STEPHENS
ON THE
ENGLISH
CONSTITUTION

VOL. II

Francis Lieber.

THE

RISE AND PROGRESS

OF THE

ENGLISH CONSTITUTION:

THE TREATISE OF

J. L. DE LOLME, LL.D.

WITH AN

HISTORICAL AND LEGAL INTRODUCTION, AND NOTES,

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IN TWO VOLUMES,

VOL. II.

LONDON:
JOHN W. PARKER, WEST STRAND.
M.DCCC.XXXVIII.

10.454

THE RISE AND PROGRESS

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THE TREATISE OF DE LOLME.

INTRODUCTION.

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

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

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

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

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

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

One other consideration I will suggest, which is, that the very circumstance of being a foreigner may of itself be attended, in this case, with a degree of advantage. The English themselves (the observation cannot give them any offence) having their eyes open, as I may say, upon their liberty, from their first

entrance into life, are perhaps too much familiarized with its enjoyment to inquire, with real concern, into its causes. Having acquired practical notions of their government long before they have meditated on it, and these notions being slowly and gradually imbibed, they at length behold it without any high degree of sensibility; and they seem to me, in this respect, to be like the recluse inhabitant of a palace, who is perhaps in the worst situation for attaining a complete idea of the whole, and never experienced the striking effect of its external structure and elevation: or, if you please, like a man who, having always had a beautiful and extensive scene before his eyes, continues for ever to view it with indifference.

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

Not that I mean to insinuate that I have penetrated with more acuteness into the constitution of England than others; my only design, in the above observations, was to obviate an unfavourable, though natural prepossession; and if, either in treating of the causes which originally produced the English liberty, or of those by which it continues to be maintained, my observations should be found new or singular, I hope

DE LOLME. the English reader will not condemn them, but where they shall be found inconsistent with history, or with daily experience. Of readers in general I also request, that they will not judge of the principles I shall lay down, but from their relation to those of human nature; a consideration which is almost the only one essential, and has been hitherto too much neglected by the writers on the subject of government.

BOOK I.

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

CHAPTER I.

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

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

Uncertain accounts of the Anglo-Saxon government.

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

It appears to have had little more affinity with the present constitution, than the general relation, common indeed to all the governments established by the

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northern nations,—that of having a king and a body of nobility; and the ancient Saxon government is "left us in story," (to use the expressions of Sir William Temple on the subject) "but like so many antique, broken, or defaced pictures, which may still represent something of the customs and fashions of those ages, though little of the true lines, proportions, or resemblance*[1]."

Foundation of the English constitution, is to be sought after at the era of the conquest.

It is at the era of the conquest that we are to look for the real foundation of the English constitution. From that period, says Spelman, *novus seclorum nascitur ordo*†. William of Normandy, having defeated

* See his Introduction to the History of England.

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

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

Some Saxon laws, favourable to the liberty of the people, were indeed again established under the successors of William: but the introduction of some new modes of proceeding in the courts of justice, and of a few particular laws, cannot, so long as the ruling power in the state remains the same, be said to be the introduction of a new government; and as, when the laws in question were again established, the public power in England

[1] Vide ante, 1—18.

Harold, and made himself master of the crown, subverted the ancient fabric of the Saxon legislation: he exterminated, or expelled, the former occupiers of lands, in order to distribute their possessions among his followers; and established the feudal system of government, as better adapted to his situation, and indeed the only one of which he possessed a competent idea[2].

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

Independent character of the German nations.

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

continued in the same channel where the conquest had placed it, they were more properly new modifications of the Anglo-Norman constitution than they were the abolition of it; or, since they were again adopted from the Saxon legislation, they were rather imitations of that legislation, than the restoration of the Saxon government.

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

[2] Vide ante, 19—40.

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less in quality of subjects, than as companions in conquest.

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

The fiefs by connivance at first became annual; afterwards, held for life.

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

On the other hand, the lords who gave their

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

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

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

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

The establishment of the feudal system in England was an immediate consequence of the conquest.

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

Despotism of William I.

Surrounded by a warlike, though a conquered nation, William kept on foot part of his army. The English, and after them the Normans themselves, having

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

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

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revolted, he crushed both: and the new king of England, at the head of victorious troops, having to do with two nations lying under a reciprocal check from the enmity they bore to each other, and, moreover, equally subdued by a sense of their unfortunate attempts of resistance, found himself in the most favourable circumstances for becoming an absolute monarch; and his laws, thus promulgated in the midst, as it were, of thunder and lightning, imposed the yoke of despotism both on the victors and the vanquished[3].

England divided into fiefs.

He divided England into sixty thousand two hundred and fifteen military fiefs, all held of the crown[4]; the possessors of which were, on pain of forfeiture, to take up arms, and repair to his standard on the first signal: he subjected not only the common people, but even the barons, to all the rigours of the feudal government: he even imposed on them his tyrannical forest laws *.

He assumed the prerogative of imposing taxes[5]. He invested himself with the whole executive power of government. But what was of the greatest consequence, he arrogated to himself the most extensive judicial power by the establishment of the court which was called *Aula Regis*,—a formidable tribunal, which received appeals from all the courts of the barons, and decided, in the last resort, on the estates, honour, and lives of the barons themselves; and which, being wholly composed of the great officers of the crown, removable at the king's pleasure, and having the king

The Aula Regis.

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

[3] Vide ante, 19—21, 26—28, 30—34.
[4] Ibid. 21—26.
[5] Ibid. 39, 40.

himself for president, kept the first noblemen in the kingdom under the same control as the meanest subject[6]. DE LOLME.

Feudal governments of France and England.

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

Arbitrary power of the kings of England.

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

Limited authority of the sovereigns of France.

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

[6] Vide ante, 28, 29, 111.

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blindfold, and like slaves, to the standard of their leaders. In the mean time, as the laws, by virtue of which, their masters were considered as vassals, had no relation to those by which they were themselves bound as subjects, the resistance, of which they were made the instruments, never produced any advantageous consequence in their favour, nor did it establish any principle of freedom that was applicable to them.

The people, rendered desperate by oppression, attempted to revolt.

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

At length, when by conquests, by escheats, or by treaties, the several provinces came to be *reunited*† to the extensive and continually increasing dominions of the monarch, they became subject to their new master, already trained to obedience. The few privileges which

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

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

the cities had been able to preserve, were little respected by a sovereign who had himself entered into no engagement for that purpose; and, as the *re-unions* were made at different times, the king was always in a condition to overwhelm every new province that accrued to him, with the weight of all those he already possessed.

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Liberty perished in France, because it wanted a favourable culture and situation.

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

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

The excessive power of the kings, made England free.

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because it was this very excess that gave rise to the spirit of union, and of concerted resistance. Possessed of extensive demesnes, the king found himself independent: invested with the most formidable prerogatives, he crushed, at pleasure, the most powerful barons in the realm. It was only by close and numerous confederacies, therefore, that these could resist tyranny; they even were compelled to associate the people in them, and make them partners of public liberty.

The mode in which the people became participators in public liberty.

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

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

Principle of primeval equality became every where diffused and established.

The different orders of the feudal government, as established in England, being connected by tenures exactly similar, the same maxims which were laid down as true, against the lord paramount, in behalf of the lord of an upper fief, were likewise to be admitted against the latter, in behalf of the owner of an inferior fief. The same maxims were also to be applied to the possessor of a still lower fief: they farther descended to the freeman, and to the peasant: and the same spirit of liberty, after having circulated through the different

branches of the feudal subordination, thus continued to flow through successive homogeneous channels; it forced a passage into the remotest ramifications; and the principle of primeval equality became every where diffused and established: a sacred principle, which neither injustice nor ambition can erase; which exists in every breast, and to exert itself, requires only to be awakened among the numerous and oppressed classes of mankind!

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Oppression caused the union of the lord and the vassal.

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

The people stipulated conditions for themselves.

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

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[7] Vide ante, 26—29.

Chapter II.

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

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The reign of Henry I.

It was in the reign of Henry I., about forty years after the conquest, that we see the above causes begin to operate. This prince, having ascended the throne to the exclusion of his elder brother, was sensible that he had no other means to maintain his power, than by gaining the affection of his subjects; but, at the same time, he perceived that it must be the affection of the whole nation: he, therefore, not only mitigated the rigour of the feudal laws in favour of the lords, but also annexed, as a condition to the charter he granted, that the lords should allow the same freedom to their respective vassals. Care was even taken to abolish those laws of the Conqueror which lay heaviest on the lower classes of the people* [1].

Rigour of the feudal laws mitigated.

Advances of liberty under Henry II.

Under Henry II., liberty took a farther stride; and the ancient *trial by jury*, a mode of procedure which is at present one of the most valuable parts of the English law, made again, though imperfectly, its appearance [2].

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

[1] Vide ante, 40—42. [2] Ibid. 44—48.

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

Despotic government of John.

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

England acknowledged but one master; France an aggregation of sovereignties.

No sooner was the standard set up against John, than his very courtiers forsook him[3]. In this situation, finding no part of his kingdom less irritated against him than another, having no detached province which he could engage in his defence by promises of pardon or of peculiar concessions, the trivial, though never-failing resources of government, he was compelled, with seven of his attendants, all that remained with him, to submit himself to the disposal of his subjects,

John compelled to submit himself to the disposal of his subjects.

[3] Vide ante, 50.

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Magna Charta.

—and he signed at Runimede* the charter of the Forest; together with that famous charter, which, from its superior and extensive importance, is denominated *Magna Charta*[4].

Provisions embodied in Magna Charta.

By the former, the most tyrannical parts of the forest laws were abolished; and, by the latter, the rigour of the feudal laws was greatly mitigated in favour of the lords. But this charter did not stop there; conditions were also stipulated in favour of the numerous body of the people who had concurred to obtain it, and who claimed, with sword in hand, a share in that security it was meant to establish. It was hence instituted by the Great Charter, that the same services which were remitted in favour of the barons should be, in like manner, remitted in favour of their vassals. This charter moreover established an equality of weights and measures throughout England; it exempted the merchants from arbitrary imposts, and gave them liberty to enter and depart the kingdom at pleasure: it even extended to the lowest orders of the state, since it enacted, that the *villain*, or bondman, should not be subject to the forfeiture of his implements of tillage. Lastly, by the thirty-ninth article of the same charter, it was enacted, that no subject should be exiled, or in any shape whatever molested, either in his person or effects, otherwise than by judgment of his peers, and according to the law of the land†;—an article so important, that it may be said to

No subject to be molested, either in person or effects, unless by the judgment of his peers, and the law of the land.

* Anno 1215.

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

[4] Vide ante, 50—54.

comprehend the whole end and design of political societies:—and from that moment the English would have been a free people, if there were not an immense distance between the making of laws and the observing of them.

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But, though this charter wanted most of those supports which were necessary to ensure respect to it,—though it did not secure to the poor and friendless any certain and legal methods of obtaining the execution of it (provisions which numberless transgressions alone, could, in process of time, point out);—yet it was a prodigious advance towards the establishment of public liberty. Instead of the general maxims respecting the rights of the people and the duties of the prince (maxims against which ambition perpetually contends, and which it sometimes even openly and absolutely denies), here was substituted a written law; that is, a truth admitted by all parties, which no longer required the support of argument. The rights and privileges of the individual, as well in his person as in his property, became settled axioms. The Great Charter, at first enacted, with so much solemnity, and afterwards confirmed, at the beginning of every succeeding reign[5], became, like a general banner, perpetually set up for the union of all classes of the people; and the foundation was laid on which those equitable laws were to rise, which offer the same assistance to the poor and weak, as to the rich and powerful*.

Magna Charta, an advance towards the establishment of public liberty.

Confirmations of the Great Charter.

* The reader, to be more fully convinced of the reality of the causes to which the liberty of England has been here ascribed, as well of the truth of the observations made at the same time on the situation of the people of France, needs only to compare the Great Charter, so extensive in its provisions, and in which the barons stipulated in favour even of the bondmen, with the treaty concluded at St. Maur, October 29, 1465, between

[5] Vide ante, 54—58.

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Civil dissensions during the reign of Henry III.

Under the long reign of Henry III.[6], the differences which arose between the king and the nobles rendered England a scene of confusion. Amidst the vicissitudes which the fortune of war produced in their mutual conflicts, the people became still more and more sensible of their importance, and so did, in consequence, both the king and the barons also. Alternately courted by both parties, they obtained a confirmation of the Great Charter, and even the addition of new privileges, by the Statutes of Merton and of Marlebridge[7]. But I hasten to reach the grand epoch of the reign of Edward I.[8],—a prince who, from his numerous and prudent laws, has been denominated the English Justinian.

Statutes of Merton and Marlebridge.

Character of Edward I.

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

Jurisprudence improved.

Louis XI. and several of the princes and peers of France. In this treaty, which was made in order to terminate a war that was called the war for the public good (*pro bono publico*), no provision was made but concerning the particular power of a few lords: not a word was inserted in favour of the people. It may be seen at large in the *pièces justificatives* annexed to the *Mémoires de Philippe de Comines.*

[6] Vide ante, 65—81. [7] Ibid. 78, 80. [8] Ibid. 82—102.

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Parliamentary representation.

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

The pecuniary necessities of Edward I.

Edward, continually engaged in wars, either against Scotland or on the Continent, seeing moreover his demesnes considerably diminished, was frequently reduced to the most pressing necessities. But, though, in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general oppression over a body of nobles, and a people, who so well knew how to unite in a common cause. In order to raise subsidies, therefore, he was obliged to employ a new method, and to endeavour to obtain, through the consent of the people, what his predecessors had hitherto expected from their own power. The sheriffs were ordered† to invite the towns and boroughs of the different counties to send deputies to parliament;—and it is from this era that we are to date the origin of the House of Commons[9].

The commons were not originally possessed of great authority.

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

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

† Anno 1295.

‡ The end mentioned in the summons sent to the lords, was *de arduis negotiis regni tractaturi, et consilium impensuri:* the requisition sent to the

[9] Vide ante, 94—102.

De Lolme.

The people invested with the power of influencing the motions of government.

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

Confirmations of Magna Charta by Edward I.

And indeed this privilege of naming representatives, insignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy of so great a king, Edward was obliged to confirm the Great Charter[10]; he even confirmed it eleven times in the course of his reign[11]. It was moreover enacted, that whatever should be done contrary to it, should be null and void; that it should be read twice a year in all cathedrals; and that the penalty of excommunica-

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

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

[10] Vide ante, 93.

[11] Ibid. 116.

tion should be denounced against any one who should presume to violate it*. DE LOLME.

At length he converted into an established law a privilege of which the English had hitherto had only a precarious enjoyment; and, in the statute *de tallagio non concedendo*[12], he decreed, that no tax should be laid, nor impost levied, without the joint consent of the lords and commons†. A most important statute this, which, in conjunction with Magna Charta, forms the basis of the English constitution. If from the latter the English are to date the origin of their liberty, from the former they are to date the establishment of it: and as the Great Charter was the bulwark that protected the freedom of individuals, so was the statute in question the engine which protected the charter itself, and by the help of which the people were thenceforth to make legal conquests over the authority of the crown.

Statute de Tallagio non concedendo.

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

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

Efficient causes of slavery operating and gaining strength.

France, still bleeding from the extravagance of a

Distracted state of France.

* Confirmationes Chartarum, cap. 2—4.

† "Nullum tallagium vel auxilium, per nos, vel hæredes nostros, in regno nostro ponatur seu levetur, sine voluntate et assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium, et aliorum liberorum hominum de regno nostro." Stat. an. 34 Edward I.

[12] Vide ante, 99.

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

The French had no conception of the necessary ingredients of a free constitution.

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

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

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

their sufferings, and reduce to the same level both the oppressors and the oppressed. DE LOLME.

Imperceptible advances of the royal authority.

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

Disturbed state of Spain.

It was the destiny of Spain also to behold her several kingdoms united under one head;—she was fated to be in time ruled by Ferdinand and Charles V.* And Germany, where an elective crown prevented the *re-unions*†, was indeed to acquire a few free cities;

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

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

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but her people, parcelled into so many different dominions, were destined to remain subject to the arbitrary yoke of such of her different sovereigns as should be able to maintain their power and independence. In a word, the feudal tyranny which overspread the Continent did not compensate, by any preparation of distant advantages, the present calamities it caused; nor was it to leave behind it, as it disappeared, anything but a more regular kind of despotism.

The spirit of liberty and resistance arose in England on the dissolution of the feudal system.

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

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

CHAPTER III.

The Subject continued.

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Representatives of the nation admitted into parliament.

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

Edward II. Petitions annexed to subsidy bills.

Under Edward II.[1], the commons began to annex petitions to the bills by which they granted subsidies: this was the dawn of their legislative authority.

Edward III. Commons declare they will not acknowledge any law, unless they have assented to it.

Under Edward III.[2], they declared they would not in future acknowledge any law to which they had not expressly assented[3]. Soon after this, they exerted a privilege, in which consists, at this time, one of the great balances of the constitution: they impeached[4], and procured to be condemned, some of the first ministers of state. Under Henry IV.[5], they refused to grant subsidies before an answer had been given to their petitions. In a word, every event of any consequence was attended with an increase of the power of the commons;—increases indeed but slow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the people, and coalesce with the ancient principles of the constitution.

Henry IV. Refusal to grant subsidies until redress of grievances.

Henry V.

Under Henry V.[6], the nation was entirely taken up with its wars against France; and in the reign of

[1] Vide ante, 102—110. [2] Ibid. 117—121. [3] Ibid. 119.
[4] Ibid. 117. [5] Ibid. 129—137. [6] Ibid. 138, 139.

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Henry VI.

Country desolated by faction.

Henry VII. had promises to fulfil, as well as injuries to avenge.

History of the first two Tudor princes resemble the relation given by Tacitus, of Tiberius and the Roman senate.

Henry VI.[7] began the fatal contests between the Houses of York and Lancaster. The noise of arms alone was now to be heard; during the silence of the laws already in being, no thought was had of enacting new ones: and for thirty years together England presents a wide scène of slaughter and desolation.

At length, under Henry VII.[8], who, by his intermarriage with the House of York, united the pretensions of the two families, a general peace was re-established, and the prospect of happier days seemed to open on the nation. But the long and violent agitation under which it had laboured, was to be followed by a long and painful recovery. Henry, mounting the throne with sword in hand, and in great measure as a conqueror, had promises to fulfil, as well as injuries to avenge. In the mean time, the people, wearied out by the calamities they had undergone, and longing only for repose, abhorred even the idea of resistance; so that the remains of an almost exterminated nobility beheld themselves left defenceless and abandoned to the mercy of the sovereign.

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

* *Quanto quis illustrior, tanto magis falsi ac festinantes.*

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[7] Vide ante, 139—150. [8] Ibid. 151—158.

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

The franchises contained in Magna Charta were ineffaced by transitory evils.

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

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

The advantage of England being one undivided state.

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

The different parliaments, or assemblies of these several states, having thenceforth no means of recommending themselves to their sovereign, but their forwardness in complying with his demands, would have vied with each other in granting what it would not only have been fruitless, but even highly dangerous, to refuse. The king would not have failed soon to demand, as a tribute, a gift he must have been confi-

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dent to obtain; and the outward forms of consent would have been left to the people only as additional means of oppressing them without danger.

Parliament always vindicated the right of granting or refusing subsidies.

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

Edward VI. Abolition of the tyrannical laws against high treason.

Mary.

Under Edward VI.[9], the absurd tyrannical laws against high treason[10] (instituted under Henry VIII.) were abolished. But this young and virtuous prince having soon passed away, the blood-thirsty Mary[11] astonished the world with cruelties, which nothing but the fanaticism of a part of her subjects could have enabled her to execute.

Elizabeth.

Under the long and brilliant reign of Elizabeth[12], England began to breathe anew: and the Protestant religion, being seated once more on the throne, brought with it some more freedom and toleration[13].

The courts of Star Chamber and High Commission.

The Star Chamber[14], that effectual instrument of the tyranny of the two Henries, yet continued to subsist: the inquisitorial tribunal of the high commission[15] was even instituted; and the yoke of arbitrary power lay still heavy on the subject. But the general affec-

[9] Vide ante, 208—252. [10] Ibid. 209, 210.
[11] Ibid. 252—258, 260—262. [12] Ibid. 262—311.
[13] Ibid. 262—289. [14] Ibid. 151, 264. [15] Ibid. 294—296.

tion of the people for a queen, whose former misfortunes had created such a general concern, the imminent dangers which England escaped, and the extreme glory attending that reign, lessened the sense of such exertions of authority as would, in these days, appear the height of tyranny, and served at that time to justify, as they still do to excuse, a princess whose great talents, though not her principles of government, render her worthy of being ranked among the greatest sovereigns.

James I.

Under the sway of the Stuarts, the nation began to recover from its long lethargy. James I.[16], a prince rather imprudent than tyrannical, drew back the veil which had hitherto disguised so many usurpations, and made an ostentatious display of what his predecessors had been contented to enjoy.

The doctrine of the uncontrollable authority of kings, diffused an universal alarm.

He was incessantly asserting, that the authority of kings was not to be controlled any more than that of God himself. Like Him, they were omnipotent; and those privileges to which the people so clamorously laid claim as their inheritance and birthright, were no more than an effect of the grace and toleration of his royal ancestors*[17].

Printing, disseminated salutary notions throughout all orders of the people.

Those principles, hitherto only silently adopted in the cabinet, and in the courts of justice, had maintained their ground in consequence of this very obscurity. Being now announced from the throne, and resounded from the pulpit, they spread an universal alarm[18]. Commerce, besides, with its attendant arts, and, above all, that of printing, diffused more salutary notions throughout all orders of the people; a new light began to rise upon the nation; and the spirit of

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

[16] Vide ante, 312—366.

[17] Ibid. 321—334, 350—353.

[18] Ibid. 321—323.

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opposition frequently displayed itself in this reign, to which the English monarchs had not, for a long time past, been accustomed.

Charles I.

But the storm, which was only gathering in clouds, during the reign of James, began to mutter under Charles I.[19]; and the scene which opened to view, on the accession of that prince, presented the most formidable aspect.

Notions of religion united with the love of liberty.

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

The commons, sensible of their own strength, determined to repress that of the crown.

The commons, on the other hand, were recovering from the astonishment into which the extinction of the power of the nobles had, at first, thrown them. Taking a view of the state of the nation, and of their own, they became sensible of their whole strength: they determined to make use of it, and to repress a power which seemed, for so long a time, to have levelled every barrier. Finding among themselves men of the greatest capacity, they undertook that important task with method, and by constitutional means[20]; and thus had Charles to cope with a whole nation put in motion and directed by an assembly of statesmen.

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

In France, where, in consequence of the division

[19] Vide ante, 366—413.

[20] Ibid. 388—413.

of the people, and of the exorbitant power of the nobles, the people were accounted nothing,—when the nobles themselves were suppressed, the work was completed.

Public liberty preserved from the union of the people.

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

Charles I. ignorant of the dangers with which he was surrounded.

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

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

De Lolme.

Petition of Right.

of Right[21], and a posterior act, to both which he assented, the compulsory loans and taxes, disguised under the name of *benevolences*, were declared to be contrary to law[22]; arbitrary imprisonments, and the exercise of martial law, were abolished[23]; the court of high commission[24], and the Star Chamber[25], were suppressed*; and the constitution, freed from the apparatus of despotic powers with which the Tudors had obscured it, was restored to its ancient lustre. Happy had been the people, if their leaders, after having executed so noble a work, had contented themselves with the glory of being the benefactors of their country. Happy had been the king, if, obliged at last to submit, his submission had been sincere, and if he had become sufficiently sensible that the only resource he had left was the affection of his subjects.

Constitution freed from the despotic powers, with which it had been obscured by the Tudors.

But Charles knew not how to survive the loss of a power he had conceived to be indisputable: he could not reconcile himself to limitations and restraints, so injurious, according to his notions, to sovereign authority. His discourse and conduct betrayed his secret designs; distrust took possession of the nation; certain ambitious persons availed themselves of it to promote their own views; and the storm, which seemed to have blown over, burst forth anew. The contending fanaticism of persecuting sects[26] joined in the conflict between regal haughtiness and the ambition of individuals; the tempest blew from every point of the

The fanaticism of persecuting sects, joined in the disputes between the crown and the people.

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

[21] Vide ante, 377, 392—395.
[22] Ibid. 329, 393.
[23] Ibid. 393, 394.
[24] Ibid. 393.
[25] Ibid. 382—385, 393.
[26] Ibid. 390, 396—400, 407—409.

compass; the constitution was rent asunder; and Charles exhibited in his fall an awful example to the universe.

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The royal power being thus annihilated, the English made fruitless attempts to substitute a republican government in its stead. "It was a curious spectacle," says Montesquieu, "to behold the vain efforts of the English to establish among themselves a democracy." Subjected, at first, to the power of the principal leaders[27] in the Long Parliament, they saw that power expire, only to pass, without bounds, into the hands of a Protector. They saw it afterwards parcelled out among the chiefs of different bodies of soldiers; and thus shifting, without end, from one kind of subjection to another, they were, at length, convinced, that an attempt to establish liberty in a great nation, by making the people interfere in the common business of government, is, of all attempts, the most chimerical[28]; that the authority *of all*, with which men are amused, is, in reality, no more than the authority of a few powerful individuals, who divide the republic among themselves[29]; and they at last rested in the bosom of the only constitution which is fit for a great state and a free people; I mean that in which a chosen number deliberate, and a single hand executes; but in which, at the same time, the public satisfaction is rendered, by the general relation and arrangement of things, a necessary condition of the duration of government.

The Commonwealth.

The interference of the people in the common business of government, is most chimerical.

Charles II., therefore, was called over; and he experienced, on the part of the people, that enthusiasm of affection which usually attends the return from a long alienation[30]. He could not, however, bring himself to forgive them the inexpiable crime of which he looked upon them to have been guilty. He saw,

Charles II. received with enthusiasm.

[27] Vide ante, 391—417.
[28] Ibid. 391—417.
[29] Ibid. 391—417.
[30] Ibid. 417.

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with the deepest concern, that they still entertained their former notions with regard to the nature of the royal prerogative; and, bent upon the recovery of the ancient powers of the crown, he only waited for an opportunity to break those promises which had procured his restoration[31].

The parliament destroy those remnants of despotism which made a part of the royal prerogative.

But the very eagerness of his measures frustrated their success. His dangerous alliances on the Continent, and the extravagant wars in which he involved England, joined to the frequent abuse he made of his authority, betrayed his designs. The eyes of the nation were soon opened, and saw into his projects[32]; when, convinced, at length, that nothing but fixed and irresistible bounds can be an effectual check on the views and efforts of power, they resolved finally to take away those remnants of despotism which still made a part of the regal prerogative.

Abolition of military services.

The military services due to the crown, the remains of the ancient feudal tenures, had been already abolished[33]: the laws against heretics were now repealed[34]; the statute for holding parliaments once, at least, in three years, was enacted[35]; the *Habeas Corpus* act[36], that barrier of the subject's personal safety, was established; and such was the patriotism of the parliaments, that it was under a king the most destitute of principle that liberty received its most efficacious supports[37].

Triennial Bill.

Habeas Corpus Act.

James II. hurried away by a spirit of despotism.

At length, on the death of Charles, began a reign which affords a most exemplary lesson, both to kings and people. James II.[38], a prince of a more rigid disposition, though of a less comprehensive understanding than his late brother, pursued, still more openly, the project which had already proved so fatal

[31] Vide ante, 417—459. [32] Ibid. 443, 445, 448.
[33] Ibid. 394, 420—422. [34] Ibid. 420—422. [35] Ibid. 428.
[36] Ibid. 454, 454. [37] Ibid. 420—459. [38] Ibid. 459—470.

to his family. He would not see that the great alterations which had successively been effected in the constitution, rendered the execution of it daily more and more impracticable: he imprudently suffered himself to be exasperated at a resistance he was in no condition to overcome; and, hurried away by a spirit of despotism and a monkish zeal, he ran headlong against the rock which was to wreck his authority[39].

Doctrines of absolute power and unlimited obedience.

He not only used in his declarations the alarming expressions of absolute power and unlimited obedience—he not only usurped to himself a right to dispense with the laws; but moreover sought to convert that destructive pretension to the destruction of those very laws which were held most dear by the nation, by endeavouring to abolish a religion for which they had suffered the greatest calamities, in order to establish on its ruins a mode of faith which repeated acts of the legislature had proscribed,—and proscribed, not because it tended to establish in England the doctrines of transubstantiation and purgatory, doctrines in themselves of no political moment, but because the unlimited power of the sovereign had always been made one of its principal tenets[40].

The nation withdraw their allegiance from James II.

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

[39] Vide ante, 463—470.

[40] Ibid. 464, 468.

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oath to a king who himself disregarded the oath he had made to his people[41].

The deposition of James proved a matter of short and easy operation.

But, instead of a revolution like that which dethroned Charles I., which was effected by a great effusion of blood, and threw the state into a general and terrible convulsion, the dethronement of James proved a matter of short and easy operation. In consequence of the progressive information of the people, and the certainty of the principles which now directed the nation, the whole were unanimous. All the ties by which the people were bound to the throne were broken, as it were, by one single shock; and James, who, the moment before, was a monarch surrounded by subjects, became at once a simple individual in the midst of the nation[42].

The legality with which the dethronement of James II. was accompanied.

That which contributes, above all, to distinguish this event as singular in the annals of mankind, is the moderation, I may even say, the legality, which accompanied it. As if to dethrone a king, who sought to set himself above the laws, had been a natural consequence of, and provided for by, the principles of government, everything remained in its place; the throne was declared vacant, and a new line of succession was established[43].

William III.

Nor was this all; care was had to repair the breaches that had been made in the constitution[44], as well as to prevent new ones; and advantage was taken of the rare opportunity of entering into an original and express compact between king and people[45].

Compact between the king and people.

An oath was required of the new king, more precise than had been taken by his predecessors: and it was consecrated as a perpetual formula of such oaths. It

[41] Vide ante, 459, 460.
[42] Ibid. 468, 470—472.
[43] Ibid. 471, 473.
[44] Ibid. 452, 456—459, 461, 463.
[45] Ibid. 472—478, 485—487.

was determined, that to impose taxes without the consent of parliament, as well as to keep up a standing army in time of peace, are contrary to law[46]. The power, which the crown had constantly claimed, of dispensing with the laws, was abolished[47]. It was enacted, that the subject, of whatever rank or degree, had a right to present petitions to the king* [48]. Lastly, the key-stone was put to the arch, by the final establishment of the liberty of the press†.

Revolution of 1689, the third era in the English constitution.

The revolution of 1689 is therefore the third grand era in the history of the constitution of England. The Great Charter had marked out the limits within which the royal authority ought to be confined; some outworks were raised in the reign of Edward I.[49]; but it was at the Revolution that the circumvallation was completed.

The scaffolding of false and superstitious notions respecting royal authority utterly destroyed.

It was at this era that the true principles of civil society were fully established. By the expulsion of a king who had violated his oath, the doctrine of resistance, that ultimate resource of an oppressed people, was confirmed beyond a doubt. By the exclusion given to a family hereditarily despotic, it was finally determined that nations are not the property of kings. The principles of passive obedience, the divine and

* The lords and commons, previous to the coronation of King William and Queen Mary, had framed a bill which contained a declaration of the rights which they claimed in behalf of the people, and was in consequence called the *Bill of Rights*. This bill contained the articles above, as well as some others; and, having received afterwards the royal assent, became an act of parliament, under the title of *An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown.*—A. 1 William and Mary, sess. 2, cap. 2.

