* the earl of Shrewsbury nearly the whole of

* This was, upon the whole, more like a great French fief than any English earldom. Hugh de Abrincis, nephew of

Salop. But these domains bore no comparison with the dukedom of Guienne, or the county of Toulouse. In general, the lordships of William's barons, whether this were owing to policy or accident, were exceedingly dispersed. Robert, earl of Moreton, for example, the most richly endowed of his followers, enjoyed 248 manors in Cornwall, 54 in Sussex, 196 in Yorkshire, 99 in Northamptonshire, besides many in other counties.* Estates so disjoined, however immense in their aggregate, were ill calculated for supporting a rebellion. It is observed by Madox, that the knights' fees of almost every barony were scattered over various counties.

In the next place, these baronial fiefs were held under an actual derivation from the crown. The great vassals of France had usurped their dominions before the accession of Hugh Capet, and barely submitted to his nominal sovereignty. They never intended to yield the feudal tributes of relief and aid, nor did some of them even acknowledge the supremacy of his royal jurisdiction. But the Conqueror and his successors imposed what conditions they

William I., had barons of his own, one of whom held forty-six and another thirty manors. Chester was first called a county-palatine under Henry II.; but it previously possessed all regalian rights of jurisdiction. After the forfeitures of the house of Montgomery, it acquired all the country between the Mersey and Ribble. Several eminent men inherited this earldom; but upon the death of the most distinguished, Ranulf, in 1232, it fell into a female line, and soon escheated to the crown. Dugdale's Baronage, p. 45. Lyttleton's Henry II., vol. ii. p. 218.

† Dugdale's Baronage, p. 25.

would upon a set of barons who owed all to their grants; and as mankind's notions of right are generally founded upon prescription, these peers grew accustomed to endure many burthens, reluctantly indeed, but without that feeling of injury which would have resisted an attempt to impose them upon the vassals of the French crown. For the same reasons, the barons of England were regularly summoned to the great council, and by their attendance in it, and concurrence in the measures which were there resolved upon, a compactness and unity of interest was given to the monarchy which was entirely wanting in that of France. But above all, the paramount authority of the king's court, and those excellent Saxon tribunals of the county and hundred, kept within very narrow limits that great support of the feudal aristocracy, the right of territorial jurisdiction. Except in the counties palatine, the feudal courts possessed a very trifling degree of judisdiction over civil, and not a very extensive one over criminal causes.

We may add to the circumstances that rendered the crown powerful during the first century after the conquest, an extreme antipathy of the native English towards their invaders. Both William Rufus and Henry I. made use of the former to strengthen themselves against the attempts of their brother Robert; though they forgot their promises to the English after attaining their object.* A fact mentioned by Ordericus Vitalis, illustrates the advantage which the

* W. Malmsbury, p. 120. et 156. R. Hovenden, p. 461. Chron. Saxon. p. 194.

government found in this national animosity. During the siege of Bridgenorth, a town belonging to Robert de Belesme, one of the most turbulent and powerful of the Norman barons, by Henry I. in 1102, the rest of the nobility deliberated together, and came to the conclusion, that if the king could expel so distinguished a subject, he would be able to treat them all as his servants. They endeavoured therefore to bring about a treaty; but the English part of Henry's army, hating Robert de Belesme as a Norman, urged the king to proceed with the siege; which he did, and took the castle.*

Unrestrained, therefore, comparatively speaking, by the aristocratic principles which influenced other feudal countries, the administration acquired a tone of rigour and arbitrariness under William the Conqueror, which, though sometimes perhaps a little mitigated, did not cease during a century and a half. For the first three reigns we must have recourse to historians; whose language, though vague, and perhaps exaggerated, is too uniform and impressive to leave a doubt of the tyrannical character of the government. The intolerable exactions of tribute, the rapine of purveyance, the iniquity of royal courts, are continually in their mouths. "God sees the wretched people," says the Saxon Chronicler, "most unjustly oppressed; first they are despoiled of their possessions, then butchered. This was a grievous year. (1124.) Whoever had any property, lost it by

* Du Chesne, Script. Norman. p. 807.

heavy taxes and unjust decrees."* The same ancient chronicle, which appears to have been continued from time to time in the abbey of Peterborough, frequently utters similar notes of lamentation.

From the reign of Stephen, the miseries of which are not to my immediate purpose, so far as they proceeded from anarchy and intestine war,† we are able to trace the character of government by existing records.‡ These, digested by the industrious Madox into his History of the Exchequer, give us far more insight into the spirit of the constitution, if we may use such a word, than all our monkish chronicles. It was not a sanguinary despotism. Henry II. was a prince of remarkable clemency; and none of the Conqueror's successors were as grossly tyrannical as

* Chron. Saxon. p. 228. Non facile potest narrari miseria, says Roger de Hoveden, quam sustinuit illo tempore, [circ. ann. 1103.] terra Anglorum propter regias exactiones. p. 470.

† The following simple picture of that reign from the Saxon Chronicle may be worth inserting. "The nobles and bishops built castles, and filled them with devilish and wicked men, and oppressed the people, cruelly torturing men for their money. They imposed taxes upon towns, and when they had exhausted them of every thing, set them on fire. You might travel a day, and not find one man living in a town, nor any land in cultivation. Never did the country suffer greater evils. If two or three men were seen riding up to a town, all its inhabitants left it, taking them for plunderers. And this lasted, growing worse and worse, throughout Stephen's reign. Men said openly, that Christ and his saints were asleep." p. 239.

‡ The earliest record in the Pipe-office is that which Madox, in conformity to the usage of others, cites by the name of Magnum Rotulum quinto Stephani. But, in a particular dissertation subjoined to his History of the Exchequer, he inclines, though not decisively, to refer this record to the reign of Henry I.

himself. But the system of rapacious extortion from their subjects prevailed to a degree which we should rather expect to find among eastern slaves, than that high-spirited race of Normandy, whose renown then filled Europe and Asia. The right of wardship was abused by selling the heir and his land to the highest bidder. That of marriage was carried to a still grosser excess. The kings of France indeed claimed the prerogative of forbidding the marriage of their vassals' daughters to such persons as they thought unfriendly or dangerous to themselves; but I am not aware that they ever compelled them to marry, much less that they turned this attribute of sovereignty into a means of revenue. But in England, women, and even men, simply as tenants, in chief, and not as wards, fined to the crown for leave to marry whom they would, or not to be compelled to marry any other.* Towns not only fined for original grants of franchises, but for repeated confirmations. The Jews paid exorbitant sums for every common right of mankind, for protection, for justice. In return, they were sustained against their Christian debtors in demands of usury, which superstition and tyranny rendered enormous.† Men fined for the king's good will; or that he would remit his anger; or to have his mediation with their adversaries. Many fines seem as it were imposed in sport, if we look to the cause; though their extent, and the solemnity with which they were recorded, prove the humour to have been differently relished by the two parties. Thus

* Madox, c. 10. † Id. c. 7.

the bishop of Winchester paid a ton of good wine for not reminding the king (John) to give a girdle to the countess of Albemarle; and Robert de Vaux five best palfreys, that the same king might hold his peace about Henry Pinel's wife. Another paid four marks for leave to eat (pro licentiâ comedendi). But of all the abuses which deformed the Anglo-Norman government, none was so flagitious as the sale of judicial redress. The king, we are often told, is the fountain of justice; but in those ages, it was one which gold alone could unseal. Men fined to have right done them; to sue in a certain court; to implead a certain person; to have restitution of land which they had recovered at law.* From the sale of that justice which every citizen has a right to demand, it was an easy transition to withhold or deny it. Fines were received for the king's help against the adverse suitor; that is, for perversion of justice, or for delay. Sometimes they were paid by opposite parties, and, of course, for opposite ends. These were called counter-fines; but the money was, sometimes, or as Lord Lyttleton thinks, invariably, returned to the unsuccessful suitor.†

Among a people imperfectly civilized, the most outrageous injustice towards individuals may pass without the slightest notice, while in matters affecting the community, the powers of government are

* Id. c. 12. and 13.

† The most apposite instances of these exactions are well selected from Madox by Hume, Appendix II.: upon which account I have gone less into detail than would otherwise have been necessary.

exceedingly controlled. It becomes therefore an important question, what prerogative these Norman kings were used to exercise in raising money, and in general legislation? By the prevailing feudal customs, the lord was entitled to demand a pecuniary aid of his vassals in certain cases. These were, in England, to make his eldest son a knight, to marry his eldest daughter, and to ransom himself from captivity. Accordingly, when such circumstances occurred, aids were levied by the crown upon its tenants, at the rate of a mark or a pound for every knight's fee.* These aids, being strictly due in the prescribed cases, were taken without requiring the consent of parliament. Escuage, which was a commutation for the personal service of military tenants in war, having rather the appearance of an indulgence, than an imposition, might reasonably be levied by the king.† It was not till the charter of John that escuage became a parliamentary assessment; the custom of commuting service having then grown general, and the rate of commutation being variable.

* The *reasonable aid* was fixed by the statute of Westminster I., 3 Edw. I. c. 36., at twenty shillings for every knight's fee, and as much for every £20 value of land held by socage. The aid, pour faire fitz chevalier, might be raised, when he entered into his fifteenth year; pour fille marier, when she reached the age of seven.

† Fit interdum, ut imminente vel insurgente in regnum hostium machinatione, decernat rex de singulis feodis militum summam aliquam solvi, marcam scilicit, vel libram unam; unde militibus stipendia vel donativa succedant. Mavult enim princeps stipendiarios quàm domesticos bellicis exponere casibus. Hæc itaque summa, quia nomine suctorum solvitur, scutagium nominatur. Dialogus de Scaccario, ad finem. Madox, Hist. Exchequer, p. 25. (edit. in folio.)

None but military tenants could be liable for escuage;* but the inferior subjects of the crown were oppressed by tallages. The demesne lands of the king and all royal towns were liable to tallage; an imposition far more rigorous and irregular than those which fell upon the gentry. Tallages were continually raised upon different towns during all the Norman reigns, without the consent of parliament, which neither represented them, nor cared for their interests. The itinerant justices in their circuit usually set this tax. Sometimes the tallage was assessed in gross upon a town, and collected by the burgesses; sometimes individually at the judgement of the justices. There was an appeal from an excessive assessment to the barons of the exchequer. Inferior lords might tallage their own tenants and demesne towns, though not, it seems, without the king's permission.† Customs upon the import and export of merchandise, of which the prisage of wine, that is, a right of taking two casks out of each vessel, seems the most material, were immemorially exacted by the crown. There is no appearance that these originated with parliament.‡ Another tax, extending to all the lands of the kingdom, was Danegeld, the ship-money of those times. This name had been originally given to the tax imposed under Ethelred II., in

* The tenant in capite was entitled to be re-imbursed what would have been his escuage by his vassals even if he performed personal service. Madox, c. 16.

† For the important subject of tallages, see Madox, c. 17.

‡ Madox, c. 18. Hale's Treatise on the Customs in Hargrave's Tracts, vol. i. p. 116.

order to raise a tribute exacted by the Danes. It was afterwards applied to a permanent contribution for the public defence against the same enemies. But after the conquest this tax is said to have been only occasionally required; and the latest instance on record of its payment is in the 20th of Henry II. Its imposition appears to have been at the king's discretion.*

The right of general legislation was undoubtedly placed in the king, conjointly with his great council,† or, if the expression be thought more proper, with their advice. So little opposition was found in these assemblies by the early Norman kings, that they gratified their own love of pomp, as well as the pride of their barons, by consulting them in every important business. But the limits of legislative power were extremely indefinite. New laws, like new taxes, affecting the community, required the sanction of that assembly which was supposed to represent it; but there was no security for individuals against acts of prerogative, which we should justly consider as most tyrannical. Henry II., the best of these monarchs, banished from England the relations and friends of Becket, to the number of four hundred. At another time, he sent over from Normandy an injunction, that all the kindred of those who obeyed a papal interdict should be banished, and their estates confiscated.‡

* Henr. Huntingdon, l. v. p. 205. Dialogus de Scaccario, c. 11. Madox, c. 17. Lyttleton's Henry II., vol. ii. p. 170.

† Glanvil, Prologus ad Tractatum de Consuetud.

‡ Hoveden, p. 496. Lyttleton, vol. ii. p. 530. The latter

The statutes of those reigns do not exhibit to us many provisions calculated to maintain public liberty on a broad and general foundation. And although the laws then enacted have not all been preserved, yet it is unlikely that any of an extensively remedial nature should have left no trace of their existence. We find, however, what has sometimes been called the Magna Charta of William the Conqueror, preserved in Roger de Hoveden's collection of his laws. We will, enjoin, and grant, says the king, that all freemen of our kingdom shall enjoy their lands in peace, free from all tallage, and from every unjust exaction, so that nothing but their service lawfully due to us shall be demanded at their hands.* The laws of the Conqueror, found in Hoveden, are wholly different from those in Ingulfus, and are suspected not to have

says, that this edict must have been framed by the king with the advice and assent of his council. But if he means his great council, I cannot suppose that all the barons and tenants in capite could have been duly summoned to a council held beyond seas. Some English barons might doubtless have been with the king, as at Verneuil in 1176, where a mixed assembly of English and French enacted laws for both countries. Benedict. Abbas apud Hume. So at Northampton in 1165 several Norman barons voted; nor is any notice taken of this as irregular. Fitz. Stephen, ibid. So unfixed, or rather unformed, were all constitutional principles.

* Volumus etiam, ac firmiter præcipimus et concedimus, ut omnes liberi homines totius monarchiæ prædicti regni nostri habeant et teneant terras suas et possessiones suas benè, et in pace, liberè ab omni exactione injustâ, et ab omni tallagio, ita quod nihil ab iis exigatur vel capiatur, nisi servitium suum liberum, quod de jure nobis facere debent, et facere tenentur; et prout statutum est iis, et illis a nobis datum et concessum jure hæreditario in perpetuum per commune concilium totius regni nostri prædicti.

escaped considerable interpolation.* It is remarkable, that no reference is made to this concession of William the Conqueror in any subsequent charter. However, it seems to comprehend only the feudal tenants of the crown. Nor does the charter of Henry I., though so much celebrated, contain any thing specially expressed but 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 emendations made by his father with consent of his barons.‡ The charter of Stephen not only confirms that of his predecessor, but adds in fuller terms than Henry had used, an express concession of the laws and customs of Edward.§ Henry II. is silent about these, although he repeats the confirmation of his grandfather's charter.‖ The people however had begun to look back to a more ancient standard of law. The Norman conquest, and all that ensued upon it,

* Selden, ad Eadmerum. Hody (Treatise on Convocations, p. 249.) infers from the words of Hoveden, that they were altered from the French original by Glanvil.

† Wilkins, p. 234.

‡ A great impression is said to have been made on the barons confederated against John, by the production of Henry I.'s charter, whereof they had been ignorant. Matt. Paris, p. 212. But this could hardly have been the existing charter, for reasons alleged by Blackstone. Introduction to Magna Charta, p. 6. I have sometimes ventured to suspect a pious fraud of Archbishop Langton, the producer of this pretended charter, who might have fabricated an instrument in the name of Henry, containing some of those privileges which the barons were then about to extort from his successor.

§ Wilkins, Leges Anglo-Saxon. p. 310.

‖ Id. p. 318.

had endeared the memory of their Saxon government. Its disorders were forgotten, or, rather, were less odious to a rude nation, than the coercive justice by which they were afterwards restrained.* Hence it became the favourite cry to demand the laws of Edward the Confessor; and the Normans themselves, as they grew dissatisfied with the royal administration, fell into these English sentiments.† But what these laws were, or more properly perhaps, these customs subsisting in the Confessor's age, was not very distinctly understood.‡ So far, however, was

* The Saxon Chronicler complains of a wittenagemot, as he calls it, or assizes, held at Leicester in 1124, where forty-four thieves were hanged, a greater number than was ever before known: it was said that many suffered unjustly. p. 228.

† The distinction between the two nations was pretty well obliterated at the end of Henry II.'s reign, as we learn from the Dialogue on the Exchequer, then written: jam cohabitantibus Anglicis et Normannis, et alterutrum uxores ducentibus vel nubentibus, sic permixtæ sunt nationes, ut vix discerni possit hodie, de liberis loquor, quis Anglicus, quis Normannus sit genere; exceptis duntaxat ascriptitiis qui villani dicuntur, quibus non est liberum obstantibus dominis suis a sui status conditione discedere. Eapropter pene quicunque sic hodie occisus reperitur, ut murdrum punitur, exceptis his quibus certa sunt ut diximus servilis conditionis indicia. p. 26.

‡ Non quas tulit, sed quas observaverit, says William of Malmsbury, concerning the Confessor's laws. Those bearing his name in Lambard and Wilkins are evidently spurious, though it may not be easy to fix upon the time when they were forged. Those found in Ingulfus, in the French language, are genuine, and were confirmed by William the Conqueror. Neither of these collections, however, can be thought to have any relation to the civil liberty of the subject. It has been deemed more rational to suppose, that these longings for Edward's laws were rather meant for a mild administration of government, free from unjust Norman innovations, than any written and definite system.

clear, that the rigorous feudal servitudes, 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 grievances which tradition told them had not always existed.

It is highly probable, independently of the evidence supplied by the charters of Henry I. and his two successors, that a sense of oppression had long been stimulating the subjects of so arbitrary a government, before they gave any demonstrations of it sufficiently palpable to find a place in history. But there are certainly no instances of rebellion, or even, as far as we know, of a constitutional resistance in parliament down to the reign of Richard I. The revolt of the earls of Leicester and Norfolk against Henry II. which endangered his throne, and comprehended his children with a large part of his barons, appears not to have been founded even upon the pretext of public grievances. Under Richard I., something more of a national spirit began to show itself. For the king having left his chancellor William Longchamp joint regent and justiciary with the bishop of Durham during his crusade, the foolish insolence of the former, who excluded his co-adjutor from any share in the administration, provoked every one of the nobility. A convention of these, the king's brother placing himself at their head, passed a sentence of removal and banishment upon the chancellor. Though there might be reason to conceive that this would not be unpleasing to the king, who was al-

ready apprized how much Longchamp had abused his trust, it was a remarkable assumption of power by that assembly, and the earliest authority for a leading principle of our constitution, the responsibility of ministers to parliament.

In the succeeding reign of John, all the rapacious exactions usual to these Norman kings were not only redoubled, but mingled with other outrages of tyranny still more intolerable.* These too were to be endured at the hands of a prince utterly contemptible for his folly and cowardice. One is surprised at the forbearance displayed by the barons, till they took arms at length in that confederacy, which ended in establishing the Great Charter of Liberties. As this was the first effort towards a legal government, so it is beyond comparison the most important event in our history, except that Revolution without which its benefits would rapidly have been annihilated. The constitution of England has indeed no single date from which its duration is to be reckoned. The institutions of positive law, the far more important changes which time has wrought in the order of society, during six hundred years subsequent to the Great Charter, have undoubtedly lessened its direct application to our present circumstances. But it is still the key-stone of English liberty. All that has since been obtained is little more than as confirmation

* In 1207, John took a seventh of the moveables of lay and spiritual persons, cunctis murmurantibus, sed contradicere non audentibus. Matt. Paris, p. 186. ed. 1684. But his insults upon the nobility in debauching their wives and daughters were, as usually happens, the most exasperating provocation.

or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic monarchy. It has been lately the fashion to depreciate the value of Magna Charta, as if it had sprung from the private ambition of a few selfish barons, and redressed only some feudal abuses. It is indeed of little importance by what motives those who obtained it were guided. The real characters of men most distinguished in the transactions of that time are not easily determined at present. Yet if we bring these ungrateful suspicions to the test, they prove destitute of all reasonable foundation. An equal distribution of civil rights to all classes of freemen forms the peculiar beauty of the charter. In this just solicitude for the people, and in the moderation which infringed upon no essential prerogative of the monarchy, we may perceive a liberality and patriotism very unlike the selfishness which is sometimes rashly imputed to those ancient barons. And, as far as we are guided by historical testimony, two great men, the pillars of our church and state, may be considered as entitled beyond the rest to the glory of this monument; Stephen Langton, archbishop of Canterbury, and William, earl of Pembroke. To their temperate zeal for a legal government, England was indebted during that critical period for the two greatest blessings that patriotic statesmen could confer; the establishment of civil liberty upon an immoveable basis, and the preservation of national independence under the ancient line of sovereigns, which rasher

men were about to exchange for the dominion of France.

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 the 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 very 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 judgement of his peers, or by the law of the land.* We

* Nisi per legale judicium parium suorum, *vel* per legem terræ. Several explanations have been offered of the alterna-

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 the courts of justice framed the writ of Habeas Corpus in conformity to 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.

tive clause; which some have referred to judgement by default, or demurrer; others to the process of attachment for contempt. Certainly there are many legal procedures, besides trial by jury, through which a party's goods or person may be taken. But one may doubt, whether these were in contemplation of the framers of Magna Charta. In an entry of the charter of 1217 by a contemporary hand, preserved in a book in the Town-clerk's office in London, called Liber Custumarum et Regum antiquorum, a various reading, *et* per legem terræ, occurs. Blackstone's Charters, p. 42. And the word *vel* is so frequently used for *et*, that I am not wholly free from a suspicion, that it was so intended in this place. The meaning will be, that no person shall be disseised, &c. except upon a lawful cause of action or indictment, found by the verdict of a jury. This really seems as good as any of the disjunctive interpretations; but I do not offer it with much confidence.

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 wagons 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 seem to have acted upon it in most part of his reign. It had however no reference to tallages imposed upon towns without their consent. Fourscore years were yet to elapse before the great principle of parliamentary taxation was explicitly and absolutely recognized.

A law which enacts that justice shall neither be sold, denied nor delayed, stamps with infamy that government under which it had become necessary. But from the time of the charter, according to Madox, the disgraceful perversions of right, which are upon record in the rolls of the exchequer, became less frequent.*

From this era a new soul was infused into the

* Hist. of Exchequer, c. 12.

people of England. Her liberties, at the best long in abeyance, became a tangible possession, and those indefinite aspirations for the laws of Edward the Confessor were changed into a steady regard for the Great Charter. Pass but from the history of Roger de Hoveden to that of Matthew Paris, from the second Henry to the third, and judge whether the victorious struggle had not excited an energy of public spirit to which the nation was before a stranger. The strong man, in the sublime language of Milton, was aroused from sleep, and shook his invincible locks. Tyranny indeed and injustice will, by all historians not absolutely servile, be noted with moral reprobation; but never shall we find in the English writers of the twelfth century that assertion of positive and national rights which distinguishes those of the next age, and particularly the monk of St. Albans. From his prolix history we may collect three material propositions as to the state of the English constitution during the long reign of Henry III.; a prince, to whom the epithet of worthless seems best applicable; and who, without committing any flagrant crimes, was at once insincere, ill-judging and pusillanimous. The intervention of such a reign was a very fortunate circumstance for public liberty; which might possibly have been crushed in its infancy, if an Edward had immediately succeeded to the throne of John.

1. The Great Charter was always considered as a fundamental law. But yet it was supposed to acquire additional security by frequent confirmation.

This it received with some not inconsiderable variation, in the first, second, and ninth years of Henry's reign. The last of these is in our present statute-book, and has never received any alterations; but Sir E. Coke reckons thirty-two instances wherein it has been solemnly ratified. Several of these were during the reign of Henry III., and were invariably purchased by the grant of a subsidy.* This prudent accommodation of parliament to the circumstances of their age, not only made the law itself appear more inviolable, but established that correspondence between supply and redress, which for some centuries was the balance-spring of our constitution. The charter indeed was often grossly violated by their administration. Even Hubert de Burgh, of whom history speaks more favourably than of Henry's later favourites, though a faithful servant of the crown, seems, as is too often the case with such men, to have thought the king's honour and interest concerned in maintaining an unlimited prerogative.† The government was however much worse administered after his fall. From the great difficulty of compelling the king to observe the boundaries of law, the English clergy, to whom we are much indebted for their zeal in behalf of liberty during this reign, devised means of binding his conscience, and terrifying his imagination by religious sanctions. The solemn excommunication, accompanied with the most awful threats, pronounced against the violators of Magna Charta, is well known from our common histories.

* Matt. Paris. p. 272. † Id. p. 284.

The king was a party to this ceremony, and swore to observe the charter. But Henry III., though a very devout person, had his own notions as to the validity of an oath that affected his power, and indeed passed his life in a series of perjuries. According to the creed of that age, a papal dispensation might annul any prior engagement; and he was generally on sufficiently good terms with Rome to obtain such an indulgence.

2. Though the prohibition of levying aids or escuages without consent of parliament had been omitted in all Henry's charters, an omission for which we cannot assign any other motive than the disposition of his ministers to get rid of that restriction, yet neither one nor the other seem in fact to have been exacted at discretion throughout his reign. On the contrary, the barons frequently used the aids, or rather subsidies, which his prodigality was always demanding. Indeed it would probably have been impossible for the king, however frugal, stripped as he was of so many lucrative though oppressive prerogatives by the Great Charter, to support the expenditure of government from his own resources. Tallages on his demesnes, and especially on the rich and ill-affected city of London, he imposed without scruple; but it does not appear that he ever pretended to a right of general taxation. We may therefore take it for granted, that the clause in John's charter, though not expressly renewed, was still considered as of binding force. The king was often put to great inconvenience by the refusal of supply;

and at one time was reduced to sell his plate and jewels, which the citizens of London buying, he was provoked to exclaim with envious spite against their riches, which he had not been able to exhaust.*

3. The power of granting money must of course imply the power of withholding it; yet this has sometimes been little more than a nominal privilege. But in this reign the English parliament exercised their right of refusal, or, what was much better, of conditional assent. Great discontent was expressed at the demand of a subsidy in 1237; and the king alleging that he had expended a great deal of money on his sister's marriage with the emperor, and also upon his own, the barons answered, that he had not taken their advice in those affairs, nor ought they to share the punishment of acts of imprudence they had not committed.† In 1241, a subsidy having been demanded for the war in Poitou, the barons drew up a remonstrance, enumerating all the grants they had made on former occasions, but always on condition that the imposition should not be turned into precedent. Their last subsidy, it appears, had been paid into the hands of four barons, who were to expend it at their discretion for the benefit of the king and kingdom;‡ an early instance of parliamentary control over public expenditure. On a similar demand in 1244, the king was answered by

* M. Paris. p. 650.

† Quod hæc omnia sine consilio fidelium suorum fecerat, nec debuerant esse pœnæ participes, qui fuerant a culpâ immunes. p. 367.

‡ Id. p. 515.

complaints against the violation of the charter, the waste of former subsidies, and the mal-administration of his servants.* Finally, the barons positively refused any money; and he extorted 1500 marks from the city of London. Some years afterwards, they declared their readiness to burthen themselves more than ever, if they could secure the observance of the charter; and requested that the Justiciary, Chancellor, and Treasurer might be appointed with consent of parliament, according, as they asserted, to ancient custom, and might hold their offices during good behaviour.†

Forty years of mutual dissatisfaction had elapsed, when a signal act of Henry's improvidence brought on a crisis which endangered his throne. Innocent

* Id. p. 563. 572. Matthew Paris's language is particularly uncourtly: rex cum instantissimè, ne dicam impudentissimè, auxilium pecuniare ab iis iterum postularet, toties læsi et illusi, contradixerunt ei unanimiter et uno ore in facie.

† De communi consilio regni, sicut ab antiquo consuetum et justum. p. 778. This was not so great an encroachment as it may appear. Ralph de Neville, bishop of Chichester, had been made Chancellor in 1223, assensu totius regni; itaque scilicet ut non deponeretur ab ejus sigilli custodiâ nisi totius regni ordinate consensu et consilio. p. 266. Accordingly, the king demanding the great seal from him in 1236, he refused to give it up, alleging that having received it in the general council of the kingdom, he could not resign it without the same authority. p. 363. And the parliament of 1248 complained that the king had not followed the steps of his predecessors in appointing these three great officers by their consent. p. 646. What had been in fact the practice of former kings, I do not know; but it is not likely to have been such as they represent. Henry, however, had named the archbishop of York to the regency of the kingdom during his absence beyond sea in 1242, de consilio omnium comitum et baronum nostrorum et omnium fidelium nostrorum.—Rymer, t. i. p. 400.

IV., out of mere animosity against the family of Frederic II., left no means untried to raise up a competitor for the crown of Naples, which Manfred had occupied. Richard earl of Cornwall having been prudent enough to decline this speculation, the pope offered to support Henry's second son, Prince Edmund. Tempted by such a prospect, the silly king involved himself in irretrievable embarrassments by prosecuting an enterprise which could not possibly be advantageous to England, and upon which he entered without the advice of his parliament. Destitute himself of money, he was compelled to throw the expense of this new crusade upon the pope; but the assistance of Rome was never gratuitous, and Henry actually pledged his kingdom for the money which she might expend in a war for her advantage and his own.* He did not even want the effrontery to tell parliament in 1257, introducing his son Edmund as king of Sicily, that they were bound for the repayment of 14,000 marks with interest. The pope had also, in furtherance of the Neapolitan project, conferred upon Henry the tithes of all benefices in England, as well as the first fruits of such as should be vacant.† Such a concession drew upon the king the implacable resentment of his clergy, already complaining of the cowardice or connivance that had during all his reign exposed them to the shameless exactions of Rome. Henry had now indeed cause to regret his precipitancy. Alexander IV., the reigning pontiff, threatened him not only with a revo-

* p. 771. † p. 813.

cation of the grant to his son, but with an excommunication and general interdict, if the money advanced on his account should not be immediately repaid,* and a Roman agent explained the demand to a parliament assembled at London. The sum required was so enormous, we are told, that it struck all the hearers with astonishment and horror. The nobility of the realm were indignant to think that one man's supine folly should thus bring them to ruin.† Who can deny that measures beyond the ordinary course of the constitution were necessary to control so prodigal and injudicious a sovereign? Accordingly, the barons insisted, that twenty-four persons should be nominated, half by the king, and half by themselves, to reform the state of the kingdom. These were appointed on the meeting of the parliament at Oxford, after a prorogation.

The seven years that followed are a revolutionary period, the events of which we do not find satisfactorily explained by the historians of the time.‡ A king, divested of prerogatives by his people, soon

* Rymer, t. i. p. 632. This inauspicious negotiation for Sicily, which is not altogether unlike that of James I. about the Spanish match, in its folly, bad success, and the dissatisfaction it occasioned at home, receives a good deal of illustration from documents in Rymer's collection.

† Quantitas pecuniæ ad tantam ascendit summam, ut stuporem simul et horrorem in auribus generaret audientium. Doluit igitur nobilitas regni, se unius hominis ita confundi supinâ simplicitate. M. Paris, p. 827.

‡ The best account of the provisions of Oxford in 1260. and the circumstances connected with them, is found in the Burton Annals. 2 Gale. xv. Scriptores. p. 407. Many of these provisions were afterwards enacted in the statute of Marlebridge.

appears even to themselves an injured party. And, as the baronial oligarchy acted with that arbitrary temper which is never pardoned in a government that has an air of usurpation about it, the royalists began to gain ground, chiefly through the defection of some who had joined in the original limitations imposed on the crown, usually called the provisions of Oxford. An ambitious man, confident in his talents and popularity, ventured to display too marked a superiority above his fellows in the same cause. But neither his character, nor the battles of Lewes and Evesham fall strictly within the limits of a constitutional history. It is however important to observe, that, even in the moment of success, Henry III. did not presume to revoke any part of the Great Charter. His victory had been achieved by the arms of the English nobility, who had, generally speaking, concurred in the former measures against his government, and whose opposition to the earl of Leicester's usurpation was compatible with a steady attachment to constitutional liberty.*

The opinions of eminent lawyers are undoubtedly, where legislative or judicial authorities fail, the best evidence that can be adduced in constitutional history. It will therefore be satisfactory to select a few passages from Bracton, himself a judge at the end of Henry III.'s reign, by which the limitations of pre-

* The earl of Glocester, whose personal quarrel with Montfort had overthrown the baronial oligarchy, wrote to the king in 1267, ut provisiones Oxoniæ teneri faciat per regnum suum, et ut promissa sibi apud Evesham de facto compleret. Matt. Paris, p. 850.

rogative by law will clearly appear to have been fully established. "The king," says he, "must not be subject to any man, but to God and the law; for the law makes him king. Let the king therefore give to the law what the law gives to him, dominion and power; for there is no king where will and not law bears rule."* "The king (in another place) can do nothing on earth, being the minister of God, but what he can do by law; nor is what is said (in the Pandects) any objection, that whatever the prince pleases shall be law; because by the words that follow in that text it appears to design not any mere will of the prince, but that which is established by the advice of his counsellors, the king giving his authority, and deliberation being had upon it."† This passage is undoubtedly a misrepresentation of the famous lex regia, which has ever been interpreted to convey the unlimited power of the people to their emperors.‡ But the very circumstance of so perverted a gloss put upon this text, is a proof that no other doctrine could be admitted into the law of England. In another passage, Bracton reckons as superior to the king, "not only God and the law, by which he is made king, but his court of earls and barons; for the former (comites) are so styled as associates of the king, and whoever has an associate, has a master;§ so that

* L. i. c. 8.

† L. iii. c. 9. These words are nearly copied from Glanvil's introduction to his treatise.

‡ See Selden at Fletam, p. 1046.

§ This means, I suppose, that he who acts with the consent of others must be in some degree restrained by them; but it is ill expressed.

if the king were without a bridle, that is, the law, they ought to put a bridle upon him."* Several other passages in Bracton might be produced to the same purport; but these are sufficient to demonstrate the important fact, that however extensive or even indefinite might be the royal prerogative in the days of Henry III., the law was already its superior, itself but made part of the law, and was incompetent to overthrow it. It is true, that in this very reign the practice of dispensing with statutes by a non-obstante was introduced, in imitation of the papal dispensations.† But this prerogative could only be exerted within certain limits, and however pernicious it may be justly thought, was, when thus understood and defined, not, strictly speaking, incompatible with the legislative sovereignty of parliament.

In conformity with the system of France and other feudal countries, there was one standing council, which assisted the kings of England in the collection, and management of their revenue, the administration of justice to suitors, and the despatch of all public business. This was styled the King's Court, and held in his palace, or wherever he was personally present. It was composed of the great officers; the chief justiciary,‡ the chancellor, the constable,

* L. ii. c. 16. † M. Paris. p. 701.

‡ The Chief Justiciary was 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 time, and were teste'd by him. Madox, Hist.

marshal, chamberlain, steward, and treasurer, with any others whom the king might appoint. Of this great court there was, as it seems, from the beginning a particular branch, in which all matters relating to the revenue were exclusively transacted. This, though composed of the same persons, yet being held in a different part of the palace, and for different business, was distinguished from the king's court by the name of the exchequer; a separation which became complete, when civil pleas were decided, and judgements recorded in this second court.*

of Excheq. p. 16. His appointment, upon these temporary occasions, was expressed, ad custodiendum loco nostro terram nostram Angliæ et pacem regni nostri; and all persons were enjoined to obey him tanquam justitiario nostro. Rymer, t. i. p. 181. Sometimes, however, the king issued his own writ de ultra mare. The first time when the dignity of this office was impaired was at the death of John, when the justiciary, Hubert de Burgh, being besieged in Dover Castle, those who proclaimed Henry III. at Glocester, constituted the earl of Pembroke governor of the king and kingdom, Hubert still retaining his office. This is erroneously stated by Matthew Paris, who has misled Spelman in his Glossary; but the truth appears from Hubert's answer to the articles of charge against him, and from a record in Madox's Hist. of Exch. c. 21. note A, wherein the earl of Pembroke is named rector regis et regni, and Hubert de Burgh justiciary. In 1241, the archbishop of York was appointed to the regency during Henry's absence in Poitou, without the title of justiciary. Rymer, t. i. p. 410. Still the office was so considerable, that the barons who met in the Oxford parliament of 1258 insisted, that the justiciary should be annually chosen with their approbation. But the subsequent successes of Henry prevented this being established; and Edward I. discontinued the office altogether.

* For every thing that can be known about the Curia Regis, and especially this branch of it, the student of our constitutional history should have recourse to Madox's History of the Exchequer, and to the Dialogus de Scaccario, written in

It is probable, that in the age next after the conquest, few causes, in which the crown had no interest, were carried before the royal tribunals; every man finding a readier course of justice in the manor or county to which he belonged.* But, by degrees, this supreme jurisdiction became more familiar; and as it seemed less liable to partiality or intimidation than the provincial courts, suitors grew willing to submit to its expensiveness and inconvenience. It was obviously the interest of the king's court to give such equity and steadiness to its decisions as might encourage this disposition. Nothing could be more advantageous to the king's authority, nor, what perhaps was more immediately regarded, to his revenue; since a fine was always paid for leave to plead in his court, or to remove thither a cause commenced below. But because few, comparatively speaking, could have recourse to so distant a tribunal as that of the king's court, and perhaps also on account of the attachment which the English felt to their ancient right of trial by the neighbouring freeholders, Henry II. established itinerant justices, to decide civil and criminal pleas within each county.† This excellent institution is referred by some to the twenty-second year of that prince; but Madox traces it several years

the time of Henry II. by Richard bishop of Ely, though commonly ascribed to Gervase of Tilbury. This treatise he will find subjoined to Madox's work.

* Omnis causa terminetur comitatu, vel hundredo, vel halimoto socam habentium. Leges Henr. I. c. 9.

† Dialogus de Scaccario, p. 38.

higher.* We have owed to it the uniformity of our common law, which would otherwise have been split, like that of France, into a multitude of local customs; and we still owe to it the assurance, which is felt by the poorest and most remote inhabitant of England, that his right is weighed by the same incorrupt and acute understanding, upon which the decision of the highest questions is reposed. The justices of assize seem originally to have gone their circuits annually; and as part of their duty was to set tallages upon royal towns, and superintend the collection of the revenue, we may be certain that there could be no long interval. This annual visitation was expressly confirmed by the twelfth section of Magna Charta, which provides also, that no assize of novel disseisin, or mort d'ancestor, should be taken, except in the shire where the lands in controversy lay. Hence this clause stood opposed on the one hand to the encroachments of the king's court, which might otherwise, by drawing pleas of land to itself, have defeated the suitor's right to a jury from the vicinage; and on the other, to those of the feudal aristocracy, who hated any interference of the crown to chastise their violations of law, or control their own jurisdiction. Accordingly, while the confederacy of barons against Henry III. was in its full power,

* Hist. of Exchequer, c. iii. Lord Lyttleton thinks that this institution may have been adopted in imitation of Louis VI. who half a century before had introduced a similar regulation in his dominions. Hist. of Henry II. vol. iii. p. 206.

an attempt was made to prevent the regular circuits of the judges.*

Long after the separation of the exchequer from the king's court, another branch was detached for the decision of private suits. This had its beginning, in Madox's opinion, as early as the reign of Richard I.† But it was completely established by Magna Charta. "Common pleas," it is said in the fourteenth clause, "shall not follow our court, but be held in some certain place." Thus was formed the court of Common Bench at Westminster, with full and, strictly speaking, exclusive jurisdiction over all civil disputes, where neither the king's interest, nor any matter savouring of a criminal nature was concerned. For of such disputes neither the court of king's bench, nor that of exchequer, can take cognizance, except by means of a legal fiction, which, in the one case, supposes an act of force, and, in the other, a debt to the crown.

The principal officers of state, who had originally

* Justiciarii regis Angliæ, qui dicuntur itineris, missi Herfordiam, pro suo exequendo officio repelluntur, allegantibus his qui regi adversabantur, ipsos contrà formam provisionum Oxoniæ nuper factarum venisse. Chron. Nic. Trivet. A. D. 1260. I forget where I found this quotation.

† Hist. of Exchequer, c. 19. Justices of the bench are mentioned several years before Magna Charta. But Madox thinks the chief justiciary of England might preside in the two courts, as well as in the exchequer. After the erection of the Common Bench, the style of the superior court began to alter. It ceased by degrees to be called the king's court. Pleas were said to be held coram rege, or coram rege ubicunque fuerit. And thus the court of king's bench was formed out of the remains of the ancient curia regis.

been effective members of the king's court, began to withdraw from it, after this separation into three courts of justice, and left their places to regular lawyers; though the treasurer and chancellor of the exchequer have still seats on the equity side of that court, a vestige of its ancient constitution. It would indeed have been difficult for men bred in camps or palaces to fulfil the ordinary functions of judicature, under such a system of law as had grown up in England. The rules of legal decision, among a rude people, are always very simple; not serving much to guide, far less to control, the feelings of natural equity. Such were those which prevailed among the Anglo-Saxons; requiring no subtler intellect, or deeper learning, than the earl or sheriff at the head of his country-court might be expected to possess. But a great change was wrought in about a century after the conquest. Our English lawyers, prone to magnify the antiquity, like the other merits of their system, are apt to carry up the date of the common law, till, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient time. Even Sir Matthew Hale does not hesitate to say, that its origin is as undiscoverable as that of Nile. But though some features of the common law may be distinguishable in Saxon times, while our limited knowledge prevents us from assigning many of its peculiarities to any determinable period, yet the general character and most essential parts of the system were of much later growth. The laws of the Anglo-Saxon kings, Madox truly observes, are as different from

those collected by Glanvil as the laws of two different nations. The pecuniary compositions for crimes, especially for homicide, which run through the Anglo-Saxon code down to the laws ascribed to Henry I.,* are not mentioned by Glanvil. Death seems to have been the regular punishment of murder, as well as robbery. Though the investigation by means of ordeal was not disused in his time,† yet trial by combat, of which we find no instance before the conquest, was evidently preferred. Under the Saxon government, suits appear to have commenced, even before the king, by verbal or written complaint; at least, no trace remains of the original writ, the foundation of our civil procedure.‡ The descent of lands before the conquest was according to the custom of gavelkind, or equal partition among the children ;§ in the age of Henry I. the eldest son took the principal fief to his own share ;‖ in that of Glanvil he inherited all the lands held by knight service ; but the descent of socage lands depended on the particular custom of the estate. By the Saxon laws, upon the death of the son without issue, the father inherited ;¶ by our

* C. 70.

† A citizen of London, suspected of murder, having failed in the ordeal of cold water, was hanged by order of Henry II., though he offered 500 marcs to save his life. Hoveden, p. 566. It appears, as if the ordeal were permitted to persons already convicted by the verdict of a jury. If they escaped in this purgation, yet, in cases of murder, they were banished the realm. Wilkins, Leges Anglo-Saxon. p. 330. Ordeals were abolished about the beginning of Henry III.'s reign.

‡ Hickes, Dissert. Epistol. p. 8.

§ Leges Gulielmi, p. 225.

‖ Leges Henr. I. c. 70.

¶ Leges Henr. I. c. 70.

common law, he is absolutely, and in every case, excluded. Lands were, in general, devisable by testament before the conquest; but not in the time of Henry II., except by particular custom. These are sufficient samples of the differences between our Saxon and Norman jurisprudence; but the distinct character of the two will strike more forcibly every one who peruses successively the laws published by Wilkins, and the treatise ascribed to Glanvil. The former resemble the barbaric codes of the continent, and the capitularies of Charlemagne and his family; minute to an excess in apportioning punishments, but sparing and indefinite in treating of civil rights; while the other, copious, discriminating and technical, displays the characteristics as well as unfolds the principles of English law. It is difficult to assert any thing decisively as to the period between the conquest and the reign of Henry II., which presents fewer materials for legal history than the preceding age; but the Treatise denominated the laws of Henry I., compiled at the soonest about the end of Stephen's reign,* bears so much of a Saxon character, that I should be inclined to ascribe our present common law to a date, so far as what is gradual has any date, not much antecedent to the publication of Glanvil.† At the same time, since no kind of evidence attests any sudden

* The Decretum of Gratian is quoted in this treatise, which was not published, in Italy, till 1151.

† Madox, Hist. of Exch. p. 122. edit. 1711. Lord Lyttleton, vol. ii. p. 267. has given reasons for supposing that Glanvil was not the author of this treatise, but some clerk under his direction.

and radical change in the jurisprudence of England, the question must be considered as left in great obscurity. Perhaps it might be reasonable to conjecture, that the treatise called Leges Henrici Primi contains the ancient usages still prevailing in the inferior jurisdictions, and that of Glanvil the rules established by the Norman lawyers of the king's court, which would of course acquire a general recognition and efficacy, in consequence of the institution of justices holding their assizes periodically throughout the country.

The capacity of deciding legal controversies was now only to be found in men who had devoted themselves to that peculiar study; and a race of such men arose, whose eagerness and even enthusiasm in the profession of the law were stimulated by the self-complacency of intellectual dexterity in threading its intricate and thorny mazes. The Normans are noted in their own country for a shrewd and litigious temper, which may have given a character to our courts of justice in early times. Something too of that excessive subtlety, and that preference of technical to rational principles, which runs through our system, may be imputed to the scholastic philosophy, which was in vogue during the same period, and is marked by the same features. But we have just reason to boast of the leading causes of these defects; an adherence to fixed rules, and a jealousy of judicial discretion, which have in no country, I believe, been carried to such a length. Hence precedents of adjudged cases, becoming authorities for the future,

have been constantly noted, and form indeed almost the sole ground of argument in questions of mere law. But these authorities being frequently unreasonable and inconsistent, partly from the infirmity of all human reason, partly from the imperfect manner in which a number of unwarranted and incorrect reporters have handed them down, later judges grew anxious to elude by impalpable distinctions what they did not venture to overturn. In some instances this evasive skill has been applied to acts of the legislature. Those who are moderately conversant with the history of our law will easily trace other circumstances that have co-operated in producing that technical and subtle system, which regulates the course of real property. For as that formed almost the whole of our ancient jurisprudence, it is there that we must seek its original character. But much of the same spirit pervades every part of the law. No tribunals of a civilized people ever borrowed so little, even of illustration, from the writings of philosophers, or from the institutions of other countries. Hence law has been studied, in general, rather as an art than a science, with more solicitude to know its rules and distinctions, than to perceive their application to that for which all rules of law ought to have been established, the maintenance of public and private rights. Nor is there any reading more jejune and unprofitable to a philosophical mind than that of our ancient law-books. Later times have introduced other inconveniences, till the vast extent and multiplicity of our laws have become a practical evil of serious im-

portance; and an evil which, between the timidity of the legislature on the one hand, and the selfish views of practitioners on the other, is likely to reach in no long period, an intolerable excess. Deterred by an interested clamour against innovation from abrogating what is useless, simplifying what is complex, or determining what is doubtful, and always more inclined to stave off an immediate difficulty by some patchwork scheme of modifications and suspensions, than to consult for posterity in the comprehensive spirit of legal philosophy, we accumulate statute upon statute, and precedent upon precedent, till no industry can acquire, nor any intellect digest the mass of learning that grows upon the panting student; and our jurisprudence seems not unlikely to be simplified in the worst and least honourable manner, a tacit agreement of ignorance among its professors. Much indeed has already gone into desuetude within the last century, and is known only as an occult science by a small number of adepts. We are thus gradually approaching the crisis of a necessary reformation, when our laws, like those of Rome, must be cast into the crucible. It would be a disgrace to the nineteenth century, if England could not find her Tribonian.*

* Whitelocke, just after the Restoration, complains that "*Now* the volume of our statutes is grown or swelled to a great bigness." The volume! What would he have said to the monstrous birth of a volume triennially, filled with laws professing to be the deliberate work of the legislature, which every subject is supposed to read, remember and understand! The excellent sense of the following sentences from the same passage may well excuse me for quoting them, and perhaps, in this age of bigoted averseness to innovation, I have need of

This establishment of a legal system, which must be considered as complete at the end of Henry III.'s reign, when the unwritten usages of the common law as well as the forms and precedents of the courts were digested into the great work of Bracton, might, in some respect, conduce to the security of public freedom. For, however highly the prerogative might be strained, it was incorporated with the law, and treated with the same distinguishing and argumentative subtlety as every other part of it. Whatever things, therefore, it was asserted that the king might do, it was a necessary implication, that there were other things which he could not do; else it were vain to specify the former. It is not meant to press this too far; since undoubtedly the bias of lawyers towards the prerogative was sometimes too discernible. But the sweeping maxims of absolute power, which servile judges and churchmen taught the Tudor and

some apology for what I have ventured to say in the text. "I remember the opinion of a wise and learned statesman and lawyer (the Chancellor Oxenstiern) that multiplicity of written laws do but distract the judges, and render the law less certain; that where the law sets due and clear bounds betwixt the prerogative royal, and the rights of the people, and gives remedy in private causes, there needs no more laws to be increased; for thereby litigation will be increased likewise. It were a work worthy of a parliament, and cannot be done otherwise, to cause a review of all our statutes, to repeal such as they shall judge inconvenient to remain in force; to confirm those which they shall think fit to stand, and those several statutes which are confused, some repugnant to others, many touching the same matter, to be reduced into certainty, all of one subject into one statute, that perspicuity and clearness may appear in our written laws, which at this day few students or sages can find in them." Whitelocke's Commentary on Parliamentary Writ. vol. i. p. 409.

Stuart princes, seem to have made no progress under the Plantagenet line.

Whatever may be thought of the effect which the study of the law had upon the rights of the subject, it conduced materially to the security of good order by ascertaining the hereditary succession of the crown. Five kings, out of seven that followed William the Conqueror, were usurpers, according at least to modern notions. Of these, Stephen alone encountered any serious opposition upon that ground; and with respect to him, it must be remembered that all the barons, himself included, had solemnly sworn to maintain the succession of Matilda. Henry II. procured a parliamentary settlement of the crown upon his eldest and second sons; a strong presumption that their hereditary right was not absolutely secure.* A mixed notion of right and choice in fact prevailed as to the succession of every European monarchy. The coronation-oath and the form of popular consent then required were considered as more material, at least to perfect a title, than we deem them at present. They gave seisin, as it were, of the crown, and, in cases of disputed pretensions, had a sort of judicial efficacy. The Chronicle of Dunstaple says, concerning Richard I., that he was "elevated to the throne by hereditary right, after a solemn election by the clergy and people :"† words that indicate the current principles of that age. It

* Lyttleton, vol. ii. p. 14.

† p. 42. Hæreditario jure promovendus in regnum, post cleri et populi solennem electionem.

is to be observed, however, that Richard took upon him the exercise of royal prerogatives, without waiting for his coronation.* The succession of John has certainly passed in modern times for an usurpation. I do not find that it was considered as such by his own contemporaries on this side of the channel. The question of inheritance between an uncle and the son of his deceased elder brother was yet unsettled, as we learn from Glanvil, even in private succession.† In the case of sovereignties, which were sometimes contended to require different rules from ordinary patrimonies, it was, and continued very long to be, the most uncertain point in public law. John's pretensions to the crown might therefore be such as the English were justified in admitting, especially as his reversionary title seems to have been acknowledged in the reign of his brother Richard.‡ If indeed we may place reliance on Matthew Paris, Archbishop Hubert, on this occasion, declared in the most explicit terms that the crown was elective, giving even to the blood royal no other preference than their merit might challenge.§ Carte rejects this as a fiction of the historian; and it is certainly a strain far beyond the constitution, which, both before and after the conquest, had invariably limited the throne to one royal stock, though not strictly to its nearest branch. In a charter of the first year of his reign, John calls himself king "by

* Gul. Neubrigensis, l. iv. c. 1.
† Glanvil, l. vii. c. 3.
‡ Hoveden, p. 702. § p. 165.

hereditary right, and through the consent and favour of the church and people."*

It is deserving of remark, that during the rebellions against this prince and his son Henry III., not a syllable was breathed in favour of Eleanor, Arthur's sister, who, if the present rules of succession had been established, was the undoubted heiress of his right. The barons chose rather to call in the aid of Louis, with scarce a shade of title, though with much better means of maintaining himself. One should think that men, whose fathers had been in the field for Matilda, could make no difficulties about female succession. But I doubt whether, notwithstanding that precedent, the crown of England was acknowledged to be capable of descending to a female heir. Great averseness had been shown by the nobility of Henry I. to his proposal of settling the kingdom on his daughter.† And from a remarkable passage which I shall produce in a note, it appears that even in the reign of Edward III. the succession was supposed to be confined to the male line.‡

* Jure hæreditario, et mediante tam cleri et populi consensu et favore. Gurdon on Parliaments, p. 139.

† Lyttleton, vol. i. p. 162.

‡ This is intimated by the treaty made in 1339, for a marriage between the eldest son of Edward III. and the duke of Brabant's daughter. Edwin therein promises, that if his son should die before him, leaving male issue, he will procure the consent of his barons, nobles and cities, (that is, of parliament; *nobles* here meaning *knights*, if the word has any distinct sense) for such issue to inherit the kingdom; and if he die leaving a daughter only, Edward *or his heir* shall make such provision for her as belongs to the daughter of a king, Rymer, t. v. p. 114. It may be inferred from this instrument,

At length, about the middle of the thirteenth century, the lawyers applied to the crown the same strict principles of descent which regulate a private inheritance. Edward I. was proclaimed immediately upon his father's death, though absent in Sicily. Something however of the old principle may be traced in this proclamation, issued in his name by the guardians of the realm, where he asserts the crown of England "to have devolved upon him by hereditary succession and the will of his nobles."* These last words were omitted in the proclamation of Edward II.;† and it became a fundamental maxim in the law of England, that the king never dies. The coronation oath, and the recognition of the people at that solemnity, are formalities which convey no right either to the sovereign or the people, though they may testify the duties of each.

I cannot conclude the present chapter without ob-

that in Edward's intention, if not by the constitution, the Salic law was to regulate the succession of the English crown. This law, it must be remembered, he was compelled to admit in his claim on the kingdom of France, though with a certain modification, which gave a pretext of title to himself.

* Ad nos regni gubernaculum successione hæreditariâ, ac procerum regni voluntate, et fidelitate nobis præstitâ sit devolutum. Brady (History of England, vol. ii. Appendix, p. 1.) expounds *procerum voluntate* to mean *willingness*, not *will*; as much as to say, they acted readily, and without command. But in all probability it was intended to save the usual form of consent.

† Rymer, t. iii. p. 1. Walsingham however asserts, that Edward II. ascended the throne non tam jure hæreditario quàm unanimi assensu procerum et magnatum. p. 95. Perhaps his Latin is worse than his law, and he might intend to say, that the king had *not only* his hereditary title, but the free consent of his barons.

serving 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 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, to every essential purpose, as complete as at present. Compare two writers nearly contemporary, Bracton with Beaumanoir, and mark how the customs of France and England are distinguishable in this respect. The Frenchman ranges the people under three divisions, the noble, the free, and the servile; our countryman has no generic class, but freedom and villenage.† No restraint seems ever to

* It is hardly worth while, even for the sake of obviating cavils, to notice as an exception the statute of 23 H. VI. c. 14. prohibiting the election of any who were not born gentlemen for knights of the shire.

† Beaumanoir, c. 45. Bracton, l. i. c. 6.

have lain upon marriage; nor have the children even of a peer been ever deemed to lose any privilege by his union with a commoner. The purchase of lands held by knight-service was always open to all freemen. A few privileges indeed were confined to those who had received knighthood.* But, upon the whole, there was a virtual equality of rights among all the commoners of England. What is most peculiar is, that the peerage itself imparts no privilege except to its actual possessor. In every other country, the descendants of nobles cannot but themselves be noble, because their nobility is the immediate consequence of their birth. But though we commonly say that the blood of a peer is ennobled, yet this expression seems hardly accurate, and fitter for heralds than lawyers; since in truth nothing confers nobility but the actual descent of a peerage. The sons of peers, as we well know, are commoners, and totally destitute of any legal right beyond a barren precedence.

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 judgement of an ordinary jury, nor from ig-

* See for these Selden's Titles of Honour, vol. iii. p. 816.

† πλῆθος ἀρχον, πρῶτον μεν ὀνομα καλλιστον ἐχει, ἰσονομιαν, says the advocate of democracy in the discussion of forms of government which Herodotus (Thalia, c. 80.) has put into the mouths of three Persian satraps, after the murder of Smerdis; a scene conceived in the spirit of Corneille.

nominious 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.

This tendency to civil equality in the English law may, I think, be ascribed to several concurrent causes. In the first place, the feudal institutions were far less military in England than upon the continent. From the time of Henry II., the escuage, or pecuniary commutation for personal service, became almost universal. The armies of our kings were composed of hired troops, great part of whom certainly were knights and gentlemen, but who, serving for pay, and not by virtue of their birth and tenure, preserved nothing of the feudal character. It was not, however, so much for the ends of national as of pri-

vate warfare, that the relation of lord and vassal was contrived. The right which every baron in France possessed of redressing his own wrongs and those of his tenants by arms, rendered their connexion strictly military. But we read very little of private wars in England. Notwithstanding an ambiguous passage in Glanvil, I am satisfied that they were never legal.* They must always have been a breach of the king's peace, which our Saxon lawgivers were perpetually striving to preserve, and which the Conqueror and his sons more effectually maintained.† Nor does there seem, in fact, ground to believe that any thing deserving the name of private war ever existed among the nobility of England after the conquest, except during such an anarchy as the reign of Stephen or minority of Henry III. Acts of outrage and spolia-

* After mentioning the three great cases in which the lord might claim an aid from his vassals, Glanvil states it as doubtful, whether he might also do so, ad guerram suam manutenendam. l. ix. c. 8. In a foreign writer, we should interpret this generally; but so little probability appearing that the custom of private war among subjects was ever legitimate in England, I think that it must be confined to the military service due from the lord to his sovereign.

† The penalties imposed on breaches of the peace, in Wilkin's Anglo-Saxon laws, are too numerous to be particularly inserted. One remarkable passage in Domesday appears, by mentioning a legal custom of private feuds in an individual manor, and there only among Welshmen, to afford an inference that it was an anomaly. In the royal manor of Archenfeld in Herefordshire, if one Welshman kills another, it was a custom for the relations of the slain, to assemble and plunder the murderer and his kindred, and burn their houses until the corpse should be interred, which was to take place by noon on the morrow of his death. Of this plunder the king had a third part, and the rest they kept for themselves. p. 179.

tion were indeed very frequent. The statute of Marlebridge, soon after the baronial wars of Henry III., speaks of the disseisins that had taken place during the late disturbances;* and thirty-five verdicts are said to have been given at one court of assize against Foulkes de Breauté, a notorious partisan, who commanded some foreign mercenaries in the army of the confederate barons at the beginning of the same reign:† but these are faint resemblances of that wide-spreading devastation which the nobles of France and Germany were entitled to carry among their neighbours. The most prominent instance of what may be deemed a private war rose out of a contention between the earls of Glocester and Hereford, in the reign of Edward I., during which acts of extraordinary violence were perpetrated; but, far from its having passed for lawful, these powerful nobles were both committed to prison, and paid heavy fines.‡ Thus the tenure of knight-service was not in effect much more peculiarly connected with the profession of arms than that of socage. There was nothing in the former condition to generate that high self-estimation, which military habits inspire. On the contrary, the burthensome incidents of tenure in chivalry rendered socage the more advantageous, though less honourable of the two.