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

[46] Vide ante, 472. [47] Ibid. 472. [48] Ibid. 472. [49] Ibid. 94—102.

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indefeasable right of kings—in a word, the whole scaffolding of false and superstitious notions, by which the royal authority had till then been supported, fell to the ground; and in the room of it were substituted the more solid and durable foundations of the love of order, and a sense of the necessity of civil government among mankind[50].

[50] Vide ante, 472—487.

CHAPTER IV.

Of the Legislative Power.

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

The limited prerogative of the kings of England.

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

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

Legislative power belongs to parliament alone.

The basis of the English constitution, the capital principle on which all others depend, is, that the legislative power belongs to parliament alone: that is to say, the power of establishing laws, and of abrogating, changing, or explaining them.

Constituent parts of parliament.

The constituent parts of parliament are, the king, the House of Lords, and the House of Commons [1].

[1] Vide ante, 134, 135.

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Component parts of the House of Commons.

The House of Commons, otherwise the assembly of the representatives of the nation, is composed of the deputies of the different counties, each of which sends two; of the deputies of certain towns, of which London (including Westminster and Southwark) sends eight—other towns, two or one[2]; and of the deputies of the universities of Oxford and Cambridge, each of which sends two.

Lastly, since the act of union, Scotland sends forty-five deputies[3], who, added to those just mentioned, make up the whole number five hundred and fifty-eight[4]. Those deputies, though separately elected, do not solely represent the town or county that sends them, as is the case with the deputies of the United Provinces of the Netherlands, or of the Swiss Cantons; but, when they are once admitted, they represent the whole body of the nation[5].

Qualifications for being a member of the House of Commons.

The qualifications required for being a member of the House of Commons are, for representing a county, to be born a subject of Great Britain, and to be possessed of a landed estate of six hundred pounds a-year; and of three hundred, for representing a town or borough[6].

Qualifications for being a county elector.

The qualifications required for being an elector in a county are to be possessed, in that county, of a freehold of forty shillings a year*[7]. With regard to electors in towns and boroughs, they must be freemen of them[8];—a word which now signifies certain qualifications expressed in the particular charters[9].

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

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[2] Vide Note (1,) p. 538. [3] Ibid. (2,) p. 538. [4] Ibid. (3,) p. 538.
[5] Vide ante, 133, 283. [6] Vide Note (4,) p. 541.
[7] Ibid. (5,) p. 543. [8] Ibid. (6,) p. 544.
[9] Vide ante, 12—15, 58—65, 149, 150, 259, 260, 274—281, 316—320.

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Mode in which parliament is convoked.

When the king has determined to assemble a parliament, he sends an order for that purpose to the lord-chancellor[10]; who, after receiving the same, sends a writ[11], under the great seal of England, to the sheriff of every county, directing him to take the necessary steps for the election of members for the county, and the towns and boroughs contained in it. Three days after the reception of the writ, the sheriff must, in his turn, send his precept to the magistrates of the towns and boroughs, to order them to make their election within eight days after the receipt of the precept, giving four days' notice of the same. And the sheriff himself must proceed to the election for the county, not sooner than ten days after the receipt of the writ, nor later than sixteen[12].

Treating and bribery.

The principal precautions, taken by the law, to ensure the freedom of elections, are, that any candidate, who, after the date of the writ, or even after the vacancy, shall have given entertainments to the electors of a place, or to any of them, in order to his being elected, shall be incapable of serving for that place in parliament[13]; and that if any person gives or promises to give, any money, employment, or reward, to a voter, in order to influence his vote, he, as well as the voter himself, shall be condemned to pay a fine of five hundred pounds, and for ever disqualified to vote, and hold any office in a corporation,—the faculty, however, being reserved to both, of procuring indemnity for their own offence, by discovering some other offender of the same kind[14].

Interference by peers.

It has been moreover established, that no lord of parliament, or lord-lieutenant of a county, has any

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[10] Vide Note (7,) p. 549. [11] Ibid. (8,) p. 549. [12] Ibid. (9,) p. 550.
[13] Ibid. (10,) p. 551. [14] Ibid. (11,) p. 553.

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right to interfere in the elections of member[15]; that any officer of the excise, customs, &c. who shall presume to intermeddle in elections, by influencing any voter to give or withhold his vote, shall forfeit one hundred pounds, and be disabled to hold any office.

Removal of the military.

Lastly, all soldiers quartered in a place where an election is to be made must move from it, at least one day before the election, to the distance of two miles or more, and return not till one day after the election is finished[16].

Component parts of the House of Peers.

The House of Peers, or Lords, is composed of the lords spiritual, who are the Archbishops of Canterbury and of York, and the twenty-four bishops; and of the lords temporal, whatever may be their respective titles, such as dukes, marquesses, earls, &c.[17]

Lastly, the king is the third constitutive part of parliament[18]: it is even he alone who can convoke it; and he alone can dissolve or prorogue it. The effect of a dissolution is, that from that moment the parliament completely ceases to exist; the commission, given to the members by their constituents, is at an end; and, whenever a new meeting of parliament shall happen, they must be elected anew. A prorogation is an adjournment to a term appointed by the king; till which the existence of parliament is simply interrupted, and the function of the deputies suspended.

Meeting of parliament.

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

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[15] Vide Note (12,) p. 556.
[16] Ibid. (13,) p. 556.
[17] Ibid. (14,) p. 558.
[18] Vide ante, 134, 135.

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

The king, having concluded his declaration, withdraws. The parliament, which is then legally intrusted with the care of the national concerns, enters upon its functions, and continues to exist till it is prorogued, or dissolved. The House of Commons, and that of Peers, assemble separately[19]; the latter, under the presidence of the lord chancellor; the former, under that of their speaker; and both separately adjourn to such days as they respectively think proper to appoint.

The House of Commons, and that of Peers, assemble separately.

As each of the two Houses has a negative on the propositions made by the other, and there is, consequently, no danger of their encroaching on each other's rights, or on those of the king[20], who has likewise his negative upon them both, any question, judged by them conducive to the public good, without exception, may be made the subject of their respective deliberations. Such are, for instance, new limitations, or extensions, to be given to the authority of the king; the establishing of new laws, or making changes in those already in being. Lastly, the different kinds of public provisions, or establishments,—the various abuses of administration, and their remedies,—become, in every session, the objects of the attention of parliament[21].

Independent situation of the estates of parliament.

Here, however, an important observation must be made. All bills for granting money must have their beginning in the House of Commons: the lords cannot take this object into their consideration but in

Money bills must originate with the commons.

[19] Vide ante, 135—137. [20] Ibid. 147—149.
[21] Ibid. 472, 473, 485, 487.

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consequence of a bill presented to them by the latter; and the commons have at all times been so anxiously tenacious of this privilege, that they have never suffered the lords even to make any change in the money bills which they have sent to them; and the lords are expected simply and solely either to accept or reject them[22].

Mode in which bills are passed.

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

Royal assent to bills of parliament.

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

Mode in which the royal assent is given.

When the royal assent is given to a public bill, the clerk says, *Le roy le veut.* If the bill be a private bill, he says, *Soit fait comme il est desiré.* If the bill has subsidies for its object, he says, *Le roy remercie ses loyaux sujets, accepte leur bénévolence, et aussi le veut.* Lastly, if the king does not think proper to assent to

[22] Vide ante, 135—137, 288.

the bill, the clerk says, *Le roy s'avisera;* which is a mild way of giving a refusal.

The custom of addressing parliament in French was introduced at the Conquest.

It is, however, pretty singular, that the king of England should make use of the French language to declare his intentions to his parliament. This custom was introduced at the Conquest*, and has been continued, like other matters of form, which sometimes subsist for ages after the real substance of things has been altered: and Judge Blackstone expresses himself on this subject in the following words: "A badge, it must be owned (now the only one remaining), of conquest; and which one would wish to see fall into total oblivion, unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force."

Laws cannot be repealed, but by the king and the estates of parliament.

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

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

NOTES.

THE NUMBER OF PARLIAMENTARY REPRESENTATIVES, under Stat. 2 William IV. c. 45.

(1.) By 2 William IV. c. 45, it was enacted there should be six knights of the shire, instead of four, for Yorkshire (two for each of the three ridings); and four for Lincolnshire, (two for the parts of Lindsey, and two for those of Kesteven and Holland); that twenty-five English counties therein named should be divided into two divisions, and return two knights of the shire for each division; that there should be three knights of the shire for each of seven English counties therein named, and two knights of the shire, instead of one, for each of the counties of Carmarthen, Denbigh, and Glamorgan; that the Isle of Wight should return one knight; and that Greenwich, the Tower Hamlets, Finsbury, Marylebone, and Lambeth, should be created boroughs, and return two members respectively.

English counties.

English boroughs.

The number of metropolitan members were, by this statute, augmented to eighteen; fifty-six parliamentary boroughs were disfranchised, and thirty ancient boroughs lost one of their two members;—but forty-three new boroughs were created, twenty-two of them to return two members, and twenty-one, one member each, and the borough of Weymouth and Melcombe Regis was deprived of two of its four members.

COUNTIES AND BOROUGHS OF SCOTLAND.

Stat. 2 & 3 William IV. c. 65.

(2.) By Stat. 2 & 3 William IV. c. 65, the representation of Scotland was to consist of fifty-three representatives, viz., thirty for the several or conjoined shires or stewartries, and twenty-three for the several cities, boroughs, towns, or districts of burghs and towns.

COUNTIES AND BOROUGHS OF IRELAND.

Stat. 39 & 40 George III. c. 67.

(3.) By 39 & 40 George III. c. 67, it was enacted, as part of the Fourth Article of Union, that one hundred commons should be the parliamentary representatives of Ireland, viz., two for each county of Ireland, two for the City of Dublin, two for the City of Cork, one for the University of Dublin, and one each for thirty-one other cities and boroughs.

The representation of Ireland, in the commons, was subsequently extended, by Stat. 2 & 3 William IV. c. 88, to one hundred and five members; viz., each of the counties were to return two knights of the shire (sixty-four); seven cities, including the University of Dublin, were to return two members each (fourteen); and twenty-seven boroughs were to return one member each.

From returns which were made to parliament, in 1834, it

appears that the numbers represented were as follow, but it is impossible, under the Reform Bill, ever to approach, with certainty, to the precise number, because one elector is frequently registered in different places.

NOTES.

The amount of population represented in parliament.

	Registered Electors.		Members.
In England, 40 counties have	344,564	and return	144
And 185 cities, boroughs, and towns, have	274,649	„	327
Total numbers for England	619,213	„	471
In Wales, 12 counties have	25,815	„	15
And 14 districts of boroughs have . .	11,309	„	14
Total numbers for Wales	37,124	„	29
In Scotland, 30 counties have	33,115	„	30
And 76 cities, boroughs, &c. have . . .	31,332	„	23
Total numbers for Scotland	64,447	„	53
In Ireland, 32 counties have	60,607	„	64
And 34 cities and towns have	31,545	„	41
Total numbers for Ireland	92,152	„	105

Giving, in England and Wales, 656,337, and, in the United Kingdom, 812,936 registered electors, at the general election, in 1832: and, taking the total number of representatives at 658, the proportion will be, on the average of Great Britain, 1,303, and, in the United Kingdom, 1,235 electors to one representative.

In the United Kingdom there are 1235 electors to 1 representative.

The proportion of the electors in England and Wales, to the population, both in the cities and boroughs, is nearly the same; and the proportion of the electors to the males of twenty years of age and upwards, and to the gross population, is also nearly the same.

Proportion of electors in England and Wales nearly the same.

Taking the gross population of the 40 counties in England, (exclusive of the population of the cities, boroughs, towns, and universities, which are represented,) at 8,336,263, and the number of electors 344,564, there will be 1 elector in every 24 of the population; whilst the gross population, in the 185 cities, boroughs, and towns, being 4,754,742, and the number of electors 274,649, there will be 1 elector in every 17 of the population.

Taking the population of forty counties in England there will be 1 elector in every 24 of the population.

In Wales, the county population is 609,871, and the electors are 25,815, so that there is 1 elector in every 23 persons; whilst, in the 14 districts of boroughs, the population being 196,311, and the electors 11,309, the proportion is 1 in 17.

In Wales there is 1 county elector in every 23 persons.

NOTES.

In Scotland there is 1 county elector in every 45 persons.

In Scotland, the county population is 1,500,107, and the number of electors, 33,115, which will give 1 elector in every 45 persons; whilst, in the burghs, the population being 865,007, and the electors 31,332, the proportion is 1 in every 27 persons.

In Ireland the proportion is 1 county elector in every 115 of the population.

In Ireland, the population of the 32 counties is 7,027,509, the number of electors, 60,607, and the proportion is 1 elector in every 115 of the population; whilst the 34 cities and boroughs, with 31,545 electors, and a population of 739,892, give a proportion of 1 elector in every 22 persons.

The total population of the 114 counties in the United Kingdom being 17,473,750, and the number of electors 464,101, the proportion of electors will be 1 in every 37 persons; whilst the population of the 309 cities and boroughs of the United Kingdom being 6,655,952, and the number of electors 348,835, the proportion will be 1 elector in every 18 persons.

In Great Britain the proportion is 1 elector in every 22 persons.

The population of Great Britain being 16,262,301, and the electors 720,784, the proportion will be 1 elector in every 22 persons.

In Ireland, 1 elector to every 29 persons.

The population of Ireland being 7,767,401, and the electors 92,152, the proportion will be 1 elector in every 29 persons.

In Great Britain there are 1303 electors, on the average, for every representative.

The 114 counties in the United Kingdom send 253 members, and the 309 cities and boroughs send 405 members to parliament. In Great Britain there are 1303 electors, on the average, for every representative; whilst in Ireland there are only 877 electors for every representative. In England there is one representative in every 27,794; and in Wales, one in every 27,799 of the gross population; whilst in Scotland there is one representative in every 44,624; and in Ireland, one in every 73,975 of the gross population. If the whole population of the United Kingdom were equally divided into 658 districts, there would be 36,519 souls for every representative.

1 elector in every 5 males of twenty years of age.

The number of electors being 619,213, and the number of males of twenty years of age and upwards, in England, being 3,199,934, the proportion is one elector in every five males of twenty years of age and upwards; in Wales nearly the same proportion. In Scotland, one elector in every eight males; and in Ireland, one elector in every twenty of the male population of twenty years and upwards. There being 5,812,276 males of twenty years and upwards in the United Kingdom, and only 812,916 electors, the proportion is one elector in every seven males, or 14 in every 100 males.

NOTES.

The counties in England will give 2302 electors for every member; and of the cities and boroughs, 839.

An average of the counties in England will give 2302 electors for every member; and of the cities and boroughs, 839. In Scotland, the counties will average 1103 electors for every member; but there are some, as Bute, have only 279, and Caithness only 201 electors. The cities and boroughs average 1362 for one member; but some of them, as the Dysart district, have only 507, and the Haddington district only 545 electors. The average of the 32 counties in Ireland will give 947 electors for every member, and the 34 cities and boroughs will average 769 electors for every member[1].

QUALIFICATION FOR MEMBERS OF PARLIAMENT.

(4.) The eldest son of a peer or lord of parliament, or of a Scotch peer, or of a peeress or bishop, or of any person qualified for a knight of the shire, as well as the members for the universities of Oxford, Cambridge, and Dublin, do not require any qualification by estate[1].

Candidate liable to be called on, to swear to his property qualification. Stat. 9 Anne, c. 5, ss. 5, 7.

By 9 Anne, c. 5, s. 5, every person who appears as a candidate, can be called upon by any other candidate, or any two of the voters, to swear to his property qualification; and "If any of the candidates or persons proposed shall *wilfully* refuse, upon reasonable request to be made at the time of the election; or at any time before the day upon which such parliament, by the writ of summons, is, to meet, to take the oath hereby required, then the election and return of such candidate or person shall be void."

Member bound to deliver the particulars of his property qualification to the clerk of the House.

After the election, and before a member takes his seat, he is required to deliver to the clerk of the House, at the table of the House, a paper signed by himself, containing a description of the situation of the estate of qualification, and there take and subscribe an oath of its value[2].

Standing orders for examining the qualification of candidates upon a petition.

In order to prevent evasion of Stat. 9 Anne, c. 5, the House have several standing orders for affording further means of examining the qualification of candidates upon a petition. "That notwithstanding the oath taken by any candidate at or after the election, his qualification may be afterwards examined. That the person whose qualification is expressly objected to in any petition relating to his election, shall, within fifteen days after the petition received, give to the clerk of the House of Commons a paper signed by himself,

[1] Report on Election Expenses, 1834. Vide etiam Returns in 1836, No. 190, 199, 227, 248.

[1] Shepherd, 61. [2] 33 George II. c. 20. Shepherd, 61.

NOTES.

containing a rental, or particular of the lands, tenements, and hereditaments, whereby he makes out his qualification, of which any person concerned may have a copy. That of such lands, tenements, and hereditaments, whereof the party hath not been in possession for three years before the election, he shall also insert in the same paper from what person, and by what conveyance or act in law, he claims and derives the same; and also the consideration, if any paid; and the names and places of abode of the witnesses to such conveyance and payment. That if any sitting member shall think fit to question the qualification of a petitioner, he shall, within fifteen days after the petition be received, leave notice[3] thereof in writing with the clerk of the House of Commons; and the petitioner shall in such case, within fifteen days after such notice, leave with the said clerk of the House the like account in writing of his qualification, as if required from a sitting member." And where the petition against an undue election is presented by the electors, and not the unsuccessful candidate, the sitting member has the same power of examining the qualification of such candidate, as he would have had by the last rule if the candidate had petitioned[4].

Sitting member can question the qualification of a petitioner.

Member becoming bankrupt.

Stat. 52 George III. c. 24.

By 52 George III. c. 24, if a member be declared a bankrupt, and the commission not superseded within twelve months, nor debts paid, nor security given for debts disputed and costs, the major part of the commissioners shall, at the expiration of six months, certify the same to the speaker, and the election of such member shall be declared void. Upon receipt of any of these certificates, the speaker is required, in each case respectively, forthwith to cause notice thereof to be inserted in the London Gazette, and shall not issue his warrant until fourteen days after the insertion[5] of such notice in the Gazette[6].

Situation of property for a member's qualification.

The property required may be situated either in England, Wales, Berwick, or Ireland, for a member serving for any county or place in England or Ireland, or in Scotland, under Stat. 41 George III. c. 101, and 59 George III. c. 37[7].

[3] 18 Jour. 629. Shepherd, 62.

[4] 22 Jour. 355.

[5] In cases arising under 52 George III. c. 114, *after the day of inserting.*

[6] 24 George III. c. 26; 52 George III. c. 114; 52 George III. c. 144.

[7] The parliamentary decisions relative to qualification of members of parliament, are to be found in *Rochester*, C. & D. 229; *Coventry*, 1 Peck. 93; *Bristol*, 4 Doug.; and *Colchester*, cited in Rogers, 77; *Bath*, P. & K. 23—30, 1 C. & R. 1; *Coventry*, P. & K. 335, C. & R. 287; Second *Drogheda*, K. & Ombl. 212; *Leominster*, Corb. & Dan. 3—12; *Rochester*, Corb. & Dan. 230—238.

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And by 41 George III. c. 52, all persons disqualified to sit in either the English or Irish parliaments are ineligible to serve in the united parliament.

Stat. 41 George III. c. 52.

(5.) The 2 William IV. c. 45, takes away the right of voting for counties, and for cities being counties of themselves, in respect of freeholds for life, from all persons, except those in actual and *bonâ fide* occupation; or except the same shall have come by marriage, marriage settlement, devise, or promotion to any benefice or office; or be of the clear yearly value of not less than 10*l.* above all rents and charges[1] payable out of or in respect of the same;—but any then existing right of voting is reserved.

QUALIFICATION FOR A COUNTY VOTER, under Stat. 2 William IV. c. 45, s. 18.

Elective rights are conferred on every person seised in law or equity, of any lands or tenements of copyhold or any other tenure, except freehold, for his own life, or the life of another, or any lives, or any larger estate, of the clear yearly value of not less than 10*l.* above all rents and charges.

Copyholders, Sect. 19.

Sect. 20 extends the franchise to every person entitled, as lessee or assignee, to any lands or tenements, for the unexpired residue of any term originally created for a period of not less than sixty years (whether determinable on lives or not), of the clear yearly value of not less than 10*l.* above all rents and charges; or for the unexpired residue of any term originally created for a period of not less than twenty years (whether determinable on lives or not), of the clear yearly value of not less than 50*l.* above all rents and charges; or who shall occupy, as tenant, any lands or tenements, for which he shall be *bonâ fide* liable to a yearly rent of not less than 50*l.*

Lessee or assignee of lands or tenements, Sect. 20.

But no sub-lessee or assignee of any underlease can, in respect of any such term, of sixty or twenty years, exercise the elective franchise, unless he be in the actual occupation of the premises; nor can any person by reason of any trust estate, or mortgage, unless he be in the actual possession or receipt of the rents and profits;—but the mortgagor or cestuique trust in possession, can vote for the same estate notwithstanding such mortgage or trust.

Sub-lessee or assignee of any underlease. Sect. 20, 23.

No person can acquire a county vote in respect of any free-

County vote cannot be acquired

[1] No public or parliamentary tax, nor any church rate, county rate, or parochial rate, is deemed a charge for the purposes of voting (sect. 21); neither is it requisite for county voters that property should be assessed to the land tax (sect. 22).

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for property, that would confer a borough vote, Sect. 24 & 25.

hold house or land, &c. occupied by himself; nor in respect of copyholds or leaseholds, which would confer on the occupant, or any other person, a right to vote for a city or borough.

No one entitled to vote unless registered, Sect. 26.

No person is entitled to vote unless duly registered, nor to be registered in any year, as a freeholder, copyholder, customary tenant, or tenant in ancient demesne, unless he shall have been in actual possession, or in receipt of the rents and profits for his own use, for six calendar months previous to the last day of July in such year; and a possession is required for twelve months, from a lessee, or assignee, or occupier and tenant, except where the property shall vest by descent, succession, marriage settlement, devise, or promotion to any benefice in a church, or by promotion to any office.

QUALIFICATION FOR VOTING IN CITIES OR BOROUGHS, under Stat. 2 William IV. c. 45, s. 27.

(6.) The right of voting in cities and boroughs, is, by Stat. 2 William IV. c. 45, s. 27, extended to every male person of full age, not subject to any legal incapacity, and being duly registered, who shall occupy within any city or borough, or within any place sharing in the election for the same, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being, either separately or jointly with any land within such city, borough, or place occupied therewith, by him as owner, or as tenant, under the same landlord, of the clear yearly value of 10*l.*

Twelve months' occupation of premises requisite to confer a right of voting.

But no person can be registered in any year, unless he has occupied the premises for twelve calendar months next previous to the last day of July in such year; nor unless rated in respect of such premises to all rates for the relief of the poor, made during the time of such his occupation; nor unless he has paid, on or before the 20th day of July, in such year, all the poor's rates and assessed taxes which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding; nor unless he has resided for six calendar months next previous to the last day of July in such year, within the city or borough, or the place sharing in the election, or within seven statute miles thereof, or of any part thereof.

Payment of taxes.

Residence within seven miles of the city.

Premises occupied, in immediate succession, Sect. 28 & 29.

By Sect. 28 & 29, persons occupying different premises in immediate succession during twelve calendar months next previous to the last day of July in the year in which registration is claimed; and having likewise paid, on or before the

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20th day of July in such year, all poor's rates and assessed taxes that had become payable on the preceding 6th of April; and joint occupiers of premises, in case the clear yearly value shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than 10*l.* for each occupier,—can respectively claim to be registered.

Occupiers can demand to be rated, Sect. 30 & 31.

By Sect. 30 & 31, occupiers can demand to be rated, and provisions are made as to freeholders voting for cities and towns, being counties of themselves.

Reservation of the rights of freemen, Sect. 32.

By Sect. 32, persons who would have been entitled to vote, in any borough not included in Schedule (A), either as a burgess or freeman, or in the city of London, as a freeman and liveryman, if "the Act" had not been passed, are entitled to vote, provided they are duly registered; but no such person can be registered in any year, unless on the last day of July in such year, he shall be qualified in such manner as would entitle him then to vote, if such day were the day of election, and "the Act" not passed; nor unless, where he shall be a burgess or freeman, or freeman and liveryman, of any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year, within such city or borough, or within seven statute miles from the place where the poll for the same should theretofore have been taken; nor unless, where he shall be a burgess or freeman of any place sharing in the election for any city or borough, he shall have resided for six calendar months next previous to the last day of July in such year, within such respective place so sharing as aforesaid, or within seven statute miles of the place mentioned in conjunction therewith.

Future admission of freemen.

No person elected, made, or admitted, a burgess or freeman, since the 1st March, 1831, otherwise than in respect of birth or servitude, is entitled to vote as such in any such election, or to be registered; and no person will be so entitled, as a burgess or freeman in respect of birth, unless his right were originally derived from or through some person who was a burgess or freeman, or entitled to be admitted such, previously to the 1st March, 1831, or from or through some person who since that time shall have become, or shall hereafter become, a burgess or freeman in respect of servitude.

Forfeiture of ancient rights, Sect. 33.

The 33rd section reserves to every person, then having a right to vote in the election for any city or borough, in virtue

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of any other qualification, such right, as long as he shall be qualified as an elector, according to the usages and customs of such city or borough, or any law then in force, if duly registered, and resident, as required in the case of burgesses and freemen; but every such person will for ever cease to enjoy such right if his name be omitted for two successive years from the register of voters, unless omitted in consequence of his having received parochial relief within twelve calendar months next previous to the last day of July in any year, or in consequence of his absence on the naval or military service of his majesty.

Sect. 42, 50, 58.

In order to settle questions of right, the title of every voter is liable to investigation at registration and polling.

PERSONAL INCAPACITIES OF VOTERS.

The general personal incapacities from voting are as follow: peers[1], aliens[2], minors[3], ideots[4], and lunatics[5].

Holding offices.

The holders of the following offices are also, by statute, incapacitated from exercising the elective franchise:—commissioners, collectors, supervisors, gaugers, or other officer or person whatsoever concerned or employed in the charging, collecting, levying, or managing the duties of excise, or any other branch or part thereof; any commissioner, collector, comptroller, searcher, or other officer or person whatsoever concerned or employed in the charging, collecting, levying, or managing the customs, or any branch or part thereof; or any commissioner, officer, or other person employed in collecting, receiving, or managing any of the duties on stamped vellum, parchment, and paper; or any person appointed by the commissioners for distributing of stamps; or any commissioner, officer, or other person employed in collecting, levying, or managing any of the duties on salt; or any surveyor, collector, comptroller, inspector, officer, or other person employed in collecting, managing, or receiving the duties on windows or houses; or any postmaster, or husband of postmistress, postmaster-general, or his or their deputy or deputies, or any person employed by him, or under him or them, in receiving, collecting, or managing the revenue of the post-office, or any part thereof;

Excise.

Customs.

Stamps.

Duties on salt.

Tax on windows.

Post-office.

[1] Rogers, 94, 95.
[2] *Middlesex*, 2 Peck. 118; *Bedford*, 1 C. & R. 98; P. & K. 147.
[3] 2 Stat. 7 & 8 William III. c. 25, s. 8. 1 Black. Com. 463. Rogers, 81.
[4] Co. Lit. 247 (a). *Bedfordshire*, 2 Luders, 567. Sed vide *Bridgewater*, 1 Peck. 108. *Oakhampton*, 1 Fraser, 164. Vin. Abr. 323.
[5] Heywood, *Counties*, 260. Rogers, 81, 82.

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or any captain, master, or mate of any ship, packet, or other vessel employed by or under the postmaster or postmaster-general in conveying the mail to and from foreign parts;—and if any such officer votes for any candidate for parliament during the time he holds, or within twelve calendar months after he ceases to hold or execute any of the offices aforesaid, he is liable to a penalty of 100*l.* independent of the vote being considered as void.

Post-office packets.

But commissioners of the land tax, and persons acting under such commissioners, and any office held or usually granted to be held by letters patent for any estate, or inheritance, or freehold, are excepted.

Exceptions.

The votes of collectors of duties on houses and windows, under 20 George II. c. 3, s. 6; a person whose wife is office-keeper to the commissioners of excise, without salary; those who have occasional employment as excise officers; captains and masters of custom-house cutters, and packets, having absolutely resigned their interests; sub-distributers of stamps—have been held to be good[6];—although the votes of post-masters[7], husband of postmistress[8], and servant in post-office[9], are bad; yet the votes of a post-office sub-deputy[10], whose name is not entered in the post-office books, and mail guards[11], are good.

Stat. 20 George III. c. 3, s. 6.

Any justice, receiver, surveyor, constable, under 10 George IV. c. 45, or person belonging to the police force, under 10 George IV. c. 44; persons employed and receiving remuneration at parliamentary elections for acting as counsel, agent, attorney, poll-clerk, flag-man, or in any other capacity[12]; persons farming the duties on horses let to hire for travelling post or by time, and appointed collectors thereof[13]; coal meters and corn meters receiving, or entitled to receive, any salary, fee, or reward, payable out of the revenue of the customs, or other public revenues of the crown[14]; convicted felons; outlaws on criminal process; bankrupts; excommu-

Metropolitan justices.

Coal and corn meters.

[6] *Bedfordshire*, 2 Luders, 542; *Middlesex*, 2 Peck. 116; *Oakhampton*, 1 Peck. 373; *Oakhampton*, 1 Fraser, 164; *Harwich*, 1 Peck. 397, 400; *Bedfordshire*, 2 Luders, 552.

[7] *Bedfordshire*, 561. [8] Ibid. 558. [9] *Glasgow*, Peck. 354.

[10] *Bedfordshire*, 562. [11] *Cirencester*, 2 Fraser, 454.

[12] Stat. 7 & 8 George IV. c. 37, s. 1. *New Windsor*, K. & O. 174, 175, 180, 183, 185. *Worcester*, Ibid. 246, 247. *Bedford*, C. & R. 24; P. & K. 136. *New Sarum*, P. & K. 263.

[13] Stat. 27 George III. c. 26, s. 15. [14] Stat. 51 George III. c. 84.

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nicated persons[15]; receipt of alms[16]; occasionality[17]; and non-payment of taxes under the Reform Act:—are respectively disqualified from voting.

OATHS.

No person excluded from the poll on account of religious belief.

There is no statute by which any person is excluded from the poll on the ground of his religious belief. But the immediate effect of requiring oaths to be taken, as a preliminary to voting, was to exclude the Quakers and Moravians; and the enactment of the oath of supremacy banished the Roman Catholics.

Quakers.

Stat. 7 & 8 William III. c. 34.

Moravians.

Stat. 22 George III. c. 30.

But by 7 & 8 William III. c. 34, the solemn affirmation and declaration of Quakers is to be accepted instead of an oath; and 22 George III. c. 30, making the Act of William a permanent Act, extended the same indulgence to the Moravians[18].