In the next place, we must ascribe a good deal of efficacy to the old Saxon principles, that survived

* Stat. 52 H. III.
† Matt. Paris, p. 271.
‡ Rot. Parl. vol. i. p. 70.

the conquest of William, and infused themselves into our common law. A respectable class of free socagers, having, in general, full rights of alienating their lands, and holding them probably at a small certain rent from the lord of the manor, frequently occur in Domesday Book. Though, as I have already observed, these were derived from the superior and more fortunate Anglo-Saxon ceorls, they were perfectly exempt from all marks of villenage both as to their persons and estates. Some have derived their name from the Saxon *soc*, which signifies a franchise, especially one of jurisdiction. And whatever may come of this etymology, which is not perhaps so well established as that from the French word *soc*, a ploughshare,* they undoubtedly were suitors to the court-baron of the lord, to whose *soc*, or right of justice, they belonged. They were consequently judges in civil causes, determined before the manerial tribunal.† Such privileges set them

* It is not easy to decide between these two derivations of the words socage and socman. On the one hand, the frequent recurrence in Domesday Book of the expression, socmanni de socâ Algari, &c. seems to lead us to infer that these words, so near in sound, were related to each other. Somner (on Gavelkind, p. 13.) is clearly for this derivation. But Bracton, l. ii. c. 35., derives socage from the French soc, and this etymology is curiously illustrated by a passage in Blomefield's Hist. of Norfolk, vol. iii. p. 538. (folio.) In the manor of Cawston, a mace with a brazen hand holding a ploughshare was carried before the steward, as a sign that it was held by socage of the dutchy of Lancaster. Perhaps, however, this custom may be thought not sufficiently ancient to confirm Bracton's derivation.

† Territorial jurisdiction, the commencement of which we have seen before the conquest, was never so extensive as in

greatly above the roturiers, or censiers of France. They were all Englishmen, and their tenure strictly English; which seems to have given it credit in the

governments of a more aristocratical character, either in criminal or civil cases. 1. In the laws ascribed to Henry I., it is said that all great offences could only be tried in the king's court, or by his commission. c. 10. Glanvil distinguishes the criminal pleas, which could only be determined before the king's judges, from those which belong to the sheriff. Treason, murder, robbery, and rape were of the former class; theft of the latter. l. xiv. The criminal jurisdiction of the sheriff is entirely taken away by Magna Charta. c. 17. Sir E. Coke says, the territorial franchises of infangthef and outfangthef "had some continuance afterwards, but either by this act, or per desuetudinem, for inconvenience, these franchises within manors are antiquated and gone." 2 Inst p. 31. The statute hardly seems to reach them; and they were certainly both claimed and exercised, as late as the reign of Edward I. Blomefield mentions two instances, both in 1285, where executions for felony took place by the sentence of a court-baron. In these cases the lord's privilege was called in question at the assizes, by which means we learn the transaction; it is very probable, that similar executions occurred in manors, where the jurisdiction was not disputed. (Hist. of Norfolk, vol. i. p. 313.; vol. iii. p. 50.) Felonies are now cognizable in the greater part of boroughs; though it is usual, except in the most considerable places, to remit such as are not within benefit of clergy, to the justices of gaol delivery on their circuit. This jurisdiction, however, is given, or presumed to be given, by special charter, and perfectly distinct from that which was feudal and territorial. Of the latter some vestiges appear to remain in particular liberties, as for example the Soke of Peterborough; but most, if not all, of these local franchises have fallen, by right or custom, into the hands of justices of the peace. A territorial privilege somewhat analogous to criminal jurisdiction, but considerably more oppressive, was that of private gaols. At the parliament of Merton, 1237, the lords requested to have their own prison for trespasses upon their parks and ponds, which the king refused. Stat. Merton. c. 11. But several lords enjoyed this as a particular franchise; which is saved by the statute 5 H. IV. c. 10. directing justices of the peace to imprison no man, except in the common gaol. 2.

eyes of our lawyers, when the name of Englishman was affected even by those of Norman descent, and the laws of Edward the Confessor became the universal demand. Certainly Glanvil, and still more Bracton, treat the tenure in free socage with great respect. And we have reason to think, that this class of freeholders was very numerous even before the reign of Edward I.

But, lastly, the change which took place in the constitution of parliament consummated the degradation, if we must use the word, of the lower nobility: I mean, not so much their attendance by representation instead of personal summons, as their election by the whole body of freeholders, and their separation, along with citizens and burgesses, from the house of peers. These changes will fall under consideration in the following chapter.

The civil jurisdiction of the court-baron was rendered insignificant not only by its limitation, in personal suits, to debts or damages not exceeding forty shillings, but by the writs of *tolt* and *pone*, which at once removed a suit for lands, in any stage of its progress before judgement, into the county court or that of the king. The statute of Marlebridge took away all appellant jurisdiction of the superior lord, for false judgement in the manerial court of his tenant, and thus aimed another blow at the feudal connexion. 52 H. III. c. 19. 3. The lords of the counties palatine of Chester and Durham, and the royal franchise of Ely, had not only a capital jurisdiction in criminal cases, but an exclusive cognizance of civil suits; the former still is retained by the bishops of Durham and Ely, though much shorn of its ancient extent by an act of Henry VIII. (27 H. VIII. c. 24.) and administered by the king's justices of assize; the bishops or their deputies being put only on the footing of ordinary justices of the peace. Id. s. 20.

PART III.

THE ENGLISH CONSTITUTION.

Reign of Edward I.—Confirmatio Chartarum—Constitution of Parliament—the Prelates—the Temporal Peers—Tenure by Barony—its Changes—Difficulty of the Subject—Origin of Representation of the Commons—Knights of Shires—their Existence doubtfully traced through the Reign of Henry III.—Question whether Representation was confined to Tenants in capite discussed—State of English Towns at the Conquest and afterwards—their Progress—Representatives from them summoned to Parliament by Earl of Leicester—Improbability of an earlier Origin—Cases of St. Albans and Barnstable considered—Parliaments under Edward I.—Separation of Knights and Burgesses from the Peers—Edward II.—gradual Progress of the Authority of Parliament traced through the Reigns of Edward III., and his successors down to Henry VI.—Privilege of Parliament—the early instances of it noticed.

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

commons is to be referred to the age of Edward the First, it will be nearer the truth to date the English constitution from that than from any earlier era.

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

lence towards the clergy, on account of their refusal of further subsidies, that, although the ill-judged policy of that class kept their interests too distinct from those of the people, it was natural for all to be alarmed at the precedent of despotism.* These encroachments made resistance justifiable, and the circumstances of Edward made it prudent. His ambition, luckily for the people, had involved him in foreign warfare, from which he could not recede without disappointment and dishonour. Thus was wrested from him that famous statute, inadequately denominated the Confirmation of the Charters, because it added another pillar to our constitution, not less important than the Great Charter itself.†

It was enacted by the 25 E. I. that the charter of liberties, and that of the forest, besides being explicitly confirmed,‡ should be sent to all sheriffs, justices in eyre, and other magistrates throughout the

* The fullest account we possess of these domestic transactions from 1294 to 1298 is in Walter Hemingford, one of the historians edited by Hearne. p. 52—168. They have been vilely perverted by Carte, but extremely well told by Hume, the first writer who had the merit of exposing the character of Edward I. See too Knyghton, in Twysden's Decem Scriptores, col. 2492.

† Walsingham, in Camden's Scriptores Rer. Anglicarum. p. 71—73.

‡ Edward would not confirm the charters, notwithstanding his promise, without the words, salvo jure coronæ nostræ; on which the two earls retired from court. When the confirmation was read to the people at St. Paul's, says Hemingford, they blessed the king on seeing the charters with the great seal affixed; but when they heard the captious conclusion, they cursed him instead. At the next meeting of parliament, the king agreed to omit these insidious words. p. 168.

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

* The supposed statute, De Tallagio non concedendo, is considered by Blackstone, (Introduction to Charters, p. 67.)

We come now to a part of our subject exceedingly important, but more intricate and controverted than any other, the constitution of parliament. I have taken no notice of this in the last section, in order to present uninterruptedly to the reader the gradual progress of our legislature down to its complete establishment under the Edwards. No excuse need be made for the dry and critical disquisition of the following pages; but among such obscure inquiries, I cannot feel myself as secure from errour, as I certainly do from partiality.

One constituent branch of the great councils, held by William the Conqueror and all his successors, was composed of the bishops, and the heads of religious houses holding their temporalities immediately of the crown. It has been frequently maintained, that these spiritual lords sat in parliament only by virtue of their baronial tenure. And certainly they did all hold baronies, which, according to the analogy of lay peerages, were sufficient to give them such a share in the legislature. Nevertheless, I think that this is rather too contracted a view of the rights of the English hierarchy, and indeed, by implication, of the peerage. For a great council of advice and assent in matters of legislation or national import-

as merely an abstract of the Confirmatio Chartarum. By that entitled Articuli super Chartas, 28 Edw. I., a court was erected in every county, of three knights or others, to be elected by the commons of the shire, whose sole province was to determine offences against the two charters, with power of punishing by fine and imprisonment; but not to extend to any case wherein a remedy by writ was already provided.

ance was essential to all the northern governments. And all of them, except perhaps the Lombards, invited the superior ecclesiastics to their councils; not upon any feudal notions, which at that time had hardly begun to prevail, but chiefly as representatives of the church and of religion itself; next, as more learned and enlightened counsellors than the lay nobility; and, in some degree, no doubt, as rich proprietors of land. It will be remembered also, that ecclesiastical and temporal affairs were originally decided in the same assemblies, both upon the continent and in England. The Norman conquest, which destroyed the Anglo-Saxon nobility, and substituted a new race in their stead, could not impair the immortality of church possessions. The bishops of William's age were entitled to sit in his councils by the general custom of Europe, and by the common law of England, which the conquest did not overturn.* Some smaller arguments might be urged against the supposition, that their legislative rights are merely baronial: such as that the guardian of the spiritualities was commonly summoned to parliament during the vacancy of a bishopric, and that the five sees created by Henry VIII. have no baro-

* Hody (Treatise on Convocations, p. 126.) states the matter thus: in the Saxon times all bishops and abbots sat and voted in the state councils, or parliament, as such, and not on account of their tenures. After the conquest the abbots sat there not as such, but by virtue of their tenures, as barons; and the bishops sat in a double capacity, as bishops, and as barons.

nies annexed to them;* but the former reasoning appears less technical and confined.†

* Hody, p. 128.

† It is rather a curious speculative question, and such only we may presume, it will long continue, whether bishops are entitled, on charges of treason or felony, to a trial by the peers. If this question be considered either theoretically, or according to ancient authority, I think the affirmative proposition is beyond dispute. Bishops were at all times members of the great national council, and fully equal to lay lords in temporal power as well as dignity. Since the conquest, they have held their temporalities of the crown by a baronial tenure, which, if there be any consistency in law, must unequivocally distinguish them from commoners; since any one holding by barony might be challenged on a jury, as not being the peer of the party whom he was to try. It is true, that they take no share in the judicial power of the house of lords in cases of treason or felony; but this is merely in conformity to those ecclesiastical canons which prohibited the clergy from partaking in capital judgements, and they have always withdrawn from the house on such occasions under a protestation of their right to remain. Had it not been for this particularity, arising wholly out of their own discipline, the question of their peerage could never have come into dispute. As for the common objection, that they are not tried as peers, because they have no inheritable nobility, I consider it as very frivolous; since it takes for granted the precise matter in controversy, that an inheritable nobility is necessary to the definition of peerage, or to its incidental privileges.

If we come to constitutional precedents, by which, when sufficiently numerous and unexceptionable, all questions of this kind are ultimately to be determined, the weight of *ancient* authority seems to be in favour of the prelates. In the fifteenth year of Edward III. (1340), the king brought several charges against Archbishop Stratford. He came to parliament, with a declared intention of defending himself before his peers. The king insisted upon his answering in the court of exchequer. Stratford however persevered; and the house of lords by the king's consent appointed twelve of their number, bishops, earls, and barons, to report whether peers ought to answer criminal charges in parliament, and not elsewhere. This committee reported to the king in full parliament, that

Next to these spiritual lords were the earls and barons, or lay peerage of England. The former dignity was perhaps less official than in the Saxon

the peers of the land ought not to be arraigned, nor put on trial, except in parliament and by their peers. The archbishop upon this prayed the king, that inasmuch as he had been notoriously defamed, he might be arraigned in full parliament before the peers, and there make answer; which request the king granted. Rot. Parl. vol. ii. p. 127. Collier's Eccles. Hist. vol. i. p. 543. The proceedings against Stratford went no farther, but I think it impossible not to admit, that his right to trial as a peer was fully recognized both by the king and lords.

This is however the latest, and perhaps the only instance of a prelate's obtaining so high a privilege. In the preceding reign of Edward II., if we can rely on the account of Walsingham, (p. 119.) Adam Orleton, the factious bishop of Hereford, had first been arraigned before the house of lords, and subsequently convicted by a common jury; but the transaction was of a singular nature, and the king might probably be influenced by the difficulty of obtaining a conviction from the temporal peers, of whom many were disaffected to him, in a case where privilege of clergy was vehemently claimed. But, about 1357, a bishop of Ely, being accused of harbouring one guilty of murder, though he demanded a trial by the peers, was compelled to abide the verdict of a jury. Collier, p. 557. In the 31st of Edw. III. (1358), the abbot of Missenden was hanged for coining. 2 Inst. p. 635. The abbot of this monastery appears from Dugdale to have been summoned by writ in the 49th of Henry III. If he actually held by barony, I do not perceive any strong distinction between his case and that of a bishop. The leading precedent, however, and that upon which lawyers principally found their denial of this privilege to the bishops, is the case of Fisher, who was certainly tried before an ordinary jury; nor am I aware that any remonstrance was made by himself, or complaint by his friends, upon this ground. Cranmer was treated in the same manner; and from these two, being the most recent precedents, though neither of them in the best of times, the great plurality of lawbooks have drawn a conclusion, that bishops are not entitled to trial by the temporal peers. Nor can there be much doubt, that whenever the occasion shall occur, this will be the decision of the house of lords.

times, although the earl was entitled to the third penny of all emoluments arising from the administration of justice in the county-courts, and might, per-

There are two peculiarities, as it may naturally appear, in the above-mentioned resolution of the lords in Stratford's case. The first is, that they claim to be tried, not only before their peers, but in parliament. And in the case of the bishop of Ely, it is said to have been objected to his claim of trial by his peers, that parliament was not then sitting. (Collier, ubi sup.) It is most probable, therefore, that the court of the lord high steward, for the special purpose of trying a peer, was of more recent institution; as appears also from Sir E. Coke's expressions. 4 Inst. p. 58. The second circumstance that may strike a reader is, that the lords assert their privilege in all criminal cases, not distinguishing misdemeanors from treasons and felonies. But in this they were undoubtedly warranted by the clear language of Magna Charta, which makes no distinction of the kind. The practice of trying a peer for misdemeanors by a jury of commoners, concerning the origin of which I can say nothing, is one of those anomalies which too often render our laws capricious and unreasonable in the eyes of impartial men.

Since writing the above note, I have read Stillingfleet's treatise on the judicial power of the bishops in capital cases: a right which, though now, I think, abrogated by non-claim and a course of contrary precedents, he proves beyond dispute to have existed by the common law and constitutions of Clarendon, to have been occasionally exercised, and to have been only suspended by their voluntary act. In the course of this argument, he treats of the peerage of the bishops, and produces abundant evidence from the records of parliament that they were styled peers, for which, though convinced from general recollection, I had not leisure or disposition to search. But if any doubt should remain, the statute 25 E. III. c. 6. contains a legislative declaration of the peerage of bishops. The whole subject is discussed with much perspicuity and force by Stillingfleet, who seems however not to press very greatly the right of trial by peers, aware no doubt of the weight of opposite precedents. (Stillingfleet's Works, vol. iii. p. 820.) In one distinction, that the bishops vote in their judicial functions as barons, but in legislation as magnates, which Warburton has brought forward as his own in the Alliance of Church and

haps, command the militia of his county, when it was called forth.* Every earl was also a baron; and held an honour or barony of the crown, for which he paid a higher relief than an ordinary baron, probably on account of the profits of his earldom. I

State, Stillingfleet has perhaps not taken the strongest ground, nor sufficiently accounted for their right of sitting in judgement on the impeachment of a commoner. Parliamentary impeachment, upon charges of high public crimes, wherein in fact both houses act judicially, seems to be the exercise of a right inherent in the great council of the nation, some traces of which appear even before the conquest; (Chron. Sax. p. 164. 169.) independent of, and superseding, that of trial by peers, which, if the 29th section of Magna Charta be strictly construed, is only required upon indictments at the king's suit. And this consideration is of great weight in the question still unsettled, whether a commoner can be tried by the lords upon an impeachment for treason.

The treatise of Stillingfleet was written on occasion of the objection raised by the commons to the bishops voting on the question of Lord Danby's pardon, which he pleaded in bar of his impeachment. Burnet seems to suppose, that their right of final judgement had never been defended, and confounds judgement with sentence. Mr. Hargrave, strange to say, has made a much greater blunder, and imagined that the question related to their right of voting on a bill of attainder, which no one, I believe, ever disputed. Notes on Co. Litt. 134 b.

* Madox, Baronia Anglica, p. 138. Dialogus de Scaccario, l. i. c. 17. Lyttleton's Henry II. vol. ii. p. 217. The last of these writers supposes, contrary to Selden, that the earls continued to be governors of their counties under Henry II. Stephen created a few titular earls, with grants of crown lands to support them; but his successor resumed the grants, and deprived them of their earldoms.

In Rymer's Fœdera, vol. i. p. 3. we find a grant of Matilda, creating Milo of Glocester earl of Hereford, with the mote and castle of that city in fee to him and his heirs, the third penny of the rent of the city, and of the pleas in the county, three manors and a forest, and the service of three tenants in chief, with all their fiefs; to be held with all privileges and liberties as fully as ever any earl in England had possessed them.

will not pretend to say, whether titular earldoms, absolutely distinct from the lieutenancy of a county, were as ancient as the conquest, which Madox seems to think, or were considered as irregular, so late as Henry II., according to Lord Lyttleton. In Dugdale's Baronage, I find none of this description in the first Norman reigns, for even that of Clare was connected with the local earldom of Hertford.

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

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

their owner was equally a baron, and summoned to serve the king in parliament with his advice and judgement, as appears by many records and passages in history.

But about the latter end of John's reign, some only of the most eminent tenants in chief were summoned by particular writs; the rest by one general summons through the sheriffs of their several counties. This is declared in the Great Charter of that prince, wherein he promises that, whenever an aid or scutage shall be required, faciemus summoneri archiepiscopos, episcopos, abbates, comites et majores barones regni sigillatim per literas nostras. Et præterea faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios qui in capite tenent de nobis. Thus the barons are distinguished from other tenants in chief, as if that name were only applicable to a particular number of the king's immediate vassals. But it is reasonable to think, that before this charter was made, it had been settled by the law of some other parliament, how these greater barons should be distinguished from the lesser tenants in chief; else what certainty could there be in an expression so general and indefinite? And this is likely to have proceeded from the pride with which the ancient and wealthy barons of the realm would regard those newly created by grants of escheated honours, or those decayed in estate, who yet were by their tenures on an equality with themselves. They procured therefore two innovations in their condition; first, that these inferior barons should be

summoned generally by the sheriff, instead of receiving their particular writs, which made an honorary distinction; and next, that they should pay relief, not as for an entire barony, one hundred marks; but at the rate of five pounds for each knight's-fee which they held of the crown. This changed their tenure to one by mere knight-service, and their denomination to tenants in chief. It was not difficult, afterwards, for the greater barons to exclude any from coming to parliament as such, without particular writs directed to them, for which purpose some law was probably enacted in the reign of Henry III. If indeed we could place reliance on a nameless author whom Camden has quoted, this limitation of the peerage to such as were expressly summoned depended upon a statute made soon after the battle of Evesham. But no one has ever been able to discover Camden's authority, and the change was, probably, of a much earlier date.*

Such is the theory of Selden, which, if it rested less upon conjectural alterations in the law, would undoubtedly solve some material difficulties that occur in the opposite view of the subject. According to Madox, tenure by knight's service in chief was always distinct from that by barony. It is not easy, however, to point out the characteristic differences of the two; nor has that eminent antiquary, in his large work, the Baronia Anglica, laid down any definition, or attempted to explain the real nature of a barony. The distinction could not consist in the number of

* Selden's Works, vol. iii. p. 713—743.

knight's fees; for the barony of Hwayton consisted of only three; while John de Baliol held thirty fees by mere knight-service.* Nor does it seem to have consisted in the privilege or service of attending parliament, since all tenants in chief were usually summoned. But whatever may have been the line between these modes of tenure, there seems complete proof of their separation long before the reign of John. Tenants in chief are enumerated distinctly from earls and barons in the charter of Henry I. Knights, as well as barons, are named as present in the parliament of Northampton in 1165, in that held at the same town in 1176, and upon other occasions.† Several persons appear in the Liber Niger Scaccarii, a roll of military tenants made in the age of Henry II., who held single knight's fees of the crown. It is however highly probable, that, in a lax sense of the word, these knights may sometimes have been termed barons. The author of the Dialogus de Scaccario speaks of those holding greater or lesser baronies, including, as appears by the context, all tenants in chief.‡ The former of these seem to be the majores barones of King John's charter. And the secundæ dignitatis barones, said by a contemporary historian to have been present in the parliament of Northampton, were, in all probability, no other than the knightly tenants of the crown.§ For

* Lyttleton's Henry II. vol. ii. p. 212.

† Hody on Convocations, p. 222. 234.

‡ Lib. ii. c. 9.

§ Hody and Lord Lyttleton maintain these "barons of the second rank" to have been the sub-vassals of the crown; te-

the word baro, originally meaning only a man, was of very large significance, and is not unfrequently applied to common freeholders, as in the phrase of court-baron. It was used too for the magistrates or chief men of cities; as it is still for the judges of the exchequer, and the representatives of the Cinque-Ports.

The passage however before cited from the Great Charter of John, affords one spot of firm footing in the course of our progress. Then, at least, it is evident that all tenants in chief were entitled to their summons; the greater barons by particular writs, the rest, through one directed to their sheriff. The epoch when all, who, though tenants in chief, had not been actually summoned, were deprived of their right of attendance in parliament, is again involved in uncertainty and conjecture. The unknown writer quoted by Camden seems not sufficient authority to establish his assertion, that they were excluded by a statute made after the battle of Evesham. The principle was most likely acknowledged at an earlier time. Simon de Montfort summoned only twenty-three temporal peers to his famous parliament. In the year 1255, the barons complained, that many of their number had not received their writs, according

nants of the great barons, to whom the name was sometimes improperly applied. This was very consistent with their opinion, that the commons were a part of parliament at that time. But Hume, assuming at once the truth of their interpretation in this instance, and the falsehood of their system, treats it as a deviation from the established rule, and a proof of the unsettled state of the constitution.

to the tenor of the charter, and refused to grant an aid to the king till they were issued.* But it would have been easy to disappoint this mode of packing a parliament, if an unsummoned baron could have sat by mere right of his tenure. The opinion of Selden, that a law of exclusion was enacted towards the beginning of Henry's reign, is not liable to so much objection. But perhaps it is unnecessary to frame an hypothesis of this nature. Writs of summons might probably be older than the time of John;† and when this had become the customary and regular preliminary of a baron's coming to parliament, it was a natural transition to look upon it as an indispensable condition; in times when the prerogative was high, the law unsettled, and the service in parliament deemed by many still more burthensome than honourable. Some omissions in summoning the king's tenants to former parliaments may perhaps have produced the above-mentioned provision of the Great Charter, which had a relation to the imposition of taxes, wherein it was deemed essential to obtain a more universal consent, than was required in councils held for state, or even for advice.‡

* M. Paris. p. 785. The barons even tell the king, that this was contrary to *his* charter, in which nevertheless the clause to that effect, contained in his father's charter, had been omitted.

† Henry II., in 1175, forbad any of those who had been concerned in the late rebellion to come to his court without a particular summons. Carte, vol. ii. p. 249.

‡ Upon the subject of tenure by barony, besides the writers already quoted, see West's Inquiry into the Method of creating Peers, and Carte's History of England, vol. ii. p. 247.

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

In the Magna Charta of 1 Henry III., it is said: Pro hâc donatione et concessione . . . . . archiepiscopi, episcopi, comites, barones, milites, et liberè tenentes, et omnes de regno nostro dederunt nobis quintam decimam partem omnium bonorum suorum mobilium.* So in a record of 19 Henry III.: Comites, et barones, et omnes alii de toto regno nostro Angliæ, spontaneâ voluntate suâ concesserunt nobis efficax auxilium.† The largeness of these words is, however, controlled by a subsequent passage, which declares

* Hody on Convocations, p. 293.

† Brady, Introduction to History of England, Appendix, p. 48.

the tax to be imposed ad mandatum omnium comitum et baronum et omnium aliorum *qui de nobis tenent in capite.* And it seems to have been a general practice, to assume the common consent of all ranks, to that which had actually been agreed by the higher. Thus, in another writ for levying a subsidy, it is asserted that archiepiscopi, episcopi . . . . . milites, liberi homines, et villani de regno nostro concesserunt, &c.* Now, as no one can imagine that villeins were either personally, or by representation, consenting to this grant, it may be contended that the liberi homines were just as little concerned in it. The mention of villani however in this record is singular; that of liberi homines very usual. In a similar writ, 21 Henry III., the ranks of men are enumerated specifically: archiepiscopi, episcopi, abbates, priores, et clerici terras habentes quæ ad ecclesias suas non pertinent, comites, barones, milites, et liberi homines, pro se et suis villanis, nobis concesserunt in auxilium tricesimam partem omnium mobilium.† In the close roll of the same year, we have a writ directed to the archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders (liberi homines) of Ireland; in which an aid is desired of them, and it is urged, that one had been granted by his fideles Angliæ.‡

But this attendance in parliament of inferior tenants in chief, some of them too poor to have received

* Brady, Introduction to Hist. of England, p. 220. Matt. Paris, p. 320.

† Brady's History of Fngland, vol. i. Appendix, p. 182.

‡ Brady's Introduction, p. 94.

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

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

The first instance of actual representation which occurs in our history is only four years after the conquest; when William, if we may rely on Hoveden, caused twelve persons skilled in the customs of England to be chosen from each county, who were sworn to inform him rightly of their laws; and these, so ascertained, were ratified by the consent of the great council. This, Sir Matthew Hale asserts to be "as sufficient and effectual a parliament as ever was held in England."* But there is no appearance

* Hist. of Common Law, vol. i. p. 202.

that these twelve deputies of each county were invested with any higher authority than that of declaring their ancient usages. No stress can be laid, at least, on this insulated and anomalous assembly, the existence of which is only learned from an historian of a century later.

We find nothing that can arrest our attention, in searching out the origin of county representation, till we come to a writ in the fifteenth year of John, directed to all the sheriffs in the following terms: Rex Vicecomiti N. salutem. Præcipimus tibi quod omnes milites ballivæ tuæ qui summoniti fuerunt esse apud Oxoniam ad Nos a die Omnium Sanctorum in quindecim dies venire facias cum armis suis: corpora vero baronum sine armis singulariter, et *quatuor discretos milites* de comitatu tuo, illuc venire facias ad eundem terminum, ad loquendum nobiscum de negotiis regni nostri. For the explanation of this obscure writ, I must refer to what Prynne has said;* but it remains problematical, whether these four knights (the only clause which concerns our purpose) were to be elected by the county, or returned, in the nature of a jury, at the discretion of the sheriff. Since there is no sufficient proof whereon to decide, we can only say with hesitation, that there *may* have been an instance of county representation in the fifteenth year of John.

We may next advert to a practice, of which there is very clear proof in the reign of Henry III. Subsidies granted in parliament were assessed, not as

* 2 Prynne's Register, p. 16.

in former times, by the justices upon their circuits, but by knights freely chosen in the county-court. This appears by two writs, one of the fourth, and one of the ninth year of Henry III.* At a subsequent period, by a provision of the Oxford parliament in 1258, every county elected four knights to inquire into grievances, and deliver their inquisition into parliament.†

The next writ now extant, that wears the appearance of parliamentary representation, is in the thirty-eighth of Henry III. This, after reciting that the earls, barons, and other great men (cæteri magnates) were to meet at London three weeks after Easter, with horses and arms, for the purpose of sailing into Gascony, requires the sheriff to compel all within his jurisdiction, who hold twenty pounds a year of the king in chief, or of those in ward of the king, to appear at the same time and place. And that besides those mentioned he shall cause to come before the king's council at Westminster on the fifteenth day after Easter, two good and discreet knights of his county, whom the men of the county shall have chosen for this purpose, in the stead of all and each of them, to consider, along with the knights of other counties, what aid they will grant the king in such an emergency.‡ In the principle of election, and in the object of the assembly, which was to grant money, this certainly resembles a summons to parlia-

* Brady's Introduction. Appendix, pp. 41. and 44.
† Brady's Hist. of England, vol. i. Appendix, p. 227.
‡ 2 Prynne, p. 23.

ment. There are indeed anomalies, sufficiently remarkable upon the face of the writ, which distinguish this meeting from a regular parliament. But when the scheme of obtaining money from the commons of shires through the consent of their representatives had once been entertained, it was easily applicable to more formal councils of the nation.

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

At length, in the year 1265, the forty-ninth of Henry III. while he was a captive in the hands of Simon de Montfort, writs were issued in his name to all the sheriffs, directing them to return two knights for the body of their county, with two citizens or burgesses for every city and borough contained within

* 2 Prynne, p. 27.

it. This therefore is the epoch, at which the representation of the commons becomes indisputably manifest; even should we reject altogether the more equivocal instances of it which have just been enumerated.

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

The spirit of a feudal monarchy, which compelled every lord to act by the advice and assent of his immediate vassals, established no relation between him and those who held nothing at his hands. They were included, so far as he was concerned, in their superiors; and the feudal incidents were due to him from the whole of his vassal's fief, whatever tenants might possess it by sub-infeudation. In England, the tenants in chief alone were called to the great councils before representation was thought of, as it

evident both by the charter of John, and by the language of many records; nor were any others concerned in levying aids or escuages, which were only due by virtue of their tenure. These military tenants were become in the reign of Henry III. far more numerous than they had been under the Conqueror. If we include those who held of the king ut de honore, that is, the tenants of baronies escheated or in ward, who may probably have enjoyed the same privileges, being subject, in general, to the same burthens, their number will be greatly augmented, and form no inconsiderable portion of the freeholders of the kingdom. After the statute commonly called Quia emptores in the eighteenth of Edward I. they were likely to increase much more, as every licensed alienation of any portion of a fief by a tenant in chief would create a new freehold immediately depending upon the crown. Many of these tenants in capite held very small fractions of knight's fees, and were consequently not called upon to receive knighthood. They were plain freeholders holding in chief, and the liberi homines or liberè tenentes of those writs which have been already quoted. The common form indeed of writs to the sheriff directs the knights to be chosen de communitate comitatus. But the word communitas, as in boroughs, denotes only the superior part; it is not unusual to find mention in records of communitas populi or omnes de regno, where none are intended but the barons, or at most the tenants in chief. If we look attentively at the earliest instance of summoning knights of shires to parliament, that in

38 H. III., which has been noticed above, it will appear that they could have only been chosen by military tenants in chief. The object of calling this parliament, if parliament it were, was to obtain an aid from the military tenants, who, holding less than a knight's fee, were not required to do personal service. None then, surely, but the tenants in chief could be electors upon this occasion, which merely respected their feudal duties. Again, to come much lower down, we find a series of petitions in the reigns of Edward III. and Richard II., which seem to lead us to a conclusion, that only tenants in chief were represented by the knights of shires. The writ for wages directed the sheriff to levy them on the commons of the county, both within franchises and without, (tam infra libertates quam extra). But the tenants of lords holding by barony endeavoured to exempt themselves from this burthen, in which they seem to have been countenanced by the king. This led to frequent remonstrances from the commons, who finally procured a statute, that all lands, not discharged by prescription, should contribute to the payment of wages.* But, if these mesne tenants had possessed equal rights of voting with tenants in chief, it is impossible to conceive that they would have thought of claiming so unreasonable an exemption. Yet as it would appear harsh to make any distinction between the rights of those who sustained an equal burthen, we may perceive, how the freeholders holding of mesne lords might on that account obtain

* 12 Ric. II. c. 12. Prynne's 4th Register.

after the statute a participation in the privilege of tenants in chief. And without supposing any partiality or connivance, it is easy to comprehend, that while the nature of tenures and services was so obscure, as to give rise to continual disputes, of which the ancient records of the King's Bench are full, no sheriff could be very accurate in rejecting the votes of common freeholders, repairing to the county-court, and undistinguishable, as must be allowed, from tenants in capite upon other occasions, such as serving on juries, or voting on the election of coroners. To all this it yields some corroboration, that a neighbouring though long hostile kingdom, who borrowed much of her law from our own, has never admitted any freeholders, except tenants in chief of the crown, to a suffrage in county elections. These attended the parliament of Scotland in person till 1428, when a law of James I. permitted them to send representatives.*

Such is, I think, a fair statement of the arguments that might be alleged by those who would restrain the right of election to tenants of the crown. It may be urged, on the other side, that the genius of the feudal system was never completely displayed in England; much less can we make use of that policy to explain institutions that prevailed under Edward I. Instead of aids and scutages, levied upon the king's military tenants, the crown found ampler resources in subsidies upon moveables, from which no

* Pinkerton's Hist. of Scotland, vol. i. p. 120. 357. But this law was not regularly acted upon till 1587. p. 368.

class of men was exempted. But the statute that abolished all unparliamentary taxation led, at least in theoretical principle, to extend the elective franchise to as large a mass of the people as could conveniently exercise it. It was even in the mouth of our kings, that what concerned all should be approved by all. Nor is the language of all extant writs less adverse to the supposition that the right of suffrage in county elections was limited to tenants in chief. It seems extraordinary, that such a restriction, if it existed, should never be deducible from these instruments; that their terms should invariably be large enough to comprise all freeholders. Yet no more is ever required of the sheriff than to return two knights, chosen by the body of the county. For they are not only said to be returned pro communitate, but "per communitatem," and "de assensu totius communitatis." Nor is it satisfactory to allege, without any proof, that this word should be restricted to the tenants in chief, contrary to what must appear to be its obvious meaning.* Certainly, if these

* What can one, who adopts this opinion of Dr. Brady, say to the following record? Rex militibus, liberis hominibus, et *toti communitati* comitatus Wygorniæ tam intra libertates quam extra, salutem. Cum comites, barones, milites, liberi homines, et communitates comitatuum regni nostri vicesimam omnium bonorum suorum mobilium, civesque et burgenses et communitates omnium civitatum et burgorum ejusdem regni, necnon tenentes de antiquis dominicis coronæ nostræ quindecimam bonorum suorum mobilium nobis concesserunt. Pat. Rot. 1 E. II. in Rot. Parl. vol. i. p. 442. See also p. 241. and p. 269. If the word communitates is here used in any precise sense, which, when possible, we are to suppose in construing a legal instrument, it must designate,

tenants of the crown had found inferior freeholders usurping a right of suffrage, we might expect to find it the subject of some legislative provision, or at least of some petition and complaint. And, on the other hand, it would have been considered as unreasonable to levy the wages due to knights of the shire for their service in parliament on those who had no share in their election. But it appears by writs at the very beginning of Edward II.'s reign, that wages were levied "de communitate comitatus."* It will scarcely be contended, that no one was to contribute under this writ, but tenants in chief; and yet the word communitas can hardly be applied to different persons, when it occurs in the same instrument, and upon the same matter. The series of petitions above-mentioned, relative to the payment of wages, rather tends to support a conclusion that all mesne tenants had the right of suffrage, if they thought fit to exercise it, since it was earnestly contended that they were liable to contribute towards that expense. Nor does there appear any reason to doubt that all freeholders, except those within particular franchises, were suitors to the county-court; an institution of no feudal nature, and in which elections were to be made by those present. As to the meeting to which knights of shires were summoned in 38 H. III., it ought not to be reckoned a parliament, but rather one of those ano-

not the tenants in chief, but the inferior class, who though neither freeholders nor free burgesses, were yet contributable to the subsidy on their goods.

* Madox, Firma Burgi, p. 99. and p. 102. note Z.

malous conventions which sometimes occurred in the unfixed state of government. It is at least the earliest known instance of representation, and leads us to no conclusion in respect of later times, when the commons had become an essential part of the legislature, and their consent was required to all public burthens.

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

The progress of towns in several continental countries from a condition bordering upon servitude to wealth and liberty, has more than once attracted our attention in other parts of the present work. Their growth in England, both from general causes

* Prynne's 2d Register, p. 50.

† Carte's Hist. of England, vol. ii. p 250.

‡ The present question has been discussed with much ability in the Edinburgh Review, vol. xxvi. p. 341.

and imitative policy, was very similar and nearly coincident. Under the Anglo-Saxon line of sovereigns, we scarcely can discover in our scanty records the condition of their inhabitants; except retrospectively from the great survey of Domesday Book, which displays the state of England under Edward the Confessor. Some attention to commerce had been shown by Alfred and Athelstan; and a merchant who had made three voyages beyond sea was raised by a law of the latter monarch to the dignity of a Thane.* This privilege was not perhaps often claimed; but the burgesses of towns were already a distinct class from the ceorls or rustics, and though hardly free according to our estimation, seem to have laid the foundation of more extensive immunities. It is probable, at least, that the English towns had made full as great advances towards emancipation as those of France. At the conquest, we find the burgesses or inhabitants of towns living under the superiority or protection of the king, or of some other lord, to whom they paid annual rents, and determinate dues or customs. Sometimes they belonged to different lords; and sometimes the same burgess paid custom to one master, while he was under the jurisdiction of another. They frequently enjoyed special privileges as to inheritance; and in two or three instances they seem to have possessed common property, belonging to a sort of guild or corporation; but never, as far as appears by any evidence, had they a municipal administration by magistrates of

* Wilkins, p. 71.

their own choice.* Besides the regular payments, which were in general not heavy, they were liable to

* Burgenses Exoniæ urbis habent extra civitatem terram duodecim carucatarum; quæ nullam consuetudinem reddunt nisi ad ipsam civitatem. Domesday, p. 100. At Canterbury the burgesses had forty-five houses without the city, de quibus ipsi habebant gablum et consuetudinem, rex autem socam et sacam: ipsi quoque burgenses habebant de rege trigintà tres acras prati in gildam suam. p. 2. In Lincoln and Stamford some resident proprietors, called Lagemanni, had jurisdiction (socam et sacam) over their tenants. But no where have I been able to discover any trace of internal self government; unless Chester may be deemed an exception, where we read of twelve judices civitatis; but by whom constituted, does not appear. The word lageman seems equivalent to judex. The guild mentioned above at Canterbury was, in all probability, a voluntary association; so at Dover we find the burgesses guildhall, gihalla burgensium. p. 1.

Many of the passages in Domesday relative to the state of burgesses are collected in Brady's History of Boroughs; a work, which, if read with due suspicion of the author's honesty, will convey a great deal of knowledge.

Since the former part of this note was written, I have met with a charter granted by Henry II. to Lincoln, which seems to refer, more explicitly than any similar instrument, to municipal privileges of jurisdiction enjoyed by the citizens under Edward the Confessor. These charters, it is well known, do not always recite what is true; yet it is possible, that the citizens of Lincoln, which had been one of the five Danish towns, sometimes mentioned with a sort of distinction by writers before the conquest, might be in a more advantageous situation than the generality of burgesses. Sciatis me concessisse civibus meis Lincoln, omnes libertates et consuetudines et leges suas, quas habuerunt tempore Edwardi et Will. et Henr. regum Angliæ, et gildam suam mercatoriam de hominibus civitatis et de aliis mercatoribus comitatus, sicut illam habuerunt tempore predictorum antecessorum nostrorum, regum Angliæ, melius et liberius. Et omnes homines qui infra quatuor divisas civitatis manent et Mercatum deducunt, sint ad gildas, et consuetudines et assisas civitatis, sicut melius fuerunt temp. Edw. et Will. et Henr. regum Angliæ. Rymer, t. i. p. 40. (Edit. 1816.)

tallages at the discretion of their lords. This burthen continued for two centuries, with no limitation, except that the barons were latterly forced to ask permission of the king before they set a tallage on their tenants, which was commonly done when he imposed one upon his own.* Still the towns became continually richer: for the profits of their traffic were undiminished by competition; and the consciousness that they could not be individually despoiled of their possessions, like the villeins of the country around, inspired an industry and perseverance, which all the rapacity of Norman kings and barons was unable to daunt or overcome.

One of the earliest and most important changes in the condition of the burgesses was the conversion of their individual tributes into a perpetual rent from the whole borough. The town was then said to be affermed, or let in fee-farm to the burgesses and their successors for ever.† Previously to such a grant, the lord held the town in his demesne, and was the legal proprietor of the soil and tenements ;‡ though I by no means apprehend that the burgesses were destitute of a certain estate in their possessions. But of a town in fee-farm he only kept the superiority, and the inheritance of the annual rent, which he might recover by distress.‡ The burgesses held their lands by burgage-tenure, nearly analogous to, or rather a species of free

* Madox, Hist. of Exchequer, c. 17.

† Madox, Firma Burgi, p. 1. There is one instance, I know not if any more could be found, of a firma burgi before the conquest. It was at Huntingdon. Domesday, p. 203.

‡ Madox, p. 12, 13.

socage.* Perhaps before the grant they might correspond to modern copy-holders. It is of some importance to observe, that the lord by such a grant of the town in fee-farm, whatever we may think of its previous condition, divested himself of his property, or lucrative dominion over the soil, in return for the perpetual rent; so that tallages subsequently set at his own discretion upon the inhabitants, however common, can hardly be considered as a just exercise of the rights of proprietorship.

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

* Id. p. 21.

† I have read somewhere that this charter was granted in 1101. But the instrument itself, which is only preserved by an Inspeximus of Edward IV., does not contain any date. Rymer, t. i. p. 11. (Edit. 1816.) Could it be traced so high, the circumstance would be remarkable, as the earliest charters granted by Louis VI. supposed to be the father of these institutions, are several years later.

and justice, to the exclusion of every foreign jurisdiction.* These grants, however, were not in general so extensive till the reign of John.† Before that time, the interior arrangement of towns had received a new organization. In the Saxon period, we find voluntary associations, sometimes religious, sometimes secular; in some cases for mutual defence against injury, in others for mutual relief in poverty. These were called guilds, from the Saxon verb *gildan*, to pay or contribute, and exhibited the natural, if not legal character of corporations.‡ At the time of the

* This did not, however, save the citizens from fining in one hundred marks to the king for this privilege. Mag. Rot. 5 Steph. apud Madox, Hist. Exchequer, t. xi. I do not know that the charter of Henry I. can be suspected; but Brady, in his treatise of Boroughs, (p. 38. edit. 1777.) does not think proper once to mention it; and indeed uses many expressions incompatible with its existence.

† Blomefield, Hist. of Norfolk, vol. ii. p. 16. says that Henry I. granted the same privileges by charter to Norwich in 1122, which London possessed. Yet it appears, that the king named the port reeve or provost; but Blomefield suggests, that he was probably recommended by the citizens, the office being annual.

‡ Madox, Firma Burgi, p. 23. Hickes has given us a bond of fellowship among the thanes of Cambridgeshire, containing several curious particulars. A composition of eight pounds, exclusive, I conceive, of the usual weregild, was to be enforced from the slayer of any fellow. If a fellow (gilda) killed a man of 1200 shillings weregild, each of the society was to contribute half a marc; for a ceorl, two oræ (perhaps ten shillings); for a Welshman, one. If however this act was committed wantonly, the fellow had no right to call on the society for contribution. If one fellow killed another, he was to pay the legal weregild to his kindred, and also eight pounds to the society. Harsh words used by one fellow towards another, or even towards a stranger, incurred a fine. No one was to eat or drink in the company of one who had killed his brother fellow,

conquest, as has been mentioned above, such voluntary incorporations of the burgesses possessed in some towns either landed property of their own, or rights of superiority over that of others. An internal elective government seems to have been required for the administration of a common revenue, and of other business incident to their association.* They became more numerous, and more peculiarly commercial after that era, as well as from the increase of trade, as through imitation of similar fraternities existing in many towns of France. The spirit of monopoly gave

unless in the presence of the king, bishop or alderman. Dissertatio Epistolaris, p. 21.

We find in Wilkins's Anglo-Saxon laws, p. 65. a number of ordinances, sworn to by persons both of noble and ignoble rank, (ge eorlisce ge ceorlisce) and confirmed by King Athelstan. These are in the nature of by-laws for the regulation of certain societies that had been formed for the preservation of public order. Their remedy was rather violent: to kill and seize the effects of all who should rob any member of the association. This property, after deducting the value of the thing stolen, was to be divided into two parts; one given to the criminal's wife if not an accomplice, the other shared between the king and the society.

In another fraternity among the clergy and laity of Exeter, every fellow was entitled to a contribution in case of taking a journey, or if his house was burned. Thus they resembled, in some degree, our friendly societies; and display an interesting picture of manners, which has induced me to insert this note, though not greatly to the present purpose. See more of the Anglo-Saxon guilds in Turner's History, vol. ii. p. 102. Societies of the same kind, for purposes of religion, charity, or mutual assistance, rather than trade, may be found long afterwards. Blomefield's Hist. of Norfolk, vol. iii. p. 494.

* See a grant from Turstin, archbishop of York, in the reign of Henry I., to the burgesses of Beverly, that they may have their *hanshus* (i. e. guildhall) like those of York, et ibi sua statuta pertractant ad honorem Dei, &c. Rymer, t. i. p. 10. edit. 1816.

strength to those institutions, each class of traders forming itself into a body, in order to exclude competition. Thus were established the companies in corporate towns, that of the Weavers in London being perhaps the earliest;* and these were successively consolidated and sanctioned by charters from the crown. In towns not large enough to admit of distinct companies, one merchant guild comprehended the traders in general, or the chief of them; and, this from the reign of Henry II. downwards, became the subject of incorporating charters. The management of their internal concerns, previously to any incorporation, fell naturally enough into a sort of oligarchy, which the tenor of the charter generally preserved. Though the immunities might be very extensive, the powers were more or less restrained to a small number. Except in a few places, the right of choosing magistrates was first given by King John; and certainly must rather be ascribed to his poverty, than to any enlarged policy, of which he was utterly incapable.†

From the middle of the twelfth century to that of the thirteenth, the traders 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

* Madox, Firma Burgi, p. 189.

† Idem, passim. A few of an earlier date may be found in the new edition of Rymer.

the stuffs of Flanders.* Though bearing no comparison with the cities of Italy or the Empire, they increased sufficiently to acquire importance at home. That vigorous prerogative of the Norman monarchs, which kept down the feudal aristocracy, compensated for whatever inf riority there might be in the population and defensible strength of the English towns, compared with those on the continent. They had to fear no petty oppressors, no local hostility; and if they could satisfy the rapacity of the crown, were secure from all other grievances. London, far above the rest, our ancient and noble capital, might, even in those early times, be justly termed a member of the political system. This great city, so admirably situated, was rich and populous long before the conquest. Bede, at the beginning of the eighth century, speaks of London as a great market, which traders frequented by land and sea.† It paid £15,000 out of £82,000, raised by Canute upon the kingdom.‡ If we believe Roger Hovenden, the citizens of London, on the death of Ethelred II., joined with part of the nobility in raising Edmund Ironside to the throne.§ Harold I., according to better authority, the Saxon Chronicle, and William of Malmsbury, was elected by their concurrence.‖ Descending

* Lyttleton's Hist. of Henry II. vol. ii. p. 170. Macpherson's Annals of Commerce, vol. i. p. 331.

† Macpherson, p. 245.

‡ Id. p. 282.

§ Cives Lundinenses, et pars nobilium, qui eo tempore consistebant Lundoniæ, Clitonem Eadmundum unanimi consensu in regem levavere. p. 249.

‖ Chron. Saxon. p. 154. Malmsbury, p. 76. He says the

to later history, we find them active in the civil war of Stephen and Matilda. The famous bishop of Winchester tells the Londoners, that they are almost accounted as noblemen on account of the greatness of their city; into the community of which it appears that some barons had been received.* Indeed the citizens themselves, or at least the principal of them were called barons. It was certainly by far the greatest city in England. There have been different estimates of its population, some of which are extravagant; but I think it could hardly have contained less than thirty or forty thousand souls within its walls; and the suburbs were very populous.†

people of London were become almost barbarians through their intercourse with the Danes; propter frequentem convictum.

* Londinenses, qui sunt quasi optimates pro magnitudine civitatis in Angliâ. Malmsb. p. 189. Thus too Matthew Paris: cives Londinenses, quos propter civitatis dignitatem et civium antiquam libertatem Barones consuevimus appellare. p. 744; and in another place: totius civitatis cives, quos barones vocant. p. 835. Spelman says, that the magistrates of several other towns were called barons. Glossary, Barones de London.

† Drake, the historian of York, maintains that London was less populous, about the time of the conquest, than that city; and quotes Hardynge, a writer of Henry V.'s age, to prove that the interior part of the former was not closely built. Eboracum, p. 91. York however does not appear to have contained more than 10,000 inhabitants at the accession of the Conqueror; and the very exaggerations as to the populousness of London, prove that it must have far exceeded that number. Fitz-Stephen, the contemporary biographer of Thomas Becket, tells us of 80,000 men capable of bearing arms within its precincts; where however his translator, Pegge, suspects a mistake of the MS. in the numerals. And this, with similar hyperboles, so imposed on the judicious mind of Lord Lyttleton, that finding in Peter of Blois the inhabitants of London

These numbers, the enjoyment of privileges, and the consciousness of strength, gave a free and even mutinous spirit to their conduct.* The Londoners were always on the barons' side in their contests with the crown. They bore a part in deposing William Longchamp, the chancellor and judiciary of Richard I.† They were distinguished in the great struggle for Magna Charta; the privileges of their city are expressly confirmed in it; and the mayor of London was one of the twenty-five barons to whom the maintenance of its provisions was delegated. In the sub-

reckoned at quadraginta millia, he has actually proposed to read quadringenta. Hist. Henry II., vol. iv. ad finem. It is hardly necessary to observe, that the condition of agriculture and internal communication would not have allowed half that number to subsist.

The subsidy-roll of 1377, published in the Archæologia, vol. vii. would lead to a conclusion that all the inhabitants of London did not even then exceed 35,000. If this be true, they could not have amounted, probably, to so great a number two or three centuries earlier.

* This seditious, or at least refractory character of the Londoners was displayed in the tumult headed by William Longbeard in the time of Richard I., and that under Constantine in 1222, the patriarchs of a long line of city demagogues. Hoveden, p. 765. M. Paris, p. 154.

† Hoveden's expressions are very precise, and show that the share taken by the citizens of London (probably the mayor and aldermen) in this measure was no tumultuary acclamation, but a deliberate concurrence with the nobility. Comes Johannes, et fere omnes episcopi, et comites Angliæ eâdem die intraverunt Londonias; et in crastino prædictus Johannes frater regis, et archiepiscopus Rothomagensis, et omnes episcopi, et comites, et barones, et cives Londonienses cum illis convenerunt in atrio ecclesiæ S. Pauli..... Placuit ergo Johanni fratri regis, et omnibus episcopis, et comitibus, et baronibus regni, et civibus Londoniarum, quod cancellarius ille deponeretur, et deposuerunt eum, &c. p. 701.

sequent reign, the citizens of London were regarded with much dislike and jealousy by the court, and sometimes suffered pretty severely at its hands; especially after the battle of Evesham.*

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

* The reader may consult, for a more full account of the English towns before the middle of the thirteenth century, Lyttleton's History of Henry II., vol. ii. p. 174.; and Macpherson's Annals of Commerce.

† Frequent proofs of this may be found in Madox, Hist. of Exchequer, c. 17. as well as in Matt. Paris, who laments it with indignation. Cives Londinenses, contra consuetudinem et libertatem civitatis, quasi servi ultimæ conditionis, non sub nomine aut titulo liberi adjutorii, sed tallagii, quod multum eos angebat, regi, licet inviti et renitentes, numerare sunt coacti. p. 492. Heu ubi est Londinensis, toties empta, toties concessa, toties scripta, toties jurata libertas! &c. p. 657. The king sometimes suspended their market, that is, I suppose, their right of toll, till his demands were paid.

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

It is well known, that the earliest writs of summons to cities and boroughs, of which we can prove the existence, are those of Simon de Montfort, earl of Leicester, bearing date 12th of December, 1264, in the forty-ninth year of Henry III.* After a long controversy, almost all judicious inquirers seem to have acquiesced in admitting this origin of popular representation.† The argument may be very concisely stated. We find from innumerable records that the king imposed tallages upon his demesne towns

* These writs are not extant, having perhaps never been returned; and consequently we cannot tell to what particular places they were addressed. It appears however that the assembly was intended to be numerous; for the entry runs: scribitur civibus Ebor, civibus Lincoln, et cæteris burgis Angliæ. It is singular, that no mention is made of London, which must have had some special summons. Rymer, t. i. p. 803. Dugdale, Summonitiones ad Parliamentum, p. 1.

† It would ill repay any reader's diligence to wade through the vapid and diluted pages of Tyrrel, but whoever would know what can best be pleaded for a higher antiquity of our present parliamentary constitution, may have recourse to Hody on Convocations, and Lord Lyttleton's History of Henry II. vol. ii. p. 276., and vol. iv. p. 79—106. I do not conceive it possible to argue the question more ingeniously than has been done by the noble writer last quoted. Whitelocke, in his commentary on the parliamentary writ, has treated it very much at length, but with no critical discrimination.

at discretion.* No public instrument previous to the forty-ninth of Henry III. names the citizens and burgesses as constituent parts of parliament; though prelates, barons, knights, and sometimes freeholders are enumerated;† while since the undoubted admission of the commons, they are almost invariably mentioned. No historian speaks of representatives appearing for the people, or uses the word citizen or burgess in describing those present in parliament. Such convincing, though negative evidence, is not to be invalidated by some general and ambiguous phrases, whether in writs and records, or in historians.‡ Those monkish annalists are poor authorities upon any point where their language is to be delicately measured. But it is hardly possible, that writing circumstantially, as Roger de Hoveden and Matthew Paris sometimes did, concerning proceedings in parliament, they could have failed to mention the commons in unequivocal expressions, if any

* Madox, Hist. of Exchequer, c. 17.

† The only apparent exception to this is in the letter addressed to the pope by the parliament of 1246; the salutation of which runs thus: Barones, proceres, et magnates, *ac nobiles portuum maris habitatores*, necnon et clerus et populus universus, salutem. Matt. Paris, p. 696. It is plain, I think, from these words, that some of the chief inhabitants of the Cinque-ports, at that time very flourishing towns, were present in this parliament. But whether they sat as representatives, or by a peculiar writ of summons, is not so evident; and the latter may be the more probable hypothesis of the two.

‡ Thus Matthew Paris tells us that, in 1237, the whole kingdom, regni totius universitas, repaired to a parliament of Henry III. p. 367.

representatives from that order had actually formed a part of the assembly.

Two authorities, however, which have been supposed to prove a greater antiquity than we have assigned to the representation of the commons, are deserving of particular consideration; the cases of St. Albans and Barnstaple. The burgesses of St. Albans complained to the council in the eighth year of Edward II., that, although they held of the king in capite, and ought to attend his parliaments whenever they are summoned, by two of their number, instead of all other services, as had been their custom in all past times, which service the said burgesses and their predecessors had performed as well in the time of the late king Edward and his ancestors, as in that of the present king until the parliament now sitting, the names of their deputies having been constantly enrolled in chancery, yet the sheriff of Hertfordshire, at the instigation of the Abbot of St. Albans, had neglected to cause an election and return to be made; and prayed remedy. To this petition it was answered, "Let the rolls of chancery be examined, that it may appear, whether the said burgesses were accustomed to come to parliament, or not, in the times of the king's ancestors; and let right be done to them, vocatis evocandis, si necesse fuerit." I do not translate these words, concerning the sense of which there has been some dispute, though not, apparently very material to the principal subject.*

This is, in my opinion, by far the most plausible

* Brady's Introduction to Hist. of England, p. 38.

testimony for the early representation of boroughs. The burgesses of St. Albans claim a prescriptive right from the usage of all past times, and more specially, those of the late Edward and his ancestors. Could this be alleged, it has been said, of a privilege at the utmost of fifty years standing, once granted by an usurper, in the days of the late king's father, and afterwards discontinued till about twenty years before the date of their petition, according to those, who refer the regular appearance of commons in parliament to the twenty-third of Edward I.? Brady, who obviously felt the strength of this authority, has shown little of his usual ardour and acuteness in repelling it. It was observed, however, by Madox, that the petition of St. Albans contains two very singular allegations: it asserts that the town was part of the king's demesne, whereas it had invariably belonged to the adjoining abbey; and that its burgesses held by the tenure of attending parliament, instead of all other services, contrary to all analogy, and without a parallel in the condition of any tenant in capite throughout the kingdom. "It is no wonder, therefore," says Hume, "that a petition which advances two falsehoods, should contain one historical mistake, which indeed amounts only to an inaccurate expression." But it must be confessed, that we cannot so easily dispense with the whole authority of this record. For whatever assurance the people of St. Albans might show in asserting what was untrue, the king's council must have been aware how recently the deputies of any

towns had been admitted into parliament. If the lawful birth of the House of Commons were in 1295, as is maintained by Brady and his disciples, it is conceivable that, in 1315, the council would have received a petition, claiming the elective franchise by prescription, and have referred to the rolls of chancery to inquire whether this had been used in the days of the king's progenitors? I confess that I see no answer which can easily be given to this objection by such as adopt the *latest* epoch of borough representation, namely, the parliament of 23 E. I. But they are by no means equally conclusive against the supposition, that the communities of cities and towns, having been first introduced into the legislature during Leicester's usurpation, in the forty-ninth year of Henry III., were summoned, not perhaps uniformly, but without any long intermission, to succeeding parliaments. There is a strong presumption, from the language of a contemporary historian, that they sat in the parliament of 1269, four years after that convened by Leicester.* It is more unequivocally stated by another annalist, that they were present in the first parliament of Edward I. held in 1273.† Nor does a similar inference want some de-

* Convocatis universis Angliæ prelatis et magnatibus, necnon cunctarum regni sui civitatum et burgorum potentioribus. Wikes, in Gale, xv Scriptores, t. ii. p. 88. I am indebted to Hody on Convocations for this reference, which seems to have escaped most of our constitutional writers.

† Hoc anno .... convenerunt archiepiscopi, episcopi, comites et barones, abbates et priores, et de quolibet comitatu quatuor milites, et de quâlibet civitate quatuor. Annales Waverleienses, in Gale, t. ii. p. 227. I was led to this passage by

gree of support from the preambles of the statute of Marlebridge in 51 H. III., of Westminster I., in the third, and of Glocester, in the sixth year of Edward I.* And the writs are extant, which summon every city, borough, and market town to send two deputies to a council in the eleventh year of his reign. I call this a council, for it undoubtedly was not a parliament. The sheriffs were directed to summon personally all who held more than twenty pounds a year of the crown, as well as four knights for each county, invested with full powers to act for the commons thereof. The knights and burgesses thus chosen, as well as the clergy, within the province of Canterbury, met at Northampton: those within the province of York, at that city. And neither assembly was opened by the king.† This anomalous convention was nevertheless one means of establishing the representative system, and, to an inquirer free from technical prejudice, is little less important than

Atterbury, Rights of Convocations, p. 310. where some other authorities, less unquestionable, are adduced for the same purpose.