Roman Catholics.

England.

Stat. 5 & 6 William IV. c. 36.

Ireland.

Stat. 33 George III. c. 21.

Roman Catholics, at English elections, are not required to take the oath contained in 10 George IV. c. 7, s. 5; the 5 & 6 William IV. c. 36, s. 6, having not only dispensed with the oaths of allegiance, abjuration, and supremacy, but with all oaths directed to be taken in lieu of them. At Irish elections, the necessity of taking the above oaths was dispensed with by 33 George III. c. 21; therefore, at such elections, there was no necessity for taking that oath[19]. Protestants in Ireland must still take the oaths of allegiance, abjuration, and supremacy, the 5 & 6 William IV. not applying to Ireland.

Scotland.

Stat. 2 & 3 William IV. c. 65.

Stat. 10 George IV. c. 7.

By 2 & 3 William IV. c. 65, s. 26, no oath is required to be taken at elections in Scotland, except that which is given in the schedule; consequently, it is no longer necessary for Protestants to take the oaths of allegiance, abjuration, and supremacy. And by 10 George IV. c. 7, s. 8, Roman Catholics

[15] Rogers, 89, 90, 92, 93.

[16] *Taunton*, 1 Doug. 370; *Bedford*, 2 Doug. 123; *Cricklade*, 2 Luders, 365; *Cirencester*, 2 Fraser, 453; *Colchester*, 1 Peck. 508; *Great Grimsby*, 1 Peck. 72; *Oakhampton*, 1 Peck. 373; *Bedford*, C. & R. 79; P. & K. 129; *Bedford*, P. & K. 132; C. & R. 80; Rogers, 95—103.

[17] *Pontefract*, 13 Journ. 127; *East Grinstead*, 1 Peck. 350; 1 Somers' Tracts, 279; *Oakhampton*, 1 Peck. 360; *Luggershall*, 1 Peck. 377; *Oakhampton*, 1 Fraser, 69; *Downton*, 1 Peck. 343, *in notis*; *Horsham*, 2 Fraser, 45; *Haslemere*, Nov. 11, 1680; *Horsham*, 16 Journ. 173; *Petersfield*, P. & K. 31; C. & R. 16; *Galway Town*, P. & K. 302; C. & R. 390; Stat. 7 & 8 William III. c. 25; 10 Anne, c. 23; 11 George I. c. 1; 3 George II. c. 8.; 18 George II. c. 18; 19 George II. c. 28; 3 George III. c. 15; 3 George III. c. 24; 26 George III. c. 100; 2 William IV. c. 45; Rogers, 104—107.

[18] Vide 10 Anne, c. 23, s. 8, and 4 William IV. c. 49; and in Ireland, 2 & 3 William IV. c. 88, s. 41.

[19] *Carlow*, P. & K. 408; sed vide *Limerick* and *Galway* cases there cited.

can take and subscribe the oath directed by that Act, in lieu of the oaths of allegiance, supremacy, and abjuration.

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(7.) The House of Commons is summoned by a warrant from the king in council to the lords high chancellors of Great Britain and Ireland, lords keepers or lords commissioners of the Great Seal, to issue their writs for the election of knights, citizens, and burgesses to serve in parliament.

THE MODE IN WHICH THE HOUSE OF COMMONS IS SUMMONED.

Stat. 7 & 8 William III. c. 25; 2 William IV. c. 45.

By Stat. 7 & 8 William and Mary, c. 25, whenever a new parliament is summoned, there must be forty days between the teste and return of the writ of summons.

On a vacancy occurring during the session, by a member being called up to the House of Peers, by death, by his acceptance of office, or by his election having been declared void by a resolution of a committee of the House, or by the seat having become vacant from any other cause, it becomes the duty of the speaker to sign warrants to the clerk of the crown in chancery, to issue writs for the electing of members to serve in the room of those whose seats are become vacant.

Vacancy occurring during the session.

By 24 George III. c. 26, during a parliamentary recess, whether by prorogation or adjournment, the speaker is required to make out a new writ for electing a member in the room of any member who shall die, or who shall become a peer of Great Britain, as soon as he shall receive notice thereof by a certificate under the hands of two members[1].

During a parliamentary recess.

(8.) By Stat. 53 George III. c. 89, "the messenger or pursuivant of the Great Seal, or his deputy, after receiving the writs, whether upon a new parliament, or upon vacancies during a session of parliament, is forthwith to carry them to the General Post-office in London, and there to deliver them to the postmaster or postmasters-general for the time being, or to such other person or persons as he or they shall depute to receive the same (which deputation is thereby required to be made, &c.); and such deputy or deputies, on receipt of the writs, is to give an acknowledgment in writing, expressing the time of such delivery, and to keep a duplicate of such acknowledgment, signed by the parties respectively, to whom and by whom the same shall be delivered."

TRANSMISSION OF ELECTION WRITS.

Delivery to the postmaster-general.

The Post-office authorities must despatch all such writs

Duties of the officers of the post-office.

[1] Vide etiam 52 George III. c. 24; et Ibid. cc. 114, 144. Rogers, 2—4.

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free of postage, by the first post, under covers, to the officer to whom the same shall be directed, with directions to the postmaster of the town, or nearest to the town, where such officer shall hold his office, requiring him forthwith to carry such writs to such office, and to deliver them to such officer to whom they shall be directed, or to his deputy, and who is required to give a memorandum of the same.

Punishment for neglecting to deliver the parliamentary writs.

Every person concerned in the delivery of any writ, who wilfully neglects or delays to deliver it, or accepts any fee, or does anything in violation of the Act, is guilty of a misdemeanour.

Indorsement on the writ by the officer to whom directed.

The writ being delivered to the proper officer, he is required, by 7 & 8 William III. c. 25, s. 1, upon receipt thereof, to endorse upon the back of the writ the day he received the same.

PROCLAMATION FOR COUNTY ELECTION. Stat. 25 George III. c. 34.

(9.) By Stat. 25 George III. c. 84, s. 4, the sheriff must, "within two days after the receipt of the writ, cause proclamation, where the ensuing election ought by law to be holden, of a special county court, to be there holden for the purpose of such election only, on any day, Sunday excepted, not later, from the day of making such proclamation, than the sixteenth day, nor sooner than the tenth day; and that he shall proceed in such election, at such special county court, in the same manner as if the said election was to be held at a county court, or at an adjourned county court, according to the laws now in being."

Election not before 10th nor after 16th day from making the proclamation.

Cities being counties. Stat. 19 George II. c. 28.

The notice of election to be given in towns and cities being counties, is regulated by 19 George II. c. 28, which enacts,—"That the sheriff or sheriffs shall forthwith, on the receipt of the writ, cause public notice to be given of the time and place of election, and shall proceed to election thereupon, within the space of eight days next after that of his receipt of the said writ, and give three days' notice thereof at least, exclusive of the day of the receipt of the writ, and of the day of election."

Election within eight days.

NOTICE OF ELECTION IN BOROUGHS, &c.

The practice with regard to boroughs is regulated by 7 & 8 William III. c. 25, s. 1. "Every officer, to whom the execution of the writ belongs, shall forthwith, upon receipt of the same, make out the precept or precepts to each borough, town corporate, port, or place, within his jurisdiction; and within three days after the receipt of the said writ of election, shall, by himself or proper agent, deliver, or cause to be delivered, such precept or precepts to the proper officer of

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every such borough, &c., to whom the execution of such precepts belong; and every officer (having received the precept) shall indorse the day of his receipt thereof, in the presence of the party from whom he received it, and shall forthwith cause public notice to be given of the time and place of election, and shall proceed to election thereupon, within the space of eight days next after the receipt of the same precept, and give four days' notice at least of the day appointed for the election."

Four days' notice.

Election in eight days.

This act, shortly after its enactment, underwent an alteration with regard to the Cinque Ports, by 11 & 12 William III. c. 2, which enacted,—"That the proper officer of the Cinque Ports shall be allowed six days, from the receipt of such writ, for the delivery of the precept[1]."

Cinque Ports.

By Stat. 33 George III. c. 64, s. 1,—"All notices of elections shall be given publicly, at the usual place or places, within the hours of eight in the forenoon, and four in the afternoon, from the 25th of October to the 25th of March, inclusive; and within the hours of eight in the forenoon, and six in the afternoon, from the 25th of March to the 25th of October, inclusive. No other notice to be binding:"—but it seems that a mistake in the place of election, without fraud or improper motive, will not vitiate the election.

Time and place for giving notice of an election.

Stat. 33 George III. c. 64.

The continuance of polls for counties is limited to two days, and for cities and boroughs to one day, besides the day of nomination; counties are also divided into districts for polling, and the polls for cities and boroughs are to be at different booths.

Continuance of polls.

Stat. 2 & 3 William IV. c. 45; 5 & 6 William IV. c. 86.

(10.) Though treating, in most of the instances when it takes place, would fall within the description of bribery, yet as it does not necessarily amount to that offence, it was specifically provided against; first, by order of the House, declaring it to be bribery, if extended beyond a limited expense, and afterwards by Stat. 7 William III. c. 4. All entertainment or refreshment given or allowed by a candidate, directly by himself or his agents, or indirectly, "by any other ways or means" on his behalf, or at his "charge,"—that is, "ways or means" resorted to by others at his desire, or with his knowledge, without reference to the extent or extravagance of the entertainment, or to any corrupt intent, or to the effect it

TREATING AT PARLIAMENTARY ELECTIONS.

[1] Vide etiam 11 George III. c. 55; 22 George III. c. 31; 44 George III. c. 60; 1 William IV. c. 74.

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might have upon the result of the election, will, if given after the teste of the writ, or after a place has become vacant, avoid the election.—The 7 William III. c. 4, having enacted and declared that "no person hereafter to be elected, &c., after the teste of the writ of summons to parliament, or after the teste or issuing out or ordering of the writ or writs of election upon the calling or summoning of any parliament hereafter, or after any such place becomes vacant, &c., shall or do hereafter by himself or themselves, or by any other ways or means on his or their behalf, or at his or their charge before his or their election, directly or indirectly, give, present, or allow, to any person or persons having voice or vote at such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to any such county, city, town, borough, port, or place in general, or to or for the use, benefit, employment, profit, or preferment, of any such person or persons, place or places, in order to be elected, or for being elected, to serve in parliament for such county, &c."

Stat. 7 William III. c. 4.

Giving any present, gift, reward, or entertainment.

By Sect. 2,—"Every person or persons so giving, &c., shall be disabled and incapacitated, upon such election, to serve in parliament for such county, &c., and shall be deemed and taken to be no member of parliament, and shall not sit, act, or vote, or have any place in parliament, but shall be, to all intents and purposes, as if he had never been returned or elected member for the parliament[1]."

Disqualifications from bribery.

In order to limit the expenses of elections, and to check corrupt practices, it is enacted, by Stat. 7 & 8 George IV. c. 37, s. 2, "That no person to be hereafter elected to serve in parliament shall, after the teste of the writ of summons, or after such place becomes vacant in time of parliament, before his election, by himself or agent, directly or indirectly, give or allow to any person having a vote at such election, or to any inhabitant of the county, city, town, borough, port, or place, any cockade, riband, or other mark of distinction," under a penalty of 10*l.*[2]

Distribution of ribands or other party distinctions.

7 & 8 George IV. c. 37.

[1] *Ribbans* v. *Cricket*, 1 B. & P. 264; *Herefordshire*, 1 Peck. 185; sed vide *Radnorshire*, ibid. 494.

[2] The parliamentary decisions relative to treating are embodied in the following cases:—*Westminster*, 1 Doug. 162; Notes on *Bristol* Case, 1 Doug. 288; *Ipswich*, 1 Luders, 31—62; *Norwich*, 3 Lud. 444—448; Second

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Effects of treating.

Treating not only operates in avoidance of the candidate's return at the particular election, but disqualifies him at the subsequent election from being elected[3].

BRIBERY, disqualifies the electors and elected.

(11.) Bribery, which is the creation, or the attempt to create an undue influence over the disposition of suffrages by a lucrative consideration; or a voluntary subjection to such influence[1]; is also a disqualification from exercising the elective franchise, or from a member retaining his seat in parliament.

Principles embodied in the statutes aginst corruption and bribery.

The statutes against corruption and bribery contemplate an act completed by payment or promise on the one side, and acceptance on the other.

The definition given of a person guilty of bribery in Stat. 2 George II. c. 24, is, that if, "by himself or any person employed by him, he doth or shall, by any gift or reward, or by any promise or agreement or security for any gift or reward, corrupt or procure any person to give his vote, or to forbear to give his vote in any such election."

Incapacities arising from a conviction for perjury or bribery.

No person convicted of perjury, or subornation of perjury, or of having asked or received any bribe, is, after such conviction, capable of voting at any election. This exclusion is "for ever," but is only applicable to those who have been convicted in a court of law; and every prosecution for bribery must be commenced within two years after the act shall have been committed[2].

Voter giving or forbearing to give his vote for money.

A voter who agrees or contracts for any money or other reward to give or forbear to give his vote at an election, is liable to the penalties of Stat. 2 George II. c. 24, s. 7, though he never intended to perform the corrupt agreement[3].

Wager between two voters.

A wager laid by two voters in opposite interests, upon the event of an election, is bribery[4]; for they are biassed in the

Norwich, 3 Luders, 500; *Herefordshire*, 1 Peck. 186—214; *Cirencester*, 1 Peck. 467, 468; *Radnorshire*, 1 Peck. 494—496; *Middlesex*, 2 Peck. 31; *Durham*, 2 Peck, 178; *First Southwark*, Clifford, 30—80; *Chester*, Corb. & Dan. 69—72; Talbot's *Forfar Case*, 70—75; *Oxford*, 1 P. & K. 60—69, 95; *Montgomery*, 1 P. & K. 172, 173; *Second Montgomery*, 1 P. & K. 464; *Hertford*, 1 P. & K. 553; *Ward* v. *Nanney*, C. & P. (N. P.), 399; Wordsworth's Dig. Elect. Rep. 110—118; Rogers, 73, 239—242, 247.

[3] *First and Second Southwark*, Clifford. Shepherd, 55.

[1] Shepherd, 51.

[2] 1 Wilson, 38. 3 Burr. 1341. 4 Burr. 2283, 2469. Stat. 2 George II. c. 24, s. 6; 9 George II. c. 24, s. 7. Rogers, 90.

[3] *Henslow* v. *Fawcett*, 4 N. & M. 585. [4] Rogers, 236.

NOTES.

disposition of their votes by the hope of a pecuniary compensation.

Stat. 2 George II. c. 24.

Under Stat. 2 George II. c. 24, s. 7, a person asking for money or other reward, by way of gift, &c., is liable to the penalties of that act; but it is doubtful whether his vote is bad, unless there be an understanding that he is to have what he asked for[5].

Any undue influence vitiates an election.

It is essential to the very idea of election that it should be *free*, and this has been declared by the legislature, in Stat. Westminster I., with regard to elections in general, and by the Declaration of Rights with regard to elections of members of parliament. Hence it is understood that, independent of the positive statutes against bribery, whenever a person is returned in consequence of an undue influence acquired by that means, his election is void; and that every vote purchased by bribery is also void; the person who gave his voice under such influence, being to be considered as if he had not voted at all.

Purchasing a seat in parliament.

Stat. 49 George III. c. 118.

Independent of corrupting the individual voter, another corrupt system arose, namely, the member purchasing his return, of him who had sufficient influence in the borough to command the electors; to repress which, Stat. 49 George III. c. 118, enacted, not only that if a person gives or promises any money or office, but if he knows of, and consents to, the giving or the promising, if returned, his return should be void; if not returned, he should still forfeit 500*l.*; and in either case, the party receiving should forfeit 500*l.*; and if the party conferring any place under sect. 3, held any office under the crown, the penalty was to be 1000*l.*

A candidate liable for the acts of his agent.

"Knowledge of, and consent to," an act done by others are sufficient to make a candidate liable for all the consequences of this act; it is not necessary that a party should direct an act to be done; that is, be the moving party in doing it, or ratify it when done; if he knows of its being done, and sanctions it by his silence and non-intervention, and reaps the benefit of it afterwards, it would be a knowing of, and consenting to, within the statute.

Bribery at election of members of parliament is stated to have been a crime at common law, and punishable by indictment or information.

[5] Rogers on Elections, 91.

NOTES.

Principal cases upon which questions of bribery have arisen.

The principal cases upon which questions of bribery at common law have arisen have been as follows.

Money, or tickets for money or food, given previous to an election:—money given after, there being no previous promise:—offer of a bribe, by a candidate, which is not accepted;—payments for travelling expenses and loss of time, or for admission of freemen:—wager between two voters, or with one voter, on the issue of an election.

Principles under which the House of Commons have acted in cases of bribery.

In these cases, committees have usually considered whether what was done or paid was done with an intention to influence and corrupt the voter; for instance, a trifling wager, when the bet could not be, from its amount, an object of gain to the voter[6], or a payment of the charges of travelling, sufficient to cover the expenses out of pocket, would hardly be deemed a bribe. At the same time, if they were convinced of a corrupt intention, they have not allowed themselves to be deceived by any disguise, however specious, or duped by any contrivance, however ingenious or plausible the machinery might have made it appear. A thing strictly legal in itself, may be made fraudulent and void by its being done with a corrupt intention: thus, the conveyance of an advowson in fee is legal; but if it be done for the purpose of carrying a simoniacal contract into effect, it is void for so much as goes to effect that purpose; and if the sound part cannot be separated from the corrupt, it is void altogether; it is not, as in the cases of usury, and some others, avoided by the positive and inflexible enactment of a statute, but left to the operation of the common law, which will reject the illegal part, and leave the rest untouched, if they can fairly be separated[7].

[6] Sed vide *New Windsor*, K. & Ombl. 195.

[7] Per Gibbs, C. J., *Greenwood* v. the *Bishop* of *London*, 1 Marsh, 309. Rogers, 229. As to bribery, generally, vide *Bletchingly*, Glanv. 41, (a); *Bristol*, 1 Doug. 260—280; Notes to *St. Ives'* case, 2 Doug. 400, 403; *Second Cricklade*, 4 Doug. 55; *Ipswich*, 1 Lud. 35—62; *Barnstaple*, 1 Peck. 91; *Coventry*, 1 Peck. 97; *Berwick*, 1 Peck. 402—405; *Aylesbury*, 2 Peck. 259—261; *First Canterbury*, Clifford, 355; *Worcester*, Corb. & Dan. 173; *Barnstaple*, 1 Corb. & Dan. 193; *Newry*, 1 P. & K. 151—158; *Linlithgowshire*, 1 P. & K. 295; *Ennis*, 1 P. & K. 528; *Carrickfergus*, 1 P. & K. 532; *Huntingtower* v. *Ireland*, and *Same* v. *Gardiner*, 1 B. & C. 297; *Curgenven* v. *Cuming*, 4 Burr. 2504; *Davy* v. *Baker*, 4 Burr. 2471; *Combe*, q. t. v. *Pitt*, 1 W. Bl. 523; *Lilly* v. *Corne*, 1 Selw. N. P. 650, n; *Anon. Lofft*, 552; 1 T. R. 56; *Sutton* v. *Bishop*, 1 W. Bl. 665; R. v. *Heydon*, 3 Burr. 1359; *Sulston* v. *Norton*, 3 Burr. 1235; R. v. *Pitt*, 1 W. Bl. 380; *Cuming* v. *Sibly*, 4 Burr. 2489; *Pugh* v. *Curgenven*, 3 Wils. 35; *Talmash* v. *Gardiner*, 1 D. & R.

NOTES.

Effects of bribery.

The Bribery Act makes no mention of any parliamentary disqualification, affecting a member's seat; the effect, therefore, of an act of bribery not within 7 William III. c. 4, is in that respect determined by the law of parliament.

Bribery by a candidate.

Bribery by a candidate, though in one instance only, and though a majority of unbribed votes remain in his favour, will avoid the particular election, and disqualify him from being re-elected to fill such vacancy.

This disqualification extends not only to candidates at the prior election; but it seems that any person having committed an act of bribery, which is afterwards avoided, though for another cause, is disqualified from the next immediate vacancy; and the votes given to a candidate, after notice of disqualification, are thrown away.

Bribery affects the petitioning candidate.

The incapacity from bribery affects the petitioning candidate equally with the sitting member, as where the petitioner established a majority of votes, and was proved guilty of bribery, the election was avoided, and he was disqualified for the vacancy so occasioned[8].

INTERFERENCE BY PEERS IN PARLIAMENTARY ELECTIONS.

(12.) The freedom of election may be disturbed, not only by force, but by undue or corrupt influence; this also is provided against by a resolution passed at the beginning of every session, and by a standing order to the effect, "that it is a high infringement of the liberties of the commons for any peer, except Irish peers, when candidates for places in Great Britain, to concern themselves in the election of members of the House of Commons." And a declaration, to the same effect, was made by the House, in 1779, in respect of the ministers and the servants of the crown[1].

By canvass and solicitation.

In the Worcester case[2], the select committee held themselves bound by the words of their oaths to try "the matter of the petition," to receive proof of a peer interfering by canvass and solicitation, which was alleged in the petition, but no special report was made to the House.

512; *Petrie* v. *White*, 3 T. R. 5; *Grey* v. *Smithyes*, 4 Burr. 2271; R. v. *Pippett*, 1 T. R. 235. Wordsworth, Dig. Elect. 15—20.

[8] Shepherd, 54, 55.

[1] 37 Journ. 507. Shepherd, 57.

[2] 3 Doug. 255; vide 68 Journ, 341. *Hertford*, P. & K. 552. Rogers, 217.

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INTERFERENCE BY THE MILITARY IN PARLIAMENTARY ELECTIONS.

(13.) The House of Commons passed a resolution in 1645[1], "against any interruption to the freedom of election, by any commander, governor, officer, or soldier, that hath not the right of electing," and, in 1741, resolved, "that the presence of a regular body of soldiers at an election of members to serve in parliament, is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom[2];" and the 8 George II. c. 30, which recognises, by its preamble, that by the ancient common law of the land, all elections ought to be free[3], enacts, "that when, and as often as any election of any peer or peers, to represent the peers of Scotland in parliament, or of any member or members to serve in parliament, shall be appointed to be made, the secretary-at-war for the time being, or in case there shall be no secretary-at-war," the person officiating in his place, "shall at some convenient time before the day appointed for such election, issue and send forth proper orders in writing for the removal of every such regiment, troop, or company, or other number of soldiers as shall be quartered or billeted in any such city, &c., or place where such election shall be appointed to be made, out of every such city, &c., or place, one day at the least before the day appointed for such election, to the distance of two or more miles from such city, &c., and not to make any nearer approach to such city, &c.," until one day after the ending of the poll, and close of the poll books. And this is to be done by the secretary under the penalty of forfeiting his office, with incapacity of holding any other, upon conviction[4]. But in the case of a particular vacancy, during the existence of parliament, he is not subject to the penalty, unless he has received notice of the vacancy by the officer making out the new writ[5].

Stat. 8 George II. c. 30.

The time previous to an election, that the military must leave the borough.

There is, however, an exception in the act, as to Westminster and Southwark, in respect of the king's guards, as well as all other places where any of the royal family are resident at the time, in respect of their guards, and as to all fortified places for the soldiers composing the garrison[6]. Nor does it extend to prevent individual soldiers or officers giving their votes[7].

Exception as to the Guards.

Soldiers may vote.

[1] 4 Journ. 346. [2] 24 Journ. 37. [3] Vide 3 Edward I. c. 5.
[4] 8 George II. c. 30, s. 1. [5] Ibid. c. 5, s. 5.
[6] Ibid. s. 3. [7] Ibid. s. 4.

NOTES.

RIOTS.

Stat. 5 & 6 William IV. c. 36.

The sheriff or other returning officer, or the lawful deputy of any returning officer, can, where the proceedings are interrupted or obstructed by any riot or open violence, adjourn the poll till such interruption shall have ceased: the 5 & 6 William IV. c. 36, s. 70, having enacted that the returning officer or his deputy shall not, because of riot, "terminate the business of such nomination, nor finally close the poll, but shall adjourn the nomination or the taking of the poll at the particular place until the following day; and, if necessary, shall further adjourn till the interruption or obstruction shall have ceased; and the day on which the business of the nomination shall have been concluded, shall be deemed to have been the day fixed for the election, and the commencement of the poll shall be regulated accordingly; and any day whereon the poll shall have been so adjourned shall not, as to such place where it was so adjourned, be reckoned the day of polling at such election; and whenever the poll shall have been so adjourned by any deputy of any sheriff, or other returning officer, such deputy shall forthwith give notice of such adjournment to the sheriff or returning officer, who shall not finally declare the state of the poll, or make proclamation of the member or members chosen, until the poll so adjourned at such place shall have been finally closed, and the poll-books delivered or transmitted to the returning officer;—provided that the adjournment shall not be to a Sunday, but that in every case in which the day to which the adjournment would be otherwise made shall happen to be a Sunday, Good Friday, or Christmas Day, that day or days shall be passed over, and the following day shall be the day to which the adjournment shall be made."

Adjournment of nomination or poll.

Notice of adjournment.

Riots, accompanied with personal intimidation, will avoid the election.

If riots are carried to a great extent, accompanied with personal intimidation, and exclude the possibility of a fair exercise of the franchise, they will avoid the election[8]. But unless the proceedings were actually interrupted, a riot will not affect the event of an election[9]: thus, in the case of Exeter, where one man was knocked down, and if any person cried out against Mr. Ball, the sitting member, the butchers cried

[8] *Pontefract*, May 28, 1624; *Southwark*, Dec. 10, 1702; *Coventry*, Feb. 5, 1706; *Westminster*, Nov. 6, 1722; *Coventry*, Nov. 20, 1722, and March 22, 1736; *Westminster*, Dec. 22, 1741; *Pontefract*, Nov. 24, 1768; were avoided on the ground of riots.

[9] 16 Journ. 254. *Morpeth*, 1 Doug. 147; *Knaresborough*, 2 Peck. 312; *Coventry*, P. & K. 335, C. & R. 260, P. & K. 338, *in notis*.

out, "Knock them down;"—the House agreed that the sitting member was duly elected.

NOTES.

(14.) The Act of Union of A.D. 1706, created a new kingdom of "Great Britain," and constituted a new peerage,—the peerage of Great Britain: the Act of Union of A.D. 1800, created another new kingdom,—the United Kingdom of Great Britain and Ireland, and constituted a new peerage,—the peerage of that United Kingdom.

THE UNIONS OF SCOTLAND AND IRELAND WITH ENGLAND.

By the Act of the parliament of England of 5 Anne, c. 8, for an union of the two kingdoms of England and Scotland, and by a corresponding Act of the parliament of Scotland, the two kingdoms were united into one kingdom, by the name of Great Britain, according to articles of a treaty of union recited in the acts; and it was provided that the United Kingdom should be represented in one and the same parliament, to be styled the parliament of Great Britain; that sixteen peers of Scotland at the time of the union should sit and vote in the House of Lords, and forty-five of the representatives of Scotland in the House of Commons of the parliament of Great Britain; and provision was made for the issue of a writ under the great seal of the United Kingdom, directed to the privy council of Scotland, commanding them to cause sixteen peers who were to sit in the House of Lords to be summoned to parliament, and forty-five members to be elected to sit in the House of Commons of the parliament of Great Britain, according to the agreement of the treaty of union, in such manner as by an Act of parliament of Scotland was or should be settled, which Act was declared to be part of the treaty; and when the time and place of meeting of the first parliament of Great Britain should be appointed, a writ should be issued under the great seal, directed to the privy council of Scotland, for summoning the sixteen peers and electing the forty-five members by whom Scotland was to be represented in the parliament of Great Britain; and the lords of parliament of England, and the sixteen peers of Scotland, (such sixteen peers being summoned and returned in the manner agreed in the treaty), and the members of the House of Commons of the parliament of England, and the forty-five members for Scotland (such members being elected and returned in the manner agreed in the treaty), should assemble and meet respectively in the respective Houses of the parlia-

Stat. 5 Anne, c. 8.

Sixteen peers of Scotland, and forty-five commoners to be members of the parliament of Great Britain.

Mode of summoning the representatives of Scotland.

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ment of Great Britain, at such time and place as should be appointed by her majesty, and should be the two Houses of the first parliament of Great Britain.

Privileges of the Scotch peers of sitting upon the trials of peers.

That the sixteen peers of Scotland who were to sit in the House of Lords of the parliament of Great Britain, should have all privileges of parliament which the peers of England then had, and which they or any peers of Great Britain should have after the union, and particularly the right of sitting upon the trials of peers; and in case of the trial of any peer in time of adjournment or prorogation of parliament, the said sixteen peers should be summoned in the same manner, and have the powers and privileges at such trials, as any other peers of Great Britain; and in case any trials of peers should happen when there should be no parliament in being, the sixteen peers of Scotland who sat in the last preceding parliament should be summoned in the same manner, and have the same powers and privileges at such trials, as any other peers of Great Britain.

Rank and precedency of the peers of Scotland.

That all peers of Scotland, and their successors to their honours and dignities, should, from and after the union, be peers of Great Britain, and have rank and precedency next and immediately after the peers of the like orders and degrees in England at the time of the union, and before all peers of Great Britain of the like orders and degrees who might be created after the union, and should be tried as peers of Great Britain, and should enjoy all privileges of peers as fully as the peers of England did then, or as they or any other peers of Great Britain might thereafter, enjoy the same, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting on the trial of peers.

Election of the Scotch peers.

The act of the parliament of Scotland, for settling the manner of electing the sixteen peers and forty-five members to represent Scotland in the parliament of Great Britain, provided that the sixteen peers, who should have right to sit in the House of Peers in the parliament of Great Britain on the part of Scotland, should be named by the peers of Scotland whom they would represent, their heirs or successors to their dignities and honours, out of their own number, by election in manner mentioned in the act, and that the forty-five representatives of Scotland in the House of Commons in the parliament of Great Britain should be chosen as in the act

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directed; and this act of the parliament of Scotland was, by the act of the parliament of England before mentioned, declared to be as valid as if part of the articles of union ratified and approved by the acts of the two parliaments for the union of the two kingdoms.

The rights of the representative peers, merely personal.

The effect of these acts of the two parliaments was to give to the sixteen peers, to be elected by the peers of Scotland to sit as their representatives in the parliaments of Great Britain, legislative rights and rights of judicature as such elected peers in the parliament of Great Britain; but such rights were merely personal, created by election, and vested in the persons elected during the parliament in which they were to sit and vote, except in the case of a trial of a peer when there should be no parliament, and then only during the interval. But during this period the elected peers have all the legislative and judicial rights of the temporal peers of England before the union, and of the peers of Great Britain created since the union.

The sixteen elected peers, have alone the right to writs of summons.

The declaration that the peers of Scotland generally should be peers of Great Britain, and have all the privileges of peers of Great Britain, except as in the acts excepted, also gave to all the peers of Scotland, rights as peers of Great Britain merely personal, not including any legislative or judicial rights, nor connected in any manner with writs of summons to parliament, such writs being issued only to the sixteen elected peers, who in the parliament were to represent all the peers of Scotland by whom they were to be elected.

Prerogation of the crown to increase the number of the commons, impliedly taken away.