* The statute of Marlebridge is said to be made convocatis discretioribus, tam majoribus quàm minoribus; that of Westminster primer, par son conseil, et par l'assentements des archievesques, evesques, abbes, priors, countes, barons, et tout le comminalty de la terre illonques summones. The statute of Glocester runs, appelles les plus discretes de son royaume, auxibien des grandes come des meinders. These preambles seem to have satisfied Mr. Prynne that the commons were then represented, though the writs are wanting; and certainly no one could be less disposed to exaggerate their antiquity. 2d Register, p. 30.

† Brady's Hist. of England, vol. ii. Appendix. Carte, vol ii. p. 257.

a regular parliament. Nor have we long to look even for this. In the same year, about eight months after the councils at Northampton and York, writs were issued summoning to a parliament at Shrewsbury two citizens from London, and as many from each of twenty other considerable towns.* It is a slight cavil to object, that these were not directed as usual to the sheriff of each county, but to the magistrates of each place. Though a very imperfect, this was a regular and unequivocal representation of the commons in parliament. But their attendance seems to have intermitted from this time to the twenty-third year of Edward's reign.

Those to whom the petition of St. Albans is not satisfactory will hardly yield their conviction to that of Barnstaple. This town set forth in the eighteenth of Edward III., that among other franchises granted to them by a charter of Athelstan they had ever since exercised the right of sending two burgesses to parliament. The said charter indeed was unfortunately mislaid; and the prayer of their petition was to obtain one of the like import in its stead. Barnstaple, it must be observed, was a town belonging to Lord

* This is commonly denominated the parliament of Acton Burnell; the clergy and commons having sat in that town, while the barons passed judgement upon David, prince of Wales, at Shrewsbury. The towns which were honoured with the privilege of representation, and may consequently be supposed to have been at that time the most considerable in England, were York, Carlisle, Scarborough, Nottingham, Grimsby, Lincoln, Northampton, Lynn, Yarmouth, Colchester, Norwich, Chester, Shrewsbury, Worcester, Hereford, Bristol, Canterbury, Winchester and Exeter. Rymer, t. ii. p. 247.

Audley, and had actually returned members ever since the twenty-third of Edward I. Upon an inquisition directed by the king to be made into the truth of these allegations, it was found that "the burgesses of the said town were wont to send two burgesses to parliament for the commonalty of the borough; but nothing appeared as to the pretended charter of Athelstan, or the liberties which it was alleged to contain. The burgesses, dissatisfied with this inquest, prevailed that another should be taken, which certainly answered better their wishes. The second jury found that Barnstaple was a free borough, from time immemorial; that the burgesses had enjoyed under a charter of Athelstan, which had been casually lost, certain franchises by them enumerated, and particularly that they should send two burgesses to parliament; and that it would not be to the king's prejudice, if he should grant them a fresh charter in terms equally ample with that of his predecessor Athelstan. But the following year we have another writ and another inquest, the former reciting that the second return had been unduly and fraudulently made; and the latter expressly contradicting the previous inquest in many points, and especially finding no proof of Athelstan's supposed charter. Comparing the various parts of this business, we shall probably be induced to agree with Willis, that it was but an attempt of the inhabitants of Barnstaple to withdraw themselves from the jurisdiction of their lord. For the right of returning burgesses, though it is the main point of our inquiries,

was by no means the most prominent part of their petition, which rather went to establish some civil privileges of devising their tenements, and electing their own mayor. The first and fairest return finds only that they were accustomed to send members to parliament, which an usage of fifty years (from 23 E. I. to 18 E. III.) was fully sufficient to establish, without searching into more remote antiquity.*

It has however probably occurred to the reader of these two cases, St. Albans and Barnstaple, that the representation of the commons in parliament was not treated as a novelty, even in times little posterior to those in which we have been supposing it to have originated. In this consists, I think, the sole strength of the opposite argument. An act in the fifth year of Richard II. declares, that if any sheriff shall leave out of his returns any cities or boroughs which be bound, and of old time were wont to come to the parliament, he shall be punished as was accustomed to be done in the like case in time past.† In the memorable assertion of legislative right by the commons in the second of Henry V., (which will be quoted hereafter,) they affirm that "the commune of the land is, *and ever has been*, a member of parliament."‡ And the consenting suffrage of our older law-books must be placed in the same scale. The first gainsayers, I think, were Camden and Sir Hen-

* Willis, Notitia Parliamentaria, vol. ii. p. 312. Lyttleton's Hist. of Hen. II. vol. iv. p. 89.

† 5 Ric. II. stat. 2. c. iv.

‡ Rot. Parl. vol. iv. p. 22.

ry Spelman, who upon probing the antiquities of our constitution somewhat more exactly than their predecessors, declared that they could find no signs of the commons in parliament till the forty-ninth of Henry III. Prynne, some years afterwards, with much vigour and learning, maintained the same argument, and Brady completed the victory. But the current doctrine of Westminster Hall, and still more of the two chambers of parliament, was certainly much against these antiquaries; and it passed at one time for a surrender of popular principles, and almost a breach of privilege, to dispute the lineal descent of the House of Commons from the wittenagemot.*

* Though such an argument would not be conclusive, it might afford some ground for hesitation, if the royal burghs of Scotland were actually represented in their parliament more than half a century before the date assigned to the first representation of English towns. Lord Hailes concludes from a passage in Fordun, "that, as early as 1211, burgesses gave suit and presence in the great council of the king's vassals; though the contrary has been asserted with much confidence by various authors." Annals of Scotland, vol. i. p. 139. Fordun's words, however, so far from importing that they formed a member of the legislature, which perhaps Lord Hailes did not mean by the quaint expression "gave suit and presence," do not appear to me conclusive to prove that they were actually present. Hoc anno Rex Scotiæ Willelmus magnum tenuit consilium. Ubi, petito ab optimatibus auxilio, promiserunt se daturos decem mille marcas; præter burgenses regni, qui sex millia promiserunt. Those who know the brief and incorrect style of chronicles will not think it unlikely that the offer of 6000 marks by the burgesses was not made in parliament, but in consequence of separate requisitions from the crown. Pinkerton is of opinion, that the magistrates of royal burghs might upon this, and perhaps other occasions, have attended at the bar of parliament with their offers of money. But the deputies of towns do not appear as a part of parliament till 1326. Hist. of Scotland, vol. i. p. 352. 371.

The true ground of these pretensions to antiquity was a very well founded persuasion, that no other argument would be so conclusive to ordinary minds, or cut short so effectually all encroachments of the prerogative. The populace of every country, but none so much as the English, easily grasp the notion of right, meaning thereby something positive and definite; while the maxims of expediency or theoretical reasoning pass slightly over their minds. Happy indeed for England, that it is so! But we have here to do with the fact alone. And it may be observed, that several pious frauds were practised, to exalt the antiquity of our constitutional liberties. These began, perhaps, very early, when the imaginary laws of Edward the Confessor were so earnestly demanded. They were carried farther under Edward I. and his successors, when the fable of privileges granted by the Conqueror to the men of Kent was devised; when Andrew Horn filled his Mirrour of Justices with fictitious tales of Alfred; and above all, when the "Method of holding Parliaments in the time of Ethelred" was fabricated, about the end of Richard II.'s reign; an imposture which was not too gross to deceive Sir Edward Coke.

There is no great difficulty in answering the question, why the deputies of boroughs were finally and permanently ingrafted upon parliament by Edward I.* The government was becoming constantly more

* These expressions cannot appear too strong. But it is very remarkable, that for the parliament of 18 Edward III., the writs appear to have summoned none of the towns, but only the

attentive to the wealth that commerce brought into the kingdom, and the towns were becoming more flourishing and more independent. But, chiefly, there was a much stronger spirit of general liberty, and a greater discontent at violent acts of prerogative from the era of Magna Charta; after which authentic recognition of free principles, many acts which had seemed before but the regular exercise of authority were looked upon as infringements of the subject's rights. Among these the custom of setting tallages at discretion would naturally appear the most intolerable: and men were unwilling to remember that the burgesses who paid them were indebted for the rest of their possessions to the bounty of the crown. In Edward I.'s reign, even before the great act of Confirmation of the Charters had rendered arbitrary impositions absolutely unconstitutional, they might perhaps excite louder murmurs than a discreet administration would risk. Though the necessities of the king, therefore, and his imperious temper often led him to this course,* it was a more prudent

counties. Willis, Notit. Parliament. vol. i. Preface, p. 13. Prynne's Register, 3d part, p. 144. Yet the citizens and burgesses are once, but only once, named as present in the parliamentary roll; and there is a singular chasm in place of their names, where the different ranks present are enumerated. Rot. Parl. vol. ii. p. 146. A subsidy was granted at this parliament; so that, if the citizens and burgesses were really not summoned, it is by far the most violent stretch of power during the reign of Edward III. But I know of no collateral evidence to illustrate or disprove it.

* Tallages were imposed without consent of parliament in 17 E. I. Wykes, p. 117.: and in 32 E. I. Brady's Hist. of Eng. vol. ii. In the latter instance the king also gave leave to the

counsel to try the willingness of his people, before he forced their reluctance. And the success of this innovation rendered it worth repetition. Whether it were from the complacency of the commons at being thus admitted among the peers of the realm, or from a persuasion that the king would take their money, if they refused it, or from inability to withstand the plausible reasons of his ministers, or from the private influence to which the leaders of every popular assembly have been accessible, much more was granted in subsidies, after the representation of the towns commenced, than had ever been extorted in tallages.

To grant money was, therefore, the main object of their meeting, and if the exigencies of the administration could have been relieved without subsidies, the citizens and burgesses might still have sat at home, and obeyed the laws which a council of prelates and barons enacted for their government. But it is a difficult question, whether the king and the peers designed to make room for them, as it were, in legislation; and whether the power of the purse drew after it immediately, or only by degrees, those indispensable rights of consenting to laws which they now possess. There are no sufficient means of solving this doubt during the reign of Edward I. The writ in 22 E. I. directs two knights to be chosen cum plenâ potestate pro se et totâ communitate comitatus

lay and spiritual nobility to set a tallage on their own tenants. This was subsequent to the Confirmatio Chartarum, and unquestionably illegal.

prædicti, ad consulendum et consentiendum pro se et communitate illâ, his quæ comites, barones, et proceres prædicti concorditur ordinaverint in præmissis. That of the next year runs, ad faciendum tunc quod de communi consilio ordinabitur in præmissis. The same words are inserted in the writ of 26 E. I. In that of 28 E. I. the knights are directed to be sent cum plenâ potestate audiendi et faciendi quæ ibidem ordinari contigerit pro communi commodo. Several others of the same reign have the words ad faciendum. The difficulty is to pronounce, whether this term is to be interpreted in the sense of *performing*, or of *enacting;* whether the representatives of the commons were merely to learn from the lords, what was to be done, or to bear their part in advising upon it. The earliest writ, that of 22 E. I., certainly implies the latter; and I do not know that any of the rest are conclusive to the contrary. In the reign of Edward II., the words ad consentiendum alone, or ad faciendum et consentiendum, begin; and from that of Edward III., this form has been constantly used.* It must still however be highly questionable, whether the commons, who had so recently taken their place in parliament, gave any thing more than a constructive assent to the laws enacted during this reign. They are not even named in the preamble of any statute till the last year of Edward I. Upon more

* Prynne's 2d Register. It may be remarked, that writs of summons to great councils never ran ad faciendum, but ad tractandum, consulendum et consentiendum; from which some would infer that faciendum had the sense of enacting; since statutes could not be passed in such assemblies. Id. p. 92.

than one occasion, the sheriffs were directed to return the same members who had sat in the last parliament, unless prevented by death or infirmity.*

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

* 28 E. I. in Prynne's 4th Register, p. 12.; 9 E. II. (a great council) p. 48.

† Brady's Hist. of England, vol. ii. p. 40. Parliamentary History, vol. i. p. 206. Rot. Parliament. t. ii. p. 66

distinct grantors; for it is not to be imagined that the commons intermeddled in those affecting the lords, or the lords in those of the commons. Nor can we rationally suppose, that the commons, who, if we include the knights among them, were at least double the number of the lay and spiritual peers, could have been permitted to jostle this haughty aristocracy out of their ancient privileges, by voting or even deliberating promiscuously upon measures of legislation. In fact, however, there is abundant proof of their separate existence long before the seventeenth of Edward III., which is the epoch assigned by Carte,* or even the sixth of that king, which has been chosen by some other writers. Thus the commons sat at Acton Burnell in the eleventh of Edward I., while the upper house was at Shrewsbury. In the eighth of Edward II., "the commons of England complain to the king and his council, &c."† These must surely have been the commons assembled in parliament, for who else could thus have entitled themselves? In the nineteenth of the same king, we find several petitions, evidently proceeding from the body of the commons in parliament, and complaining of public grievances.‡ The roll of 1 E. III., though mutilated, is conclusive to show that separate petitions were then presented by the commons, according to the regular usage of subsequent times.§ And indeed the

* Carte, vol. ii. p. 451. Parliamentary History, vol. i. p. 234.
† Rot. Parl. v. i. p. 289.
‡ Id. p. 430.
§ Id. vol. ii. p. 7.

preamble of 1 E. III. stat. 2. is apparently capable of no other inference.

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

The proper business of the House of Commons was to petition for redress of grievances, as much as to provide for the necessities of the crown. In the prudent fiction of English law, no wrong is supposed to proceed from the source of right. The throne is fixed upon a pinnacle, which perpetual beams of truth and justice irradiate, though corruption and partiality may occupy the middle region, and cast their chill shade upon all below. In his high court of parliament, a king of England was to learn where injustice had been unpunished, and where right had been de-

* Rot. Parl. vol. i. p. 289. 351. 430.
† Id. vol. ii. p. 5. ‡ Id. p. 86.

layed. The common courts of law, if they were sufficiently honest, were not sufficiently strong to redress the subject's injuries, where the officers of the crown, or the nobles interfered. To parliament he looked as the great remedial court for relief of private as well as public grievances. For this cause it was ordained in the fifth of Edward II., that the king should hold a parliament, once, or if necessary, twice every year; "that the pleas which have been thus delayed, and those where the justices have differed, may be brought to a close."* And a short act of 4 Edward III., which was not very strictly regarded, provides that a parliament shall be held "every year, or oftener, if need be."† By what persons, and under what limitations, this jurisdiction in parliament was exercised, will come under our future consideration.

The efficacy of a king's personal character, in so imperfect a state of government, was never more strongly exemplified than in the two first Edwards. The father, a little before his death, had humbled his boldest opponents among the nobility; and as for the commons, so far from claiming a right of remonstrating, we have seen cause to doubt whether they were accounted effectual members of the legis-

* Id. vol. i. p. 285.

† 4 E. III. c. 14. Annual sessions of Parliament seem fully to satisfy the words, and still more the spirit of this act, and of 36 E. III. c. 10.; which however are repealed by implication from the provisions of 6 W. III. c. 2. But it was very rare under the Plantagenet dynasty for a parliament to continue more than a year.

lature, for any purposes but taxation. But in the very second year of the son's reign, they granted the twenty-fifth penny of their goods, "upon this condition, that the king should take advice and grant redress upon certain articles, wherein they are aggrieved." These were answered at the ensuing parliament, and are entered, with the king's respective promises of redress, upon the roll. It will be worth while to extract part of this record, that we may see what were the complaints of the commons of England, and their notions of right in 1309. I have chosen, on this as on other occasions, to translate very literally, at the expense of some stiffness, and perhaps obscurity in language.

"The good people of the kingdom who are come hither to parliament, pray our lord the king that he will, if it please him, have regard to his poor subjects, who are much aggrieved by reason that they are not governed as they should be; especially as to the articles of the Great Charter; and for this, if it please him, they pray remedy. Besides which they pray their lord the king to hear what has long aggrieved his people, and still does so from day to day, on the part of those who call themselves his officers, and to amend it, if he pleases." The articles, eleven in number, are to the following purport: 1. That the king's purveyors seize great quantities of victuals without payment; 2. That new customs are set on wine, cloth, and other imports; 3. That the current coin is not so good as formerly;* 4, 5. That the

* This article is so expressed, as to make it appear that the grievance was the high price of commodities. But as

steward and marshal enlarge their jurisdiction beyond measure, to the oppression of the people; 6. That the commons find none to receive petitions addressed to the council; 7. That the collectors of the king's dues (pernours des prises) in towns and at fairs, take more than is lawful; 8. That men are delayed in their civil suits by writs of protection; 9. That felons escape punishment by procuring charters of pardon; 10. That the constables of the king's castles take cognizance of common pleas; 11. That the king's escheators oust men of lands held by good title, under pretence of an inquest of office.*

These articles display in a short compass the nature of those grievances, which existed under almost all the princes of the Plantagenet dynasty, and are spread over the rolls of parliament for more than a century after this time. Edward gave the amplest assurances of putting an end to them all; except in one instance, the augmented customs on imports, to which he answered rather evasively, that he would take them off, till he should perceive whether himself and his people derived advantage from so doing, and act thereupon as he should be advised. Accordingly, the next year, he issued writs to collect these new customs again. But the Lords Ordainers superseded the writs, having entirely abrogated all illegal impositions.† It does not appear, however,

this was the natural effect of a degraded currency, and the whole tenor of these articles relates to abuses of government, I think it must have meant what I have said in the text.

* Prynne's 2d Register, p. 68. Rot. Parl. vol. i. p. 282.

† Prynne's 2d Register, p. 75.

that, regard had to the times, there was any thing very tyrannical in Edward's government. He set tallages sometimes, like his father, on his demesne towns without assent of parliament.* In the nineteenth year of his reign, the commons show, that "whereas we and our ancestors have give many tallages to the king's ancestors to obtain the charter of the forest, which charter we have had confirmed by the present king, paying him largely on our part; yet the king's officers of the forest seize on lands, and destroy ditches, and oppress the people, for which they pray remedy, for the sake of God and his father's soul." They complain at the same time of arbitrary imprisonment, against the law of the land†. To both these petitions the king returned a promise of redress; and they complete the catalogue of customary grievances in this period of our constitution.

During the reign of Edward II. the rolls of parliament are imperfect, and we have not much assistance from other sources. The assent of the commons, which frequently is not specified in the statutes of this age, appears in two remarkable and revolutionary proceedings, the appointment of the Lords Ordainers in 1312,‡ and that of Prince Edward as guardian of the realm in the rebellion which ended in the king's dethronement. In the former case, it indicates that the aristocratic party then combined

* Madox, Firma Burgi, p. 6. Rot. Parl. vol. i. p. 449.
† Rot. Parl. vol. i. p. 430.
‡ Id. p. 281.

against the crown were desirous of conciliating popularity. A historian relates, that some of the commons were consulted upon the ordinances to be made for the reformation of government.* In the latter case, the deposition of Edward II., I am satisfied, that the commons assent was pretended in order to give more speciousness to the transaction.† But as this proceeding, however violent, bears evident marks of having been conducted by persons conversant in law, the mention of the commons may be deemed a

* Walsingham, p. 97.

† A record, which may be read in Brady's History of England, vol. ii. Append. p. 66., and in Rymer, t. iv. p. 1237., relative to the proceedings on Edward II.'s flight into Wales, and subsequent detention, recites that "the king, having left his kingdom without government, and gone away with notorious enemies of the queen, prince and realm; divers prelates, earls, barons and knights then being at Bristol, in the presence of the said queen and duke, (Prince Edward, duke of Cornwall,) *by the assent of the whole commonalty of the realm there being*, unanimously elected the said duke to be guardian of the said kingdom; so that the said duke and guardian should rule and govern the said realm, in the name and by the authority of the king his father, he being thus absent." But the king being taken, and brought back into England, the power thus delegated to the guardian ceased of course; whereupon the bishop of Hereford was sent to press the king to permit that the great seal, which he had with him, the prince having only used his private seal, should be used in all things that required it. Accordingly the king sent the great seal to the queen and prince. The bishop is said to have been thus commissioned to fetch the seal by the prince and queen, and by the said prelates and peers, *with the assent of the said commonalty then being at Hereford.* It is plain that these were mere words of course; for no parliament had been convoked, and no proper representatives could have been either at Bristol or Hereford. However, this is a very curious record, inasmuch as it proves the importance attached to the forms of the constitution at this period.

testimony to their constitutional right of participation with the peers in making provision for a temporary defect of whatever nature in the executive government.

During the long and prosperous reign of Edward III. the efforts of parliament in behalf of their country were rewarded with success, in establishing upon a firm footing three essential principles of our government; the illegality of raising money without consent; the necessity that the two houses should concur for any alterations in the law; and, lastly, the right of the commons to inquire into public abuses, and to impeach public counsellors. By exhibiting proofs of each of these from parliamentary records, I shall be able to substantiate the progressive improvement of our free constitution, which was principally consolidated during the reigns of Edward III. and his two next successors. Brady indeed, Carte, and the authors of the Parliamentary History, have trod already over this ground; but none of the three can be considered as familiar to the generality of readers, and I may at least take credit for a sincerer love of liberty than any of their writings display.

In the sixth year of Edward III. a parliament was called to provide for the emergency of an Irish rebellion; wherein, "because the king could not send troops and money to Ireland, without the aid of his people, the prelates, earls, barons, and other great men, and the knights of shires, and all the commons, of their free will, for the said purpose, and also in order that the king might live of his own, and not

vex his people by excessive prises nor in other manner, grant to him the fifteenth penny, to levy of the commons,* and the tenth from the cities, towns and royal demesnes. And the king, at the request of the same, in ease of his people, grants that the commissions lately made to certain persons assigned to set tallages on cities, towns and demesnes throughout England shall be immediately repealed; and that in time to come he will not set such tallage, except as it has been done in the time of his ancestors, and as he may reasonably do."†

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

In the thirteenth year of his reign, the lords gave their answer to commissioners sent to open the parliament and to treat with them on the king's part, in a sealed roll. This contained a grant of the tenth sheaf, fleece and lamb. But, before they gave it, they took care to have letters patent showed them,

* 'La commonaltée' seems in this place to mean the tenants of land, or commons of the counties, in contradistinction to citizens and burgesses.

† Rot. Parl. v. ii. p. 66.

by which the commissioners had power "to grant some graces to the great and small of the kingdom." "And the said lords," the roll proceeds to say, "will, that the imposition (maletoste) which now again has been levied upon wool be entirely abolished, and that the old customary duty be kept, and that they may have it by charter, and by enrollment in parliament, that such custom be never more levied, and that this grant now made to the king, or any other made in time past, shall not turn hereafter to their charge nor be drawn into precedent." The commons, who gave their answers in a separate roll, declared that they could grant no subsidy without consulting their constituents; and therefore begged that another parliament might be summoned, and in the mean time they would endeavour, by using persuasion with the people of their respective counties, to procure the grant of a reasonable aid in the next parliament.* They demanded also, that the imposition on wool and lead should be taken as it used to be in former times, "inasmuch as it is enhanced without assent of the commons, or of the lords, as we understand; and, if it be otherwise demanded, that any one of the commons may refuse it (le puisse arester), without being troubled on that account, (saunz estre chalangé.)"†

Wool, however, the staple export of that age, was too easy and tempting a prey to be relinquished by a prince engaged in an impoverishing war. Seven

* Id. ibid. p. 104.
† Rot. Parl. v. ii. p. 104.

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

It is probable, that Edward's counsellors wished to establish a distinction, long afterwards revived by those of James I., between customs levied on merchandise at the ports, and internal taxes. The statute entitled Confirmatio Chartarum had manifestly taken away the prerogative of imposing the latter, which indeed had never extended beyond the tenants of the royal demesne. But its language was not quite so explicit as to the former, although no reasonable doubt could be entertained that the intention of the legislature was to abrogate every species of imposition unauthorized by parliament. The thirtieth

* Id. p. 161.

section of Magna Charta had provided, that foreign merchants should be free from all tributes, except the ancient customs; and it was strange to suppose, that denizens were excluded from the benefit of that enactment. Yet, owing to the ambiguous and elliptical style so frequent in our older laws, this was open to dispute, and could perhaps only be explained by usage. Edward I., in despite of both these statutes, had set a duty of three-pence in the pound upon goods imported by merchant strangers. This imposition was noticed as a grievance in the third year of his successor, and repealed by the Lords Ordainers. It was revived however by Edward III., and continued to be levied ever afterwards.*

Edward was led by the necessities of his unjust and expensive war into another arbitrary encroachment, of which we find as many complaints as of his pecuniary extortions. The commons pray, in the same parliament of 20 E. III., that commissions should not issue for the future out of chancery, to charge the people with providing men at arms, hobelers (or light cavalry), archers, victuals, or in any other manner, without consent of parliament It is replied to this petition, that "it is notorious how in

* Case of impositions, in Howell's State Trials, vol. ii. p. 371—519.; particularly the argument of Mr. Hakewill. Hale's Treatise on the Customs, in Hargrave's Tracts, vol. i.

Edward III. imposed another duty on cloth exported, on the pretence that as the wool must have paid a tax, he had a right to place the wrought and unwrought article on an equality. The commons remonstrated against this; but it was not repealed. This took place about 22 E. III. Hale's Treatise, p. 175.

many parliaments the lords and commons had promised to aid the king in his quarrel with their bodies and goods as far as was in their power; wherefore the said lords seeing the necessity in which the king stood of having aid of men at arms, hobelers and archers, before his passage to recover his rights beyond sea, and to defend his realm of England, ordained, that such as had five pounds a year or more in land on this side of Trent should furnish men at arms, hobelers and archers, according to the proportion of the land they held to attend the king at his cost; and some who would neither go themselves, nor find others in their stead, were willing to give the king wherewithal he might provide himself with some in their place. And thus the thing has been done, and no otherwise. And the king wills, that henceforth what has been thus done in this necessity be not drawn into consequence or example."*

The commons were not abashed by these abitrary pretensions; they knew that by incessant remonstrances they should gain at least one essential point, that of preventing the crown from claiming these usurpations as uncontested prerogatives. The roll of parliament in the next two years, the 21st and 22d of Edward III., is full of the same complaints on one side, and the same allegations of necessity on the other.† In the latter year, the commons grant a subsidy, on condition that no illegal levying of money should take place, with several other remedial provisions; "and that these conditions should be en-

* Rot. Parl. p. 160. † p. 161. 166. 201.

tered on the roll of parliament, as a matter of record, by which they may have remedy, if any thing should be attempted to the contrary in time to come." From this year the complaints of extortion become rather less frequent; and soon afterwards a statute was passed, "That no man shall be constrained to find men at arms, hobelers, nor archers, other than those which hold by such services, if it be not by common assent and grant made in parliament."* Yet even in the last year of Edward's reign, when the boundaries of prerogative and the rights of parliament were better ascertained, the king lays a sort of claim to impose charges upon his subjects in cases of great necessity, and for the defence of his kingdom.† But this more humble language indicates a change in the spirit of government, which after long fretting impatiently at the curb, began at length to acknowledge the controlling hand of law.

These are the chief instances of a struggle between the crown and commons as to arbitrary taxation; but there are two remarkable proceedings in the 45th and 46th of Edward, which though they would not have been endured in later times, are rather anomalies arising out of the unsettled state of the constitution and the recency of parliamentary rights, than mere encroachments of the prerogative. In the former year, parliament had granted a subsidy of fifty thousand pounds, to be collected by an assessment of twenty-two shillings and three-pence

* 25 E. III. stat. v. c. 8.
† Rot. Parl. vol. ii. p. 366.

upon every parish, on a presumption that the parishes in England amounted to forty-five thousand, whereas they were hardly a fifth of that number. This amazing mistake was not discovered till the parliament had been dissolved. Upon its detection, the king summoned a great council, consisting of one knight, citizen and burgess, named by himself, out of two that had been returned to the last parliament.* To this assembly the chancellor set forth the deficiency of the last subsidy, and proved by the certificates of all the bishops in England, how strangely the parliament had mis-calculated the number of parishes; whereupon they increased the parochial assessment, by their own authority, to one hundred and sixteen shillings.† It is obvious, that the main intention of parliament was carried into effect by this irregularity, which seems to have been the subject of no complaint. In the next parliament, a still more objectionable measure was resorted to; after the petitions of the commons had been answered, and the knights dismissed, the citizens and burgesses were convened before the prince of Wales and the lords in a room near the white chamber, and solicited to renew their subsidy of forty shillings upon the ton of wine, and sixpence in the pound upon other imports, for safe convoy of shipping, during one year more; to which they assented; and so departed."‡

* Prynne's 4th Register, p. 289.

† Rot. Parl. p. 304.

‡ Idem, p. 310. In the mode of levying subsidies, a remarkable improvement took place early in the reign of Edward III. Originally, two chief taxors were appointed by the

The second constitutional principle established in the reign of Edward III. was that the king and two houses of parliament in conjunction possessed exclusively the right of legislation. Laws were now declared to be made by the king at the request of the commons, and by the assent of the lords and prelates. Such at least was the general form, though, for many subsequent ages, there was noinvariable regularity in this respect. The commons, who till this reign were rarely mentioned, were now as rarely omitted in the enacting clause. In fact, it is evident from the rolls of parliament, that statutes were almost always founded upon their petition.* These petitions, with the respective answers made to them in the king's name, were drawn up after the end of the session in the form of laws, and entered upon the statute-roll. But here it must be remarked, that the petitions were often extremely qualified and altered

king for each county, who named twelve persons in every hundred to assess the moveable estate of all inhabitants according to its real value. But in 8 E. III., on complaint of parliament, that these taxors were partial, commissioners were sent round to compound with every town and parish for a gross sum, which was from thenceforth the fixed quota of subsidy, and raised by the inhabitants themselves. Brady on Boroughs, p. 81.

* Laws appear to have been drawn up, and proposed to the two houses by the king, down to the time of Edward I. Hale's Hist. of Common Law, p. 16.

Sometimes the representatives of particular places address separate petitions to the king and council; as the citizens of London, the commons of Devonshire, &c. These are intermingled with the general petitions, and both together are for the most part very numerous. In the roll of 50 Edw. III. they amount to 140.

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

The statute of treasons, however, was supposed to be declaratory of the ancient law; in permanent and material innovations, a more direct concurrence of all the estates was probably required. A new statute, to be perpetually incorporated with the law of England, was regarded as no light matter. It was a very common answer to a petition of the commons, in the earlier part of this reign, that it could not be granted without making a new law. After the parliament of 14 E. III., a certain number of prelates, barons and counsellors, with twelve knights and six

* Rot. Parl. p. 239.

burgesses, were appointed to sit from day to day in order to turn such petitions and answers, as were fit to be perpetual, into a statute; but for such as were of a temporary nature, the king issued his letters patent.* This reluctance to innovate without necessity, and to swell the number of laws which all were bound to know and obey with an accumulation of transitory enactments, led, apparently, to the distinction between statutes and ordinances. The latter are indeed defined by some lawyers to be regulations proceeding from the king and lords, without concurrence of the commons. But if this be applicable to some ordinances, it is certain that the word, even when opposed to statute, with which it is often synonymous, sometimes denotes an act of the whole legislature. In the 37th of Edward III., when divers sumptuary regulations against excess of apparel were made in full parliament, "it was demanded of the lords and commons, inasmuch as the matter of their petitions was novel, and unheard of before, whether they would have them granted by way of ordinance or of statute? They answered that it would be best to have them by way of ordinance, and not of statute, in order that any thing which should need amendment might be amended at the next parliament."† So much scruple did they entertain about tampering with the statute law of the land.

Ordinances, which, if it were not for their partial or temporary operation, could not well be distinguish-

* p. 113. † p. 280.

ed from laws,* were often established in great councils. These assemblies, which frequently occurred in Edward's reign, were hardly distinguishable, except in name, from parliaments, being constituted not only of those who were regularly summoned to the house of lords, but of deputies from counties, cities and boroughs. Several places that had never returned burgesses to parliament have sent deputies to some of these councils.† The most remarkable of these was that held in the 27th of Edward III., consisting of one knight for each county, and of deputies from all the cities and boroughs, wherein the ordinances of the staple were established. These were previously agreed upon by the king and lords, and copies given, one to the knights, another to the burgesses. The roll tells us, that they gave their opinion in writing to the council, after much deliberation, and that this was read and discussed by the great men. These ordinances fix the staple of wool in particular places within England, prohibit English merchants from exporting that article under pain of death, inflict sundry other penalties, create jurisdictions, and in short, have the effect of a new and im-

* "If there be any difference between an ordinance and a statute, as some have collected, it is but only this, that an ordinance is but temporary till confirmed and made perpetual; but a statute is perpetual at first, and so have some ordinances also been." Whitelocke on Parliamentary Writ, vol. ii. p. 297. See Rot. Parl. vol. iii. p. 17.; vol. iv. p. 35.

† These may be found in Willis's Notitia Parliamentaria. In 28 E. I. the universities were summoned to send members to a great council, in order to defend the king's right to the kingdom of Scotland. 1 Prynne.

portant law. After they were passed, the deputies of the commons granted a subsidy for three years, complained of grievances, and received answers, as if in a regular parliament. But they were aware that these proceedings partook of some irregularity, and endeavoured, as was their constant method, to keep up the legal forms of the constitution. In the last petition of this council, the commons pray, "because many articles touching the state of the king, and common profit of his kingdom have been agreed by him, the prelates, lords, and commons of his land, at this council, that the said articles may be recited at the next parliament, and entered upon the roll; for this cause, that ordinances and agreements made in council are not of record, as if they had been made in a general parliament." This accordingly was done at the ensuing parliament, when these ordinances were expressly confirmed, and directed to be "holden for a statute to endure always."*

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

Before we leave this subject, it will be proper to

* Rot. Parl. p. 253. 257.

take notice of a remarkable stretch of prerogative, which, if drawn into precedent, would have effectually subverted this principle of parliamentary consent in legislation. In the 15th of Edward III., petitions were presented of a bolder and more innovating cast than was acceptable to the court; that no peer should be put to answer for any trespass, except before his peers; that commissioners should be assigned to examine the accounts of such as had received public monies; that the judges and ministers should be sworn to observe the Great Charter and other laws; and that they should be appointed in parliament. The last of these was probably the most obnoxious; but the king, unwilling to defer a supply which was granted merely upon condition that these petitions should prevail, suffered them to pass into a statute with an alteration which did not take off much from their efficacy; namely, that these officers should indeed be appointed by the king with the advice of his council, but should surrender their charges at the next parliament, and be there responsible to any who should have cause of complaint against them. The chancellor, treasurer and judges entered their protestation, that they had not assented to the said statutes, nor could they observe them, in case they should prove contrary to the laws and customs of the kingdom, which they were sworn to maintain.* This is the first instance of a protest on the roll of parliament against the passing of an act. Nevertheless they

* p. 131.

were compelled to swear on the cross of Canterbury to its observance.*

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

* p. 128.

† Rymer, t. v. p. 282. This instrument betrays in its language Edward's consciousness of the violent step he was taking, and his wish to excuse it as much as possible.

the remedy was not always attainable. Two years afterwards, Edward met his parliament, when that obnoxious statute was formally repealed.

Notwithstanding the king's unwillingness to permit this control of parliament over his administration, he suffered, or rather solicited their interference in matters which have since been reckoned the exclusive province of the crown. This was an unfair trick of his policy. He was desirous, in order to prevent any murmuring about subsidies, to throw the war upon parliament as their own act, though none could have been commenced more selfishly for his own benefit, or less for the advantage of the people of England. It is called "the war which our lord the king has undertaken against his adversary of France by common consent of all the lords and commons of his realm in divers parliaments."* And he several times referred it to them to advise upon the subject of peace. But the commons showed their humility or discretion by treating this as an invitation which it would show good manners to decline, though in the 18th of the king's reign they had joined with the lords in imploring the king to make an end of the war by a battle, or by a suitable peace.† "Most dreaded lord," they say upon one occasion, "as to your war and the equipment necessary for it, we are so ignorant and simple that we know not how, nor have the power to advise; wherefore we pray your grace to excuse us in this matter, and that it please you, with advice of the great and wise persons of

* p. 165. † p. 148.

your council, to ordain what seems best to you for the honour and profit of yourself and your kingdom; and whatever shall be thus ordained by assent and agreement of you and your lords, we readily assent to, and will hold it firmly established."* At another time, after their petitions had been answered, "it was showed to the lords and commons by Bartholomew de Burghersh, the king's chamberlain, how a treaty had been set on foot between the king and his adversary of France; and how he had good hope of a final and agreeable issue with God's help; to which he would not come without assent of the lords and commons. Wherefore the said chamberlain inquired on the king's part of the said lords and commons, whether they would assent and agree to the peace, in case it might be had by treaty between the parties. To which the said commons with one voice replied, that whatever end it should please the king and lords to make of the treaty would be agreeable to them. On which answer the chamberlain said to the commons, then you will assent to a perpetual treaty of peace if it can be had. And the said commons answered at once and unanimously, yes, yes."† The lords were not so diffident. Their great station as hereditary counsellors gave them weight in all deliberations of government; and they seem to have pretended to a negative voice in questions of peace. At least they answer, upon the proposals made by David king of Scots in 1368, which were submitted to them in parliament, that, "saving to the said Da-

* 21 E. III. p. 165. † 28 E. III. p. 261.

vid and his heirs the articles contained therein, they saw no way of making a treaty which would not openly turn to the disherison of the king and his heirs, to which they would on no account assent; and so departed for that day."* A few years before, they had made a similar answer to some other propositions from Scotland.† It is not improbable, that in both these cases, they acted with the concurrence and at the instigation of the king; but the precedents might have been remembered in other circumstances.

A third important acquisition of the house of commons during this reign was the establishment of their right to investigate and chastise the abuses of administration. In the fourteenth of Edward III., a committee of the lords' house had been appointed to examine the accounts of persons responsible for the receipt of the last subsidy; but it does not appear that the commons were concerned in this.‡ The unfortunate statute of the next year contained a similar provision, which was annulled with the rest. Many years elapsed before the commons tried the force of their vindictive arm. We must pass onward an entire generation of man, and look at the parliament assembled in the fifteenth of Edward III. Nothing memorable as to the interference of the commons in government occurs before, unless it be their request, in the forty-fifth of the king, that no clergyman

* p. 295. Carte says, "the lords and commons giving this advice separately, declared, &c." Hist. of England, vol. ii. p. 518. I can find no mention of the commons doing this in the roll of parliament.

† p. 269. ‡ p. 114.

should be made chancellor, treasurer, or other great officer; to which the king answered, that he would do what best pleased his council.*

It will be remembered by every one who has read our history, that in the latter years of Edward's life, his fame was tarnished by the ascendency of the duke of Lancaster and Alice Perrers. The former, a man of more ambition than his capacity seems to have warranted, even incurred the suspicion of meditating to set aside the heir of the crown, when the Black Prince should have sunk into the grave. Whether he were wronged or not by these conjectures, they certainly appear to have operated on those most concerned to take alarm at them. A parliament met in April 1376, wherein the general unpopularity of the king's administration, or the influence of the Prince of Wales, led to very remarkable consequences.† After granting a subsidy, the commons, "considering the evils of the country, through so many wars and other causes, and that the officers now in the king's service are insufficient without further assistance for so great a charge, pray that the council be strengthened by the addition of ten or

* p. 304.

† Most of our general historians have slurred over this important session. The best view, perhaps, of its secret history will be found in Lowth's Life of Wykeham; an instructive and elegant work, only to be blamed for marks of that academical point of honour, which makes a fellow of a college too indiscriminate an encomiast of its founder. Another modern book may be named with some commendation, though very inferior in its execution, Godwin's Life of Chaucer; of which the duke of Lancaster is the political hero.

twelve bishops, lords and others, to be constantly at hand, so that no business of weight should be despatched without the consent of all; nor smaller matters without that of four or six."* The king pretended to come with alacrity into this measure, which was followed by a strict restraint on them and all other officers from taking presents in the course of their duty. After this, "the said commons appeared in parliament, protesting that they had the same good will as ever to assist the king with their lives and fortunes; but that it seemed to them, if their said liege lord had always possessed about him faithful counsellors and good officers, he would have been so rich, that he would have had no need of charging his commons with subsidy or tallage, considering the great ransoms of the French and Scotch kings, and of so many other prisoners; and that it appeared to be for the private advantage of some near the king, and of others by their collusion, that the king and kingdom are so impoverished, and the commons so ruined. And they promised the king, that if he would do speedy justice on such as should be found guilty, and take from them what law and reason permit, with what had been already granted in parliament, they will engage that he should be rich enough to maintain his wars for a long time, without much charging his people in any manner." They next proceeded to allege three particular grievances; the removal of the staple from Calais, where it had been fixed by parliament, through the procurement and

* p. 322.

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

The part which the prince of Wales, who had ever been distinguished for his respectful demeanour towards Edward, bore in this unprecedented opposition, is strong evidence of the jealousy with which he regarded the duke of Lancaster; and it was led in the House of Commons by Peter de la Mare, a servant of the earl of March, who by his marriage with Philippa, heiress of Lionel duke of Clarence, stood next after the young Prince Richard in lineal

* Ibid. † p. 329.

succession to the crown. The proceedings of this sessions were indeed highly popular. But no house of commons would have gone such lengths on the mere support of popular opinion, unless instigated and encouraged by high authority. Without this, their petitions might perhaps have obtained, for the sake of subsidy, an immediate consent; but those who took the lead in preparing them must have remained unsheltered after a dissolution, to abide the vengeance of the crown, with no assurance that another parliament would espouse their cause as its own. Such indeed was their fate in the present instance. Soon after the dissolution of parliament, the prince of Wales, who, long sinking by fatal decay, had rallied his expiring energies for this domestic combat, left his inheritance to a child ten years old, Richard of Bordeaux. Immediately after this event, Lancaster recovered his influence; and the former favourites returned to court. Peter de la Mare was confined at Nottingham, where he remained two years. The citizens indeed attempted an insurrection, and threatened to burn the Savoy, Lancaster's residence, if de la Mare was not released; but the bishop of London succeeded in appeasing them.* A parliament met next year, which overthrew the work of its predecessor, restored those who had been impeached, and repealed the ordinance against Alice Perrers.† So little security will popular assemblies

* Anonym. Hist. Edw. III. ad calcem Hemingford, pp. 444. 448. Walsingham gives a different reason. p. 192.

† Rot. Parl. p. 374. Not more than six or seven of the

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

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

The commons had sustained with equal firmness

knights who had sat in the last parliament were returned to this, as appears by the writs in Prynne's 4th Register. p. 302, 311.

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

* Walsingham, p. 200. says, pæne omnes; but the list published in Prynne's 4th Register induces me to qualify this loose expression. Alice Perrers had bribed, he tells us, many of the lords, and all the lawyers of England; yet by the perseverance of these knights she was convicted.

† Rot. Parl. vol. ii. p. 374.

‡ Rot. Parl. vol. iii. p. 12.

house, the lords, in the king's name, appointed nine persons of different ranks; three bishops, two earls, two bannerets, and two bachelors to be a permanent council about the king, so that no business of importance should be transacted without their unanimous consent. The king was even compelled to consent that, during his minority, the chancellor, treasurer, judges, and other chief officers should be made in parliament; by which provision, combined with that of a parliamentary council, the whole executive government was transferred to the two houses. A petition, that none might be employed in the king's service, nor belong to his council, who had been formerly accused upon good grounds, struck at Lord Latimer, who had retained some degree of power in the new establishment. Another, suggesting that Gascony, Ireland, Artois and the Scottish marches were in danger of being lost for want of good officers, though it were so generally worded as to leave the means of remedy to the king's pleasure, yet shows a growing energy and self-confidence in that assembly, which not many years before had thought the question of peace or war too high for their deliberation. Their subsidy was sufficiently liberal; but they took care to pray the king, that fit persons might be assigned for its receipt and disbursement, lest it should any way be diverted from the purposes of the war. Accordingly Walworth and Philpot, two eminent citizens of London, were appointed to this office and sworn in parliament to its execution.*

* Id. ibid.

But whether through the wastefulness of government, or rather because Edward's legacy, the French war, like a ruinous and interminable law-suit, exhausted all public contributions, there was an equally craving demand for subsidy at the next meeting of parliament. The commons now made a more serious stand. The speaker, Sir James Pickering, after the protestation against giving offence, which has since become more matter of form than perhaps it was then considered, reminded the lords of the council of a promise made to the last parliament, that if they would help the king for once with a large subsidy, so as to enable him to undertake an expedition against the enemy, he trusted not to call on them again, but to support the war from his own revenues; in faith of which promise there had been granted the largest sum that any king of England had ever been suffered to levy within so short a time, to the utmost loss and inconvenience of the commons; part of which ought still to remain in the treasury, and render it unnecessary to burthen anew the exhausted people. To this Scrope, lord steward of the household, protesting that he knew not of any such promise, "made answer by order of the king, that, saving the honour and reverence of our lord the king, and the lords there present, the commons did not speak truth in asserting that part of the last subsidy should be still in the treasury; it being notorious that every penny had gone into the hands of Walworth and Philpot, appointed and sworn treasurers in the last parliament, to receive and expend it upon the purposes

of the war, for which they had in effect disbursed the whole." Not satisfied with this general justification, the commons pressed for an account of the expenditure. Scrope was again commissioned to answer that "though it had never been seen, that of a subsidy or other grant made to the king in parliament or out of parliament by the commons any account had afterwards been rendered to the commons, or to any other except the king and his officers, yet the king to gratify them, of his own accord, without doing it by way of right, would have Walworth along with certain persons of the council exhibit to them in writing a clear account of the receipt and expenditure, upon condition that this should never be used as a precedent nor inferred to be done otherwise than by the king's spontaneous command." The commons were again urged to provide for the public defence, being their own concern, as much as that of the king. But they merely shifted their ground, and had recourse to other pretences. They requested that five or six peers might come to them, in order to discuss this question of subsidy. The lords entirely rejected this proposal, and affirmed that such a proceeding had never been known except in the three last parliaments; but allowed that it had been the course to elect a committee of eight or ten from each house, to confer easily and without noise together. The commons acceded to this, and a committee of conference was appointed, though no result of their discussion appears upon the roll.

Upon examining the accounts submitted to them,

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

The necessities of government, however, let their cause be what it might, were by no means feigned; and a new parliament was assembled about seven months after the last, wherein the king, without waiting for a petition, informed the commons, that the treasurers were ready to exhibit their accounts before them. This was a signal victory after the reluctant and ungracious concession made to the last parliament. Nine persons of different ranks were appointed at the request of the commons to investigate the state of the revenue, and the disposition

* Rot. Parl. p. 35—38.

which had been made of the late king's personal estate. They ended by granting a poll-tax, which they pretended to think adequate to the supply required.* But in those times no one possessed any statistical knowledge, and every calculation which required it, was subject to enormous errour, of which we have already seen an eminent example.† In the next parliament (3 Ric. II.) it was set forth, that only £22,000 had been collected by the poll-tax, while the pay of the king's troops hired for the expedition to Britany, the pretext of the grant, had amounted for but half a year to £50,000. The king, in short, was more straitened than ever. His distresses gave no small advantage to the commons. Their speaker was instructed to declare that as it appeared to them, if the affairs of their liege lord had been properly conducted at home and abroad, he could not have wanted aid of his commons, who now are poorer than before. They pray that, as the king was so much advanced in age and discretion, his perpetual council (appointed in his first parliament) might be discharged of their labours; and that instead of them, the five chief officers of state, to wit, the chancellor, treasurer, keeper of the privy seal, chamberlain, and steward of the household might be named in parliament, and declared to the commons, as the king's sole counsellors, not removable before the next parliament. They required also a general commission to be made out, similar to that in the last session, giving powers to a certain number of peers

* p. 57. † V. supra, p. 252.

and other distinguished persons, to inquire into the state of the household, as well as into all receipts and expenses since the king's accession. The former petition seems to have been passed over;* but a commission as requested was made out to three prelates, three earls, three bannerets, three knights, and three citizens.† After guarding thus, as they conceived, against malversation, but in effect rather protecting their posterity than themselves, the commons prolonged the last imposition on wool and leather for another year.

It would be but repetition to make extracts from the rolls of the two next years; we have still the same tale; demand of subsidy on one side, remonstrance and endeavours at reformation on the other. After the tremendous insurrection of the villeins, in 1382, a parliament was convened to advise about repealing the charters of general manumission, extorted from the king by the pressure of circumstances. In this measure all concurred; but the commons were not afraid to say, that the late risings had been provoked by the burthens which a prodigal court had called for in the preceding session. Their language is unusually bold. "It seemed to them after full deliberation," they said, "that unless the adminis-

* Nevertheless, the commons repeated it in their schedule of petitions; and received an evasive answer, referring to an ordinance made in the first parliament of the king, the application of which is indefinite. p. 82.

† p 73. In Rymer, t. vii. p. 250. the archbishop of York's name appears among these commissioners, which makes their number sixteen. But it is plain by the instrument, that only fifteen were meant to be appointed.

tration of the kingdom were speedily reformed, the kingdom itself would be utterly lost, and ruined for ever, and therein their lord the king, with all the peers and commons, which God forbid. For true it is that there are such defects in the said administration, as well as about the king's person, and his household, as in his courts of justice; and by grievous oppressions in the country through maintainers of suits, who are, as it were, kings in the country, that right and law are come to nothing, and the poor commons are from time to time so pillaged and ruined, partly by the king's purveyors of the household, and others who pay nothing for what they take, partly by the subsidies, and tallages raised upon them, and besides by the oppressive behaviour of the servants of the king and other lords, and especially of the aforesaid maintainers of suits, that they are reduced to greater poverty and discomfort than ever they were before. And moreover, though great sums have been continually granted by and levied upon them, for the defence of the kingdom, yet they are not the better defended against their enemies, but every year are plundered and wasted by sea and land, without any relief. Which calamities the said poor commons, who lately used to live in honour and prosperity, can no longer endure. And to speak the real truth, these injuries lately done to the poorer commons more than they ever suffered before, caused them to rise, and to commit the mischief done in their late riot; and there is still cause to fear greater evils, if sufficient remedy be not timely provided against the

outrages and oppressions aforesaid. Wherefore may it please our lord the king, and the noble peers of the realm now assembled in this parliament, to provide such remedy and amendment as to the said administration, that the state and dignity of the king in the first place, and of the lords may be preserved, as the commons have always desired; and the commons may be put in peace; removing, as soon as they can be detected, evil ministers and counsellors; and putting in their stead the best and most sufficient, and taking away all the bad practices which have led to the last rising, or else none can imagine that this kingdom can long subsist without greater misfortunes than it ever endured. And for God's sake let it not be forgotten, that there be put about the king and of his council, the best lords and knights that can be found in the kingdom.

"And be it known (the entry proceeds) that after the king our lord with the peers of the realm and his council had taken advice upon these requests made to him for his good and his kingdom's, as it really appeared to him, willed and granted, that certain bishops, lords and others should be appointed to survey and examine in privy council both the government of the king's person, and of his household, and to suggest proper remedies wherever necessary, and report them to the king. And it was said by the peers in parliament, that as it seemed to them, if reform of government were to take place throughout the kingdom, it should begin by the chief member, which is the king himself, and so from person to per-

son, as well churchmen as others, and place to place, from higher to lower, without sparing any degree."* A considerable number of commissioners were accordingly appointed, whether by the king alone, or in parliament, does not appear; the latter, however, is more probable. They seem to have made some progress in the work of reformation, for we find that the officers of the household were sworn to observe their regulations. But in all likelihood these were soon neglected.

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

This extraordinary assumption of power by the

* Rot. Parl. 5 R. II. p. 100. † p. 104.

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

* The commons granted a subsidy, 7 R. II. to support Lancaster's war in Castile. R. P. p. 284. Whether the populace changed their opinion of him, I know not. He was still disliked by them two years before. The insurgents of 1382 are said to have compelled men to swear that they would obey King Richard and the commons, and that they would accept no king named John. Walsingham, p. 248.

The character of Richard II. was now developing itself, and the hopes excited by his remarkable presence of mind in confronting the rioters on Blackheath were rapidly destroyed. Not that he was wanting in capacity. as has been sometimes imagined. For if we measure intellectual power by the greatest exertion it ever displays, rather than by its average results, Richard II. was a man of considerable talents. He possessed along with much dissimulation, a decisive promptitude in seizing the critical moment for action. Of this quality, besides his celebrated behaviour towards the insurgents, he gave striking evidence in several circumstances which we shall have shortly to notice. But his ordinary conduct belied the abilities which on these rare occasions shone forth, and rendered them ineffectual for his security. Extreme pride and violence, with an inordinate partiality for the most worthless favourites, were his predominant characteristics. In the latter quality, and in the events of his reign, he forms a pretty exact parallel to Edward II. Scrope, lord chancellor, who had been appointed in parliament, and was understood to be irremoveable without its concurrence, lost the great seal for refusing to set it to some prodigal grants. Upon a slight quarrel with Archbishop Courtney, the king ordered his temporalities to be seized, the execution of which, Michael de la Pole, his new chancellor, and a favourite of his own, could hardly prevent. This was accompanied with indecent and outrageous expressions of anger,

unworthy of his station, and of those whom he insulted.*

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

* Walsingh. pp. 290. 315. 317.

† Rot. Parl. 5 R. II. p. 100. 6 R. II. sess. 1 p. 134.

‡ p. 145.

§ Rot. Parl. 9 R. II. p. 209.

‖ p. 213. It is however asserted in the articles of impeachment against Suffolk, and admitted by his defence, that nine lords had been appointed in the last parliament, viz. 9 R. II. to inquire into the state of the household, and reform whatever was amiss. But nothing of this appears in the roll.

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

* Knyghton, in Twysden x. Script. col. 2680.

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

* Upon full consideration, I am much inclined to give credit to this passage of Knyghton, as to the main facts; and perhaps even the speech of Glocester and the bishop of Ely is more likely to have been made public by them, than invented by so jejune an historian. Walsingham indeed says nothing of the matter; but he is so unequally informed and so frequently defective, that we can draw no strong inference from his silence. What most weighs with me, is that parliament met on Oct. 1, 1387, and was not dissolved till Nov. 28; a longer period than the business done in it seems to have required; and also, that Suffolk, who opened the session as chancellor, is styled "darrein chancellor" in the articles of impeachment against him; so that he must have been removed in the interval, which tallies with Knyghton's story. Besides, it is plain from the famous questions subsequently put by the king to his judges at Nottingham, that both the right of retiring without a regular dissolution, and the precedent of Edward II. had been

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

This was the second precedent of that grand constitutional resource, parliamentary impeachment; and more remarkable, from the eminence of the person attacked, than that of Lord Latimer, in the fiftieth year of Edward III.† The commons were content to wave the prosecution of any other ministers; but they rather chose a scheme of reforming the administration, which should avert both the necessity of punishment, and the malversations that provoked it. They petitioned the king to ordain in parliament certain chief officers of his household, and other lords of his council, with power to reform those abuses, by which his crown was so much blemished, that the laws were not kept, and his revenues were dilapi-

discussed in parliament, which does not appear any where else than in Knyghton.

* Rot. Parl. vol. iii. p. 219.

† Articles had been exhibited by the chancellor before the peers, in the seventh of the king, against Spencer, bishop of Norwich, who had led a considerable army into a disastrous expedition against the Flemings, adherents to the anti-pope Clement in the schism. This crusade had been exceedingly popular, but its ill success had the usual effect. The commons were not parties in this proceeding. Rot. Parl. p. 153.

dated, confirming by a statute their commission for a year, and forbidding, under heavy penalties, any one from opposing, in private or openly, what they should advise.* With this the king complied, and a commission founded upon the prayer of parliament was established by statute. It comprehended fourteen persons of the highest eminence for rank and general estimation; princes of the blood and ancient servants of the crown, by whom its prerogatives were not likely to be unnecessarily impaired. In fact the principle of this commission, without looking back at the precedents in the reigns of John, Henry III., and Edward II., which yet were not without their weight as constitutional analogies, was merely that which the commons had repeatedly maintained during the minority of the present king, and which had produced the former commissions of reform in the third and fifth years of his reign. These were upon the whole nearly the same in their operation. It must be owned there was a more extensive sway virtually given to the lords now appointed, by the penalties imposed on any who should endeavour to obstruct what they might advise; the design as well as tendency of which was no doubt to throw the whole administration into their hands during the period of this commission.

Those who have written our history with more or less of a tory bias, exclaim against this parliamentary commission as an unwarrantable violation of the king's sovereignty, and even impartial men are struck

* p. 221.

at first sight by a measure that seems to overset the natural balance of our constitution. But it would be unfair to blame either those concerned in this commission, some of whose names at least have been handed down with unquestionable respect, or those high-spirited representatives of the people, whose patriot firmness has been hitherto commanding all our sympathy and gratitude, unless we could distinctly pronounce by what gentler means they could restrain the excesses of government. Thirteen parliaments had already met since the accession of Richard; in all the same remonstrances had been repeated, and the same promises renewed. Subsidies, more frequent than in any former reign, had been granted for the supposed exigencies of the war; but this was no longer illuminated by those dazzling victories, which give to fortune the mien of wisdom: the coasts of England were perpetually ravaged; and her trade destroyed; while the administration incurred the suspicion of diverting to private uses that treasure which they so feebly and unsuccessfully applied to the public service. No voice of his people, until it spoke in thunder, would stop an intoxicated boy in the wasteful career of dissipation. He loved festivals and pageants, the prevailing folly of his time, with unusual frivolity; and his ordinary living is represented as beyond comparison more showy and sumptuous than even that of his magnificent and chivalrous predecessor. Acts of parliament were no adequate barriers to his misgovernment. "Of what avail are statutes," says Walsingham, "since

the king with his privy council is wont to abolish what parliament has just enacted!"* The constant prayer of the commons in every session, that former statutes might be kept in force, is no slight presumption that they were not secure of being regarded. It may be true that Edward III.'s government had been full as arbitrary, though not so unwise as his grandson's; but this is the stronger argument, that nothing less than an extraordinary remedy could preserve the still unstable liberties of England.

The best plea that could be made for Richard was his inexperience, and the misguiding suggestions of favourites. This, however, made it more necessary to remove those false advisers, and to supply that inexperience. Unquestionably the choice of ministers is reposed in the sovereign; a trust, like every other attribute of legitimate power, for the public good; not, what no legitimate power can ever be, the instrument of selfishness or caprice. There is something more sacred than the prerogative, or even than the constitution; the public weal, for which all powers are granted, and to which they must all be referred. For this public weal it is confessed to be sometimes necessary to shake the possessor of the throne out of his seat; could it never be permitted to suspend, though but indirectly and for a time, the positive exercise of misapplied prerogatives? He has learned in a very different school from myself, who denies to parliament at the present day a preventive as well as vindictive control over the administration of affairs;

* p. 281.

a right of resisting, by those means which lie within its sphere, the appointment of unfit ministers. These means are now indirect; they need not be the less effectual, and they are certainly more salutary on that account. But we must not make our notions of the constitution in its perfect symmetry of manhood, the measure of its infantine proportions, nor expect from a parliament just struggling into life, and "pawing to get free its hinder parts," the regularity of definite and habitual power.