The limitation of the representatives of Scotland in the House of Commons of the parliament of Great Britain to the number of forty-five, impliedly limited the number of representatives of England in the same House of Commons to the number then to be elected for England according to law, and consequently took from the crown the right which had been exercised by it, of adding to the number of representatives of England in the House of Commons; at the same time that the power of the crown to make peers of Great Britain, giving to the persons so to be created, the rights and privileges of peers of Great Britain, was impliedly though not expressly reserved; and the constitution of the two Houses of Parliament of Great Britain was thus definitively settled, except as it might be altered by a legislative act, consistent with the terms of the treaty of union.

NOTES.

The relative rights and privileges of the Scotch peers since the Act of Union.

In consequence of these acts of union, the parliament of Great Britain thenceforth consisted of the spiritual peers of England, the temporal peers of England created before the union, sixteen of the peers of Scotland created before the union, and as many peers of Great Britain created subsequently to the union as the king might think fit to create; and there remained a distinct body of peers of Scotland, not elected to sit in parliament, but who had all the rights and privileges of peers of Great Britain, except the legislative and judicial functions. The rights of the temporal peers of England were thus modified by the acts of union: they became peers of a new kingdom—the kingdom of Great Britain; and there were associated with them, in the exercise of their legislative and judicial functions, sixteen persons, peers of Scotland, elected by and representing the peers of Scotland, and made by the acts of union, peers of the new kingdom of Great Britain.

The peers of England became peers of a new kingdom.

The component parts of the peers of Great Britain.

There were also associated with the peers of England, except in the exercise of legislative and judicial functions, all the peers of Scotland, entitled to all the rights and privileges of the peerage of England, except the rights and privileges incident to their legislative and judicial functions; and these were also made peers of Great Britain: added to these were the peers of Great Britain created after the union, forming, with the peers of England before the union, and the sixteen elected Scottish peers, the lords temporal in parliament, and with all the peers of England and Scotland created before the union, the peers of Great Britain.

UNION OF GREAT BRITAIN WITH IRELAND.

A further change was made by the union of Great Britain and Ireland. By an act of the parliament of Great Britain, of 40 George III., and a corresponding act of the parliament of Ireland, for the union of Great Britain and Ireland, the kingdoms of Great Britain and Ireland were united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland; and it was provided, that the United Kingdom should be represented in one and the same parliament, to be styled the parliament of the United Kingdom of Great Britain and Ireland: that four lords spiritual of Ireland by rotation of sessions, and twenty-eight lords temporal of Ireland elected for life by the peers of Ireland, should be the number to sit and vote on the part of Ireland in the House of Lords of the parliament of the United Kingdom, and one hundred commoners should be the number to sit and vote on

Four lords spiritual by rotation, twenty-eight peers, and one hundred commoners, to have parliamentary rights.

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the part of Ireland in the House of Commons of the parliament of the United Kingdom; and that such act as should be passed in the parliament of Ireland previous to the union, to regulate the mode by which the lords spiritual and temporal, and the commons, to serve in the parliament of the United Kingdom on the part of Ireland should be considered as part of the treaty of union. That any person holding any peerage of Ireland then subsisting, or thereafter to be created, should not thereby be disqualified from being elected to serve, or from serving or continuing to serve, for any county, city, or borough of Great Britain, in the House of Commons of the United Kingdom, unless he should have been previously elected to sit in the House of Lords of the United Kingdom; but that so long as such peer of Ireland should so continue to be a member of the House of Commons, he should not be entitled to the privilege of peerage, nor be capable of being elected to serve as a peer on the part of Ireland, or of voting at any such election; and that he should be liable to be sued, indicted, proceeded against, and tried as a commoner, for any offence with which he might be charged.

Irish peers not disqualified from being members of the commons.

A restricted power was also reserved to the crown to create peers of Ireland; and it was declared that the lords spiritual and temporal and commons of Great Britain, together with the lords spiritual and temporal and commons returned, as stated in the act, on the part of Ireland, should constitute the two Houses of Parliament of the United Kingdom. It was further provided, that the lords of parliament on the part of Ireland in the House of Lords of the United Kingdom, should at all times have the same privileges of parliament which should belong to the lords of parliament on the part of Great Britain; and, that the lords spiritual and temporal respectively, on the part of Ireland, should at all times have the same rights in respect of their sitting and voting upon the trial of peers, as the lords spiritual and temporal respectively, or the peers of Great Britain; and that all lords spiritual of Ireland should have rank and precedency next immediately after the lords spiritual, of the same rank and degree, of Great Britain, and should enjoy all privileges as fully as the lords spiritual of Great Britain then held, or might thereafter enjoy the same (the right and privilege of sitting in the House of Lords and the privileges depending thereon, and particularly the right of sitting on the trial of peers, excepted); and that the persons

The crown restricted in the creation of Irish peers.

Privileges of the Irish peers.

NOTES.

Rank and precedency.

holding any temporal peerage of Ireland, existing at the time of the union, should, from and after the union, have rank and precedency next and immediately after all the persons holding peerage of the like order and degree in Great Britain, subsisting at the time of the union; and that all peerages of Ireland created after the union, should have rank and precedency with the peerages of the United Kingdom so created, according to the dates of their creation; and that all peerages both of Great Britain and Ireland, then subsisting, or thereafter to be created, should in all other respects, from the date of the union, be considered as peerages of the United Kingdom; and that the peers of Ireland should, as peers of the United Kingdom, be sued and tried as peers, except as aforesaid, and should enjoy all privileges of peers, as fully as the peers of Great Britain (the right of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted).

Mode in which the Irish representatives were to be summoned.

An act of the parliament of Ireland, which regulated the mode in which the lords spiritual and temporal, and the commons, to serve in the parliament of the United Kingdom on the part of Ireland, should be summoned and returned to the said parliament, was by the acts of the two parliaments of Great Britain and Ireland, for the union of the two kingdoms, made part of those acts, and incorporated within the same.

The effect of the Acts of Union.

The effect of these acts for the union of the kingdoms of Great Britain and Ireland, was to give to the twenty-eight peers to be elected by the peers of Ireland to sit as their representatives in the parliament of the United Kingdom of Great Britain and Ireland, rights as such elected peers in the parliament of the United Kingdom, merely personal, enduring only during their respective lives, and not transmitted to their descendants; and the declaration that the peers of Ireland, except those who should be members of the Commons House of parliament, should be peers of the United Kingdom, and have all the privileges of peers of the United Kingdom, except as in the acts excepted, also gave to all the peers of Ireland, except those who should be members of the Commons House of parliament, rights merely personal, and suspended the rights of those who should be members of the Commons House of parliament whilst they should be respectively members of such House. The limitation of the representatives of Ireland in the Commons House of parliament to one hundred, also con-

Limitation of the number of representatives.

NOTES.

firmed the limitation of the number of representatives of England in the same House of Commons, before impliedly enacted by the acts for the union of England and Scotland. The power of the crown to create peers of Scotland was impliedly taken away by the act for the union of England and Scotland; but the power of the crown to create peers of Ireland was not taken away absolutely, but was limited by the acts for the union of Great Britain and Ireland.

The distinction between the terms of the two Unions respecting the peers.

The remarkable distinctions between the terms of the two unions, with respect to peers, are the election of the sixteen peers of Scotland for the parliament only for which they are elected, their rights determining with the dissolution of that parliament, the twenty-eight Irish peers being elected for life; the permission to peers of Ireland to divest themselves of their privileges of peerage by sitting in the Commons House of Parliament; and the power reserved to the crown of creating new peers of Ireland. In other respects the relative situations of the peers of England and Scotland, after the union of the two kingdoms of England and Scotland, and of the peers of England, Scotland, Great Britain, Ireland, and the United Kingdom of Great Britain and Ireland after the last union, are precisely the same[1].

The relative situation of the peers of Scotland and Ireland to those of England.

[1] Rep. Dig. Peer. D. V.

Chapter V.

Of the Executive Power.

De Lolme.

The king, in the exercise of his power of government, is no more than a magistrate.

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

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

The first prerogative of the king is the administration of justice.

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

The chie fof all courts of law.

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

Universal proprietor of the kingdom.

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

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[1] Vide Note (1.) p. 568.

[2] Ibid. (2.) p. 569.

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

II. The second prerogative of the king is, to be the *fountain of honour*, that is, the distributor of titles and dignities: he creates the peers of the realm, as well as bestows the different degrees of inferior nobility[4]. He moreover disposes of the different offices, either in the courts of law, or elsewhere. The fountain of honour.

III. The king is the superintendent of commerce[5]; he has the prerogative of regulating weights and measures[6]; he alone can coin money[7], and can give a currency to foreign coin[8]. Superintendent of commerce.

IV. He is the supreme head of the church[9]. In this capacity he appoints the bishops, and the two archbishops[10]; and he alone can convene the assembly of the clergy. This assembly is formed in England, on the model of the parliament; the bishops form the upper house: deputies from the dioceses, and from the several chapters, form the lower house: the assent of the king is likewise necessary to the validity of their acts, or canons[11]; and the king can prorogue, or dissolve, the convocation[12]. Supreme head of the church.

V. He is, in right of his crown, the generalissimo of all sea or land forces whatever; he alone can levy troops, equip fleets, build fortresses, and fill all the posts in them[13]. Generalissimo of all sea and land forces.

VI. He is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation; he sends and receives Prerogative with regard to the treatment of foreign nations.

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[3] Vide Note (3.) p. 569. [4] Vide ante, 124—126, 559—565.
[5] Co. Litt. 172. Lord Raym. 181, 1542. Com. Dig. Prerog. D. 38. 1 Chitty's Com. Law, 491. 2 Inst. 220. Com. Dig. Market. 2 Chitty's Com. Law, 142—161.
[6] Vide Note (4.) p. 570. [7] 1 Hale, P. C. 191.
[8] Vide Note (5.) p. 570. [9] Vide ante, 179—207, 215—252, 289—311, 479.
[10] Vide Note (6.). p. 570.
[11] Vide ante, 194, 195, 362, 363. [12] Vide Note (7) p. 570.
[13] Ibid. (8.) p. 571.

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ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper[14].

The king can do no wrong.

VII. In fine, what seems to carry so many powers to the height, is, its being a fundamental maxim, that THE KING CAN DO NO WRONG: which does not signify, however, that the king has not the power of doing ill, or, as it was pretended by certain persons in former times, that everything he did was lawful; but only that he is above the reach of all courts of law whatever, and that his person is sacred and inviolable[15].

NOTES.

(1.) Justice is not derived from the king, as from his free gift; but he is the steward of the public, to dispense it to whom it is due. He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual.

The original power of judicature is lodged in the society at large.

The original power of judicature, by the fundamental principles of society, is lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints: and in England this authority has immemorially been exercised by the king, or his substitutes.

The king has alone the right of erecting courts of judicature.

The king, therefore, has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected to assist him in executing this power; and equally necessary, that, if erected, they should be erected by his authority. And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

[14] Vide Note (9.) p. 571.

[15] Ibid. (10.) p. 572.

NOTES.

The king can only make courts to proceed according to the course of the common law, and he cannot erect a new court of chancery or conscience; that can only be effected by act of parliament, of which many instances have recently occurred[1].

The judicial power of the crown delegated to the judges.

By the long and uniform usages of many ages, our kings have delegated their whole judicial power to the judges of their several courts, which are the grand depositories of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament[2].

The king can only make courts of justice proceed according to the common law.

In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty, which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined to the executive, this union might soon be an overbalance for the legislative.

Advantages from the independence of the judges.

INDICTMENTS AT THE SUIT OF THE KING.

(2.) It is in the character of representative of the public, that criminal offenders are indicted at the suit of the king, and not as the avenger of injuries committed against himself.

PREROGATIVE OF MERCY.

(3.) The prerogative of mercy is inseparably incident to the crown, and the king is intrusted with it upon especial confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case[1].

The power of the crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons[2].

[1] Hawk. P. C. 2. [2] Com. Dig. Prerog. D. 28.
[1] Co. Litt. 114, B. Hale, P. C. 104. 3 Inst. 233. Show. 284.
[2] R. *v. Amery*, 2 T. R. 569.

NOTES.

REGULATION OF WEIGHTS AND MEASURES.

(4.) The king does not now possess the power of regulating the "weights and measures:" Stat. 5 George IV. c. 74, 6 George IV. c. 12, and 5 & 6 William IV. c. 63, having fixed the principles upon which they are to be regulated and preserved.

DECRYING THE COIN.

(5.) The king can at any time decry, or cry down, any coin of the kingdom, and make it no longer current: but the king cannot debase or enhance the value of the coin below or above the sterling value[1].

14 George III. c. 70.

All officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight, according to the king's proclamation. And by 13 George III. c. 71, any person may cut counterfeit gold money, or that which has been unlawfully diminished.

APPOINTMENT OF IRISH BISHOPS.

(6). By the Act of Union with Ireland, the crown has the appointment of the archbishops and bishops of that kingdom.

MEMBERS OF CONVOCATION.

(7.) All deans and archdeacons are members of the convocation of their province; each chapter sends one proctor or representative, and the parochial clergy in each diocese in Canterbury two proctors; but on account of the small number of dioceses in the province of York, each archdeaconry elects two proctors.

The York and Conterbury Convocations.

In York the convocation consists only of one house; but in Canterbury there are two houses, of which the twenty-two bishops form the upper house: and before the Reformation, abbots, priors, and other mitred prelates, sat with the bishops.

The lower house of convocation in the province of Canterbury consists of twenty-two deans, fifty-three archdeacons, twenty-four proctors for the chapters, and forty-four proctors for the parochial clergy.

Stat. 8 Henry VI. c. 1.

By Stat. 8 Henry VI. c. 1, the clergy, in their attendance upon the convocation, have the same privilege in freedom from arrest as the members of the House of Commons in their attendance upon parliament[1].

NOMINATION AND CONSECRATION OF SUFFRAGAN BISHOPS.

The nomination and consecration of suffragan bishops, is provided for by 26 Henry VIII. c. 14: and there are twenty-

[1] 2 Inst. 577.

[1] Bac. Abr. Courts Ecclesiastical, A. 1. Burn. Ecc. L. tit. Convocation.

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six places mentioned, for which bishops suffragan may be appointed.

Stat. 26 Henry VIII. c. 14.

The archbishop or bishop was to present two persons to the king, of whom he was to nominate one to be suffragan. The authority of such suffragans was to be limited by their commissions, which they were not to exceed under the pains of præmunire: and these commissions were to be given by the bishop presenting.

Stat. 1 & 2 Philip and Mary, c. 8. 1 Elizabeth, c. 1.

This statute of Henry VIII. was repealed by 1 & 2 Philip and Mary, c. 8, but was revived by 1 Elizabeth, c. 1. Bishops suffragan are spoken of in the Thirty-fifth Canon of 1604.

It is much to be regretted that the clergy have allowed this law to fall into desuetude, for there are many dioceses at the present moment where its application would be attended with beneficial results; and if it had been adopted in the diocese of Norwich, during the latter years of Bishop Bathurst, it would have been a very salutary regulation.

THE MILITARY POWER VESTED IN THE CROWN.

(8). The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose: it follows, therefore, from the very end of its institution, that, in a monarchy, the military power must be trusted in the hands of the prince[1].

WAR CAN ONLY BE DECLARED BY THE KING.

(9.) It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels.

In the king, therefore, as in a centre, all the rays of his people are united, and form by that union a consistency, splendour, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement that must afterwards be revised and ratified by a popular assembly.

What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without

[1] 1 Black. Com. B. 1, c. 7.

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the king's concurrence is the act only of private men. And so far is this point carried by our law, that it hath been held[1], that if all the subjects of England made war with a king in league with the King of England, without the royal assent, such war is no breach of the league.

Denunciation of war, precedes the commencement of hostilities.

According to the law of nations, a denunciation of war ought always to precede the actual commencement of hostilities, not so much that the enemy may be put upon his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. This principle is recognised by the English constitution, for no war with another nation is legal, unless it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it: and wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this prerogative.

THE POWERS OF THE CROWN ATTACHED TO IT FOR THE BENEFIT OF THE PEOPLE.

(10.) The splendour, rights, and powers of the crown, were attached to it for the benefit of the people, and not for the private gratification of the sovereign. They are therefore to be guarded on account of the public; they are not to be extended farther than the laws and constitution of the country have allowed them, but within these bounds they are entitled to every protection.

Mr. Locke defines prerogative as consisting in the discretionary power of acting for the public good where the positive laws are silent; if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner.

The law is the highest inheritance which the king has.

These principles are not only in accordance with those of nature, liberty, reason, and of society, but are recognised by the common law: thus Bracton wrote,—"The king ought

[1] 4 Inst. 152.

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not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law what the law has invested in him with regard to others, —dominion and power; for he is not truly king where will and pleasure rules, and not the law." So likewise it is stated in the Year Book of 19 Henry VI. fol. 63,—"The law is the highest inheritance which the king has; for by the law he himself and all his subjects are governed, and if there were no law there would be neither king nor inheritance."

The laws of England are the birthright of the people.

Whatever difficulties might have been raised, by either very wicked or very weak men, with respect to the "divine rights of kings," and other equally absurd and nonsensical theories, such as "non-resistance," have been destroyed by Stat. 12 & 13 William III. c. 2, which declares "that the laws of England are the birthright of the people thereof; and all the kings and queens, who shall ascend the throne of this realm, ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same, now in force, are ratified and confirmed accordingly."

In addition to this enactment, the king is bound by his coronation oath to govern according to law, to execute judgment in mercy, and to maintain the established religion.

Declaration against popery.

The Bill of Rights[1], and Act of Settlement[2], require that every sovereign of the age of twelve years, either at their coronation, or on the first day of the first parliament, upon the throne in the House of Peers, (which shall first happen,) shall repeat and subscribe the declaration against popery, according to Stat. 30 Charles II. Stat. 2, c. 1; and by Stat. 5 Anne, c. 8, every sovereign at his succession must take and subscribe an oath to preserve the Protestant religion, and Presbyterian church government in Scotland.

The king can do no wrong.

With respect to the fundamental maxim that the "king can do no wrong," this means only two things. First, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the king, nor is he answerable for it personally to his people; for this doctrine would totally destroy that

[1] Vide ante, 472. [2] Ibid. 473.

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constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice[3].

The king cannot misuse his power without the advice of evil counsellors.

The constitution has also raised a coercive authority to punish an abuse of the prerogative; for as a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men, if they dare to assist the crown in contradiction to the laws of the land, are punishable by means of indictments and parliamentary impeachments. And to such an extent is the principle carried, that the king, although the fountain of justice, cannot commit to prison the meanest of his subjects, unless the warrant is countersigned by a ministerial officer, who thus becomes personally responsible for the arrest.

[3] 1 Black. Com. 246. Plowd. 487.

CHAPTER VI.

The Boundaries which the Constitution has set to the Royal Prerogative.

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

Union of powers vested in the crown.

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

The king can only obtain subsidies from parliament.

This is the case of the king of England. He has, in that capacity, and without the grant of his people, scarcely any revenue. A few *hereditary duties* on the exportation of wool, which (since the establishment of

Hereditary duties.

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manufactures) are become tacitly extinguished; a branch of the excise, which, under Charles II. was annexed to the crown as an indemnification for the military services it gave up, and which, under George II., was fixed at seven thousand pounds; a duty of two shillings on every tun of wine imported; the wrecks of ships of which the owners remain unknown; whales and sturgeons thrown on the coast; swans swimming on public rivers; and a few other feudal relics, now compose the whole appropriated revenue of the king, and are all that remain of the ancient inheritance of the crown.

Military and naval force cannot be supported without the concurrence of parliament.

The king of England, therefore, has the prerogative of commanding armies, and equipping fleets; but without the concurrence of his parliament he cannot maintain them. He can bestow places and employments; but without his parliament he cannot pay the salaries attending on them. He can declare war; but without his parliament it is impossible for him to carry it on. In a word, the royal prerogative, destitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions; or, if you please, it is like a ship completely equipped, but from which the parliament can at pleasure draw off the water, and leave it aground,—and also set it afloat again, by granting subsidies[1].

Modes in which the commons acquired their privileges.

And indeed we see, that, since the establishment of this right of the representatives of the people, to grant or refuse subsidies to the crown, their other privileges have been continually increasing. Though these representatives were not, in the beginning, admitted into parliament but upon the most disadvantageous terms, yet they soon found means, by joining petitions to their money-bills, to have a share in framing those

[1] Vide Note (1.) p. 577.

laws by which they were in future to be governed[2]; and this method of proceeding, which at first was only tolerated by the king, they afterwards converted into an express right, by declaring, under Henry IV.[3], that they would not, thenceforward, come to any resolutions with regard to subsidies, before the king had given a precise answer to their petitions.

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The commons made grievances and supplies go hand in hand together.

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

(1.) From a return which was made to the House of Commons, on the 3rd March, 1837, the following is a statement of the public income and expenditure of the United Kingdom in the year ended 5th January, 1837:—

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

[2] Vide ante, 82—102, 104—110, 117—121, 131—137. [3] Ibid. 131—137.

An ACCOUNT of the INCOME and EXPENDITURE of the

INCOME, Year ended 5th January, 1837.

	£	£
CUSTOMS AND EXCISE:		
Spirits — Foreign	1,462,573	
Spirits — Rum	1,496,156	
Spirits — British	5,503,477	
Malt	5,848,950	
Hops	402,290	
Wine	1,794,033	
Sugar and Molasses	4,479,809	
Tea	4,674,535	
Coffee	691,606	
Tobacco and Snuff	3,397,108	
		29,750,537
Butter	238,306	
Cheese	105,067	
Currants and Raisins	311,916	
Corn	149,661	
Cotton Wool and Sheep's, imported	622,293	
Silk	224,768	
Hides and Skins	67,171	
Paper	712,119	
Soap	756,138	
Candles and Tallow	207,788	
Coals, sea-borne	8,667	
Glass	652,225	
Bricks, Tiles, and Slates	474,921	
Timber	1,537,468	
Auctions	294,803	
Excise Licenses	1,018,002	
Miscellaneous Duties of Customs and Excise	1,633,221	
		9,014,554
Total Customs and Excise	.. ..	38,765,091[1]
STAMPS:		
Deeds and other Instruments	1,621,741	
Probate and Legacies	2,042,528	
Insurance — Marine	252,712	
Insurance — Fire	831,367	
Bills of Exchange, Bankers' Notes	739,957	
Newspapers and Advertisements	466,701	
Stage Coaches	514,628	
Post Horses	226,049	
Receipts	172,093	
Other Stamp Duties	482,601	
		7,350,377
ASSESSED AND LAND TAXES:		
Land Taxes	1,199,609	
Windows	1,254,325	
Servants	207,311	
Horses	390,222	
Carriages	449,792	
Dogs	158,190	
Other Assessed Taxes	262,056	
		3,921,505
POST OFFICE	.. ..	2,350,602
CROWN LANDS	.. ..	361,593
Other Ordinary Revenues and other Resources	.. ..	146,130
TOTAL REVENUE	.. ..	52,895,298[2]

[1] In 1835, £36,086,459; in 1836, £36,540,616.

[2] In 1835, £50,633,545; in 1836, £50,494,732.

UNITED KINGDOM IN THE YEAR ENDED 5TH JANUARY, 1837.

EXPENDITURE, YEAR ENDED 5TH JANUARY, 1837.

	£	£
REVENUE—CHARGES OF COLLECTION:		
Civil Departments { Customs	647,138	
Civil Departments { Excise	869,191	
		1,516,329
Preventive Service, Land Guard, Revenue Police, Cruizers and Harbour Vessels	.. ..	562,219
		2,078,548
Stamps	.. ..	159,394
Assessed and Land Taxes	.. ..	176,211
Other Ordinary Revenue	.. ..	47,637
Superannuation and other Allowances	.. ..	389,435
TOTAL REVENUE	.. ..	2,851,225[1]
PUBLIC DEBT:		
Interest of Permanent Debt	24,156,664	
Terminable Annuities	4,224,427	
Management	126,958	
	28,508,049	
Interest on Exchequer Bills	726,824	
TOTAL DEBT		29,234,873[2]
CIVIL GOVERNMENT:		
Civil List—Privy Purse:		
Salaries of the Household; Tradesmen's Bills	411,800	
Allowances to Junior Branches of Royal Family, and to H.R.H. Prince Leopold	206,000	
The Lord Lieutenant of Ireland's Establishment	33,345	
The Salaries and Expenses of the Houses of Parliament (including Printing)	137,731	
Civil Departments (exclusive of those in Army, Navy, and Ordnance Estimates), including Superannuation Allowances	407,328	
Other Annuities, Pensions, and Superannuation Allowances on the Consolidated Fund, and on the Gross Revenue	325,664	
Pensions Civil List	75,000	
TOTAL CIVIL GOVERNMENT		1,596,868[3]
JUSTICE:		
Courts of Justice	390,837	
Police and Criminal Prosecutions	329,520	
Correction	289,827	
TOTAL JUSTICE		1,010,184[4]
DIPLOMATIC:		
Foreign Ministers' Salaries and Pensions	198,301	
Consuls' Salaries and Superannuation Allowances	94,620	
Disbursements, Outfit, &c.	22,515	
TOTAL DIPLOMATIC		315,436[5]
FORCES:		
Army { Effective; Charge	3,829,803	
Army { Non-Effective; Charge	2,643,380	
TOTAL ARMY	6,473,183	
Navy { Effective; Charge	2,616,829	
Navy { Non-Effective; Charge	1,588,897	
TOTAL NAVY	4,205,726	
Ordnance { Effective; Charge	1,274,442	
Ordnance { Non-Effective; Charge	159,617	
TOTAL ORDNANCE	1,434,059	
TOTAL FORCES		12,112,968[6]
Bounties, &c., for Promoting Fisheries, Linen Manufactures, &c.	.. ..	15,683
Public Works	.. ..	316,841
Payments out of the Revenue of Crown Lands, for Improvements & Public Services	.. ..	327,458
Post Office; Charges of Collection and other Payments	.. ..	712,304
Quarantine and Warehousing Establishments	.. ..	111,563
Miscellaneous Services, not classed under the foregoing heads	.. ..	2,213,902
TOTAL EXPENDITURE	.. ..	50,819,305[7]
SURPLUS	.. ..	2,075,993[8]
		52,895,298
Memorandum:		
The Amount of Terminable Annuities, on 5th January, was	.. ..	4,220,817
In corresponding Perpetuities, as estimated by Mr. Finlaison	.. ..	1,928,155
DIFFERENCE	.. ..	2,292,662

[1] In 1835, £2,947,972; in 1836, £2,943,496.
[2] In 1835, £28,494,827; in 1836, £28,505,675.
[3] In 1835, £1,571,121; in 1836, £1,627,475.
[4] In 1835, £822,427; in 1836, £1,022,751.
[5] In 1835, £284,907; in 1836, £358,964.
[6] In 1835, £12,066,057; in 1836, £11,657,487.
[7] In 1835, £49,223,116; in 1836, £49,797,639.
[8] In 1835, £1,410,429; in 1836, £1,707,093.

REVENUE. Charges of Collection.	Year ended 5th January, 1837. £	£
Customs:		
Salaries and Allowances, including, in the year 1836, 38,337*l.* repaid to Treasurers of Barbadoes and Grenada for Salaries defrayed from the Colonial Duties	444,458	
Day Pay	112,631	
Allowances for Special Services and Travelling Charges	9,946	
Tradesmen's Bills, Buildings, and Repairs	16,337	
Rent, Taxes, and Tithes	14,652	
Law Charges	6,815	
Stationery, Printing, Postage, &c.	30,637	
Other Payments	11,662	
		647,138
Excise:		
Salaries and Allowances	736,585	
Day Pay	3,193	
Allowances for Special Services and Travelling Charges	26,739	
Tradesmen's Bills, Buildings, and Repairs	15,242	
Rent, Taxes and Tithes	16,138	
Law Charges	13,687	
Stationery, Printing, Postage, &c.	30,018	
Other Payments	27,589	
		869,191
Total Customs and Excise		1,516,329[1]
Preventive Service:		
Water Guard Customs:		
Salaries and Allowances	90,207	
Day Pay	247,242	
Allowances for Special Services and Travelling Charges	3,885	
Tradesmen's Bills, Buildings and Repairs, Victualling and Stores	22,246	
Rent, Taxes, and Tithes	7,570	
Other Payments	5,955	
		377,105
Land Guard Customs:		
Salaries and Allowances	17,854	
Other Payments	1,574	
		19,428
Harbour Vessels Customs:		
Salaries and Allowances	2,464	
Repairs, Victualling, and Stores	3,468	
		5,932
Revenue Cruizers Customs:		
Salaries and Allowances	41,483	
Repairs, Victualling, and Stores	65,941	
Other Payments	1,853	
		109,277
Revenue Cruizers Excise:		
Salaries and Allowances	2,614	
Repairs, Victualling and Stores	2,540	
Other Payments	150	
		5,304
Expenses attending the Revenue Police, Ireland		45,173
Total Preventive Service		562,219[2]

[1] In 1835, this total was £1,534,186; and in 1836, £1,563,042.
[2] In 1835, this total was £579,679; and in 1836, £576,641.

EXPENDITURE—*continued.*	£	Year ended 5th January, 1837. £
STAMPS:		
Salaries and Allowances	65,366	
Poundage and Salary to Distributors	54,149	
Special Services and Travelling Charges	7,113	
Tradesmen's Bills, Buildings, and Repairs	4,664	
Rent, Taxes, and Tithes	585	
Law Charges	3,607	
Stationery, Printing, Postage, &c.	13,187	
Other Payments	10,723	
		159,394
TAXES:		
Salaries and Allowances	49,195	
Poundage	103,601	
Special Services and Travelling Charges	15,798	
Tradesmen's Bills, Buildings, and Repairs	1,113	
Rent, Taxes, and Tithes	103	
Law Charges	615	
Stationery, Printing, Postage, &c.	3,246	
Other Payments	2,540	
		176,211
Total Stamps and Taxes		335,605 [1]
OTHER ORDINARY REVENUE:		
Woods, Forests, and Works:		
Salaries and Allowances	22,466	
Poundage	5,543	
Tradesmen's Bills	1,880	
		29,889
Salaries to Warders, Rangers, &c.	5,062	
Ancient Pensions and Payments to Schools, including Payments transferred from Civil List	12,542	
		17,604
		47,493
MISCELLANEOUS:		
Poundage	144	
		144
Total Other Ordinary Revenue and Miscellaneous		47,637 [2]
SUPERANNUATION or Retired Allowances, &c. viz.		
Customs	115,552	
Excise	97,847	
Stamps	7,547	
Taxes	4,181	
Woods, Forests, and Works	1,935	
		227,062
COMPENSATION Allowances for Offices Abolished, Reduced or Consolidated, or for loss of Fees, or Patent Offices Abolished:		
Customs	65,896	
Excise	31,275	
Stamps	7,570	
Taxes	32,021	
Woods, Forests, and Works	7,540	
		144,302

[1] In 1835, this total was £380,563; and in 1836, £369,081.
[2] In 1835, this total was £51,683; and in 1836, £46,233.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Pensions to Wounded Men, Widows and Children, and Allowances payable out of the late Charity Fund:		
Customs	5,712	
Excise	12,359	
		18,071
Total Superannuation, Compensation, and Pensions		389,435[1]
Total Revenue		2,851,225[2]

PUBLIC DEBT.

Interest of the Permanent Debt	24,156,664	
Terminable Annuities	4,224,427	
Management	126,958	
		28,508,049
Interest on Exchequer Bills		726,824
Total Public Debt		29,234,873[3]

CIVIL GOVERNMENT.

Privy Purse of their Majesties; Salaries of the Household; Tradesmen's Bills		411,800
Allowances to the Junior Branches of the Royal Family, and to his Royal Highness Leopold, Prince of Cobourg		206,000
The Lord Lieutenant's Establishment:		
Salary to the Lord Lieutenant	20,000	
Establishment	13,345	
		33,345
Houses of Parliament:		
Speaker of the House of Commons' Salary	5,000	
Outfit	5,295	
Salaries; Officers two Houses of Parliament; Expenses	49,671	
Printing; Houses of Parliament	74,810	
Fees on Turnpike Road Bills	2,955	
		137,731
Civil Departments:		
Treasury	45,369	
Home Department	16,136	
Foreign ditto	44,987	
Colonial ditto	18,052	
Privy Council Office and Board of Trade	23,116	
Audit Office	42,117	
Exchequer and Pay Office; Civil Services	16,791	
National Debt Office	12,000	
Exchequer Bill Office	4,000	
Mint	13,753	
Office for the Registry of Slaves	1,687	
State Paper Office, Record Office, Tower and Exchequer	3,819	
Office of West India Relief	1,977	
„ Public Works	4,000	
„ Commissioners for Building Churches	3,000	
Messengers attending First Lord of the Treasury and Court of Exchequer	2,537	

[1] In 1835, this total was £401,861; and in 1836, £388,499.
[2] In 1835, this total was £2,947,972; and in 1836, £2,943,496.
[3] In 1835, this total was £28,494,827; and in 1836, £28,505,675.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Civil Departments—*continued.*		
Alien Office	1,961	
Board of Education, Ireland	652	
Vice Treasurer's Office, Record Branch, and Teller Exchequer	6,811	
Chancellor of Exchequer's Secretary, Ireland	998	
Public Works, Ireland	4,000	
Clerk of the Council, Ireland	905	
Keeper of the State Papers, Ireland	446	
" Records, Ireland	446	
Sir A. B. King's Compensation	2,500	
Office of Works, Ireland	2,200	
Chief and Under Secretary's Office, Dublin Castle	22,469	
Salaries under Irish Tithe Act	14	
Superannuation Allowances	38,300	
Mint of Scotland	680	
First Fruits and Tenths, Ireland	50	
Expenses of Commissioners of West India Compensation	40,396	
Consolidated Pay Offices	31,159	
		407,328
ANNUITIES and Pensions for Civil, Military and Judicial Services, granted by various Acts of Parliament:		
For Naval and Military Services	37,623	
Civil Services, including Superannuation Allowances	60,938	
Judicial Service	82,532	
To the Servants of their late Majesties King George III., and Queens Charlotte and Caroline	18,786	
Late Sign Manual Pensions, England	27,643	
Ditto " Scotland	10,791	
Ditto " Ireland	21,882	
Late 4½ per Cent. Pensions	10,079	
On the Consolidated Fund, Ireland	35,958	
	306,232	
Payable out of the Gross Revenue under Acts of Parliament	19,432	
		325,664
Pensions on the Civil List (5th class)		75,000
Total Civil Government		1,596,868[1]

JUSTICE.

England: Courts of Justice:		
Vice Chancellor	6,000	
Master of the Rolls	3,707	
Chief and Puisne Judges, King's Bench	28,500	
Common Pleas	29,500	
Exchequer	27,243	
Clerk of the Hanaper	4,000	
Insolvent Debtors' Court	13,000	
Compensation Allowances for Loss of Fees and Emoluments	52,569	
Inspectors General of Prisons	4,430	
		168,949
Scotland: Paid out of the Gross Revenue for the Judicial Establishments		83,776
Ireland: Courts of Justice:		
Lord Chancellor	8,804	
Master of the Rolls	3,969	

[1] In 1835, this total was £1,571,121; and in 1836, £1,627,475.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Ireland: Courts of Justice—*continued:*		
Masters in Ordinary and others, Court of Chancery	16,240	
Judges of the Court of King's Bench	28,107	
Common Pleas	25,287	
Exchequer	32,582	
Judge of the Prerogative Court	3,000	
Admiralty	500	
Clerk of the Court of Errors	277	
Commissioners of the Court of Appeals	2,215	
Insolvent Debtors' Court	8,161	
Taxing Officers	2,415	
Registrars to the Judges	5,077	
Judges attending adjourned Assizes	185	
Lodging-Money to Judges	1,293	
		138,112
		390,837
England: Police and Criminal Prosecutions:		
Eight Police Offices	54,500	
Metropolitan Police	61,576	
Mint Prosecutions	8,000	
Law Charges	11,000	
Sheriffs' Convictions	10,683	
Scotland: Criminal Prosecutions	21,000	
Ireland: Barristers of Counties	15,289	
Criminal Prosecutions	70,167	
Police and Watch of Dublin	17,000	
Constabulary Police	60,305	
		329,520
England: Correction:		
Convicts at Home and Abroad	58,150	
Bills drawn from New South Wales	100,000	
Penitentiary House	12,683	
Criminal Lunatics	5,904	
Commissioners to prevent Traffic in Slaves	20,050	
Bills drawn on account of Captured Negroes	17,661	
Ireland: Officers of Prisons	4,034	
Expense of removing Convicts	2,071	
Salary of Process Servers	8,200	
Transportation of Felons	7,249	
Scotland: Salaries to Sheriffs, and other Expenses	53,825	
		289,827
Total Justice		1,010,184[1]
DIPLOMATIC.		
Salaries: Ministers at Foreign Courts	143,348	
Pensions	54,953	
		198,301
Consuls-General and Consuls' Salaries	83,328	
Ditto Pensions	11,292	
		94,620
Disbursements, Outfit, and Equipage		22,515
Total Diplomatic		315,436[2]

[1] In 1835, this total was £822,427; and in 1836, £1,022,751.
[2] In 1835, this total was £284,907; and in 1836, £358,964.

EXPENDITURE—*continued.*		Year ended 5th January, 1837. £	£
FORCES.			
Army—Effective	Number of Men		(80,557)
	Charge	3,829,803	
Non-effective	Number of Men		(87,122)
	Charge	2,643,380	
			6,473,183
Navy—Effective	Number of Men		(29,076)
	Charge	2,616,829	
Non-effective	Number of Men		(30,704)
	Charge	1,588,897	
			4,205,726
Ordnance—Effective	Number of Men		(12,445)
	Charge	1,274,442	
Non-effective	Number of Men		(2,415)
	Charge	159,617	
			1,434,059
Total Forces			12,112,968[1]
BOUNTIES, &c.			
For promoting the Linen Manufactures, Fisheries, &c.			
Salaries, &c., White Herring Fishery-Board		11,000	
For Building Piers and Quays, and for Repairs of Boats of Poor Fishermen		4,683	
			15,683
Total Bounties			15,683[2]
PUBLIC WORKS.			
Commissioners of Highland Roads and Bridges; paid out of the Gross Revenue		5,000	
Erecting Courts of Justice in Scotland ditto		7,235	
			12,235
The Annuity for building Barracks in the Regent's Park		5,400	
For the erection of Revenue Buildings, Liverpool		20,606	
For constructing Roads, Harbours, and Piers, Ireland		5,922	
			31,928
Public Buildings		63,921	
Port Patrick Harbour		12,226	
Holyhead and Howth Roads		6,455	
Pier, Hobb's Point		1,862	
Windsor Castle and Buckingham Palace		4,914	
Judges' Chambers		4,000	
Temporary Accommodation, Two Houses of Parliament		7,500	
Whitehall Chapel		2,998	
Houses of Parliament and other Public Buildings		7,976	
Lighthouses, Bahama Straits		9,000	
British Museum		11,500	

[1] In 1835, this total was £12,066,057; and in 1836, £11,657,487.
[2] In 1835, this total was £13,345; and in 1836, £14,539.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Public Works—*continued*:		
Westminster Hall	4,500	
Erection of School-houses	19,368	
Canal Communication in Canada	34,511	
Rideau Canal	28,000	
National Gallery	23,000	
Restoring Penitentiary	3,424	
		245,155
Kingstown Harbour	9,750	
Dunmore Harbour	2,473	
Board of Works (Civil Buildings, Ireland)	15,300	
		27,523
Total Public Works		316,841[1]

PAYMENTS OUT OF THE REVENUE OF CROWN LANDS,

For Improvements, and various Public Services, &c.

For Lands and Buildings, purchased, &c.	27,044	
For repairing and maintaining Buildings, Walls, Fences and Roads, and for making Inclosures and Plantations in the Royal Forests and Parks	91,948	
		118,992
Repayment of Principal and Interest on Sums advanced by the Equitable Assurance Company, and the Commissioners of Public Works	188,859	
Works at the King's Palace, St. James's	18,261	
Contributions towards the Expense of forming Roads in the counties of Cork and Kerry	750	
		207,870
Auditors, Treasury, Parliamentary and Navy Office Fees		596
Total Payments out of the Revenue of Crown Lands		327,458[2]

POST-OFFICE.

Charges of Collection and other Payments.

Salaries and Allowances	249,554	
Allowances for Special Services and Travelling Charges	10,739	
Tradesmen's Bills, Buildings and Repairs	10,879	
Rent, Taxes, and Tithes	4,255	
Law Charges	9,899	
Stationery, Printing, and Postage	3,811	
Other Payments	3,824	
		292,961
Superannuation Allowances	14,927	
Allowances for Offices abolished, and Compensation to Officers for Loss of Fees	11,706	
Allowances to Wounded Men, and Widows of Seamen, in the Packet Service	841	
		27,474

[1] In 1835, this total was £340,596; and in 1836, £280,600.
[2] In 1835, this total was £274,152; and in 1836, £362,491.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Post-Office—*continued:*		
Conveyance of Mails, Transit Postage, and payment for Ship Letters	264,973	
Packet Establishment - - - - - - -	119,357	
		384,330
Commissioners for repairing Roads between London and Holyhead -		7,539
Total Post-Office - - - -		712,304[1]

QUARANTINE AND WAREHOUSING ESTABLISHMENTS.

Salaries and Allowances - - - - - - -	55,444
Day-pay to Lockers - - - - - - - -	17,534
Rent, Taxes, &c. - - - - - - - - -	32,042
Other Payments - - - - - - - -	6,543
Total Quarantine and Warehousing Establishments - -	111,563[2]

MISCELLANEOUS,

Classed under the following Heads:

COLONIAL CHARGES.

The Expense of the Ecclesiastical Establishment in the West Indies - - - - - - - -	20,300	
The Agents for Colonies, Relief of Trinidad, St. Lucia, Dominica, and British Guiana - - - - - -	44,000	
Civil Establishment: Bahamas - - - - - -	1,000	
— Bermuda - - - - -	2,512	
— Prince Edward's Island - - -	1,920	
— Newfoundland - - - -	3,679	
— Nova Scotia - - - - -	750	
— Heligoland - - - - - -	900	
Civil and Military Establishments, St. Helena - -	23,900	
Clergy, North America - - - - - -	8,529	
Indian Department, Upper and Lower Canada - - -	6,451	
Salaries of Governors and others, West Indies - - -	19,667	
Settlements Western Africa - - - - - -	12,000	
— Australia - - - - - -	21,045	
Education Slave Population in the Colonies - - -	40,000	
Emigration Agents - - - - - - -	1,718	
Stipendiary Magistrates, West Indies - - -	49,469	
		257,840

ALLOWANCES, GRATUITIES AND REMUNERATION FOR SERVICES AND FOR LOSSES.

Payment of the Difference of Trinity Light Pilotage and Scavage dues, between British and Foreign Vessels - -	26,977
Treasurers of Counties for Corn Returns - - -	6,279
Expenses of Officers connected with the Acts of Navigation, and for keeping the Accounts of Trade and Navigation of the Empire	7,940
Allowance of 2*l.* 10*s.* per cent. on Navy Payments - -	10

[1] In 1835, this total was £702,692; and in 1836, £686,141.
[2] In 1835, this total was £110,059; and in 1836, £113,999.

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Allowances, Gratuities and Remuneration for Services and for Losses—*continued:*		
Marquis of Camden, being the estimated Amount of Exchequer Fees due to his Lordship, per Act 4 Will. 4, c. 15, and which is repaid by him as a voluntary Contribution to the State, per Act 59 Geo. 3, c. 43	17,422	
Danish Claims	96,442	
Compensation to Weighmasters of Butter for deficiency of Fees	4,025	
Non-conforming Seceding Ministers, Ireland	25,527	
Augmentation of Stipends to Clergy, Scotland	16,578	
Remuneration to sundry Persons for Losses sustained by the Fire at the Custom House Docks	4,140	
Salaries and Allowances to sundry Persons formerly charged on the Civil List, Ireland	793	
Salary of Harbour Master, Kingstown Harbour	162	
Allowances to sundry Persons, as set forth in the Act 41 Geo. 3, c. 32	4,763	
Sundry small Fees and Salaries formerly charged on the 7th Class of the Civil List	419	
Salaries formerly charged on the Hereditary Revenue, Scotland	6,821	
		213,298
Expenses for Special and Temporary Objects.		
Commissioners and Trustees of Fisheries for improving Fisheries and Manufactures	2,000	
Clerk and Treasurer to the Metropolitan Commissioners in Lunacy	1,732	
Expenses of Record Commissioners	19,820	
Expenses under and connected with the Acts relating to Municipal Corporations in England, Scotland and Ireland	28,948	
Expenses of Clerks of the Peace for carrying into effect the Irish Reform Act	5,107	
Revising Barristers appointed in revising Lists of Voters under the Reform Act for England and Wales	44,704	
Commissioners for inquiring into Religious Instruction, Ireland	36,800	
— Municipal Corporations	5,150	
— Charities	24,325	
— Criminal Law	5,852	
— County Rates	2,851	
— Religious Worship, Scotland	3,600	
— Municipal Corporations, Ireland	1,150	
Forming Tables of Parishes, and ascertaining their Boundaries	6,000	
Inspectors and Superintendents of Factories	7,089	
Townland Survey in Ireland	14,000	
Compensation to Deputy Barristers for registering Voters, Ireland	315	
		209,443
For Public Charitable Institutions.		
Expense of the Establishment for the Administration of the Poor Laws	52,934	
Refuge for the Destitute	3,000	
Hospital for Incurables - Ireland	500	
Foundling Hospital - ditto	17,000	
House of Industry - ditto	15,000	
Hibernian Marine Society ditto	150	
Female Orphan House - ditto	1,000	
Westmorland Lock Hospital ditto	2,500	
Lying-in Hospital	1,000	

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
For Public Charitable Institutions—*continued:*		
Dr. Stephens's Hospital	1,500	
Board of Charitable Bequests	700	
County Infirmaries	3,415	
Charitable and other Allowances (4th Class Civil List)	13,200	
Greenwich Hospital	20,000	
Vaccine Establishment	1,850	
Fever Hospital, Ireland	3,800	
Polish Exiles	10,450	
Toulonese and Corsican Emigrants	10,500	
Protestant Dissenting Ministers, Poor French Refugee Clergy and Laity, and Poor of St. Martin's-in-the-Fields	3,936	
		162,435
EDUCATION, SCIENCE AND ART.		
British Museum	26,423	
Egyptian Antiquities	878	
Purchases for the British Museum	9,224	
Steam Navigation to India	5,726	
Salaries to certain Professors at Oxford and Cambridge	2,006	
Royal Dublin Society	5,300	
„ Hibernian Academy	300	
„ Irish Academy	300	
Belfast Academy	875	
Roman Catholic College	8,928	
To enable the Lord Lieutenant of Ireland to issue Money for the Advancement of Education in Ireland	43,250	
Universities in Scotland	6,239	
Inspectors of Anatomy, Great Britain	874	
Ditto Ireland	826	
Towards defraying the Expense of the Establishment of the Royal Irish Academy	46	
		111,195
OTHER MISCELLANEOUS CHARGES OF A PERMANENT NATURE.		
Home Secret Service, (4th Class Civil List)	10,000	
Foreign Secret Service	29,650	
Secret Service, Ireland	19,500	
Fortification Payments, paid out of the Excise, Ireland	742	
Annuity and Charges of Management to the Equivalent Company	10,600	
Civil Government, Isle of Man	4,777	
South Sea Company, deficiency of Profits	8,725	
Interest and Sinking Fund on Russian-Dutch Loan	103,726	
Charges formerly paid out of the County Rates	69,000	
Gold and Silver Coinage	8,600	
Civil Contingencies	37,049	
Law and other Charges, Scotland	3,929	
Stationery for Public Departments	95,731	
Printing Proclamations in Ireland	6,124	
Militia paid out of the Revenue of Taxes, Scotland	142	
		408,295
OTHER MISCELLANEOUS CHARGES OF A CASUAL AND TEMPORARY NATURE.		
Chamberlain of the City of London, Produce of Tonnage Duty, per Act 4 & 5 Will. 4, c. 32	19,077	

EXPENDITURE—*continued.*	Year ended 5th January, 1837. £	£
Other Miscellaneous Charges of a Casual and Temporary Nature—*continued:*		
Money paid to the Bank of England beyond the Sum received on Account of Unclaimed Dividends. - - -	70,092	
Bank of England, for Loss sustained by conversion of Coin into Bullion - - - - - - - -	38,289	
Various small Miscellaneous Payments by Revenue Departments -	25	
Expenses of Revising Barristers appointed under Municipal Corporation Act - - - - - - -	3,750	
		131,233
ABOLITION OF SLAVERY.		
Interest due to Claimants under the Slavery Compensation Acts up to the Time when the Awards were made - -	677,825	
Bank of England, for receiving Subscription to West India Loan -	7,500	
Bounty on Slaves - - - - - - -	29,838	
		715,163
Total - - - - - -		2,213,902[1]

The Grand Total of the foregoing Expenditure was:—

In 1835 - - - - - -	£49,223,116
In 1836 - - - - -	£48,787,639
In 1837 - - - - - -	£50,819,305

[1] In 1835, this total was £1,594,961; and in 1836, £1,194,031.

CHAPTER VII.

The same Subject continued.

DE LOLME.

The commons can destroy the equilibrium of the constitution.

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

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

Yearly revenue granted to the crown.

A custom has for a long time prevailed, at the beginning of every reign, and in the kind of overflowing of affection which takes place between a king and his first parliament, to grant the king a revenue for his life; a provision which, with respect to the great exertions of his power, does not abridge the influence of the commons, but yet puts him in a condition to support the dignity of the crown, and affords him, who is the first magistrate in the nation, that independence which the laws ensure also to those magistrates who are particularly intrusted with the adminstration of justice*.

* The twelve judges[1]. Their commissions, which in former times were often given them *durante bene placito*, now must always "be made *quamdiu se bene gesserint*, and their salaries ascertained; but, upon an address of

[1] Vide Note (1), p. 595.

De Lolme.

Remedy for the accidental disorders of the state.

This conduct of the parliament provides an admirable remedy for the accidental disorders of the state. For though, by the wise distribution of the powers of government, great usurpations are become in a manner impracticable, nevertheless it is impossible but that, in consequence of the continual (though silent) efforts of the executive power to extend itself, abuses will at length slide in. But here the powers, wisely kept in reserve by the parliament, afford the means of remedying them. At the end of each reign, the civil list, and consequently that kind of independence which it procured, are at an end. The successor finds a throne, a sceptre, and a crown; but he finds neither power, nor even dignity; and before a real possession of all these things be given him, the parliament have it in their power to take a thorough review of the state, as well as correct the several abuses that may have crept in during the preceding reign; and thus the constitution may be brought back to its first principles[3].

Grant of the civil list.

Superiority of the English over the Roman laws, respecting periodical reformation.

England, therefore, by this mean, enjoys one very great advantage,—one that all free states have sought to procure for themselves; I mean that of a periodical reformation. But the expedients which legislators have contrived for this purpose in other countries, have always, when attempted to be carried into practice, been found to be productive of very disadvan-

both Houses, it may be lawful to remove them."—Stat. 13 William III. c. 2. In the first year of the reign of George III. it was moreover enacted, that the commissions of the judges should continue in force notwithstanding the demise of the king'; which has prevented their being dependant, with regard to their continuation in office, on the heir-apparent[2].

[2] During the arbitrary periods of our history, a judge was liable to be capriciously deprived of his seat, although his title to office was by the patent stated to be "quamdiu se bene gesserint."—(Whitlocke, 16. May's Hist. 17. 1 Hut. Mem. 132. Vide ante, 477.)

[3] Vide Note (2), p. 575.

tageous consequences. Those laws which were made in Rome, to restore that equality which is the essence of a democratical government, were always found impracticable: the attempt alone endangered the overthrow of the republic; and the expedient which the Florentines called *ripigliar il stato*, proved nowise happier in its consequences. This was because all those different remedies were destroyed beforehand, by the very evils they were meant to cure; and the greater the abuses were, the more impossible it was to correct them.

Parliament does not forcibly overthrow the prerogative; it only enervates its springs.

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

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

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

Absolute power of the Tudors.

The truth of all these observations is remarkably confirmed by the events that followed the reign of the last two Henries[4]. Every barrier that protected the

[4] Vide ante, 152—207.

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people against the incursions of power had been broken through. The parliament, in their terror, had even enacted that proclamations, that is, the will of the king, should have the force of laws*; the constitution seemed really undone. Yet, on the first opportunity afforded by a new reign, liberty began again to make its appearance†. And when the nation, at length recovered from its long supineness, had, at the accession of Charles I.[5], another opportunity of a change of sovereign, that enormous mass of abuses, which had been accumulating, or gaining strength, during five successive reigns, was removed, and the ancient laws were restored.

Proclamations of Henry VIII. had the force of laws.

Annihilation of abuses.

To which add, that this second reformation, which was so extensive in its effects, and might be called a new creation of the constitution, was accomplished without producing the least convulsion. Charles I., in the same manner as Edward VI.[7], (or his uncle, the regent duke of Somerset) had done in former times, assented to every regulation that was passed; and whatever reluctance he might at first manifest, yet the act, called *the Petition of Right* (as well as the bill which afterwards completed the work) received the royal sanction without bloodshed[7].

The Petition of Right.

It is true, great misfortunes followed[8]; but they were the effects of particular circumstances. The nature and extent of regal authority not having been accurately defined during the time which preceded the reigns of the Tudors, the exorbitant power of the

* Stat. 31 Henry VIII. chap. 8.

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

[5] Vide ante, 366, et seq.
[6] Ibid. 208—252.
[7] Ibid. 377, 393.
[8] Ibid. 395—417.

princes of that house had gradually introduced political prejudices, of even an extravagant kind: those prejudices, having had a hundred and fifty years to take root, could not be shaken off but by a kind of general convulsion; the agitation continued after the action, and was carried to excess by the religious quarrels that arose at that time.

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Political prejudices introduced under the Tudors.

NOTES.

NUMBER OF THE JUDGES INCREASED.

(1.) By Stat. 1 William IV. c. 70, the number of judges was increased to fifteen, one additional puisne judge being appointed to the courts of King's Bench, Common Pleas, and Exchequer, who are to "sit by rotation in each term, or otherwise, as they shall agree amongst themselves, so that no greater number than three puisne judges shall sit at the same time in Banc for the transaction of the business in term, unless in the absence of the chief."

HEREDITARY REVENUES OF THE CROWN TRANSFERRED TO THE PUBLIC, BY VICTORIA.

(2.) Upon the accession of Queen Victoria those hereditary revenues of the crown, which had been transferred to the public by her majesty's immediate predecessor, were, by royal command, placed unreservedly at the disposal of parliament[1].

[1] The revenues which accrue from the duchies of Cornwall and Lancaster, although held by the crown as public property, for the benefit of the state, and as a parcel of the national possessions, were not surrendered to parliament, and their annual amount is, by the public, unknown; but Lord Brougham, in the House of Lords, Dec. 20, 1837, thus expressed himself.

"There are, belonging to the duchy, between thirty and forty manors in the county of Cornwall, ten having been sold to redeem the land tax upon the whole estates. There is, beside the manorial rights, a considerable extent of demesne land; and independent of all surface property, there are very extensive and valuable mineral rights all over the county. This is exclusive of the possessions of the duchy, which are most valuable, in many of the other counties—Devon, Dorset, Somerset, Surrey, Norfolk, Herts, and as far as Lincolnshire. There may be, in all, upwards of a hundred parcels of property of various kinds, manorial, and demesne, beside the mineral rights.

"The property to which I have adverted, is let upon lease, for lives and for terms of years, and in either case upon a moderate rent, sometimes raised, indeed, but with large fines upon renewal. For the twenty-five years between 1783, the late duke's majority, and 1808, the average rents were from 3000*l.* to 4000*l.*, the average fines from 5000*l.* to 6000*l.* a year; but these were years of comparatively small receipt. During the minority there had been received considerably more than 10,000*l.* a year, for about 225,000*l.* was paid out of the net revenues for the Prince of Wales' expenses, and it was never pretended that this was anything like the net

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Grant of 385,000*l.* to Queen Victoria for the support of her household. Stat. 1 Victoria, c. 2.

In consequence of which, Stat. 1 Victoria, c. 2, was enacted, and for carrying its provisions into effect, Stat. 1 George III. c. 1; 22 George III. c. 82; 25 George III. c. 61; 27 George III. c. 13; 33 George III. (I.); 56 George III. c. 46; 59 George III. c. 22; 1 George IV. c. 1; 1 & 2 George IV. c. 31; 11 George IV. and 1 William IV. c. 51; 1 William IV. c. 25, and all other statutes, relative to the levying and collecting the payment, or keeping separate accounts of the hereditary revenues, &c. were made applicable and re-enacted.

In lieu of the royal hereditary revenues, the clear yearly sum of 385,000*l.* is to be paid out of the Consolidated Fund to

profit upon the whole estates. Between 1808 and 1813, there were received in fines only, no less than 129,000*l.* in the space of five years. For a renewal of the lease of that valuable, but small piece of ground, called Prince's Meadow, which adjoins Waterloo Bridge, on the Surrey side, no less a sum than 55,000*l.* was taken; and for a renewal lease to the corporation, of the ground called Sutton Pool, at Plymouth, a sum of 12,000*l.* The term of years in each case was ninety-nine, but there was a rent reserved of 4000*l.* in the one, and 1000*l.* in the other, both to commence in 1841; so that whatever may be the unknown amount of the present duchy income, we know that in three or four years it must, on these two parcels of the estates, be increased 5000*l.* a year. But let us consider the fines; on these two parcels they amounted to 67,000*l.*, leaving of the whole sum of 129,000*l.* received, 62,000*l.*, raised by fines upon the other leases renewed during these five years.

"Now these other leases were not for years, but for lives, all of which will drop in about three years. They are all comprised in four leases of valuable mineral rights, which will enable the crown to raise almost immediately, a sum of at least what was paid at the last renewal, namely, 62,000*l.* But the crown will inevitably be enabled to gain a very great deal more; for since 1810, the value of mining property has greatly increased from the improvements in machinery, in the scientific knowledge and mechanical skill brought to bear upon the management of all underground property, and also from the general accumulation of capital. It would, therefore, by no means be too sanguine, or too bold a calculation, to estimate the sum of money which the crown, that is, the reigning sovereign, may immediately after the civil list is settled, obtain upon these four leases at 80,000*l.*, 90,000*l.*, or even 100,000*l.* I have conferred with persons to whom the subject is familiar, persons themselves largely engaged in mining pursuits, and I will venture to affirm, that I speak within the mark very considerably, when I put the least sum which can be expected to accrue from this source, at 80,000*l.*"

There are no restrictions in [Stat. 1 Victoria, c. 2] "from adding near 400,000*l.* to the fixed royal income, or by any pledge given upon passing it, or by any promise made here or elsewhere, or by any statement, or intimation, or by any hint or understanding; none of them are in any way bound to have the duchy revenues providently and honestly managed without anticipation; the minister of the day may help the sovereign of the day to such fines as will impoverish the duchy for half a century to come, and no one will have a right to say it is against the faith of any treaty, in breach of any contract, in contravention of any understanding whatever.

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the support of her majesty's household and of the honour and dignity of the crown, and which is divided into six classes:—

First Class.	For her majesty's privy purse	£ 60,000
Second Class.	Salaries of her majesty's household and retired allowances	131,260
Third Class.	Expenses of her majesty's household . . .	172,500
Fourth Class.	Royal bounty, alms, and special services . .	13,200
Fifth Class.	Pensions to the extent of, per annum . . .	1,200
Sixth Class.	Unappropriated monies	8,040
		£385,000

The grant of pensions.

With respect to the grant of pensions, up to the time when the Act 22 George III. c. 82, commonly called Mr. Burke's Act, was passed, pensions were granted without any limit and without any control. In that act it was provided, that the amount granted on the English Civil List should be reduced gradually to 95,000*l.* by no larger a sum than 600*l.* a year

"The four mineral leases to which I have alluded as worth 80,000*l.* or 100,000*l.* for converting future revenue into ready money, are not by any means all: there are other sources of as abundant supply to the royal purse. For instance, there is the Kennington estate in the neighbourhood of this House; it is duchy property, and the lease has actually expired.

"The fine for renewal was, I know, some years ago assessed at 100,000*l.*, but the lessee declined to renew—that he would have given 80,000*l.* or 90,000*l.* there cannot be the least question;—but I make no kind of doubt that the duchy officers were well advised respecting the value, and that the full 100,000*l.* will, if wished for, be obtained. Upon these five parcels of property then, now and during the next two or three years, a sum of near 200,000*l.* may be obtained for the sovereign, if the course hitherto pursued shall be persisted in, and the reigning prince be advised to enrich himself at the expense of the duchy.

"No provision upon this branch of the revenue is made [by Stat. 1, Victoria, c. 2;] nor any information at all given to us upon the subject. Nothing, however, can be more clear, than that the present arrangement should not only be made with a full knowledge of that subject, but that the arrangement should comprehend the settlement of the duchies on a right footing, by the transfer of Cornwall as well as Lancaster to the public, and the placing their administration under the ordinary departments of the public service, making fair compensation to the crown or the duke for the surrender. What do your lordships think is the charge of managing these duchies as their affairs are now administered? Of Lancaster I am not able to form so accurate an estimate; but I know that the gross revenues of Cornwall for the years from 1810 to 1819 inclusive, amounted to 333,000*l.*: and what think you was the net revenue, for the proportion of the net to the gross is the test of good management? Why, only 228,000*l.*:—so that one pound in every three was taken, absorbed, for the cost of collecting and managing the whole. Match me that if you can, in the worst managed estate in any part of the United Kingdom! Show me the man who submits to one pound being retained in the country, or lost by the way, for every two that are paid into his account at the banker's! Another striking instance of mismanagement is afforded by the encroachments which are

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being granted in pensions not exceeding 300*l.* each in any one year, till such reduction was effected. In Scotland, the same principle was applied by 50 George III. c. 3; and the amount of the pensions was to be reduced to 25,000*l.*, no more than 800*l.* to be granted in any one year, till such reduction was effected. In Ireland, the same principle was not applied till 1793, when by 33 George III. c. 34, in the Irish Statutes, the pensions on the Civil List in Ireland were limited to 80,000*l.*, 1,200*l.* only being allowed to be granted till such reduction was effected; and again they were further limited by 1 George IV. c. 1, to 50,000*l.* Thus making at the close of the reign George IV. for the whole United Kingdom, the sum of 170,000*l.* divided into three lists, as the sum to which the pensions were ultimately to be reduced.