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

liament, and to a temporary suspension of prerogative, this unfortunate prince might probably have reigned long and peacefully; the contrary course of acting led eventually to his deposition and miserable death.

Before the dissolution of parliament, Richard made a verbal protestation, that nothing done therein should be in prejudice of his rights; a reservation not unusual when any remarkable concession was made, but which could not decently be interpreted, whatever he might mean, as a dissent from the statute just passed. Some months had intervened, when the king, who had already released Suffolk from prison, and restored him to his favour, procured from the judges whom he had summoned to Nottingham, a most convenient set of answers to questions concerning the late proceedings in parliament. Tresilian and Belknap, chief justices of the King's Bench and Common Pleas, with several other judges, gave it under their seals, that the late statute and commission were derogatory to the prerogative; that all who procured it to be passed, or persuaded or compelled the king to consent to it, were guilty of treason; that the king's business must be proceeded upon before any other in parliament; that he may put an end to the session at his pleasure; that his ministers cannot be impeached without his consent; that any members of parliament contravening the three last articles, incur the penalties of treason, and especially he who moved for the sentence of deposition against Edward II. to be read; and that the judgement against the

earl of Suffolk might be revoked as altogether erroneous.

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

* The judgement against Simon de Burley, one of those who were executed on this occasion, upon impeachment of the commons, was reversed under Henry IV.; a fair presumption of its injustice. Rot. Parl. vol. iii. p. 464.

Notwithstanding the death or exile of all Richard's favourites, and the oath taken not only by parliament, but by every class of the people to stand by the lords appellants, we find him, after about a year, suddenly annihilating their pretensions, and snatching the reins again without obstruction. The secret cause of this event is among the many obscurities that attend the history of his reign. It was conducted with a spirit and activity which broke out two or three times in the course of his imprudent life; but we may conjecture that he had the advantage of disunion among his enemies. For some years after this, the king's administration was prudent. The great seal, which he took away from Archbishop Arundel, he gave to Wykeham, bishop of Winchester, another member of the reforming commission, but a man of great moderation and political experience. Some time after, he restored the seal to Arundel, and reinstated the duke of Glocester in the council. The duke of Lancaster, who had been absent during the transactions of the tenth and eleventh years of the king, in prosecution of his Castilian war, formed a link between the parties, and seems to have maintained some share of public favour.

There was now a more apparent harmony between the court and the parliament. It seems to have been tacitly agreed that they should not interfere with the king's household expenses; and they gratified him in a point where his honour had been most wounded, declaring his prerogative to be as high and unimpaired as that of his predecessors, and repealing the

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

But this summer season was not to last for ever. Richard had but dissembled with those concerned in the transactions of 1388, none of whom he could ever forgive. These lords in lapse of time were divided among each other. The earls of Derby and Nottingham were brought into the king's interest. The earl of Arundel came to an open breach

* Rot. Parl. 14 R. II. p. 279. 15 R. II. p. 286.
† Rot. Parl. 13 R. II. Parl. p. 258.

with the duke of Lancaster, whose pardon he was compelled to ask for an unfounded accusation in parliament.* Glocester's ungoverned ambition, elated by popularity, could not brook the ascendency of his brother Lancaster, who was much less odious to the king. He had constantly urged and defended the concession of Guienne to this prince, to be held for life, reserving only his liege homage to Richard, as king of France;† a grant, as unpopular among the natives of that country, as it was derogatory to the crown; but Lancaster was not much indebted to his brother for assistance, which was only given in order to diminish his influence in England. The truce with France, and the king's French marriage, which Lancaster supported, were passionately opposed by Glocester. And the latter had given keener provocation, by speaking contemptuously of that mis-alliance with Katharine Swineford, which contaminated the blood of Plantagenet. To the parliament summoned in the 20th of Richard, one object of which was to legitimate the duke of Lancaster's ante-nuptial children by this lady, neither Glocester nor Arundel would repair. There passed in this assembly something remarkable, as it exhibits not only the arbitrary temper of the king, a point by no means doubtful, but the inefficiency of the commons to resist it, without support from political confederacies of the nobility. The circumstances are thus related in the record.

* 17 R. II. p. 313. † Rymer, t. vii. p. 583. 659.

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

Upon this information the king declared to the lords, that through God's gift he is by lineal right of inheritance king of England, and will have the royalty and freedom of his crown, from which some of

* Hume has represented this, as if the commons had petitioned for the continuance of sheriffs beyond a year, and grounds upon this mistake part of his defence of Richard II. (note to vol. ii. p. 270, 4to edit.) For this he refers to Cotton's Abridgement; whether rightly or not, I cannot say, being little acquainted with that inaccurate book, upon which it is unfortunate that Hume relied so much. The passage from Walsingham in the same note is also wholly perverted; as the reader will discover without further observation. An historian must be strangely warped, who quotes a passage explicitly complaining of illegal acts in order to infer that those very acts were legal. I may add, that Richard was not in his minority at the time that Walsingham makes this complaint, as Hume asserts; it was in the tenth year of his reign.

these articles derogate. The first petition, that sheriffs should never remain in office beyond a year, he rejected; but passing lightly over the rest, took most offence, that the commons, who are his lieges, should take on themselves to make any ordinance respecting his royal person or household, or those whom he might please to have about him. He enjoined therefore the lords to declare plainly to the commons his pleasure in this matter; and especially directed the duke of Lancaster to make the speaker give up the name of the person who presented a bill for this last article in the lower house.

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

* The church would perhaps have interfered in behalf of Haxey, if he had only received the tonsure. But it seems that he was actually in orders; for the record calls him Sir Thomas Haxey, a title at that time regularly given to the parson of a parish. If this be so, it is a remarkable authority for the clergy's capacity for sitting in parliament.

his person; protesting that this was not claimed by way of right, but merely of the king's grace.*

This was an open defiance of parliament and a declaration of arbitrary power. For it would be impossible to contend, that after the repeated instances of control over public expenditure by the commons since the 50th of Edward III., this principle was novel and unauthorized by the constitution; or that the right of free speech demanded by them in every parliament was not a real and indisputable privilege. The king, however, was completetely successful, and having proved the feebleness of the commons, fell next upon those he more dreaded. By a skilful piece of treachery he seized the duke of Glocester, and spread consternation among all his party. A parliament was summoned, in which the only struggle was to outdo the king's wishes, and thus to efface their former transgressions.† Glocester, who had

* Rot. Parl. 20 R. II. p. 339. In Henry IV.'s first parliament, the commons petitioned for Haxey's restoration, and truly say, that his sentence was en ancantissement des custumes de la commune, p. 434. His judgement was reversed by both houses, as having past de volonté du Roy Richard et contre droit, et la course quel avoit este devant en parlement. p. 430. There can be no doubt with any man who looks attentively at the passages relative to Haxey, that he was a member of parliament; though this was questioned a few years ago by the committee of the house of commons, who made a report on the right of the clergy to be elected; a right, which I am inclined to believe, did exist down to the Reformation, as the grounds alleged for Nowell's expulsion in the first of Mary, besides this instance of Haxey, conspire to prove, though it has since been lost by disuse.

† This assembly, if we may trust the anonymous author of the life of Richard II., published by Hearne, was surrounded by the king's troops. p. 133.

been murdered at Calais, was attainted after his death; Arundel was beheaded, his brother the archbishop of Canterbury deposed and banished, Warwick and Cobham sent beyond the sea. The commission of the tenth, the proceedings in parliament of the eleventh year of the king, were annulled. The answers of the judges to the questions put at Nottingham, which had been punished with death and exile, were pronounced by parliament to be just and legal. It was declared high treason to procure the repeal of any judgement against persons therein impeached. Their issue male were disabled from ever sitting in parliament, or holding place in council. These violent ordinances, as if the precedent they were then overturning had not shielded itself with the same sanction, were sworn to by parliament upon the cross of Canterbury, and confirmed by a national oath, with the penalty of excommunication denounced against its infringers. Of those recorded to have bound themselves by this adjuration to Richard, far the greater part had touched the same relics for Glocester and Arundel ten years before, and two years afterwards swore allegiance to Henry of Lancaster.*

In the fervour of prosecution this parliament could hardly go beyond that whose acts they were annulling; and each is alike unworthy to be remembered in the way of precedent. But the leaders of the former, though vindictive and turbulent, had a concern for the public interest; and after punishing

* Rot. Parl. 21 R. II. p. 347.

their enemies, left the government upon its right foundation. In this, all regard for liberty was extinct; and the commons set the dangerous precedent of granting the king a subsidy upon wool during his life. This remarkable act of servility was accompanied by another, less unexampled, but, as it proved, of more ruinous tendency. The petitions of the commons not having been answered during the session, which they were always anxious to conclude, a commission was granted for twelve peers and six commoners to sit after the dissolution, and "examine, answer, and fully determine as well all the said petitions, and the matters therein comprised, as all other matter and things moved in the king's presence; and all things incident thereto not yet determined, as shall seem best to them."* The "other matters" mentioned above were, I suppose, private petitions to the king's council in parliament, which had been frequently despatched after a dissolution. For in the statute which establishes this commission, 21 R. II. c. 16. no powers are committed, but those of examining petitions; which, if it does not confirm the charge afterwards alleged against Richard of falsifying the parliament roll, must at least be considered as limiting and explaining the terms of the latter. Such a trust had been committed to some lords of the council eight years before, in very peaceful times; and it was even requested, that the same might be done in future parliaments.† But it is obvious what a latitude this gave to a prevailing faction. These

* 21 R. II. p. 369. † 13 R. II. p. 256.

eighteen commissioners or some of them (for there were who disliked the turn of affairs) usurped the full rights of the legislature, which undoubtedly were only delegated in respect of business already commenced.* They imposed a perpetual oath on prelates and lords for all time to come, to be taken before obtaining livery of their lands, that they would maintain the statutes and ordinances made by this parliament, or "afterwards by the lords and knights having power committed to them by the same." They declared it high treason to disobey their ordinances. They annulled the patents of the dukes of Hereford and Norfolk, and adjudged Henry Bowet, the former's chaplain, who had advised him to petition for his inheritance, to the penalties of treason.† And thus

* This proceeding was made one of the articles of charge against Richard in the following terms: Item, in parliamento ultimo celebrato apud Salopiam, idem Rex proponens opprimere populum suum procuravit subtiliter et fecit concedi, quod potestas parliamenti de consensu omnium statuum regni sui remaneret apud quasdam certas personas ad terminandum, dissoluto parliamento, certas petitiones in eodem parliamento porrectas protunc minimè expeditas. Cujus concessionis colore personæ sic deputatæ processerunt ad alia generaliter parliamentum illud tangentia; et hoc de voluntate regis; in derogationem statûs parliamenti, et in magnum incommodum totius regni, et perniciosum exemplum. Et ut super factis eorum hujusmodi aliquem colorem et auctoritatem viderentur habere, rex fecit rotulos parliamenti pro voto suo mutari et deleri, contra effectum consensionis prædictæ. Rot. Parl. 1 H. IV. vol. iii. p. 418. Whether the last accusation, of altering the parliamentary roll, be true or not, there is enough left in it to prove every thing I have asserted in the text. From this it is sufficiently manifest, how unfairly Carte and Hume have drawn a parallel between this self-deputed legislative commission, and that appointed by parliament to reform the administration 11 years before.

† p. 372. 385.

having obtained a revenue for life, and the power of parliament being notoriously usurped by a knot of his creatures, the king was little likely to meet his people again, and became as truly absolute as his ambition could require.

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

was referred to the eighteen commissioners who sat after the dissolution, and a trial by combat was awarded. But when, after many delays, this was about to take place at Coventry, Richard interfered and settled the dispute by condemning Hereford to banishment for ten years, and Norfolk for life. This strange determination, which treated both as guilty, where only one could be so, seems to admit no other solution than the king's desire to rid himself of two peers whom he feared and hated at a blow. But it is difficult to understand by what means he drew the crafty Bolingbroke into his snare.* However this might have been, he now threw away all appearance of moderate government. The indignities he had suffered in the eleventh year of his reign were still at his heart, to revenge which seems to have been the main spring of his conduct. Though a general pardon of those proceedings had been granted, not only at the time, but in his own last parliament, he made use of them as a pretence to extort money from seventeen counties, to whom he imputed a share in the rebellion. He compelled men to confess under their

* Besides the contemporary historians, we may read a full narrative of these proceedings in the rolls of parliament, vol. iii. p. 382. It appears that Mowbray was the most offending party, since, independently of Hereford's accusation, he is charged with openly maintaining the appeals made in the false parliament of the eleventh of the king. But the banishment of his accuser was wholly unjustifiable by any motives that we can discover. It is strange that Carte should express surprise at the sentence upon the duke of Norfolk, while he seems to consider that upon Hereford as very equitable. But he viewed the whole of this reign, and of those that ensued, with the jaundiced eye of Jacobitism.

seals that they had been guilty of treason, and to give blank obligations, which his officers filled up with large sums.* Upon the death of the duke of Lancaster, who had passively complied throughout all these transactions, Richard refused livery of his inheritance to Hereford, whose exile implied no crime, and who had letters patent enabling him to make his attorney for that purpose during its continuance. In short, his government for nearly two years was altogether tyrannical; and, upon the same principles that cost James II. his throne, it was unquestionably far more necessary, unless our fathers would have abandoned all thought of liberty, to expel Richard II. Far be it from us to extenuate the treachery of the Percies towards this unhappy prince, or the cruel circumstances of his death, or in any way to extol either his successor, or the chief men of that time, most of whom were ambitious and faithless; but after such long experience of the king's arbitrary, dissembling and revengeful temper, I see no other safe course, in the actual state of the constitution, than what the nation concurred in pursuing.

The reign of Richard II. is, in a constitutional light, the most interesting part of our earlier history; and it has been the most imperfectly written. Some have misrepresented the truth through prejudice, and others through carelessness. It is only to be understood, and indeed there are great difficulties in the way of understanding it at all, by a perusal of the

* Rot. Parl. 1 H. IV. p. 420. 426. Walsingham, p. 353. 357. Otterburn, p. 199. Vita Ric. II. p. 147.

rolls of parliament, with some assistance from the contemporary historians, Walsingham, Knyghton, the anonymous biographer published by Hearne, and Froissart. These, I must remark, except occasionally the last, are extremely hostile to Richard; and although we are far from being bound to acquiesce in their opinions, it is at least unwarrantable in modern writers to sprinkle their margins with references to such authority in support of positions decidedly opposite.*

The revolution which elevated Henry IV. to the throne was certainly so far accomplished by force, that the king was in captivity, and those who might still adhere to him in no condition to support his authority. But the sincere concurrence, which most of the prelates and nobility, with the mass of the people, gave to changes that could not have been otherwise effected by one so unprovided with foreign support as Henry, proves this revolution to have been, if not an indispensable, yet a national act, and should prevent our considering the Lancastrian kings as usurpers of the throne. Nothing indeed looks so much like usurpation in the whole transaction, as Henry's remarkable challenge of the crown, insinuating, though not avowing, as Hume has justly animadverted upon it, a false and ridiculous title by

* It is fair to observe, that Froissart's testimony makes most in favour of the king, or rather against his enemies, where it is most valuable, that is, in his account of what he heard in the English court in 1395. l. iv. c. 62. where he gives a very indifferent character of the duke of Glocester. In general, this writer is ill informed of English affairs, and undeserving to be quoted as an authority.

right line of descent, and one equally unwarrantable by conquest. The course of proceedings is worthy of notice. As the renunciation of Richard might well pass for the effect of compulsion, there was a strong reason for propping up its instability by a solemn deposition from the throne, founded upon specific charges of misgovernment. Again, as the right of dethroning a monarch was no where found in the law, it was equally requisite to support this assumption of power by an actual abdication. But as neither one nor the other filled the duke of Lancaster's wishes, who was not contented with owing a crown to election, nor seemed altogether to account for the exclusion of the house of March, he devised this claim, which was preferred in the vacancy of the throne, Richard's cession having been read and approved in parliament, and the sentence of deposition, "out of abundant caution, and to remove all scruple," solemnly passed by seven commissioners, appointed out of the several estates. "After which challenge and claim," says the records, "the lords spiritual and temporal, and all the estates there present, being asked separately and together, what they thought of the said challenge and claim, the said estates, with the whole people, without any difficulty or delay, consented that the said duke should reign over them."* The claim of Henry, as opposed to that of the earl of March, was indeed ridiculous; but it is by no means evident, that, in such cases of extreme urgency as leave no security for the common weal but

* Rot. Parl. p. 423.

the deposition of a reigning prince, there rests any positive obligation upon the estates of the realm to fill his place with the nearest heir. A revolution of this kind seems rather to defeat and confound all prior titles, though in the new settlement it will commonly be prudent, as well as equitable, to treat them with some regard. Were this otherwise, it would be hard to say, why William III. reigned to the exclusion of Anne, or even of the Pretender, who had surely committed no offence at that time; or why (if such indeed be the true construction of the Act of Settlement) the more distant branches of the royal stock, descendants of Henry VII. and earlier kings, have been cut off from their remainders by the restriction to the heirs of the princess Sophia.

In this revolution of 1309, there was as remarkable an attention shown to the formalities of the constitution, allowance made for the men and the times, as in that of 1688. The parliament was not opened by commission; no one took the office of president; the commons did not adjourn to their own chamber; they chose no speaker; the name of parliament was not taken, but that only of estates of the realm. But as it would have been a violation of constitutional principles to assume a parliamentary character without the king's commission, though summoned by his writ, so it was still more essential to limit their exercise of power to the necessity of circumstances. Upon the cession of the king, as upon his death, the parliament was no more; its existence as the council of the sovereign, being dependent upon

his will. The actual convention, summoned by the writs of Richard, could not legally become the parliament of Henry; and the validity of a statute declaring it to be such would probably have been questionable in that age, when the power of statutes to alter the original principles of the common law was by no means thoroughly recognized as at the Restoration and Revolution. Yet Henry was too well pleased with his friends to part with them so readily; and he had much to effect before the fervour of their spirits should abate. Hence an expedient was devised, of issuing writs for a new parliament, returnable in six days. These neither were, nor could be complied with; but the same members as had deposed Richard sat in the new parliament, which was regularly opened by Henry's commissioner as if they had been duly elected.* In this contrivance, more than in all the rest, we may trace the hand of lawyers.

If we look back from the accession of Henry IV. to that of his predecessor, the constitutional authority of the house of commons will be perceived to have made surprising progress during the course of twenty-two years. Of the three capital points in contest while Edward reigned, that money could not be levied, or laws enacted, without the commons' consent, and the administration of government was subject to their inspection and control; the first was absolutely decided in their favour, the second was at

* If proof could be required of any thing so self-evident, as that these assemblies consisted of exactly the same persons, it may be found in their writs of expenses, as published by Prynne, 4th Register, p. 450.

king; and giving an assurance that this shall be de-least perfectly admitted in principle, and the last was confirmed by frequent exercise. The commons had acquired two additional engines of immense efficiency; one, the right of directing the application of subsidies, and calling accountants before them; the other, that of impeaching the king's ministers for misconduct. All these vigorous shoots of liberty throve more and more under the three kings of the house of Lancaster, and drew such strength and nourishment from the generous heart of England, that in after-times, and in a less prosperous season, though checked and obstructed in their growth, neither the blasts of arbitrary power could break them off, nor the mildew of servile opinion cause them to wither. I shall trace the progress of parliament till the civil wars of York and Lancaster: 1. in maintaining the exclusive right of taxation; 2. in directing and checking the public expenditure; 3. in making supplies depend on the redress of grievances; 4. in securing the people against illegal ordinances and interpolations of the statutes; 5. in controlling the royal administration; 6. in punishing bad ministers; and lastly, in establishing their own immunities and privileges.

1. The pretence of levying money without consent of parliament expired with Edward III., who had asserted it, as we have seen, in the very last year of his reign. A great council of lords and prelates, summoned in the second year of his successor, declared that they could advise no remedy for the king's necessities, without laying taxes on the peo-

ple, which could only be granted in parliament.* Nor was Richard ever accused of illegal tallages, the frequent theme of remonstrance under Edward, unless we may conjecture that this charge is implied in an act (11 R. II. c. 9.) which annuls all impositions on wool and leather, without consent of parliament, *if any there be.*† Doubtless his innocence in this respect was the effect of weakness; and if the revolution of 1399 had not put an end to his newly acquired despotism, this, like every other right of his people, would have been swept away. A less palpable means of evading the consent of the commons was by the extortion of loans, and harassing those who refused to pay, by summonses before the council. These loans, the frequent resource of arbitrary sovereigns in later times, are first complained of in an early parliament of Richard II.; and a petition is granted that no man shall be compelled to lend the king money.‡ But how little this was regarded, we may infer from a writ directed in 1386, to some persons in Boston, enjoining them to assess every person who had goods and chattels to the amount of twenty pounds, in his proportion of two hundred pounds, which the town had promised to lend the

* 2 R. II. p. 56.

† It is positively laid down by the assertors of civil liberty in the great case of impositions (Howell's St. Trials, vol. ii. p. 443. 507.) that no precedents for arbitrary taxation of exports or imports occur from the accession of Richard II. to the reign of Mary.

‡ 2 R. II. p. 62. This did not find its way to the statute book.

ducted from the next subsidy to be granted by parliament. Among other extraordinary parts of this letter is a menace of forfeiting life, limbs and property, held out against such as should not obey these commissioners.* After his triumph over the popular party towards the end of his reign, he obtained large sums in this way.

Under the Lancastrian kings, there is much less appearance of raising money in an unparliamentary course. Henry IV. obtained an aid from a great council in the year 1400; but they did not pretend to charge any besides themselves; though it seems that some towns afterwards gave the king a contribution.† A few years afterwards, he directs the sheriffs to call on the richest men in their counties to advance the money voted by parliament. This, if any compulsion was threatened, is an instance of over-strained prerogative, though consonant to the practice of the late reign.‡ There is, however, an instance of very arbitrary conduct with respect to a grant of money in the minority of Henry IV. A subsidy had been granted by parliament upon goods imported, under certain restrictions in favour of the merchants, with a provision, that if these conditions be not observed on the king's part, then the grant should be void and of no effect.§ But an entry is

* Rymer, t. vii. p. 544.

† Carte, vol. ii. p. 640. Sir M. Hale observes that he finds no complaints of illegal impositions under the kings of the house of Lancaster. Hargrave's Tracts, vol. i. p. 184.

‡ Rymer, t. viii. p. 412. 488.

§ Rot. Parl. vol. iv. p. 216.

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

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

* Id. p. 301. † p. 302. ‡ vol. iii. p. 546. § p. 568.

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

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

* vol. iii. p. 458 † Id. vol. iv. p. 63. ‡ Walsingham, p. 379.

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

4. It had long been out of question, that the legislature consisted of the king, lords and commons; or in stricter language, that the king could not make or repeal statutes without the consent of parliament. But this fundamental maxim was still frequently defeated by various acts of evasion or violence; which, though protested against as illegal, it was a difficult task to prevent. The king sometimes exerted a power of suspending the observance of statutes; as in the ninth of Richard II., when a petition that all statutes might be confirmed is granted with an exception as to one passed in the last parliament, forbidding the judges to take fees, or give counsel in cases where the king was a party; which, "because it was too severe, and needs declaration, the king would have of no effect till it should be declared in parliament."* The apprehension of this dispensing prerogative and sense of its illegality are manifested by the wary terms wherein the commons. in one of Richard's parliaments, "assent that the king make such sufferance

* p. 210. Ruff head observes in the margin upon this statute 8 R. II. c. 3., that it is repealed, but does not take notice what sort of repeal it had.

respecting the statute of provisors, as shall seem reasonable to him, so that the said statute be not repealed; and moreover that the commons may disagree thereto at the next parliament, and resort to the statute;" with a protestation that this assent, which is a novelty, and never done before, shall not be drawn into precedent; praying the king that this protestation may be entered on the roll of parliament.* A petition in one of Henry IV.'s parliaments, to limit the number of attornies, and forbid filazers and prothonotaries from practising, having been answered favourably as to the first point, we find a marginal entry in the roll, that the prince and council had respited the execution of this act.†

The dispensing power, as exercised in favour of individuals, is quite of a different character from this general suspension of statutes, but indirectly weakens the sovereignty of the legislature. This power was exerted, and even recognized, throughout all the reigns of the Plantagenets. In the first of Henry V. the commons pray, that the statute for driving aliens out of the kingdom be executed. The king assents, saving his prerogative, and his right of dispensing with it when he pleased. To which the commons replied, that their intention was never otherwise, nor by God's help, ever should be. At the same time one Rees ap Thomas petitions the king to modify or dispense with the statute prohibiting Welchmen from

* 15 R. II. p. 285. See too 16 R. II. p. 301. where the same power is renewed in H. IV.'s parliaments.

† 13 H. IV. p. 643.

purchasing lands in England, or the English towns in Wales; which the king grants. In the same parliament, the commons pray, that no grant or protection be made to any one in contravention of the statute of provisors, saving the king's prerogative. He merely answers, "Let the statutes be observed:" evading any allusion to his dispensing power.*

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

An ordinance was put upon the roll of parliament, in the fifth of Richard II., empowering sheriffs of counties to arrest preachers of heresy, and their abettors, and detain them in prison till they should justify themselves before the church. This was introduced into the statutes of the year; but the assent of lords and commons is not expressed. In the next parliament, the commons, reciting this ordinance, declare that it was never assented to or granted by them, but what had been proposed in this matter, was without their concurrence; (that is, as I conceive, had been rejected by them,) and pray that this statute be annulled, for it was never their intent to bind themselves or their descendants to the bishops more than their ancestors had been bound in times

* Rot. Parl. v. 4 H. V. p. 6. 9.

past. The king returned an answer, agreeing to this petition. Nevertheless the pretended statute was untouched, and remains still among our laws;* unrepealed, except by desuetude, and by inference from the acts of much later times.

This commendable reluctance of the commons to let the clergy forge chains for them produced, as there is much appearance, a similar violation of their legislative rights in the next reign. The statute against heresy in the second of Henry IV. is not grounded upon any petition of the commons, but only upon one of the clergy. It is said to be enacted by consent of the lords, but no notice is taken of the lower house in the parliament roll, though the statute reciting the petition asserts the commons to have joined in it.† The petition and the statute are both in Latin, which is unusual in the laws of this time. In a subsequent petition of the commons, this act is styled "the statute made in the second year of your majesty's reign, at the request of the prelates and clergy of your kingdom;" which affords a presump-

* 5 R. II. stat. 2. c. 5.; Rot. Parl. 6 R. II. p. 141. Some other instances of the commons attempting to prevent these unfair practices are adduced by Ruffhead, in his preface to the statutes, and in Prynne's preface to Cotton's Abridgment of the Records. The act 13 R. II. stat. 1. c. 15., that the king's castles and gaols which had been separated from the body of the adjoining counties should be re-united to them, is not founded upon any petition that appears on the roll; and probably, by making search, other instances equally flagrant might be discovered.

† There had been, however, a petition of the commons on the same subject, expressed in very general terms on which this terrible superstructure might artfully be raised. p. 474.

tion, that it had no regular assent of parliament.* And the spirit of the commons during this whole reign being remarkably hostile to the church, it would have been hardly possible to obtain their consent to so penal a law against heresy. Several of their petitions seem designed indirectly to weaken its efficacy.†

These infringements of their most essential right were resisted by the commons in various ways, according to the measure of their power. In the fifth of Richard II., they request the lords to let them see a certain ordinance before it is engrossed.‡ At another time they procured some of their own members, as well as peers, to be present at engrossing the roll. At length they spoke out unequivocally in a memorable petition, which, besides its intrinsic importance, is deserving of notice, as the earliest instance in which the House of Commons adopted the English language. I shall present its venerable orthography without change.

"Oure soverain lord, youre humble and trewe lieges that ben come for the comune of youre lond

* p. 626.

† We find a remarkable petition in 8 H. IV., professedly aimed against the Lollards, but intended, as I strongly suspect, in their favour. It condemns persons preaching against the catholic faith or sacraments to imprisonment till the next parliament, when they are to abide such judgement as should be rendered *by the king and the peers of the realm.* This seems to supersede the burning statute of 2 H. IV., and spiritual cognizance of heresy. Rot. Parl. p. 583. See too p. 626. The petition was expressly granted; but the clergy, I suppose, prevented its appearing on the statute-roll.

‡ Rot. Parl. vol. iii. p. 102.

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

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

* Rot. Parl. v. iv. p. 22. It is curious that the authors of the Parliamentary History say that the roll of this parliament

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

is lost, and consequently suppress altogether this important petition. Instead of which they give, as their fashion is, impertinent speeches out of Holingshed, which are certainly not genuine, and would be of no value if they were so.

* Henry VI. and Edward IV., in some cases passed bills with sundry provisos annexed by themselves. Thus the act for resumption of grants, 4 E. I. V. was encumbered with 289 clauses in favour of so many persons whom the king meant to exempt from its operation; and the same was done in other acts of the same description. Rot. Parl. vol. v. p. 517.

nary effect on the character of our constitution, was gradually introduced in Henry VI.'s reign.*

From the first years of Henry V., though not, I think, earlier, the commons began to concern themselves with the petitions of individuals to the lords or council. The nature of the jurisdiction exercised by the latter will be treated more fully hereafter; it is only necessary to mention in this place, that many of the requests preferred to them were such as could not be granted without transcending the boundaries of law. A just inquietude as to the encroachments of the king's council had long been manifested by the commons; and finding remonstrances ineffectual, they took measures for preventing such usurpations of legislative power, by introducing their own consent to private petitions. These were now presented

* The variations of each statute, as now printed, from the parliamentary roll, whether in form or substance, are noticed in Cotton's Abridgement. It may be worth while to consult the preface to Ruffhead's edition of the Statutes, where this subject is treated at some length.

Perhaps the triple division of our legislature may be dated from this innovation. For as it is impossible to deny that, while the king promulgated a statute founded upon a mere petition, he was himself the real legislator, so I think it is equally fair to assert, notwithstanding the formal preamble of our statutes, that laws brought into either house of parliament in a perfect shape, and receiving first the assent of lords and commons, and finally that of the king, who has no power to modify them, must be deemed to proceed, and derive their efficacy, from the joint concurrence of all the three. It is said indeed at a much earlier time, that le ley de la terre est fait en parlement par le roi, et les seigneurs espirituels et temporels, et tout la communauté du royaume. Rot. Parl. vol. iii. p. 293. But this I must allow was in the violent session of 11 Ric. II., the constitutional authority of which is not to be highly prized.

by the hands of the commons, and in very many instances passed in the form of statutes, with the express assent of all parts of the legislature. Such was the origin of private bills, which occupy the greater part of the rolls in Henry V. and VI.'s parliaments. The commons once made an ineffectual endeavour to have their consent to all petitions presented to the council in parliament rendered necessary by law; if I rightly apprehend the meaning of the roll in this place, which seems obscure or corrupt.*

5. If the strength of the commons had lain merely in the weakness of the crown, it might be inferred, that such harassing interference with the administration of affairs as the youthful and frivolous Richard was compelled to endure would have been sternly repelled by his experienced successor. But, on the contrary, the spirit of Richard might have rejoiced to see that his mortal enemy suffered as hard usage at the hands of parliament as himself. After a few years, the government of Henry became extremely unpopular. Perhaps his dissention with the great family of Percy, which had placed him on the throne, and was regarded with partiality by the people,† chiefly contributed to this alienation of their attachment. The commons requested, in the fifth of his reign, that certain persons might be removed from the court; the lords concurred in displacing four of these, one being the king's confessor. Henry came

* 8 H. V. vol. iv. p. 127.

† The house of commons thanked the king for pardoning Northumberland, whom, as it proved, he had just cause to suspect. 5 H. IV. p. 525.

down to parliament and excused these four persons, as knowing no special cause why they should be removed; yet, well understanding, that what the lords and commons should ordain would be for his and his kingdom's interest, and therefore anxious to conform himself to their wishes, consented to the said ordinance, and charged the persons in question to leave his palace; adding that he would do as much by any other about his person, whom he should find to have incurred the ill affection of his people.* It was in the same session that the archbishop of Canterbury was commanded to declare before the lords the king's intention respecting his administration; allowing that some things had been done amiss in his court and household; and therefore, "wishing to conform to the will of God and laws of the land, protested that he would let in future no letters of signet or privy seal go in disturbance of law, beseeched the lords to put his household in order, so that every one might be paid, and declared that the money granted by the commons for the war should be received by treasurers appointed in parliament, and disbursed by them for no other purpose, unless in case of rebellion. At the request of the commons, he named the members of his privy council; and did the same, with some variation of persons, two years afterwards. These, though not nominated with the express consent, seem to have had the approbation of the commons; for a subsidy is granted, in 7 H. IV., among other causes, for the great trust that the commons have in the lords

* 5 H. IV. p. 525.

lately chosen, and ordained to be of the king's continual council, that there shall be better management than heretofore."*

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

But no parliament came near, in the number and boldness of its demands, to that held in the 8th year of Henry IV. The commons presented thirty-one articles, none of which the king ventured to refuse, though pressing very severely upon his prerogative. He was to name sixteen counsellors, by whose advice he was solely to be guided, none of them to be dismissed without conviction of misdemeanour. The chancellor and privy seal to pass no grants or other matter, contrary to law. Any persons about the court stirring up the king or queen's minds against their subjects, and duly convicted thereof, to lose their offices, and be fined. The king's ordinary revenue was wholly appropriated to his

* Rot. Parl. v. iii. p. 529. 568. 573. † p. 547.
‡ 13 H. IV. p. 624.

household and the payment of his debts; no grant of wardship or other profit to be made thereout, nor any forfeiture to be pardoned. The king, "considering the wise government of other christian princes, and conforming himself thereto," was to assign two days in the week for petitions, "it being an honourable and necessary thing, that his lieges who desire to petition him should be heard." No judicial officer, nor any in the revenue or household to enjoy his place for life or term of years. No petition to be presented to the king by any of his household, at times when the council were not sitting. The council to determine nothing cognizable at common law, unless for a reasonable cause and with consent of the judges. The statutes regulating purveyance were affirmed; abuses of various kinds in the council and in courts of justice enumerated and forbidden; elections of knights for counties put under regulation. The council and officers of state were sworn to observe the common law, and all statutes, those especially just enacted.*

It must strike every reader, that these provisions were of themselves a noble fabric of constitutional liberty, and hardly perhaps inferior to the petition of right under Charles I. We cannot account for the submission of Henry to conditions far more derogatory than ever were imposed on Richard, because the secret politics of his reign are very imperfectly understood. Towards its close he manifested more vigour. The speaker, Sir Thomas Chaucer, having made the usual petition for liberty of speech, the king

* Rot. Parl. 8 H. IV. p. 585.

answered that he might speak as others had done in the time of his (Henry's) ancestors, and his own, but not otherwise; for he would by no means have any innovation, but be as much at his liberty as any of his ancestors had ever been. Some time after he sent a message to the commons, complaining of a law passed at the last parliament, infringing his liberty and prerogative, which he requested their consent to repeal. To this the commons agreed, and received the king's thanks, who declared at the same time that he would keep as much freedom and prerogative as any of his ancestors. It does not appear what was the particular subject of his complaint; but there had been much of the same remonstrating spirit in the last parliament, that was manifested on preceding occasions. The commons, however, for reasons we cannot explain, were rather dismayed. Before their dissolution, they petition the king, that, whereas he was reported to be offended at some of his subjects in this and the preceding parliament, he would openly declare, that he held them all for loyal subjects. Henry granted this, "of his special grace;" and thus concluded his reign more triumphantly with respect to his domestic battles than he had gone through it.*

Power deemed to be ill-gotten is naturally precarious; and the instance of Henry IV. has been well quoted to prove that public liberty flourishes with a bad title in the sovereign. None of our kings seem to have been less beloved; and indeed he had little claim to affection. But what men denied to the reign-

* 13 H. IV. p. 648. 658.

ing king, they poured in full measure upon the heir of his throne. The virtues of the Prince of Wales are almost invidiously eulogized by those parliaments who treat harshly his father;* and these records afford a strong presumption, that some early petulance or riot has been much exaggerated by the vulgar minds of our chroniclers. One can scarcely understand at least, that a prince, who was three years engaged in quelling the dangerous insurrection of Glendour, and who in the latter time of his father's reign presided at the council, was so lost in a cloud of low debauchery as common fame represents.† Loved he certainly was throughout his life, as so intrepid, affable, and generous a temper well deserved; and this sentiment was heightened to admiration by successes still more rapid and dazzling than those of Edward III. During his reign, there scarcely appears any vestige of dissatisfaction in parliament; a circumstance very honourable, whether we ascribe it to the justice of his administration, or to the affection of his people. Perhaps two exceptions, though they are rather one in spirit, might be made: the first, a petition to the duke of Glocester, then holding parliament as guardian of England, that he would move the king and queen to return, as speedily as might please them, in relief and comfort of the commons;‡ the second, a request that their petitions might not

* Rot. Parl. vol. iii. pp. 549. 568. 574. 611.

† This passage was written before I was aware that the same opinion had been elaborately maintained by Mr. Luders, in one of his valuable essays upon points of constitutional history.

‡ 8 H. V. vol. iv. p. 125.

be sent to the king beyond sea, but altogether determined "within this kingdom of England, during this parliament;" and that this ordinance might be of force in all future parliaments to be held in England.* This prayer, to which the guardian declined to accede, evidently sprung from the apprehensions excited in their minds by the treaty of Troyes, that England might become a province of the French crown, which led them to obtain a renewal of the statute of Edward III., declaring the independence of this kingdom.†

It has been seen already, that even Edward III. consulted his parliament upon the expediency of negotiations for peace; though at that time the commons had not acquired boldness enough to tender their advice. In Richard II.'s reign they answered to a similar proposition with a little more confidence, that the dangers each way were so considerable they dared not decide, though an honourable peace would be the greatest comfort they could have; and concluded by hoping that the king would not engage to do homage for Calais or the conquered country.‡ The parliament of the tenth of his reign was expressly summoned in order to advise concerning the king's intended expedition beyond sea; a great council, which had previously been assembled at Oxford, having declared their incompetence to consent to this measure without the advice of parliament.§ Yet a few years afterwards, on a similar reference, the com-

* p. 128. † p. 130.
‡ 7 R. II. vol. iii. p. 170. § p. 215.

mons rather declined to give any opinion.* They confirmed the league of Henry V. with the Emperor Sigismund.† And the treaty of Troyes, which was so fundamentally to change the situation of Henry and his successors, obtained, as it evidently required, the sanction of both houses of parliament.‡ These precedents conspiring with the weakness of the executive government, in the minority of Henry VI., to fling an increase of influence into the scale of the commons, they made their concurrence necessary to all important business, both of a foreign and domestic nature. Thus commissioners were appointed to treat of the deliverance of the king of Scots, the dutchesses of Bedford and Glocester were made denizens, and mediators were appointed to reconcile the dukes of Glocester and Burgundy, by authority of the three estates assembled in parliament.§ Leave was given to the dukes of Bedford and Glocester, and others in the king's behalf, to treat of peace with France, by both houses of parliament, in pursuance of an article in the treaty of Troyes, that no treaty should be set on foot with the dauphin without consent of the three estates of both realms.‖ This article was afterwards repealed.¶

* 17 R. II. p. 315. † 4 H. V. vol. iv. p. 98.
‡ vol. iv. p. 135.
§ Rot. Parl. vol. iv. p. 211. 242. 277.
‖ p. 371.
¶ 23 H. VI. vol. v. p. 102. There is rather a curious instance, in 3 H. VI. of the jealousy with which the commons regarded any proceedings in parliament, where they were not concerned. A controversy arose between the earls Marshal and of Warwick respecting their precedence; founded upon

Some complaints are made by the commons, even during the first years of Henry's minority, that the king's subjects underwent arbitrary imprisonment, and were vexed by summonses before the council, and by the newly invented writ of subpœna out of chancery.* But these are not so common as formerly; and so far as the rolls lead us to any inference, there was less injustice committed by the government under Henry VI. and his father, than at any former period. Wastefulness indeed might justly be imputed to the regency, who had scandalously lavished the king's revenue.† This ultimately led to an act for resuming all grants since his accession, founded upon a public declaration of the great officers of the crown, that his debts amounted to £372,000 and the annual expense of the household to £24,000, while the ordinary revenue was not more than £5,000.‡

6. But before this time the sky had begun to darken, and discontent with the actual administration pervaded every rank. The causes of this are familiar; the unpopularity of the king's marriage with Margaret of Anjou, and her impolitic violence in the conduct of affairs, particularly the imputed murder of the people's favourite, the Duke of Glocester. This

the royal blood of the first, and long possession of the second. In this the commons could not affect to interfere judicially; but they found a singular way of meddling, by petitioning the king to confer the dukedom of Norfolk on the earl marshal. vol. iv. p. 273.

* Rot. Parl. 1 H. VI. p. 189. 3 H. VI. p. 292. 8 H. VI. p. 343.

† Rot. Parl. vol. v. 18 H. VI. p. 17.

‡ Rot. Parl. vol. v. 28 H. VI. p. 185.

provoked an attack upon her own creature the duke of Suffolk. Impeachment had lain still, like a sword in the scabbard, since the accession of Henry IV.; when the commons, though not preferring formal articles of accusation, had petitioned the king that Justice Rickhill, who had been employed to take the duke of Glocester's confession at Calais, and the lords appellants of Richard II.'s last parliament, should be put on their defence before the lords.* In Suffolk's case, the commons seem to have proceeded by bill of attainder, or at least to have designed the judgement against that minister to be the act of the whole legislature. For they delivered a bill containing articles against him to the lords, with a request that they would pray the king's majesty to enact that bill in parliament, and that the said duke might be proceeded against upon the said articles in parliament according to the law and custom of England. These articles contained charges of high treason; chiefly relating to his conduct in France, which whether treasonable or not, seems to have been grossly against the honour and advantage of the crown. At a later day, the commons presented many other articles of misdemeanour. To the former he made a defence, in presence of the king as well as the lords both spiritual and temporal; and indeed the articles of impeachment were directly addressed to the king, which gave him a reasonable pretext to interfere in the judgement. But, from apprehension, as it is said, that Suffolk could not escape conviction upon at least

* Rot. Parl. vol. iii. p. 430. 449.

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

7. Privilege of parliament, an extensive and singular branch of our constitutional law, begins to attract attention under the Lancastrian princes. It is true indeed, that we can trace long before by records, and may infer with probability as to times whose records have not survived, one considerable immunity, a freedom from arrest for persons transacting the king's business in his national council.† Several au-

* 28 H. VI. vol. v. p. 176.

† If this were to rest upon antiquity of precedent, one might be produced, that would challenge all competition. In the laws of Ethelbert, the first christian king of Kent, at the end of

thorities may be found in Mr. Hatsell's precedents; of which one, in the 9th of Edward II., is conclusive.* But in those rude times, members of parliament were not always respected by the officers executing legal process, and still less by the violators of law. After several remonstrances, which the crown had evaded,† the commons obtained the statute 11 H. VI. c. 11. for the punishment of such as assault any on their way to the parliament, giving double damages to the party.‡ They had more difficulty in establishing, notwithstanding the old precedents in their favour, an immunity from all criminal process, except in charges of treason, felony, and breach of the peace, which is their present measure of privilege. The truth was, that with a right pretty clearly recognized, as is admitted by the judges in Thorp's case, the house of commons had no regular compulsory process at their command. In the cases of Lark, servant of a member, in the 8th of Henry VI.,§ and of Clerke, himself a burgess, in the 39th of the same king,‖ it was thought necessary to effect their release from a civil execution by special acts of parliament. The commons, in the former instance, en-

the sixth century, we find this provision: if the king call his people to him, (i. e. in the wittenagemot,) and any one does an injury to one of them, let him pay a fine. Wilkins, Leges Anglo-Saxon. p. 2.

* Hatsell, vol. i. p. 12.

† Rot. Parl. 5 H. IV. p. 541.

‡ The clergy had got a little precedence in this. An act passed 8 H. VI. c. 1. granting privilege from arrest for themselves and servants on their way to convocation.

§ Rot. Parl. vol. iv. p. 357. ‖ vol. v. p. 374.

deavoured to make the law general, that no members nor their servants might be taken, except for treason, felony, and breach of peace; but the king put a negative upon this part of their petition.

The most celebrated, however, of these early cases of privilege is that of Thomas Thorp, speaker of the commons in 31 H. VI. This person, who was moreover a baron of the exchequer, had been imprisoned on an execution at suit of the duke of York. The commons sent some of their members to complain of a violation of privilege to the king and lords in parliament, and to demand Thorp's release. It was alleged by the duke of York's council, that the trespass done by Thorp was since the beginning of the parliament, and the judgement thereon given in time of vacation, and not during the sitting. The lords referred the question to the judges, who said, after deliberation, that "they ought not to answer to that question, for it hath not be used aforetyme, that the justices should in any wise determine the privilege of this high court of parliament; for it is so high and so mighty in his nature, that it may make law, and that that is law it may make no law; and the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the justices." They went on, however, after observing that a general writ of supersedeas of all processes upon ground of privilege had not been known, to say, that, "if any person that is a member of this high court of parliament be arrested in such cases as be not for treason or felony, or surety of the peace; or

for a condemnation had before the parliament, it is used that all such persons should be released of such arrests and make an attorney, so that they may have their freedom and liberty, freely to intend upon the parliament."

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

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

* Rot. Parl. vol. v p. 239. Hatsell's Precedents, p. 29.

effectually maintained, before the reign of Henry VIII.*

No privilege of the commons can be so fundamental as liberty of speech. This is claimed at the opening of every parliament by their speaker, and could never be infringed without shaking the ramparts of the constitution. Richard II.'s attack upon Haxey has been already mentioned as a flagrant evidence of his despotic intentions. No other case occurs until the 33d year of Henry VI., when Thomas Young, member for Bristol, complained to the commons, that, "for matters by him showed in the house accustomed for the commons in the said parliaments, he was therefore taken, arrested, and rigorously in open wise led to the Tower of London, and there grievously in great duress long time imprisoned against the said freedom and liberty," with much more to the like effect. The commons transmitted this petition to the lords, and the king "willed, that the lords of his council do and provide for the said suppliant, as in their discretions shall be thought convenient and reasonable." This imprisonment of Young, however, had happened six years before, in consequence of a motion made by him, that the king then having no issue, the duke of York might be declared heir apparent of the crown. In the present session, when the duke was protector, he thought it well-timed to prefer his claim to remuneration.†

* Upon this subject, the reader should have recourse to Hatsell's Precedents, vol. i. chap. i.

† Rot. Parl. vol. v. p. 357. W. Wyrcester, p. 475. Mr. Hatsell seems to have overlooked this case, for he mentions

There is a remarkable precedent in the 9th of Henry IV., and perhaps the earliest authority for two eminent maxims of parliamentary law; that the commons possess an exclusive right of originating money bills, and that the king ought not to take notice of matters pending in parliament. A quarrel broke out between the two houses upon this ground; and as we have not before seen the commons venture to clash openly with their superiors, the circumstance is for this additional reason worthy of attention. As it has been little noticed, I shall translate the whole record.

"Friday the second day of December, which was the last day of the parliament, the commons came before the king and the lords in parliament, and there by command of the king, a schedule of indemnity touching a certain altercation moved between the lords and commons was read; and on this it was commanded by our said lord the king, that the said schedule should be entered of record in the roll of parliament; of which schedule the tenor is as follows: be it remembered, that on Monday the 21st day of November, the king our sovereign lord being in the council-chamber in the abbey of Glocester,* the lords spiritual and temporal for this present parliament assembled being then in his presence, a debate took place among them about the state of the kingdom, and its defence to resist the malice of the

that of Strickland in 1571, as the earliest instance of the crown's interference with freedom of speech in parliament, vol. i. p. 85.

* This parliament sat at Glocester.

enemies who on every side prepare to molest the said kingdom and its faithful subjects, and how no man can resist this malice, unless, for the safeguard and defence of his said kingdom, our sovereign lord the king has some notable aid and subsidy granted to him in his present parliament. And therefore it was demanded of the said lords by way of question, what aid would be sufficient and requisite in these circumstances? To which question it was answered by the said lords severally, that considering the necessity of the king on one side, and the poverty of his people on the other, no less aid could be sufficient, than one tenth and a half from cities and towns, and one fifteenth and a half from all other lay persons; and besides, to grant a continuance of the subsidy on wool, woolfels and leather, and of three shillings on the ton (of wine), and twelve pence on the pound (of other merchandise), from Michaelmas next ensuing for two years thenceforth. Whereupon, by command of our said lord the king, a message was sent to the commons of this parliament, to cause a certain number of their body to come before our said lord the king and the lords, in order to hear and report to their companions what they should be commanded by our said lord the king. And upon this the said commons sent into the presence of our said lord the king, and the said lords twelve of their companions; to whom, by command of our said lord the king, the said question was declared, with the answer by the said lords severally given to it. Which answer it was the pleasure of our said lord the king, that they should report to

the rest of their fellows, to the end that they might take the shortest course to comply with the intention of the said lords. Which report being thus made to the said commons, they were greatly disturbed at it, saying and asserting it to be much to the prejudice and derogation of their liberties. And after that our said lord the king had heard this, not willing that any thing should be done at present, or in time to come, that might anywise turn against the liberty of the estate, for which they are come to parliament, nor against the liberties of the said lords, wills and grants, and declares, by the advice and consent of the said lords, as follows; to wit, that it shall be lawful for the lords to debate together in this present parliament, and in every other for time to come, in the king's absence, concerning the condition of the kingdom, and the remedies necessary for it. And in like manner it shall be lawful for the commons, on their part, to debate together concerning the said condition and remedies. Provided always, that neither the lords on their part, nor the commons on theirs, do make any report to our said lord the king of any grant granted by the commons, and agreed to by the lords, nor of the communications of the said grant, before that the said lords and commons are of one accord and agreement in this matter, and then in manner and form accustomed, that is to say, by the mouth of the speaker of the said commons for the time being, to the end that the said lords and commons may have what they desire (avoir puissent leur gree) of our said lord the king. Our said lord the

king willing moreover, by the consent of the said lords, that the communication had in this present parliament as above be not drawn into precedent in time to come, nor be turned to the prejudice or derogation of the liberty of the estate, for which the said commons are now come, neither in this present parliament, nor in any other time to come. But wills, that himself, and all the other estates, should be as free as they were before. Also, the said last day of parliament, the said speaker prayed our said lord the king on the part of the said commons, that he would grant the said commons, that they should depart in as great liberty as other commons had done before. To which the king answered, that this pleased him well, and that at all times it had been his desire."*

Every attentive reader will discover this remarkable passage to illustrate several points of constitutional law. For hence it may be perceived: first, that the king was used in those times to be present at debates of the lords, personally advising with them upon the public business; which also appears by many other passages on record; and this practice, I conceive, is not abolished by the king's present declaration, save as to grants of money, which ought to be of the free will of parliament, and without that fear or influence, which the presence of so high a person might create: secondly, that it was already the established law of parliament, that the lords should consent to the commons' grant, and not the commons to the lords; since it is the inversion of this

*. Rot. Parl. v. iii. p. 611.

order whereof the commons complain, and it is said expressly that grants are made by the commons, and agreed by the lords: thirdly, that the lower house of parliament is not, in proper language, an estate of the realm, but rather the image and representative of the commons of England; who, being the third estate, with the nobility and clergy, make up and constitute the people of this kingdom and liege subjects of the crown.*

* A notion is entertained by many people, and not without the authority of some very respectable names, that the king is one of the three estates of the realm, the lords spiritual and temporal forming together the second, as the commons in parliament do the third. This is contradicted by the general tenor of our ancient records and law-books; and indeed the analogy of other governments ought to have the greatest weight, even if more reason for doubt appeared upon the face of our own authorities. But the instances where the three estates are declared or implied to be the nobility, clergy and commons, or at least their representatives in parliament, are too numerous for insertion. This land standeth, says the Chancellor Stillington, in 7th Edward IV. by three states, and above that one principal, that is to wit, lords spiritual, lords temporal, and commons, and over that, state royal, as our sovereign lord the king. Rot. Parl. vol. v. p. 622. Thus too it is declared that the treaty of Staples in 1492 was to be confirmed per tres status regni Angliæ ritè et debitè convocatos, videlicet per prelatos et clerum, nobiles et communicates ejusdem regni. Rymer, t. xii. p. 508.

I will not, however, suppress one passage, and the only instance that has occurred in my reading, where the king does appear to have been reckoned among the three estates. The commons say, in the 2d of Henry IV., that the states of the realm may be compared to a trinity, that is, the king, the lords spiritual and temporal and the commons. Rot. Parl. vol. iii. p. 459. In this expression, however the sense shows, that by estates of the realm, they meant members, or necessary parts of the parliament.

Whitelocke, on the Parliamentary Writ, vol. ii. p. 43, argues at length, that the three estates are king, lords and commons,

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

which seems to have been a current doctrine among the popular lawyers of the seventeeth century. His reasoning is chiefly grounded on the baronial tenure of bishops, the validity of acts passed against their consent, and other arguments of the same kind; which might go to prove that there are only at present two estates, but can never turn the king into one.

The source of this errour is an inattention to the primary sense of the word estate (status), which means an order or condition into which men are classed by the institutions of society. It is only in a secondary or rather an elliptical application, that it can be referred to their representatives in parliament or national councils. The lords temporal, indeed, of England, are identical with the estate of the nobility; but the house of commons is not, strictly speaking, the estate of commonalty, to which its members belong, and from which they are deputed. So the whole body of the clergy are properly speaking one of the estates, and are described as such in the older authorities, 21 Ric. II. Rot. Parl. v. iii. p. 348. though latterly the lords spiritual in parliament acquired, with less correctness, that appellation. Hody on Convocations, p. 426. The bishops, indeed, may be said, constructively, to represent the whole of the clergy, with whose grievances they are supposed to be best acquainted, and whose rights it is their peculiar duty to defend. And I do not find that the inferior clergy had any other representation in the cortes of Castile and Aragon, where the ecclesiastical order was always counted among the estates of the realm.

* p. 623.

It was not only in money bills that the originating power was supposed to reside in the commons. The course of proceedings in parliament, as has been seen, from the commencement at least of Edward III.'s reign, was that the commons presented petitions, which the lords by themselves, or with the assistance of the council, having duly considered, the sanction of the king was notified or withheld. This was so much according to usage, that, on one occasion, when the commons requested the advice of the other house on a matter before them, it was answered, that the ancient custom and form of parliament had ever been for the commons to report their own opinion to the king and lords, and not the contrary; and the king would have the ancient and laudable usages of parliament maintained.* It is singular that in the terror of innovation, the lords did not discover how materially this usage of parliament took off from their own legislative influence. The rule, however, was not observed in succeeding times; bills originated indiscriminately in either house; and indeed some acts of Henry V., which do not appear to be grounded on any petition, may be suspected from the manner of their insertion in the rolls of parliament, to have been proposed on the king's part to the commons.† But there is one manifest instance in the 18th of Henry VI., where the king requested the commons to give their authority to such regulations‡ as his council might

* Rot. Parl. 5 R. II. p. 100.

† Stat. 2 H. V. c. 6, 7, 8, 9. 4 H. VI. c. 7.

‡ Rot. Parl. vol. v. p. 7. It appears by a case in the year-book of the thirty-third of Henry VI., that, where the lords

provide for redressing the abuse of purveyance ; to which they assented.

made only some minor alterations in a bill sent up to them from the commons, even if it related to a grant of money, the custom was not to remand it for their assent to the amendment. Brooke's Abridgement : Parliament 4. The passage is worth extracting, in order to illustrate the course of proceeding in parliament at that time. Case fuit que Sir J. P. fuit attaint de certeyn trespas par acte de parliament, dont les commons furent assentus, que sil ne vient eins per tiel jour que il forfeytera tiel summe, et les seigneurs done plus longe jour, et le bil nient rebaile al commons arrere ; et per Kirby, clerk des roles del parliament, l'use del parliament est, que si bil vient primes a les commons, et ils passent ceo, il est use d'endorser ceo en tiel forme ; Soit bayle as seigniors ; et si les seigniors *ne le roy* ne alteront le bil, donques est use a liverer ceo al clerke del parliament destre enrol saunz endorser ceo..... Et si les seigniors volent alter un bil in ceo que poet estoyer ore le bil, ils poyent saunz remandre ceo al commons, come si les commons graunte poundage pur quatuor ans, et les grantent nisi par deux ans, ceo ne serra rebayle al commons ; mes si les commons grauntent nisi pur deux ans, et les seigneurs pur quatre ans, la ceo serra reliver al commons, et en cest case les seigniors doyent faire un sedule de lour intent, ou d'endorser le bil en ceste forme, Les seigneurs ceo assentent pur durer par quatuor ans ; et quant les commons ount le bil arrere, et ne volent assenter a ceo, ceo ne poet estre un acte, mes si les commons volent assenter, donques ils indorse leur respons sur le mergent de basse deins le bil en tiel forme, Les commons sont assentans al sedul des seigniors, a mesme cesty bil annexe, et donques sera bayle ad clerke del parliament, ut supra. Et si un bil soit primes liver al seigniors, et le bille passe eux, ils ne usont de fayre ascun endorsement, mes de mitter le bil as commons, et donques si le bil passe les commons, il est use destre issint endorce, Les commons sont assentants, et ceo prove que il ad passe les seigniors devant, et lour assent est a cest passer del seigniors ; et ideo cest acte supra nest bon, pur ceo que ne fuit rebaile as commons.

A singular assertion is made in the year-book 21 E. IV. p. 48. (Maynard's edit.) that a subsidy granted by the commons without assent of the peers is good enough. This cannot surely have been law at that time.

If we are to choose constitutional precedents from seasons of tranquillity rather than disturbance, which surely is the only means of preserving justice or consistency, but little intrinsic authority can be given to the following declaration of parliamentary law in the 11th of Richard II. "In this parliament (the roll says) all the lords as well spiritual and temporal there present, claimed as their liberty and privilege, that the great matters moved in this parliament, and to be moved in other parliaments for time to come, touching the peers of the land, should be treated, adjudged, and debated according to the course of parliament, and not by the civil law, nor the common law of the land, used in other lower courts of the kingdom; which claim, liberty and privilege, the king graciously allowed and granted them in full parliament."* It should be remembered that this assertion of paramount privilege was made in very irregular times, when the king was at the mercy of the duke of Glocester and his associates, and that it had a view to the immediate object of justifying their violent proceedings against the opposite party, and taking away the restraint of the common law. It stands as a dangerous rock to be avoided, not a lighthouse to guide us along the channel. The law of parliament as determined by regular custom is incorporated into our constitution; but not so as to warrant an indefinite, uncontrollable assumption of power in any case, least of all in judicial procedure, where the form and the essence of justice are insepa-

* Rot. Parl. vol. iii. p. 244.

rable from each other. And, in fact, this claim of the lords, whatever gloss Sir E. Coke may put upon it, was never intended to bear any relation to the privileges of the lower house. I should not perhaps have noticed this passage so strongly, if it had not been made the basis of extravagant assertions as to the privileges of parliament;* the spirit of which exaggerations might not be ill adapted to the times wherein Sir E. Coke lived, though I think they produced at several later periods no slight mischief, some consequences of which we may still have to experience.

* Coke's 4th Institute, p. 15.

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