Stat. 50 George III c. 3.

33 George III. c. 34.

1 George IV. c. 1.

Restrictions on grants of pension, by a resolution of the commons, Feb. 18, 1834.

A further restriction was placed on grants of pensions by the following resolution of the commons, on February 18, 1834:—"That it is the bounden duty of the responsible advisers of the crown to recommend to his majesty, for grants of pensions on the Civil List, such persons only as have just claims on the royal beneficence, or who by their personal services to the crown, by the performance of duties to the public, or by their useful discoveries in science and attainments in literature and the arts, have merited the gracious consideration of their sovereign and the gratitude of their country."

And Stat. 1 Victoria, c. 2, s. 5.

The 1 Victoria, c. 2, s. 5, after reciting that it was expedient that provision should be made by law for carrying into full effect such resolution, and for giving an assurance to parliament that the responsible advisers of the crown have acted in conformity therewith; enacted, "that the pensions which may hereafter be charged upon the Civil List revenues shall be granted to such persons only as have just claims on the royal beneficence, or who by their personal services to the crown, by the performance of duties to the public, or by their

made everywhere upon the duchy domains. What think you of an estate of five and forty acres, having, within the period of two or three generations, extended to two hundred of good arable land, without any miracle, or any fresh grant, without any gain from the sea by embankment, or the deposit of any alluvial soil? The extension was effected by the address and industry of one party, the proprietors, and the carelessness of the other party, the duchy authorities. When asked by one who recollected the old bounds of the farm, how all this increase had been effected, the party now in quiet possession of the extended domain, answered innocently enough, in his Cornish dialect, that it was all owing to his grandfather being a careful man, and good at hedging by candle light."

useful discoveries in science and attainments in literature and the arts, have merited the gracious consideration of their sovereign and the gratitude of their country; and that a list of all such pensions granted in each year ending the twentieth day of June shall be laid before parliament within thirty days after the said twentieth day of June in each year, if parliament shall be then sitting, but if parliament shall not be then sitting, then within thirty days after the next meeting of parliament."

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List of pensions to be laid before parliament yearly.

CHAPTER VIII.

New Restrictions.

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

Money-bills must originate with the commons, and no alteration permitted in their details.

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

* As the crown has the undisputed prerogative of assenting to, and dissenting from, what bills it thinks proper, as well as of convening, pro-

[1] Vide ante, 97—100, 119, 135—137, 288.

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Although the royal prerogative has remained undisputed, parliament, to restrain the use, have entered into conventions with the crown.

Besides, though this prerogative has of itself, we may say, an irresistible efficiency, the parliament has neglected nothing that may increase it, or at least the facility of its exercise; and though they have allowed the general prerogatives of the sovereign to remain undisputed, they have in several cases endeavoured to restrain the use he might make of them, by entering with him into divers express and solemn conventions for that purpose*[3].

The king has the exclusive right of assembling parliament.

Thus, the king is indisputably invested with the exclusive right of assembling parliaments; yet he must assemble one, at least once in three years[4]; and this obligation on the king, which was insisted upon by the

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

Moved by these considerations, and, no doubt, by a sense of their duty towards their constituents, to whom this right of taxation originally belongs, the House of Commons have at all times been very careful lest precedents should be established, which might, in the most distant manner, tend to weaken that right. Hence the warmth, I might say the resentment, with which they have always rejected even the amendments proposed by the lords in their money-bills. The lords, however, have not given up their pretension to make such amendments; and it is only by the vigilance and constant predetermination of the commons to reject all alteration whatever made in their money-bills, without even examining them, that this pretension of the lords is reduced to be an useless, and only dormant, claim[2].

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

[2] By means of this claim, the Upper House obtains in effect the participation of a privilege denied to it in fact, inasmuch as, though the Lower House uniformly refuses its assent to any alterations made in a money-bill by the lords, yet, if the alterations be considered amendments, a new bill embodying them is generally introduced in the commons.

[3] Vide ante, 97—100, 119, 134—137, 288, 329, 377, 472. [4] Ibid. 486.

people in very early times, has been since confirmed by an act passed in the sixteenth year of the reign of Charles II.[5].

Moreover, as the most fatal consequences might ensue, if laws which might most materially affect public liberty, could be enacted in parliaments abruptly and imperfectly summoned, it has been established that the writs for assembling a parliament must be issued forty days at least before the first meeting of it. Upon the same principle it has also been enacted, that the king cannot abridge the term he has once fixed for a prorogation, except in the two following cases: viz., of a rebellion, or of imminent danger of a foreign invasion; in both which cases a fourteen days' notice must be given*[6].

A prorogation of parliament cannot be abridged, except in cases of imminent danger.

Again, the king is the head of the church[8]; but he can neither alter the established religion, or call individuals to an account for their religious opinions†[9]. He cannot even profess the religion which the legislature has particularly forbidden; and the prince who should profess it, is declared incapable of *inheriting, possessing, or enjoying the crown of these kingdoms*‡[11].

The king is the first magistrate; but he can make no change in the maxims and forms consecrated by law or custom: he cannot even influence, in any case whatever, the decision of causes between subject and

The king can make no change in either the common or statute law.

* Stat. 30 George II. c. 25[7].

† The convocation, or assembly of the clergy, of which the king is the head, can only regulate such affairs as are merely ecclesiastical; they cannot touch the laws, customs, and statutes of the kingdom.—Stat. 25 Henry VIII. c. 19[10].

‡ 1 William and Mary, Stat. 2, c. 2[12].

[5] Vide ante, 428, 486.
[6] Vide Note (1.) p. 609.
[7] Vide Note (1.) p. 609.
[8] Vide ante, 178—207, 215—252, 289—311. Note (2.) p. 610.
[9] Vide ante, 178—207, 479.
[10] Ibid. 193.
[11] Ibid. 474.
[12] Ibid. 472—475.

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subject; and James I., assisting at the trial of a cause, was reminded by the judge that he could deliver no opinion*. Lastly, though crimes are prosecuted in his name, he cannot refuse to lend it to any particular persons who have complaints to prefer[13].

Coining money.

The king has the privilege of coining money; but he cannot alter the standard[14].

Prerogative of mercy.

The king has the power of pardoning offenders[15]; but he cannot exempt them from making a compensation to the parties injured. It is even established by law, that, in case of murder, the widow, or next heir, shall have a right to prosecute the murderer; and the king's pardon, whether it preceded the sentence passed in consequence of such prosecution, or whether it be granted after it, cannot have any effect†.

The king has the military, but not absolute power.

The king has the military power; but still, with respect to this, he is not absolute. It is true, in regard to the sea-forces[17], as there is in them this very great advantage, that they cannot be turned against the liberty of the nation, at the same time that they are the surest bulwark of the island, the king may keep them as he thinks proper; and in this respect he lies only under the general restraint of applying to parlia-

* These principles have since been made an express article of an act of parliament; the same which abolished the Star Chamber. "Be it likewise declared and enacted, by the authority of this present parliament, that neither his majesty nor his privy council have, or ought to have, any jurisdiction, power, or authority, to examine or draw into question, determine, or dispose of, the lands, tenements, goods, or chattels of any of the subjects of this kingdom."—Stat. 16 Charles I. c. 10, s. 10.

† The method of prosecution mentioned here, is called an *appeal;* it must be sued within a year and a day after the commission of the crime[16].

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[13] Vide ante, 568, 569.

[14] Ibid. 393, 570.

[15] Ibid. 569.

[16] The Stat. 59 George III. c. 46, abolished appeals of murder, treason, felony, or other offences, and wager of battel, or joining issue and trial by battel, in writs of right.

[17] Vide ante, 579, The Account of the Public Income and Expenditure, tit. Forces.

ment for obtaining the means of doing it. But in regard to land-forces, as they may become an immediate weapon in the hands of power, for throwing down all the barriers of public liberty, the king cannot raise them without the consent of parliament. The guards of Charles II. were declared anti-constitutional; and James's army was one of the causes of his being dethroned*.

The annual establishment of a standing army.

In these times, however, when it has become a custom with princes to keep those numerous armies, which serve as a pretext and means of oppressing the people, a state that would maintain its independence is obliged, in a great measure, to do the same. The parliament has therefore thought proper to establish a standing body of troops (amounting to about thirty thousand men[18]), of which the king has the command.

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

Troops paid by annual taxation.

Besides, the funds for the payment of these troops are to be paid by taxes that are not established for more than one year†: and it becomes likewise neces-

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

† The land-tax[19] and malt tax[20].

[18] Vide ante, 579.

[19] By 38 George III. c. 60, the several sums of money then charged in Great Britain as a land-tax for one year from the 25th day of March 1798, were made perpetual, subject to redemption and purchase. This act was, inter alia, amended by Stats. 42, 53, & 57 George III. cc. 116, 121, 24; and 5 George IV. c. 48.

[20] The malt-tax has also some years ceased to be an annual tax, that now in collection having been imposed by 6 George IV. c. 58.

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sary, at the end of this term, again to establish them*. In a word, this instrument of defence, which the circumstances of modern times have caused to be judged necessary, being capable, on the other hand, of being applied to the most dangerous purposes, has been joined to the state by only a slender thread, the knot of which may be slipped, on the first appearance of danger†.

Refusal of subsidies rarely exercised.

But these laws, which limit the king's authority, would not, of themselves, have been sufficient. As they are, after all, only intellectual barriers, which the king might not at all times respect; as the check which the commons have on his proceedings, by a refusal of subsidies, affects too much the whole state to be exerted on every particular abuse of his power; and lastly, as even this check might in some degree be eluded, either by breaking the promises which have

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

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

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

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

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

After this, the king or queen, laying his or her hand upon the holy gospels, shall say, "The things which I have here before promised I will perform and keep: So help me God!"——*and then shall kiss the book.*

procured subsidies, or by applying them to uses different from those for which they were appointed; the constitution has besides supplied the commons with the means of immediate opposition to the misconduct of government, by giving them a right to impeach the ministers[21].

Impeachment of ministers.

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

Misemployment of public money.

If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it[22]. If any abuse of power is committed, or in general anything done contrary to the public weal, they prosecute those who have been either the instruments or the advisers of the measure* [23].

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

Impeachments are decided by the House of Peers.

It is before the House of Peers[24] that the law has directed the commons to carry their accusation; that is, before judges, whose dignity, on the one hand, renders them independent, and who, on the other,

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

[21] Vide ante, 140, 369, 449.
[22] Ibid. 485, 486.
[23] Ibid. 448.
[24] Ibid. 111, 112, 131, 147, 346, 348, 447.

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have a great honour to support in that awful function, where they have all the nation for spectators of their conduct.

The impeached ordered into custody.

When the impeachment is brought to the lords, they commonly order the person accused to be imprisoned[25]. On the day appointed, the deputies of the House of Commons, with the person impeached, make their appearance: the impeachment is read in his presence; counsel are allowed him, as well as time to prepare for his defence; and, at the expiration of this term, the trial goes on from day to day, with open doors, and everything is communicated in print to the public.

Commands of the sovereign no defence for a criminal act.

But whatever advantage the law grants to the person impeached, for his justification, it is from the intrinsic merits of his conduct that he must draw his arguments and proofs. It would be of no service to him, in order to justify a criminal conduct, to allege the commands of the sovereign[26]; or, pleading guilty with respect to the measures imputed to him, to produce the royal pardon*. It is against the administration itself that the impeachment is carried on; it

* This point, in ancient times, was far from being clearly settled. In the year 1678, the commons having impeached the Earl of Danby, he pleaded the king's pardon in bar to that impeachment: great altercations ensued, which were terminated by the dissolution of that parliament. It was afterwards enacted, (Stat. 12 & 13 Willliam III. c. 2.) "that no pardon under the great seal should be pleaded in bar to an impeachment by the House of Commons."

I once asked a gentleman, very learned in the laws of this country, if the king could remit the punishment of a man condemned in consequence of an impeachment of the House of Commons: he answered me, The tories will tell you the king can, and the whigs, he cannot. But it is not perhaps very material that the question should be decided: the great public ends are attained when a corrupt minister is removed with disgrace, and the whole system of his proceedings unveiled to the public eye[27].

[25] Vide ante, 392.

[26] Ibid. 573, 574.

[27] Ibid. 449, 450.

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

The removal and punishment of corrupt ministers affords an immediate remedy for the evils of the state.

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

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

Every individual has an absolute right to be judged according to positive law.

But the laws which so effectually provide for the safety of the people, provide no less for that of the members, whether of the House of Peers, or that of the Commons. There are not known in England either *commissaries* who are always ready to find those guilty whom the wantonness of ambition points out, or those secret imprisonments which are, in other countries, the usual expedients of government. As the forms and maxims of the courts of justice are

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strictly prescribed, and every individual has an invariable right to be judged according to law, he may obey without fear the dictates of public virtue. Lastly, what crowns all these precautions, is, its being a fundamental maxim, "That the freedom of speech, and debates and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament* [28]."

Personal incapacity from persons being members of parliament.

The legislators, on the other hand, have not forgotten that interest, as well as fear, may impose silence on duty[29]. To prevent its effects, it has been enacted, that all persons concerned in the management of any taxes created since 1692, commissioners of prize, navy, victualling-office, &c., comptrollers of the army accounts, agents for regiments, the clerks in the different offices of the revenue, persons holding any new office under the crown (created since 1705), or having a pension under the crown during pleasure, or for any term of years, are incapable of being elected members.

Acceptance of office under the crown.

Besides, if any member accepts an office under the crown, except it be an officer in the army or navy accepting a new commission, his seat becomes void, though such member is capable of being re-elected[30].

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

* Bill of Rights, Art. 9.

† Nothing can be a better proof of the efficacy of the causes that produce the liberty of the English, than those victories which the parliament from

[28] Vide ante, 351, 352. [29] Ibid. 476, 477. [30] Vide Note (3.) p. 621.

NOTES.

PROCLAMATION FOR THE MEETING OF PARLIAMENT.

(1.) By 37 George III. c. 127, and 39 & 40 George III. c. 14, the king may issue his proclamation for the meeting of parliament for the dispatch of business, in fourteen days from the date thereof, notwithstanding any previous adjournment to a more distant day.

Stat. 39 & 40 George III. c. 14.

By 39 & 40 George III. c. 14, in all cases where both Houses of Parliament shall stand adjourned for more than fourteen days, the king can issue a proclamation, declaring that the parliament shall meet on a day, being not less than fourteen days from the date of such proclamation, and the two Houses of Parliament shall stand adjourned to the day and place declared in such proclamation. And the orders which shall be appointed for the day of adjournment, or for any day subsequent thereto, except such as shall be specially appointed for particular days, shall be deemed to be appointed for the day of adjournment fixed in the proclamation.

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time to time gains over itself, and in which the members, forgetting all views of private ambition, only think of their interest as subjects.

Since this was first written, an excellent regulation has been made for the decision of controverted elections. Formerly the House decided them in a very summary manner, and the witnesses were not examined upon oath. But, by an act passed a few years ago[31], the decision is left to a jury, or committee, of fifteen members, formed in the following manner:—out of the members present, who must not be less than one hundred, forty-nine are drawn by lots: out of these, each candidate strikes off one alternately, till there remain only thirteen, who, with two others, named out of the whole House (one by each candidate), are to form the committee. In order to secure the necessary number of a hundred members, all other business in the House is to be suspended, till the above operations are completed.

[31] This statute was the temporary Act 10 George III. c. 16, which was explained and amended by 11 George III. c. 42, both of which acts were made perpetual by 14 George III. c. 15.

By 9 George IV. c. 22, the trial of controverted elections or returns of members to serve in parliament, is left to a select committee of eleven members thus composed: out of the members present, who must not be fewer than one hundred if one committee is to be formed, one hundred and twenty if more than one committee, one hundred and eighty if more than two committees, and two hundred and forty if more than three committees, thirty-three are drawn by lots; the parties then alternately strike off one of the thirty-three until the number is reduced to eleven, who constitute the committee, and are sworn at the table of the House.

NOTES.

CHURCH REVENUES.

(2.) It has been previously stated[1], that the Church of England became, at the Revolution, an authorized and paid establishment.

Amount of incomes.

The following tables[2] will afford a sketch of the number of benefices in each diocese; the total amount of incomes, gross and net, of the incumbents in each diocese; also, the averages of each respectively; the number of curates in each diocese; the total amount of their stipends, and the average thereof: also four scales of the incomes of the beneficed clergy; the first advancing by 10*l.* at each step of the scale to 200*l.*, the second by 20*l.* to 500*l.*, the third by 50*l.* to 1000*l.*, the fourth by 100*l.* to 2000*l.*, and from thence by 500*l.* to 4000*l.* and upwards, there being only two above the last-mentioned amount: the appropriations and impropriations, showing the number possessed by each class, and the number of cases in each diocese in which the vicarage is partly or wholly endowed with the great tithes; and the number of cases in each diocese in which there is a glebe-house fit or unfit for residence, or in which there is none.

Number of curates.

Appropriations and impropriations.

Glebe-houses.

Sinecure rectories.

From a statement of the sinecure rectories (sixty-two in number), it appears that the gross annual revenues thereof amount to 18,622*l.*, affording an average of 300*l.*; and that the net annual revenues thereof amount to 17,095*l.*, affording an average of 275*l.*[3]

Revenues of archiepiscopal and episcopal sees.

From the returns that were made to the Ecclesiastical Commissioners, it appears that the total amount of the gross annual revenues of the several archiepiscopal and episcopal sees in England and Wales is 181,631*l.*, affording an average of 6727*l.*; and the total amount of the net annual revenues of the same is 160,292*l.*, affording an average of 5936*l.*

Annual revenues of cathedral and collegiate churches.

The total amount of the gross annual revenues of the several cathedral and collegiate churches in England and Wales is 284,241*l.*, and the total amount of the net annual revenues of the same is 208,289*l.*

Revenues of the dignitaries and other spiritual persons.

The entire of the gross annual separate revenues of the several dignitaries and other spiritual persons, members of the cathedral and collegiate churches in England and Wales,

[1] Vide ante, 479.

[2] Vide Report of the Commissioners for inquiring into the Ecclesiastical Revenues, 1835: and in which is contained a table of the patronage of benefices classed, and showing the number possessed by each class.

[3] The sinecure rectories not returned are four in number.

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is 75,854*l.*: and the total amount of the net annual separate revenues of the same is 66,465*l.*

Number of benefices, with and without cure of souls.

The total number of benefices, with and without cure of souls, the incumbents whereof have made returns, omitting those which are permanently or accustomably annexed to superior preferments, and which are included in the statements respecting those preferments, is 10,540. The total amount of the gross annual revenues of these benefices is 3,197,225*l.*, giving an average income of 303*l.*; and the total amount of the net annual revenues of the same is 3,004,721*l.*, giving an average income of 285*l.*

Total gross and net incomes.

The total of benefices, with and without cure of souls, in England and Wales, including those not returned to the commissioners, but exclusive of those annexed to other preferments (about twenty-four in number), is 10,718, the total gross income of which, calculated upon the average of those returned, will be 3,251,159*l.*, and the total net income thereof will be 3,055,451*l.*

Number of curates employed by resident incumbents.

The number of curates returned as being employed by resident incumbents is 1006, whose annual stipends or payments in money amount to 87,075*l.*, affording an average of 86*l.* Those employed by non-resident incumbents are 4224; the amount of their stipends 337,620*l.*; and the average 79*l.* And the average of the whole of the curates' stipends is 81*l.*

Expenses bearing upon the incomes of the clergy.

"It should however be observed, that the expenses bearing upon the incomes of the clergy, of every class, are to a very large amount: thus, the archbishops and bishops, in addition to the payment of fees, first-fruits, and other charges incident to the taking possession of their preferments, are subject to heavy expenses for the support and reparation of their houses of residence. All the beneficed clergy are liable, in a greater or less degree, to similar charges. On the archdeacons, who are among the most useful and efficient officers of the church, the supervision of their archdeaconries, sometimes extending over a very large territory, entails, in many cases, an expenditure exceeding the whole emoluments of their office; and their costs and charges for first-fruits and fees of admission generally exceed the amount of their receipts for the first two or three years after their entering into office. This last observation applies to many prebendaries and other dignitaries of cathedral and collegiate churches; and the arrears due to the beneficed clergy are in many instances very considerable."

ABSTRACT OF THE INCOMES OF INCUMBENTS AND CURATES.

DIOCESE.	Number of Benefices in each Diocese, including Sinecure Rectories, but exclusive of Benefices annexed to other Preferments.	Aggregate Amount of the Gross Incomes of Incumbents in each Diocese, exclusive as before mentioned.	Average Gross Income.	Aggregate Amount of the Net Incomes of Incumbents, in each Diocese, exclusive as before mentioned.	Average Net Income.	Number of Curates in each Diocese.	Amount of Stipends of Curates in each Diocese.	Average of Stipends.	Number of Benefices in each Diocese not returned to the Commissioners.
St. Asaph - - -	143	£42,592	£297	38,840	£271	43	£3,564	£82	2
Bangor - - - -	123	35,064	285	31,061	252	61	4,723	77	...
Bath and Wells -	430	120,310	281	109,397	256	229	18,578	81	13
Bristol - - - -	253	77,056	304	71,397	282	133	10,668	80	3
Canterbury - - -	346	123,946	358	110,050	318	174	14,656	84	2
Carlisle - - -	124	22,487	181	21,777	175	44	3,684	83	3
Chester - - - -	630	169,495	269	159,372	252	266	23,239	87	4
Chichester - - -	267	82,673	309	75,522	282	121	9,440	78	3
St. David's - - -	409	60,653	148	56,317	137	206	11,464	55	7
Durham - - - -	192	74,457	387	67,639	352	100	8,556	85	2
Ely - - - - -	150	56,495	376	53,000	353	75	6,583	87	2
Exeter - - - -	613	194,181	316	174,275	284	323	28,759	89	16
Gloucester - - -	283	81,552	288	77,429	273	142	11,405	80	3
Hereford - - -	321	93,552	291	87,987	274	159	13,035	81	7
Lichfield and Coventry	610	170,104	278	159,073	260	307	24,948	81	5
Lincoln - - - -	1,251	373,976	298	358,073	286	629	48,347	77	18
Llandaff - - - -	192	36,347	189	34,077	177	113	6,749	59	...
London - - - -	640	267,742	418	255,509	399	352	35,118	99	2
Norwich - - - -	1,026	331,750	323	321,823	313	522	38,510	73	37
Oxford - - - -	196	51,395	262	49,088	250	103	8,054	78	8
Peterborough - -	293	98,381	335	93,652	319	139	11,266	81	6
Rochester - - -	94	44,565	474	39,007	414	60	6,651	109	2
Salisbury - - -	398	134,255	337	127,459	320	223	18,174	81	11
Winchester - - -	419	153,995	367	143,614	342	202	19,858	98	7
Worcester - - -	223	73,255	328	69,655	312	110	9,002	81	3
York - - - - -	891	223,220	250	216,005	242	391	29,553	75	12
Sodor and Man - -	23	3,727	162	3,623	157	3	211	70	...
TOTAL	10,540	£3,197,225		£3,004,721		5,230	£424,695		178

If the amount of the Curates' Stipends, which is included in the Income of the Incumbents, be subtracted therefrom, the Net Income returned will be reduced to 2,579,961*l.*, giving an Average of 244*l.* to each incumbent.

SCALE OF INCOMES.—Under 200*l.* and progressing by 10*l.*

DIOCESE.	Total Number of Benefices, exclusive of Sinecure Rectories and Benefices annexed to other preferments.	under 10*l.*	10*l.* and under 20*l.*	20*l.* and under 30*l.*	30*l.* and under 40*l.*	40*l.* and under 50*l.*	50*l.* and under 60*l.*	60*l.* and under 70*l.*	70*l.* and under 80*l.*	80*l.* and under 90*l.*	90*l.* and under 100*l.*	100*l.* and under 110*l.*	110*l.* and under 120*l.*	120*l.* and under 130*l.*	130*l.* and under 140*l.*	140*l.* and under 150*l.*	150*l.* and under 160*l.*	160*l.* and under 170*l.*	170*l.* and under 180*l.*	180*l.* and under 190*l.*	190*l.* and under 200*l.*
St. Asaph	131	...	...	...	...	1	2	1	1	6	9	1	6	4	7	2	1	4	4	2	1
Bangor	123	...	...	...	...	2	1	3	4	10	11	7	2	3	1	...	4	5	4	2	2
Bath and Wells	428	...	2	2	4	4	8	7	11	9	12	16	6	12	12	11	17	15	11	24	14
Bristol	252	...	1	1	1	2	8	7	4	10	5	4	2	6	5	12	8	12	4	6	6
Canterbury	339	...	...	...	2	4	8	5	6	3	3	17	9	10	11	10	8	11	10	12	6
Carlisle	124	...	...	...	...	4	10	6	8	9	12	9	3	5	6	2	6	2	6	1	3
Chester	630	...	...	...	2	17	25	27	28	36	51	47	40	37	33	23	14	15	13	9	8
Chichester	265	...	...	1	1	...	9	11	1	5	3	7	12	5	5	4	19	13	8	12	7
St. David's	401	1	...	3	...	7	21	36	28	40	31	35	21	16	21	26	17	12	10	9	4
Durham	192	...	...	1	1	1	6	11	6	5	10	4	8	5	9	3	3	2	7	2	5
Ely	146	...	...	1	...	1	2	6	5	6	6	7	3	7	...	3	7	6	5	5	1
Exeter	610	...	1	1	1	4	9	9	9	10	13	15	24	20	16	15	19	16	20	17	28
Gloucester	283	1	1	...	3	6	10	9	6	10	12	11	4	13	6	6	10	3	3	3	10
Hereford	318	1	2	...	2	7	15	4	9	5	10	14	4	8	5	11	10	8	6	13	11
Lichfield and Coventry	609	1	...	4	4	13	21	28	18	33	45	21	25	19	14	18	22	11	12	8	11
Lincoln	1,249	...	1	4	8	27	26	43	27	46	36	40	30	40	30	28	43	29	30	27	41
Llandaff	192	1	...	...	1	6	8	13	7	20	8	10	7	10	7	2	4	7	6	6	9
London	634	1	...	2	2	2	6	7	5	8	10	6	8	13	4	10	14	19	11	6	14
Norwich	1,021	3	5	2	8	17	24	30	24	17	15	36	23	18	24	24	25	27	23	19	21
Oxford	196	...	2	1	1	2	7	8	1	5	9	10	6	3	9	9	5	6	10	5	4
Peterborough	293	1	...	...	...	1	2	1	5	4	8	9	7	3	5	8	13	3	5	9	8
Rochester	94	...	...	...	...	...	...	1	...	...	1	...	...	...	2	2	3	2	2	1	4
Salisbury	396	...	1	1	4	2	9	1	4	7	3	11	4	9	12	9	7	19	11	4	7
Winchester	417	...	2	3	6	6	8	6	11	8	9	16	7	4	6	13	12	9	9	9	2
Worcester	223	...	...	1	...	4	5	1	5	9	9	9	7	4	7	5	10	5	5	5	5
York	889	1	1	4	12	31	52	36	20	32	51	38	27	43	38	35	28	29	20	17	15
Sodor and Man	23	...	...	...	...	1	3	...	1	...	8	2	...	1	1	...	...	...	...	...	...
	10,478	297, under 50*l.*					1629, 50*l.* and under 100*l.*					1602, 100*l.* and under 150*l.*					1354, 150*l.* and under 200*l.*				

SCALE OF INCOMES.—Under 500*l.* and progressing by 20*l.*

DIOCESE.	200*l.* and under 220*l.*	220*l.* and under 240*l.*	240*l.* and under 260*l.*	260*l.* and under 280*l.*	280*l.* and under 300*l.*	300*l.* and under 320*l.*	320*l.* and under 340*l.*	340*l.* and under 360*l.*	360*l.* and under 380*l.*	380*l.* and under 400*l.*	400*l.* and under 420*l.*	420*l.* and under 440*l.*	440*l.* and under 460*l.*	460*l.* and under 480*l.*	480*l.* and under 500*l.*
St. Asaph	6	6	11	7	7	4	6	6	3	2	3	...	1	3	1
Bangor	5	4	5	5	4	5	2	4	...	5	4	1	4	2	...
Bath and Wells	30	23	15	17	16	12	11	11	10	13	6	12	6	8	5
Bristol	9	13	11	12	8	11	7	4	11	8	4	6	10	2	3
Canterbury	18	11	19	6	11	10	7	11	10	15	10	7	5	6	2
Carlisle	2	5	3	2	3	2	...	2	2	1	...	1	...	1	1
Chester	21	13	24	9	16	8	7	5	5	5	6	3	3	5	2
Chichester	11	11	8	9	13	10	2	16	7	6	5	2	4	3	2
St. David's	12	9	9	5	2	7	6	3	...	2	4	1	...	...	1
Durham	8	10	8	7	5	2	5	5	3	...	1	1	1	4	3
Ely	11	9	7	2	5	4	3	2	1	1	2	4	3	...	1
Exeter	30	32	35	27	14	21	17	20	13	18	17	13	15	8	11
Gloucester	10	17	11	7	6	13	11	5	9	4	5	5	11	4	3
Hereford	11	21	18	9	9	11	11	10	8	4	...	3	5	8	2
Lichfield and Coventry	28	25	15	23	13	26	12	13	13	9	7	5	8	5	8
Lincoln	59	57	51	43	45	44	29	29	27	34	16	25	26	15	12
Llandaff	5	5	7	10	6	1	1	6	3	3	4	1	2	2	...
London	32	26	35	19	24	33	20	20	9	19	17	17	19	15	20
Norwich	43	27	40	36	49	34	34	28	21	26	30	22	22	19	15
Oxford	8	7	7	6	5	6	7	8	3	4	2	2	3	1	5
Peterborough	9	12	17	12	16	13	9	22	9	5	8	10	3	7	7
Rochester	2	4	5	2	5	2	1	8	3	4	3	...	4	1	2
Salisbury	16	25	13	21	17	20	12	15	11	11	12	7	13	8	9
Winchester	19	16	11	10	9	16	20	14	10	10	17	8	8	10	6
Worcester	12	8	15	6	7	6	3	4	6	6	6	4	1	1	1
York	36	21	34	21	24	20	19	14	15	9	12	10	10	10	2
Sodor and Man	1	...	1	1	...	...	...	1	1	...	...	...	...	...	...
	1979, 200*l.* and under 300*l.*					1326, 300*l.* and under 400*l.*					830, 400*l.* and under 500*l.*				

SCALE OF INCOMES.—Under 1000*l.*, and progressing by 50*l.*

DIOCESE.	500*l.* and under 550*l.*	550*l.* and under 600*l.*	600*l.* and under 650*l.*	650*l.* and under 700*l.*	700*l.* and under 750*l.*	750*l.* and under 800*l.*	800*l.* and under 850*l.*	850*l.* and under 900*l.*	900*l.* and under 950*l.*	950*l.* and under 1000*l.*
St. Asaph	2	3	..	2	4	1	..	..	..	..
Bangor	1	3	3	1	..	1	..	2	1	..
Bath and Wells	7	7	9	2	4	3	1	2	1	..
Bristol	8	3	4	2	4	1	2	1	1	1
Canterbury	6	9	7	8	3	7	3	2	2	2
Carlisle	3	1	..	2	..	..	..	..	..	1
Chester	11	4	7	7	4	3	6	2	2	4
Chichester	6	4	2	4	4	5	..	2	2	1
St. David's	..	..	..	1	..	..	..	..	..	..
Durham	8	5	3	4	..	4	3	..	..	2
Ely	1	2	1	3	1	2	1	..	..	..
Exeter	17	8	12	9	9	6	2	4	2	1
Gloucester	11	2	5	6	2	2	2	1	..	..
Hereford	7	6	7	6	2	4	5	..	2	1
Lichfield and Coventry	15	13	7	5	6	3	2	1	3	3
Lincoln	40	29	24	16	11	10	11	8	6	9
Llandaff	..	3	..	1	..	..	..	..	..	..
London	25	27	16	19	15	12	2	4	7	5
Norwich	54	33	24	14	17	12	9	8	3	3
Oxford	2	5	3	..	4	1	2	1	..	..
Peterborough	9	7	5	5	2	4	2	4	2	..
Rochester	8	3	6	..	4	3	..	1	2	1
Salisbury	15	6	9	8	1	6	5	3	2	2
Winchester	18	9	12	12	6	5	2	4	4	3
Worcester	6	3	8	2	4	4	2	1	2	..
York	18	13	13	11	4	8	3	10	4	2
Sodor and Man	..	..	..	..	..	..	..	..	..	1
	506		337		218		126		90	
	500*l.* and under 600*l.*		600*l.* and under 700*l.*		700*l.* and under 800*l.*		800*l.* and under 900*l.*		900*l.* and under 1000*l.*	
	954					323				
	500*l.* and under 750*l.*					750*l.* and under 1000*l.*				

SCALE OF INCOMES.—Under 2000*l.* and progressing by 100*l.*—2000*l.* and upwards, and progressing by 500*l.*

DIOCESE.	1000*l.* and under 1100*l.*	1100*l.* and under 1200*l.*	1200*l.* and under 1300*l.*	1300*l.* and under 1400*l.*	1400*l.* and under 1500*l.*	1500*l.* and under 1600*l.*	1600*l.* and under 1700*l.*	1700*l.* and under 1800*l.*	1800*l.* and under 1900*l.*	1900*l.* and under 2000*l.*	2000*l.* and under 2500*l.*	2500*l.* and under 3000*l.*	3000*l.* and under 3500*l.*	3500*l.* and under 4000*l.*	4000*l.* and upwards.
St. Asaph	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..
Bangor	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Bath and Wells	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Bristol	..	1	..	1	..	..	..	..	..	..	..	..	..	..	..
Canterbury	1	..	3	1	..	..	..	1	..	..	1	..	..	..	..
Carlisle	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Chester	6	..	2	2	2	1	..	2	2	2	1	1	1	1	..
Chichester	1	..	..	1	1	..	..	..	..	..	..	..	..	..	..
St. David's	..	1	..	..	..	..	..	..	..	..	..	..	..	..	..
Durham	1	2	1	1	1	..	1	..	1	..	1	1	..	..	1*
Ely	..	3	1	1	1	..	..	1	..	..	1	..	..	..	1†
Exeter	1	..	1	..	..	..	..	..	..	..	..	..	..	..	..
Gloucester	2	1	..	..	..	1	..	..	..	..	..	..	..	..	..
Hereford	1	..	2	..	..	..	..	..	..	..	..	..	..	..	..
Lichfield and Coventry	4	..	1	..	2	1	..	1	1	..	1	2	..	..	..
Lincoln	5	2	3	3	..	1	..	1	1	..	1	..	..	..	..
Llandaff	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
London	5	8	4	1	1	3	2	..	2	1	2	..	..	..	..
Norwich	3	3	5	..	..	..	1	..	..	..	..	..	..	1	..
Oxford	..	..	1	..	..	..	..	..	..	..	..	..	..	..	..
Peterborough	2	..	..	..	..	..	..	..	..	..	..	..	..	..	..
Rochester	1	1	..	..	..	..	..	..	..	..	..	..	..	..	..
Salisbury	1	2	..	1	..	..	..	..	..	..	..	..	..	..	..
Winchester	1	6	3	..	..	..	..	..	1	..	1	..	..	..	..
Worcester	1	5	2	..	1	..	..	..	..	..	..	..	..	..	..
York	6	1	2	1	2	3	1	..	..	..	..	..	..	..	..
Sodor and Man	..	..	..	..	..	..	..	..	..	..	..	..	..	..	..
	134, 1000*l.* and under 1500*l.*					32, 1500*l.* and under 2000*l.*					18, 2000*l.* and upwards.				

* The rectory of Stanhope, (in the county of Northumberland, diocese of Durham,) of the net annual value of 4843*l.*
† The rectory of Doddington, (in the county of Cambridge, diocese of Ely,) of the net annual value of 7306*l.*

TABLE OF SINECURE RECTORIES.

DIOCESE.	Number of Sinecure Rectories returned to the Commissioners*, exclusive of those annexed to other Preferments†.	Aggregate Amount of the Gross Incomes in each Diocese.	Average Gross Income.	Aggregate Amount of the Net Incomes in each Diocese.	Average Net Income.
		£	£	£	£
St. Asaph - - -	12	3,868	322	3,566	297
Bangor - - -	...	...	...	...	...
Bath and Wells - -	2	389	194	386	193
Bristol - - -	1	94	...	94	...
Canterbury - - -	7	1,993	284	1,653	236
Carlisle - - -	...	...	...	...	...
Chester - - -	...	...	...	...	...
Chichester - -	2	942	471	890	445
St. David's - - -	8	1,990	248	1,769	221
Durham - - -	...	...	...	...	...
Ely - - - -	4	2,776	694	2,522	630
Exeter - - -	3	654	218	561	187
Gloucester - - -	...	...	...	...	...
Hereford - - -	3	680	226	612	204
Lichfield and Coventry -	1	20	...	20	...
Lincoln - - -	2	920	460	902	451
Llandaff - - -	...	...	...	...	...
London - - -	6	1,662	277	1,549	258
Norwich - - -	5	1,043	208	1,035	207
Oxford - - -	...	...	...	...	...
Peterborough - -	...	...	...	...	...
Rochester - - -	...	...	...	...	...
Salisbury - - -	2	601	300	597	298
Winchester - -	2	434	217	402	201
Worcester - - -	...	...	...	...	...
York - - -	2	556	278	537	268
Sodor and Man - -	...	...	...	...	...
Totals - -	62	18,622	...	17,095	...
		Average.....£300		Average...£275	

* There are four sinecure rectories not returned. † Two in number.

TABLE classing the PATRONAGE of BENEFICES, and showing the Number possessed by each Class.

DIOCESE.	Crown.	Archbishops and Bishops.	Deans and Chapters, or Ecclesiastical Corporations aggregate.	Dignitaries and other Ecclesiastical Corporations sole*.	Universities, Colleges, and Hospitals, not Ecclesiastical.	Private Owners.	Municipal Corporations.
St. Asaph -	2	120	...	2	1	19	...
Bangor - -	6	78	1	7	3	29	...
Bath & Wells	21	29	39	103	23	224	4
Bristol - -	12	15	11	42	14	159	10
Canterbury -	18	148	36	36	14	87	2
Carlisle - -	4	20	27	19	3	54	...
Chester - -	26	34	34	227	13	299	6
Chichester -	19	31	21	49	15	130	...
St. David's -	63	102	16	61	12	159	...
Durham - -	12	45	36	28	4	66	...
Ely - - -	2	31	21	13	46	39	...
Exeter - -	63	44	69	117	11	309	5
Gloucester -	29	30	35	40	26	133	3
Hereford -	26	36	26	54	11	179	...
Lichfield and Coventry -	53	18	10	122	6	391	5
Lincoln - -	156	73	63	177	102	688	...
Llandaff - -	14	6	28	19	7	118	...
London - -	75	86	58	105	68	277	...
Norwich - -	95	85	47	124	86	596	13
Oxford - -	12	13	22	16	59	78	...
Peterborough	31	18	12	40	32	171	...
Rochester -	10	15	17	8	4	44	...
Salisbury -	35	39	44	67	60	154	...
Winchester -	30	53	15	79	53	197	...
Worcester -	20	14	38	39	15	98	...
York - - -	103	57	61	257	33	397	5
Sodor & Man	15	8	...	...	...	1	...
Total - -	952	1,248	787	1,851	721†	5,096	53

The above classification comprises only the patronage *returned* to the Commissioners. There are 178 non-returns, and 86 returned omitting the patronage.

The patronage being frequently divided between different classes of patrons, and being included under each, it is obvious that the aggregate total of the above numbers will not agree with the total number of benefices.

* This includes the patronage or nomination exercised by rectors and vicars.

† This number does not comprise the livings in the patronage of the dean and canons of Christ Church, which is included among the deans and chapters; and it is further to be observed, that united livings, and livings with chapels annexed, have in either case been treated as single benefices.

TABLE, classing the APPROPRIATIONS and IMPROPRIATIONS; showing the Number possessed by each Class, and the Number of Cases in each Diocese in which the Vicarage is partly or wholly endowed with the Great Tithes.

DIOCESE.	Crown.	Archbishops and Bishops.	Deans and Chapters or Ecclesiastical Corporations Aggregate.	Dignitaries and other Ecclesiastical Corporations Sole.	Universities, Colleges, and Hospitals.	Private Owners.	Municipal Corporations.	Vicarages partly Endowed.	Vicarages wholly Endowed.
St. Asaph - -	...	12	10	8	...	27	...	1	...
Bangor - -	...	11	7	7	...	29	...	3	...
Bath and Wells -	1	9	27	36	...	105	4	5	8
Bristol - -	...	1	16	11	2	48	2	2	3
Canterbury - -	...	48	46	12	8	49	1	2	7
Carlisle - -	...	8	30	3	2	28	...	3	1
Chester - -	2	21	28	5	15	113	...	6	3
Chichester - -	...	7	11	19	5	67	...	3	12
St. David's - -	1	18	20	49	4	124	2	13	4
Durham - -	1	7	28	7	13	61	1	6	3
Ely - - -	...	10	26	...	19	27	...	2	1
Exeter - -	2	5	61	23	4	156	7	9	11
Gloucester - -	2	14	32	2	3	54	1	1	5
Hereford - -	...	20	25	11	12	80	...	11	14
Lichfield and Coventry	1	8	20	49	5	249	4	9	10
Lincoln - -	3	39	48	36	31	347	3	12	8
Llandaff - -	1	10	30	9	4	45	2	3	6
London - -	1	13	26	16	16	144	1	3	4
Norwich - -	1	47	48	2	22	197	9	7	14
Oxford - -	...	7	18	5	27	36	...	4	...
Peterborough - -	...	8	10	1	6	65	...	...	1
Rochester - -	1	3	13	1	4	21	...	1	...
Salisbury - -	1	6	37	23	21	93	2	3	3
Winchester -	...	3	8	16	29	78	...	6	5
Worcester - -	5	4	25	8	3	43	3	3	3
York - -	7	40	52	79	26	265	1	2	5
Sodor and Man -	8	6	...	...	...	1	...	1	1
Total -	38	385	702	438	281	2,552	43	121	132

NOTES.

TABLE of the Number of Cases in each Diocese in which there is a GLEBE HOUSE, fit or unfit for Residence, or in which there is none.

DIOCESE.	Fit.	Unfit.	None.
St. Asaph	90	13	29
Bangor	61	6	58
Bath and Wells	285	73	73
Bristol	163	49	38
Canterbury	203	66	79
Carlisle	84	13	31
Chester	297	45	288
Chichester	168	45	59
St. David's	110	78	221
Durham	131	20	43
Ely	77	28	48
Exeter	438	73	112
Gloucester	170	48	70
Hereford	183	58	85
Lichfield and Coventry	334	77	220
Lincoln	715	289	254
Llandaff	66	36	92
London	406	89	147
Norwich	396	209	353
Oxford	129	33	42
Peterborough	223	45	27
Rochester	62	12	20
Salisbury	286	67	46
Winchester	280	42	108
Worcester	148	40	34
York	429	167	298
Sodor and Man	13	7	3
Totals	5,947	1,728	2,878

[Note to Page 619.]

The number of vicarages of which the impropriations have not been returned to the Commissioners, is 223.

Where the impropriation or appropriation of the great tithes is shared between owners of different classes, it is included under each class.

There are some few cases of rectories in which the rector has only a portion of the great tithes, the remainder being the property of a spiritual person or body, or of a lay impropriator; and in Jersey and Guernsey, the benefices are merely nominal rectories, the incumbent not being entitled, in any case, to more than a portion (generally one-third) of the great tithes, the crown or governor taking the residue; and, in some cases, the whole goes to the crown or governor.

NOTES.

PERSONAL INCAPACITIES FROM PARLIAMENT.

(3.) Exclusive of disqualification from want of qualification in estate, there is another species of disqualification, viz., personal disability; under which head the following persons are incapacitated from being members of parliament:—viz., aliens[1], denizens[2], minors[3], idiots and lunatics[4], peers of England and Scotland[5], representative peers of Ireland[6], judges of the supreme courts[7], judges of session, or justices, or barons of the exchequer in Scotland[8], judges in Ireland, and masters in chancery there[9], Irish assistant barristers[10], revising barristers in England, for eighteen months from the time of their appointment, ineligible for the county or borough to which appointed[11]; barristers or chairmen, under 2 & 3 William IV. c. 88, s. 37, (ineligible to represent any place in which they shall have exercised jurisdiction for seven years afterwards); the commissioners of her majesty's woods and forests[12]; governor, deputy governor, of any of the settlements, presidencies, territories, or plantations, of the East India Company[13]; justice of the peace, or receiver, during his appointment, under 10 George III. c. 44; magistrate appointed to any of the eight police-offices under Stat. 10 George IV. c. 45; clergymen of the Established Church[14]; Roman Catholic clergy[15]; sheriffs chosen for their own shires[16]; sheriffs chosen for places within their jurisdiction[17]; (it is, however, doubtful whether this case would not be over-ruled, because sheriffs can be chosen for boroughs which are without their jurisdiction[18];) sheriffs of one county chosen for another[19]; sheriff substitute, sheriff clerk, or depute sheriff clerk, town clerk, or depute town clerk, for the city, burgh, town, or district, in

Barristers or chairmen.

Governors of settlements.

Clergymen.

Sheriffs.

[1] 12 & 13 William III. c. 2; 1 George I. Stat. 2, c. 4, s. 2. Rogers, 45.
[2] Ibid.
[3] Stat. 7 & 8 William III. c. 25. *Flintshire*, 2 Peck. 526.
[4] *Grampound*, Oct. 29, 1566. D'Ewes, 126.
[5] Rogers, 46.
[6] Act of Union, 39 & 40 George III. c. 67.
[7] Com. Journ. Nov. 9, 1605.
[8] 7 George II. c. 16.
[9] Stat. 1 & 2 George IV. c. 44.
[10] Stat. 36 George III. c. 25, s. 3.
[11] Stat. 2 William IV. c. 45, ss. 41, 49.
[12] Stat. 10 George IV. c. 50, s. 21.
[13] Stat. 10 George IV. c. 62, s. 1.
[14] Stat. 41 George III. c. 63.
[15] Stat. 10 George IV. c. 7, s. 9.
[16] 2 Hatsell, 33. Dalton, 331. Br. Parliament, 7. D'Ewes, 37, 665.
[17] *Abingdon*, 1 Doug. 420.
[18] *Wells*, 4 Doug. 123. *Southampton*, 4 Doug. 87.
[19] 2 Whitlocke, 369.

NOTES.

which he is such clerk[20]; officers to whom election writs or precepts are directed[21].

Where the influence of government is supposed to have a direct control, a disqualification has been created by various statutes.

What is a new office or place of profit under Stat. 6 Anne, c. 7.

By Stat. 6 Anne, c. 7, s. 25, no person who shall have in his own name, or in the name of any person or persons in trust for him or for his benefit, any *new office or place of profit* whatsoever under the crown, which at any time since the 25th of October, 1705, have been created or erected, or thereafter shall be created or erected, shall be capable of being elected, or of sitting or voting as a member of the House of Commons: the holders of certain offices under government are disqualified: and pensioners are excluded.

Addresses to the crown, Feb. 16, 1729, and Feb. 15, 1779.

Addresses on February 16, 1729, and February 15, 1779, were presented to the crown, to obtain an account of the offices and employments under the crown, existing on October 25, 1705; the number of officers employed at that time in each, with their respective salaries; and also an account of the number and names of the officers in each department, with their salaries, as they stood on the then preceding January 5, distinguishing the time when any increase in the number of such offices, or their salaries, was first made. And a report, in consequence of such addresses, is among the documents of the House of Commons[22].

Operation of the statute of Anne, as to the disqualifying clauses.

The following selected cases will illustrate the operation of the statute of Anne, as to the disqualifying clauses:

The appointment to the situation of consul-general; the acceptance of the office of conservator of the privileges of the Scots' nation in the Netherlands, and resident there for the affairs of Scotland[23]; inspector of the roads in Scotland[24]; agent of militia regiments[25]; auditor of land revenue of Wales[26]; chancellor of duchy of Lancaster[27]; chief clerk of ordnance, ammunition, &c.[28]; clerk of delivery of ordnance

[20] Stat. 21 George II. c. 19, s. 11; Stat. 2 & 3 William IV. c. 65, s. 36.

[21] *Cambridge*, 1 Journ. 540; 9 Journ. 725. *Lyme*, 2 Luders, 40. *Taunton*, 1 Peck. 406.

[22] 2 Hatsell, 42. Rogers, 53.

[23] Rogers, 54.

[24] *Fife*, 1 Luders, 455.

[25] 37 Com. Journ. 470. 38 Ibid. 651—700. 39 Ibid. 6.

[26] 38 Ibid. 48.

[27] 30 Ibid. 910.

[28] 36 Ibid. 995.

NOTES.

stores[29]; clerk of ordnance[30]; clerk of comptroller of household[31]; clerk of parliament[32]; commissary-general of musters[33]; commissioners of affairs of India, with salary[34]; comptroller of household[35]; groom of bed-chamber[36]; master of buckhounds[37]; master of household[38]; out ranger of Windsor Forest[39]; registrar of court of admiralty[40]; remembrancer of exchequer[41]; riding forester[42]; secretary of Greenwich Hospital[43]; surveyors-general of land revenue[44]; ordnance[45]; works[46]; treasurer of household[47]; (by Stat. 22 George III. c. 82, and 57 George III. c. 62, certain other offices were abolished, and which, if revived, were to be considered as new offices on their revival;) clerks of the signet and privy seal[48]; auditors and tellers of the exchequer in England and Ireland; clerk of the pells in ditto; and every officer in the establishment of either[49].

Registrar of Court of Admiralty.

Surveyors-general of land revenue, &c.

Tellers of the Exchequer, &c.

But no officer in the army or navy, *being a member of the House*, vacates his seat in consequence of a new commission: but the acceptance of a commission by a member, not being at the time in the army, vacates his seat[50].

Acceptance of a commission in the army.

Acceptance of commissions in the militia, under the general Defence Act, or in regiments of yeomanry, will not vacate a seat: but a commission to a military officer of governor, or lieutenant-governor, of any fort, citadel, or garrison, upon the military establishment, does vacate a seat[51].

Commissions in the militia, &c.

The offices of governor of Greenwich Hospital, and lieutenant-general of the ordnance, if given to military officers, do not vacate: but the situations of constable of the Tower of London, and Tower of Flint, were held to vacate, when given to civilians[52].

Greenwich Hospital; Ordnance; the Tower.

Governors of any of the plantations[53]; governor of the

Governors of the plantations.

[29] 36 Com. Journ. 1006.
[30] 39 Ibid. 1008. 49 Ibid. 19.
[31] 36 Ibid. 539.
[32] 43 Ibid. 539.
[33] 35 Ibid. 809.
[34] 48 Ibid. 994.
[35] 46 Ibid. 447.
[36] 44 Ibid. 319. 48 Ibid. 126.
[37] 39 Ibid. 420.
[38] 49 Ibid. 774.
[39] 48 Ibid. 6.
[40] 46 Ibid. 91.
[41] 53 Ibid. 5.
[42] 46 Ibid. 459.
[43] 39 Ibid. 306.
[44] 35 Ibid. 454.
[45] 44 Ibid. 239.
[46] 37 Ibid. 55.
[47] 48 Ibid. 996.
[48] Stat. 57 George III. c. 63.
[49] Stat. 57 George III. c. 84, s. 1.
[50] 2 Hatsell, 35, 39, 40.
[51] Rogers, 53. 22 Com. Journ. 201, A.D. 1733.
[52] Com. Journ. Feb. 12, 1710; 3 March, 1784. 54 Journ. 292. 2 Hatsell, 47.
[53] Stat. 6 Anne, c. 7, s. 25.

NOTES.

Bahama Isles[54]; lieutenant-governor of Upper Canada[55], are disqualified.

Commissioners executing the office of high treasurer of Ireland.

But the appointment of the chancellor of the exchequer in Ireland to be a lord of the treasury in England, without salary, does not make void his election[56]; neither are commissioners executing the office of high treasurer of Ireland[57], incapacitated.

Offices, of which the holders are disqualified by particular acts of parliament, are as follow:

Officers incapable of being elected members of parliament, from statutes.

Persons concerned in farming, managing, or collecting the money or duties on salt, ale, beer, or other liquors[58]; commissioners determining appeals concerning such duties; comptrollers or auditors of the accounts of such duties.

Collecting or managing the duties of excise or customs.

Any one holding, by himself or deputy, or for whom any office, place, or employment, is held in trust, touching or concerning the farming, collecting, or managing the duty of excise[59]; commissioners or farmers of the customs; any one holding, by himself or deputy, or for whom any office, place, or employment is held in trust, touching or concerning the farming or managing the customs, are declared incapable of sitting, voting, or acting as members[60].

Commissioners of prizes, transports, wine licenses, &c.

Commissioners or sub-commissioners of prizes; secretary or receiver of prizes; comptroller of army accounts; commissioners of transports, or of the sick and wounded; agents for regiments; commissioners for wine licences; deputy-governor of any of the plantations; commissioners of the navy employed at any of the outports[61]; commissioners of the navy or victualling offices; deputies in the above and following offices; lord high treasurer; commissioners of the treasury; auditors of the exchequer; lord high admiral; tellers of the exchequer; chancellor of the exchequer; commissioners of the admiralty; paymasters of the army and navy; principal secretaries of state; commissioners of salt; commissioners of stamps; commissioners of appeals; commissioners of wine licenses; commissioners of hackney coaches; commissioners of hawkers and pedlars[62]; persons having offices, civil or

Official deputies.

[54] 53 Journ. 63. c. 7. [55] Ibid. 46, 47.
[56] Stat. 47 George III. sess. 2, c. 20, s. 3.
[57] Stat. 33 George III. c. 41, s. 3.
[58] Stat. 5 William and Mary, c. 7, s. 57.
[59] Stat. 11 & 12 William III. c. 2, s. 150; 41 George III. c. 52, s. 4.
[60] Stat. 11 William III. c. 10, s. 89. [61] Stat. 6 Anne, c. 7, s. 25.
[62] Stat. 15 George II. c. 22, s. 1; 41 George III. c. 52, s. 4.

military, within the island of Minorca or Gibraltar, except army officers only holding their commission; commissioners for the examination of the accounts of the expenditure of public money in the West Indies, who receive salaries[63]: and commissioners of the revenue in Ireland, and their deputies or clerks[64], are all disqualified, not only from being elected, but also from sitting and voting as members of parliament[65].

NOTES.

Civil or military offices at Gibraltar.

Commissioners of the revenue in Ireland.

The architect appointed by the lord-lieutenant to superintend the execution of public works under the direction of the commissioners of the board of works[66]; surveyor-general in the revenue; collector in the revenue appointed by the commissioners of the customs or excise, except the collectors of the customs and excise in the port of Dublin and in the county and city of Dublin. The secretaries to the commisioners of customs, the excise, the commissioners of accounts, the commissioners of the barracks, the post-office, the board of ordnance, are disqualified from sitting or voting.

Ireland.

Secretaries to commissioners of customs and excise.

Paymasters of bounties on corn coming coastwise to the city of Dublin[67], are disqualified from being elected and also from sitting or voting as members of parliament.

The penalties under 33 George III. c. 41, s. 1, for an incapacitated person, presuming to sit or vote as member, is a penalty of 500*l.*, independent of the election and return being void.

Penalties under 33 George III. c. 41.

The ten commissioners under 46 George III. c. 141, s. 22, for examining and auditing the public accounts; and the surveyor-general of his majesty's works, under 54 George III. c. 157, s. 2, are absolutely disqualified from being members of parliament.

Stat. 46 George III. c. 141; 54 George III. c 157.

Certain officers have been excepted from such incapacities: thus, commissioners of the treasury[68]; commissioners of the land-tax[69]; members of the corporation of the Bank of England[70]; treasurer or comptroller of the navy; secretaries of the treasury; secretary to the chancellor of the exchequer; secretaries of the admiralty; under secretary to any of the

Exceptions.

[63] Stat. 45 George III. c. 91, s. 7.
[64] Stat. 15 George II. c. 22, s. 1.
[65] Vide post, 627, "Contractors."
[66] 33 George III. c. 34, s. 21.
[67] 43 George III. c. 41, s. 1 (Ireland).
[68] 5 William and Mary, c. 7, s. 57.
[69] 42 George III. c. 116, s. 185.
[70] 5 William and Mary, c. 20, s. 13; 15 George II. c. 13, s. 8.

NOTES.

secretaries of state; deputy paymaster of the army[71]; one of the commissioners of woods and forests[72]; commissioners to hear and determine claims to premises under 42 George III. c. 89; and the vice president of the board of trade[73].

Members may be re-elected.

The principle of election statutes is, that of freedom of selection, and which was productive of Stat. 6 Anne, c. 7, under which, as previously stated, if any person being chosen a member of the House of Commons, shall accept of any *office of profit from the crown* during such time as he shall continue a member, his election shall be void, and a new writ shall issue, as if such person accepting were naturally dead; but it was also provided, that such person shall be capable of being again elected, as if his place had not become void. Thus the electors have an opportunity of reviewing their choice in the re-election or rejection of a representative, who has rendered himself liable to an influence from which he was before exempt. The amount of profit is immaterial; and there are two places of *no* profit which, for the convenience of members desirous of retiring from parliament, are considered within this statute, and enable them to vacate their seats, viz.—the steward of the Chiltern Hundreds, and the steward of East Hendres, in Berks[74].

Possession of an office must be complete in order to disqualify.

Under the statute of Anne, the possession of the office must be complete in order to disqualify; and the mere grant of an office in reversion will not disqualify[75]; the disqualification arises from the enjoyment[76].

PENSIONS.

Stat. 6 Anne, c. 7. 1 George I. Stat. 2, c. 56, s. 2.

By Stat. 6 Anne, c. 7, s. 25, no person having any pension from the crown, *during pleasure*, is capable of being elected, or of sitting or voting, &c. The 1 George I. Stat. 2, c. 56, extends the Act of Anne to cases of pensions from the crown for any term or number of years; and "that if any person who shall have such pension as aforesaid (viz. pension for any term or number of years), at the time of his being so elected, or at any time after, during such time as he shall continue to be a member of the House of Commons, shall presume to sit or vote in that House, then in such case he shall forfeit 20*l.* for every day he shall so sit or vote." But by 6 Anne, c. 7, s. 29, if any person thereby disabled or rendered incapable of

Penalties against a disqualified person, acting as member of parliament.

[71] 15 George II. c. 22, s. 3.
[72] 50 George III. c. 65.
[73] 57 George III. c. 66.
[74] Shepherd, 60.
[75] *Lanarkshire*, 1775, 2 Doug. 367.
[76] Case of *Anstis*, April 9, 1714, 1 Roe, 209; *Rye*, 2 Hatsell.

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being elected, shall presume to sit or vote as a member of the House of Commons, such person so sitting or voting shall forfeit 500*l.* So that, if a person having a pension for a term of years should, notwithstanding, procure himself to be elected, he would be liable to pay 20*l.* a day for every day he sat in the House; but a pensioner for life so offending would forfeit 500*l.*, though he sat but one day[77].

CONTRACTORS.

Stat. 22 George III. c. 45, ss. 1,

The provisions relative to contractors are contained in 22 George III. c. 45, and are as follow:—"Any person who shall directly or indirectly, himself, or by any person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in the whole or in part, any contract, agreement, or commission made or entered into with, under, or from the commissioners of his majesty's treasury, navy, or victualling office, or with the master-general or board of ordnance, or with any one or more of such commissioners, or with any other persons whatsoever, for or on account of the public service; or shall knowingly and willingly furnish or provide, in pursuance of any such agreement, contract, or commission, which he or they shall have made or entered into as aforesaid, any money to be remitted abroad, or any wares or merchandise to be used or employed in the service of the public, shall be incapable of being elected, or of sitting or voting as a member of the House of Commons, during the time he shall execute, hold, or enjoy any such contract, &c. or any share thereof, or any benefit or emolument arising from the same."

Contracts with the treasury, navy, victualling office, or ordnance.

"Any person being a *member*, who shall enter into such contract, or having entered into it, shall continue to hold it, his seat shall be void."

Members becoming, or continuing to be, contractors, vacate their seats.

But this statute does not extend to contracts, &c. by any incorporated trading company, nor to any company then existing, consisting of more than *ten persons*, where the contract has been made for the general benefit of the company: and the same exception is made in the Irish Act.

Exception as to trading companies.

Neither does the act extend to any person on whom the completion of any contract shall devolve by operation of law, until twelve calendar months after he shall have been in possession of the same:—And a condition is to be inserted in

And to those who have ceased to contract for twelve months previous.

Condition in every contract.

[77] *Reading*, C. & D. 114; Stat. 33 George III. c. 41, s. 1; 41 George III. c. 52; Rogers, 64, 65.

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all public contracts, that no member of the House of Commons shall have any share therein.

The London Flour Company.

By the Stat. 39 & 40 George III. c. 97, s. 27, which incorporates the London Flour Company, no person who shall be a member or manager, or other officer of the said company, shall, for that cause only, be disabled from being a member of parliament:—And Stat. 39 George III. c. 94, s. 5, after reciting that the covenants in the indenture usually made between his majesty and the master or worker of the mint, are not within the nature of a contract, coming within the meaning and intention of 22 George III. c. 45, enacts, "that nothing in that act shall extend, or be construed to extend, to the person holding such office."

Master or worker of the mint.

Army clothiers.

An army clothier, who contracts with the colonel of a regiment to furnish it with clothing, is not a contractor within the meaning of the act, and consequently not incapacitated from being elected: it was said by Richardson, J.:—"If it could be considered that General Nicols (the colonel of the regiment), were a contractor of the government within the meaning of the act, I should still think that the defendant, as a *sub-contractor*, is not liable for the penalties imposed by the statute. The act can only extend to *those who come in immediate contact with the government;* if it were otherwise, a large proportion of competent persons must, in time of war, be excluded from sitting in parliament[78]."

Sub-contractors.

Persons returned upon a double return.

Persons returned upon a double return are not competent to sit until the return is decided by a committee; but petitioners are eligible for any other place during the trial of their petition[79]: and absence from England is no ground of ineligibility[80], though it was once resolved to be so[81].

Absence from England, no ground of ineligibility.

Traitors, felons, outlaws, &c.

Those persons are also disqualified who have been attainted of treason or convicted of felony[82], gross fraud, and notorious

[78] *Thompson* v. *Pearce*, 1 Brod. & Bing. 25.
[79] Shepherd, 59. Com. Journ. April 16, 1727.
[80] *Bristol*, Simeon, 51. 1 Doug. 24.
[81] 2 Hatsell, 22.
[82] "Concerning the election of two knights, the words of the writ be,—'Duos milites gladiis cinctos magis idoneos et discretos elegi fac;' and for the election of citizens and burgesses, the words of the writ be,—'Duos, &c. de discretioribus, et magis sufficientibus;' which they cannot be said to be when they are attainted of treason or felony."—4 Inst. 47, 48. But the being indicted for felony causes no disqualification until conviction.—Com. Journ. Jan. 21, 1508. Com. Dig. Parl. D. 9. Dalton, 334.

breach of trust[83]:—outlaws in criminal suits[84], (but not in civil suits[85],) are also incapacitated; and expelled members are incapable for the then parliament[86]. NOTES.

CHAPTER IX.

Of private Liberty, or the Liberty of Individuals.

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

Private liberty defined.

Private liberty, according to the division of the English lawyers, consists, first, of the right of *property;* that is, of the right of enjoying exclusively the gifts of fortune, and all the various fruits of one's industry;

[83] Where a person had been convicted of felony, but whose sentence was remitted, because the offence only amounted to a misdemeanour, the commons resolved, he should be expelled the House, as having been guilty of a gross fraud and notorious breach of trust (as proved at the trial), therefore unworthy and unfit to continue a member of the House of Commons.—Com. Journ. March 5, 1812. Rogers, 68.

[84] Ibid. 69.

[85] *Cumberland*, Glanv. 124. The committee was informed by a petition exhibited by Sir R. B. with a certificate annexed from the clerk of the outlawries, that F. H., Esq., returned for Cumberland, was outlawed at the time of election, by twenty outlawries, all yet remaining in full force, at the suits of several persons, whereof some were for judgments; thereupon the petitioner prayed the opinion and order of the House; but after argument and search for precedents, the committee resolved, that F. H. was a person eligible and well returned; vide etiam 1 Com. Journ. 797. 2 Ibid. 149, 151. *Camelford*, Feb. 1558. *Buckinghamshire*, March, 1603. *Carmarthenshire*, April, 1668; sed vide Com. Dig. Parl. D. 9. 2 Hatsell, 37. Rogers, 69.

[86] *King's Lynn*, March 6, 1711. *Middlesex*, 1769; February 3, 1769; March, 1769. Sed vide, Com. Journ. May 3, 1782.

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secondly, of the right of *personal security;* thirdly, of the *locomotive faculty*, taking the word liberty in its more confined sense.

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

Rights of property.

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

No man, in England, can oppose the power of the laws.

In regard to the attempts to which the right of property might be exposed from one individual to another, I believe I shall have said everything, when I have observed, that there is no man in England who can oppose the irresistible power of the laws;—that, as the judges cannot be deprived of their employments but on an accusation by parliament, the effect of interest with the sovereign, or with those who approach his person, can scarcely influence their decisions;—that, the judges themselves have no power to pass sentence till the matter of fact has been settled by men nominated, we may almost say, at the common choice of the parties*, all private views, and, conse-

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

quently, all respect of persons, are banished from the courts of justice. However, that nothing may be wanting which may help to throw light on the subject I have undertaken to treat, I shall relate, in general, what is the law in civil matters, that has taken place in England.

Rejection of the Roman laws.

When the Pandects were found at Amalphi, the clergy, who were then the only men that were able to understand them, did not neglect that opportunity of increasing the influence they had already obtained, and caused them to be received in the greater part of Europe. England, which was destined to have a constitution so different from that of other states, was to be farther distinguished by its rejecting the Roman laws[1].

Limited powers of the foreign ecclesiastics.

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

The idea of ecclesiastical power associated with the Roman laws.

It happened, therefore, by a somewhat singular conjunction of circumstances, that, to the Roman laws, brought over to England by monks, the idea of

[1] See Note (1.), p. 638.

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

Introduction of the Roman laws opposed by the lawyers.

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

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

† It might, perhaps, be shown, if it belonged to the subject, that the liberty of thinking in religious matters, which has at all times remarkably prevailed in England, is derived from nearly the same causes as its political liberty: both, perhaps, are owing to this, that the same men, whose interest it is in other countries that the people should be influenced by prejudices of a political or religious kind, have been in England forced to inform and unite with them. I shall here take occasion to observe, in answer to the reproach made to the English, by President Henault, in his much-esteemed Chronological History of France, that the frequent changes of religion which have taken place in England, do not argue any servile disposition in the people; they only prove the equilibrium between the then existing

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Superiority of the English laws over the civil.

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

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

Supposed advantages from the non-admission of the civil law.

Even at present the English lawyers attribute the liberty they enjoy, and of which other nations are deprived, to their having rejected, while those nations have admitted, the Roman law; which is mistaking the effect for the cause. It is not because the English have rejected the Roman laws that they are free; but it is because they were free (or, at least, because there existed, among them, causes which were, in process of time, to make them so), that they have been able to reject the Roman laws. But, even though they had admitted those laws, these same circumstances, that have enabled them to reject the whole, would have likewise enabled them to reject those parts which

sects: there was none but what might become the prevailing one, whenever the sovereign thought proper to declare for it: and it was not England, as people may think at first sight,—it was only its government, which changed its religion.

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might not have suited them; and they would have seen, that it is very possible to receive the decisions of the civil law on the subject of the *servitutes urbanæ et rusticæ*, without adopting its principles with respect to the power of the emperors*.

A spirit of unlimited submission to monarchical power, is no necessary consequence of the admission of the Roman law.

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

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

The unwritten law receives its force from immemorial custom.

The *unwritten law*[2] is thus called, not because it is only transmitted by tradition from generation to generation, but because it is not founded on any known act of the legislature. It receives its force from immemorial custom, and, for the most part, derives its origin from acts of parliament enacted in the times which immediately followed the Conquest, (particularly those anterior to the time of Richard I.) the originals of which are lost.

The principal objects settled by the common law.

The principal objects settled by the *common law* are, the rules of descent, the different methods of acquiring property, the various forms required for rendering con-

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

[2] Vide ante, 79, 80.

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

Sources of the common law.

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

Legal text authors.

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

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

Gavel-kind.

Borough-English.

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The civil law, admitted only so far as it has been authorised by immemorial custom.

The civil law, in the few instances where it is admitted, is likewise comprehended under the unwritten law, because it is of force only so far as it has been authorised by immemorial custom. Some of its principles are followed in the ecclesiastical courts, in the courts of admiralty, and in the courts of the two universities; but it is there nothing more than *lex sub lege graviori;* and these different courts must conform to acts of parliament, and to the sense given to them by the courts of common law; being moreover subjected to the control of the latter[3].

The written law is the collection of the various acts of parliament.

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

Courts for the administration of justice.

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

The Court of Common Pleas.

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

* Unless they be private acts.

[3] Vide Note (1,) p. 638.

the Court of Common Pleas should thenceforward be holden in a fixed place*; and since that time it has been seated at Westminster[4]. It is composed of a lord chief justice, and three other judges[5]; and appeals from its judgments, usually called *writs of error*, are brought before the Court of King's Bench.

The Court of Exchequer.

II. The Court of Exchequer[6]. It was originally established to determine those causes in which the king, or his servants, or accomptants, were concerned, and has gradually become open to all persons. The confining the power of this court to the above class of persons is, therefore, now a mere fiction; only a man must, for form's sake, set forth in his declaration that he is debtor to the king, whether he be so or no. This court is composed of the chief baron of the Exchequer, and three[7] other judges.

The Court of King's Bench.

III. The Court of King's Bench[8] forms that part of the *Aula Regis* which continued to subsist after the dismembering of the Common Pleas. This court enjoys the most extensive authority of all other courts; it has the superintendence over all corporations, and keeps the various jurisdictions in the kingdom within their respective bounds. It takes cognizance, according to the end of its original institution, of all criminal causes, and even of many causes merely civil. It is composed of the lord chief justice and three other judges[9]. Writs of error against the judgments passed in this court, in civil matters, are brought before the Court of the Exchequer Chamber: or, in most cases, before the House of Peers[10].

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

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[4] Vide ante, 53, 79, 80. [5] Ibid. Note (1.) p. 595.
[6] Ibid. 28. [7] Vide Note (1.) p. 595. [8] Vide ante, 81, 111, 112.
[9] Vide Note (1.) p. 595. [10] Ibid. 111, 112, 447.

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The Exchequer Chamber.

IV. The Court of the Exchequer Chamber. When this court is formed by the four barons, or judges of the Exchequer, together with the chancellor and treasurer of the same, it sits as a court of equity. When it is formed by the twelve[11] judges, to whom, sometimes, the lord chancellor is joined, its office is to deliberate, when properly referred and applied to, and give an opinion on important and difficult causes, before judgments are passed upon them in those courts where the causes are depending.

Notes.

The Civil Law.

(1.) Some of the principles of the civil law being embodied in the jurisprudence of this country, the following sketch of its origin, rise, and progress, has been chiefly compiled from the treatises of Taylor, Wood, Harris, Gibbon, Butler, Blackstone, and Geldart's Hallifax.

Previous to entering upon the history of the Roman law, it may perhaps be requisite to state the classes into which the Roman subjects were divided, and the Roman form of government and legislation:—

1. The highest class of subjects were those who had the *Jus Civitatis*, by which they became possessed of the public rights, and were liable to the obligations attending the census, or enrolment in the censor's books; the militia, or serving in the army; the tributa, or taxation; the suffragium, or voting in the different assemblies of the people; the honores, or public offices of the state; and the sacra, or a participation in the sacred rights of the city; it conferred on them the private rights and obligations of liberty, family, marriage, parental authority, legal property, making a will, succeeding to an inheritance, and tutelage or wardship.

Division of the Citizens of Rome.

The citizens of Rome were divided into patricians or nobles, and plebeians or inferior persons, and the middle order, called the equites. Beneath the plebeians, were the slaves; their masters might set them free, they were then called "freedmen;" but, even after they were set free, their masters retained some rights over them.

The Romans were divided into gentes or clans.

The Romans were divided into gentes or clans; their clans into families; their families into individuals. Each individual

[11] Vide Note (1.) p. 595.

had a prænomen, by which he was distinguished from others; a nomen, which denoted his clan; and a cognomen, which denoted his family; sometimes an agnomen was added, to denote the branch of the family to which he belonged. Thus, in respect to Aulus Virginius Tricostus Cœlimontanus,—Aulus, the prænomen, denoted the individual; Virginius, the nomen-gentilitium, denoted that he was of the Virginian clan; Tricostus, the cognomen, denoted that he was of the Tricostan family of that clan; the Cœlimontanus, the agnomen, denoted that he was of the Cœlimontan branch of that family; sometimes a further name was acquired, as Cunctator by Fabius, and Africanus by Scipio, in consequence of an illustrious deed.

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Persons who had the "Jus Latii."

Next to the citizens of Rome, were the Latins, or those who had the *Jus Latii*. Ancient Latium contained the Albani, Rutuli, and Æqui; it was afterwards extended to the Osci, Ausones, and Volsci: the difference between the right of the city and the right of Latium is not precisely ascertained: the principal privilege of the Latins seems to have been, the use of their own laws, and their not being subject to the edicts of the prætor; and that they had occasional access to the freedom of Rome, and a participation in her sacred rights.

Jus Italicum.

The Italians, or those who had the *Jus Italicum*, followed. All the country, except Latium, between the Tuscan and Hadriatic Seas, to the rivers Rubicon and Macra, was, in this sense of the word, called Italy; the Italians had not access to the freedom of Rome, and did not participate in her sacred rites; in other respects, they were nearly on a footing with the Latins.

The Provinces.

Those countries were called Provinces, which the Romans had conquered, or, in any other way, reduced to their power, and which were governed by magistrates, sent from Rome.

Municipia.

The foreign towns, which obtained the rights of Roman citizens, were called Municipia.

Coloniæ.

The cities or lands, which the Romans were sent to inhabit, were called Coloniæ; some consisted of citizens, some of Latins, and some of Italians, and had therefore different rights.

Præfecturæ.

Præfecturæ were conquered towns, governed by an officer called a præfect, who was chosen in some instances by the people, in others by the prætors.

Civitates Fœderatæ.

Civitates Fœderatæ, were towns in alliance with Rome, and

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considered to be free. All who were not citizens, Latins, or Italians, were called Peregrini, or foreigners; they enjoyed none of the privileges of citizens, Latins, or Italians.

CIVIL GOVERNMENTS in their first institution are associations for mutual defence.

Civil governments, in their first institution, are voluntary associations for mutual defence. To obtain the desired end, it is absolutely necessary that each individual should conceive himself obliged to submit his private opinion and actions to the judgment of the greater number of his associates; and the science of laws is the slow growth of time and experience.

Among savage nations, the want of letters is imperfectly supplied by the use of visible signs.

Among savage nations, the want of letters is imperfectly supplied by the use of visible signs, which awaken attention, and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomime; the words were adapted to the gestures, and the slightest error or neglect in the forms of proceeding was sufficient to annul the substance of the fairest claim. The communion of the marriage life was denoted by the necessary elements of fire and water[1], and the divorced wife resigned the bunch of keys, by the delivery of which she had been invested with the government of the family. The manumission of a son, or a slave, was performed by turning him round with a gentle blow on the cheek; a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clenched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence.

Manumission of slaves.

Indenture of covenants.

The indenture of covenants was a broken straw; weights and scales were introduced into every payment, and the heir who accepted a testament, was sometimes obliged to snap his fingers, to cast away his garments, and to leap and dance with real or affected transport[2]. If a citizen pursued any stolen goods into a neighbour's house, he concealed his nakedness with a linen towel, and hid his face with a mask or basin, lest he should encounter the eyes of a virgin or a matron.

Process in a civil action.

In a civil action, the plaintiff touched the ear of his witness, seized his reluctant adversary by the neck, and implored, in solemn lamentation, the aid of his fellow-citizens. The two competitors grasped each other's hand, as if they stood prepared for combat before the tribunal of the prætor: he

[1] Pandects, lib. XXIV. tit. i. leg. lxvi. 3 Gibbon, 172, edit. 1831.
[2] St. Ambrose de Officiis, 3, 2. Schulting. ad Ulpian Fragment. tit. xxii. n. xxviii. 643, 644.

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commanded them to produce the object of the dispute; they went, they returned with measured steps, and a clod of earth was cast at his feet to represent the field for which they contended. This occult science of the words and actions of law, was the inheritance of the pontiffs and the patricians. Like the Chaldean astrologers, they announced to their clients the days of business and repose; these important trifles were interwoven with the religion of Numa; and after the publication of the Twelve Tables, the Roman people were still enslaved by the ignorance of judicial proceedings. The treachery of some plebeian officers at length revealed the profitable mystery; in a more enlightened age, the legal actions were derided and observed: and the same antiquity which sanctified the practice, obliterated the use and meaning, of this primitive language[3].

Science of the words and actions of law, was the inheritance of the pontiffs and patricians.

The Roman law, in the most extensive import of those words, denotes the system of jurisprudence, by which the Roman empire was governed, from its first foundation by Romulus, to its final subversion in the East, in consequence of the taking of Constantinople by Mahomet II. The civil law denotes that part of the Roman law, which consists of the body of law, compiled by the orders of the Emperor Justinian, and of the laws subsequently enacted by him, and called his Novells.

THE ROMAN GOVERNMENT AND FORM OF LEGISLATION.

The writers on the Roman law generally divide its history into three eras,—the Jurisprudentia Antiqua, Media, and Nova. The first commences with the foundation of Rome, and extends to the era of the Twelve Tables; the second extends to the reign of the Emperor Adrian; the third to the reign of the Emperor Justinian.

Jurisprudentia Antiqua, Media, and Nova.

The Roman government, as it was constituted by Romulus, consisted of an elective king; a senate or council, first of one hundred, and afterwards of two hundred nobles; and a general assembly of the people. The command of the army, the administration of justice, the superintendence of religious concerns, with the office of high priest, belonged to the king; the senate deliberated on all public business, and prepared it for the people; to them, the right of final determination upon it belonged.

The government, as it was constituted by Romulus.

The number of senators was successively increased to three

The number of senators.

[3] Aulus Gellius, Noct. Attic. 20, 10. Gravina, Opp. 265, 267. 3 Gibbon, 173.

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hundred by Tarquinius Priscus; to six hundred by Sylla; to nine hundred by Julius Cæsar; Augustus reduced it to six hundred. That, during the monarchy, the king had the right of appointing the senators is clear: how they were chosen during the era of the republic, has been the subject of much dispute: some, with M. de Vertot, M. de Beaufort, and Lord Hervey, contend that, as the consuls succeeded to the royal power, they enjoyed the royal prerogative of filling up the senate, till the creation of the censors, to whom it then devolved: others, with Dr. Middleton and Dr. Chapman, contend that the kings, consuls, and censors, only acted in these elections ministerially and subordinately to the supreme will of the people; with whom the proper and absolute power of creating senators always resided.

Appointment of senators.

The people, as divided by Romulus.

Comitia curiata.

The people were divided by Romulus into three tribes, and each tribe into three curiæ. Their public assemblies were called the *comitia curiata:* every member had an equal right of voting at them; and the votes were reckoned by the head. Thus the issue of all deliberations depended on the poor, as they formed the most numerous portion of the community. To remedy this, Servius Tullius, the sixth king, divided the people into six classes, according to a valuation of their estates, and then subdivided the classes into an hundred and ninety-three centuries, and incorporated ninety-eight of the centuries into the first class, twenty-two into the second, twenty into the third, twenty-two into the fourth, thirty into the fifth, and the remaining part of the citizens into the sixth. The first class consisted of the richest citizens, the others followed in a proportion of wealth; the sixth consisted wholly of the poorest citizens. Each century, except the last, was obliged to furnish an hundred men in the time of war: the sixth was exempt from all taxes; and, to compensate this privilege to the rich, Servius enacted that, in the assemblies of the people, they should no longer count the votes by head, but by centuries, and that the first century should have the first vote. This arrangement, while it seemed to give every citizen an equal right of suffrage, as all voted in their respective centuries, virtually gave the richer classes the sole authority: but it was generally acceptable, as it conferred power on the rich, and immunities from taxes, and the other burdens of the state, on the poor. These assemblies were called the *comitia centuriata.* For some purposes, however, particularly for the choice of

Servius Tullius divided the people into six classes.

Votes counted by centuries.

Comitia centuriata.

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inferior magistrates, and, in the time of the republic, for vesting military power in the dictator, the consuls, and the prætors, the comitia curiata continued necessary.

The senate, as constituted after the expulsion of the last Tarquin.

On the expulsion of the last Tarquin, the senate seems to have been permitted to retain, for some time, the constitutional power, under the regal state, of the monarchs whom they had dethroned, and to have used all means within their reach to perpetuate it in themselves. During this period, the form of the Roman legislation appears to have been—1st, that the senate should convene the assembly, whether of curiæ or centuriæ; 2dly, that the consul should propound to them the matter to be discussed; 3dly, that the augur should observe the omens, and declare whether they were favourable or unfavourable,—in the last case the assembly was dissolved; 4thly, that the assembly should vote; 5thly, that the consul should report the resolution of the people to the senate; and, 6thly, that the senate should confirm or reject it.

These were the rights of the consuls, the senate, and the people, at the commencement of the republic; several alterations successively took place in favour of the people, at the expense of the consuls and the senate.

The authority of the consuls parcelled out among various magistrates.

With respect to the consuls, their dignity and power were, by degrees, parcelled out among various magistrates;—thus their power of deciding in civil matters was assigned to the prætors; their power of setting criminal prosecutions on foot was assigned to the public accusers; their care of the police to the ediles; their general superintendence of morals and manners to the censors. After this, little more remained to the consuls than their right to assemble the senate, convene the comitia, and command the armies of the republic. The consuls, and higher magistrates were chosen by the people: at first, their choice was confined to the patrician order; after much contest, it was extended to the people.

The influence of the patricians considered as a grievance.

The influence of the patricians on the deliberations of the comitia centuriata was soon thought a grievance by the people; hence, upon every occasion which offered, they endeavoured to bring the business before the comitia curiata: but with this they were not satisfied; for, as a patrician magistrate only could preside at the comitia curiata, and before the assembly proceeded to business, the omens were to be consulted, and none but patricians were admitted to the rank of augur, the comitia curiata, though in a less degree than the comitia

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centuriata, were still subject to patrician influence. To make the people entirely independent of the patricians, at their general assemblies, the tribunes insisted that the public deliberations should be brought before the assemblies of the tribes, at which every Roman citizen had an equal right to vote, and at which neither the presence of a magistrate, nor the taking of the omens, was essential. To this the senate and patricians found it necessary to submit. At first they contended that they were not bound by the laws passed at these assemblies, but they were soon forced to acknowledge their authority. These assemblies were called the *Comitia Tributa.*

Comitia Tributa.

The privileges of the senate.

Some important privileges, however, still remained to the *senate;* they had the direction of all concerns of religion, the appointment of ambassadors, of governors of the provinces, of the generals and superior officers of the army, the management of the treasury, and, speaking generally, they had the direction of all the religious, civil, and military concerns of the state, subject to the control of the people, and subject also to the control of any tribune of the people, who, by his *veto*, might, at any time, prevent the resolution of the senate from passing into a decree: but, when the people did not interfere, the senatus-consulta generally were obeyed; and it seldom happened that, in matters of weight, the people enacted a law, without the authority of the senate. Thus the constitutional language of ancient Rome was, that the senate should decree and the people order.

The decrees of the senate.

By the senators themselves, it was deemed an heinous offence that any of their body, without their leave, should propose a measure to the people: but, in the decline of the republic, the leading men of Rome and their creatures paid no attention to this notion, and frequently obtained from the people what they knew would be refused them by the senate. The writings of Cicero abound with complaints against this practice. The determination of the people at the comitia centuriata, comitia curiata, or comitia tributa, was equally *lex*, or a law of the state; but when it passed in the comitia tributa, as it orginated with the people, it was called *plebiscitum:* the decrees of the senate were called *senatus-consulta.*

Plebiscitum.

Senatus-consulta.

The laws sometimes distinguished by the name of the person who proposed them.

The laws were distinguished, sometimes by the name of the person who proposed them, as the law Æmilia: sometimes, by the names of the consuls, if they were proposed by both the consuls, as the law Papia Poppæa; and sometimes, a

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mention of the nature of the law was added, as the Lex Fannia sumptuaria.

The history of the Roman law may be divided into nine periods.

For acquiring a precise view of the history of the Roman law, it should be divided into nine periods:—1, The foundation of Rome; 2, the Twelve Tables; 3, the abolition of the decemvirs; 4, the reign of Augustus; 5, the reign of Hadrian; 6, the reign of Constantine the Great; 7, the reign of Theodosius the Second; 8, the reign of Justinian; 9, the reign of his successors, till the fall of the empire in the East; and 10, the revival of the study of the civil law, in consequence of the discovery of the Pandects at Amalphi.

FIRST PERIOD OF THE HISTORY OF THE ROMAN LAW.

Before Christ 753, Ab Urb. Cond. 1.

Roman jurisprudence from the foundation of Rome, till the era of the Twelve Tables.

The first of these periods contains the state of Roman jurisprudence from the foundation of Rome till the era of the Twelve Tables. As Rome was a colony from Alba, it is probable that her laws originated in that city. Several of them are actually traced to her first kings; particular mention is made of laws enacted by Romulus, Numa, and Servius Tullius. Historians ascribe to Romulus the primitive laws of the Romans respecting marriage, the power of the father over his child, and the relation between patron and client: to Numa, their primitive laws respecting property, religion, and intercourse with foreign states; to Servius Tullius, their primitive laws respecting contracts and obligations. It is supposed that, in the reign of the last of these kings, a collection of their laws was promulgated by public authority. The scanty materials which have reached us, of the regal jurisprudence of Rome, lead to a conjecture, that the Romans had attained a high degree of legislative refinement before the abolition of royalty.

Before Christ 509, Ab Urb. Cond. 245.

Tarquin, the last king of Rome, was expelled in 509; and not long before or after his expulsion, a body of the Roman law, as it then stood, was collected by Papyrius, and from this was called *Jus Civile Papyrianum.*

THE SECOND PERIOD OF THE HISTORY OF THE ROMAN LAW, is the era of the Twelve Tables.

During the first half century which followed the expulsion of the Tarquins, the civil government of the Romans was in great confusion: on their expulsion, much of the ancient law was disused, and some new laws were enacted.

Before Christ, 453, Ab Urb. Cond. 301.

The undefined power of the consuls in framing laws being unpopular, three persons were sent into Greece, and to some of the most civilized states of Magna Græcia or Lower Italy, to obtain copies of their laws and civil institutions.

Before Christ, 451, Ab Urb. Cond. 303.

They returned in the third year after their mission. Ten

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The Decemvirs, and the division of their code.

Before Christ 451, Ab Urb. Cond. 303.

persons, called from their number Decemvirs, were then appointed to form a code of law for the government of the state, both in private and public concerns. This they effected, and divided their code into ten distinct tables: two were added to them in the following year. They were a mixture of the laws of other nations, and of the old Roman law, adapted to the actual circumstances of the state of the people. They were inscribed on twelve tables of brass; and, from that circumstance, were called the *Laws of the Twelve Tables.*

The legislative wisdom of the Twelve Tables has been censured and praised.

The legislative wisdom of the Twelve Tables has been censured and praised, but it has been thought, in some instances, immoderately severe. Thus, in respect to an insolvent debtor, after the debt was proved or admitted, they allowed him thirty days to raise the money, or find surety for its payment: at the end of the thirty days, the law delivered him into the power of his creditor, who might confine him for sixty days in a private prison, with a chain of fifteen pounds' weight, on a daily allowance of one pound of rice: during the sixty days he was to be thrice exposed in the market-place, to raise the compassion of his countrymen; at the end of sixty days, if he was sued by a single creditor, the creditor might sell him for a slave beyond the Tyber; if he was sued by several, they might put him to death, and divide his limbs among them, according to the amount of their several debts.

The enactments respecting debtors are unjustifiable.

Nothing can be urged in defence of this savage provision, if, as appears to be its true construction, the division which it directs to be made is to be understood literally of the body, and not of the price of the debtor: but if, before the Twelve Tables, an insolvent debtor became the slave of the creditor, so that his liberty and life were immediately in the power of the creditor, the ultimate severity of the Twelve Tables should be ascribed to the harsh spirit of the people, and the intermediate delays in favour of the debtor should be ascribed to the humane policy of the decemvirs. It may be added, that about two hundred years afterwards, the Petilian law provided that the goods, and not the body of the debtor, should be liable to his creditor's demands; and that, at a subsequent period, the Julian law provided in favour of the creditor, the cessio bonorum, by which the debtor, on making over his property to his creditors, was wholly liberated from their demands. Upon the whole, if we consider the state of society for which the laws of the Twelve Tables were formed, we

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shall find reason to admit both their wisdom and their humanity.

The Twelve Tables were approved of by Cicero and Tully.

Whatever might be the origin or the merit of the *Twelve Tables*[4], they obtained among the Romans that blind and partial reverence which the lawyers of every country delight to bestow on their municipal institutions. The study is recommended by Cicero[5] as equally pleasant and instructive. "They amuse the mind by the remembrance of old words and the portrait of ancient manners; they inculcate the soundest principles of government and morals; and I am not afraid to affirm, that the brief composition of the decemvirs surpasses in genuine value the libraries of Grecian philosophy." "How admirable," says Tully, with honest or affected prejudice, "is the wisdom of our ancestors! We alone are the masters of civil prudence, and our superiority is the more conspicuous, if we deign to cast our eyes on the rude and almost ridiculous jurisprudence of Dracon, of Solon, and of Lycurgus." The Twelve Tables were committed to the young, and the meditation of the old; they were transcribed and illustrated with learned diligence: they had escaped the flames of the Gauls; they subsisted in the age of Justinian, and their subsequent loss has been imperfectly restored by the labour of modern critics[6]; but although these venerable monuments were considered as the rule of right and the fountain of justice[7], they were overwhelmed by the weight and variety of new laws, which, at the end of five centuries, became a grievance more intolerable than the vices of the city[8].

Considered as the rule of right and foundation of justice.

THE THIRD PERIOD OF THE HISTORY OF THE ROMAN LAW: the abolition of the Decemvirs.

In proportion as Rome increased in arms, arts, and the number of her citizens, the insufficiency of the laws of the Twelve Tables was felt, and new laws were passed. This insensibly produced, during the remaining part of the period of the republic, that immense collection of laws, from which the civil law, as the Justinianean body of law is called, was extracted. It was divided, like the law of Greece, into the written and the unwritten law; the written comprehending the leges plebiscita, and senatus-consulta.

Leges plebiscita, senatus-consulta.

Jus Honorarium.

The first, and most important branch of the unwritten law of Rome, was the *Jus Honorarium*, the principal part of which

[4] Diodorus, tom. i. lib. xii. 494. [5] Cicero de Legibus, ii. 23; Crassus (de Oratore) i. 43, 44. [6] Heineccius, Hist. J. R. n. 29—33.
[7] Tacit. Annal. iii. 27. T. Liv. iii. 34.
[8] Tacit Annal. iii. 25. Liv. iii. 34. 3 Gibbon, 168.

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was the *Edictum Prætoris.* During the regal government of Rome, the administration of justice belonged to the king: on the establishment of the republic, it devolved to the consuls, and from them to the prætor. At first there was but one prætor, afterwards, their number was increased to two, the Prætor Urbanus, who administered justice among citizens only; and the Prætor Peregrinus, who administered justice between citizens and foreigners, or foreigners only: the number of prætors was afterwards increased, for the administration of justice in the provinces and colonies. When the prætor entered on his office, he published an edict, or system of rules, according to which he professed to adminster justice for that year. In consequence of his often altering his edicts, in the course of the year, laws were passed, which enjoined him not to deviate from the form, which he should prescribe to himself at the beginning of his office. All magistrates who held the offices which were ranked among the honours of the state, had the same right of publishing edicts; and, on this account, that branch of the law which was composed of the edict of the prætor, and the edicts of those other magistrates, was called the *Jus Honorarium;* but the edicts of the prætor formed by far the most important part of this branch of the Roman law. Such were his rank and authority in Rome, and such the influence of his decisions on Roman jurisprudence, that several writers on the Roman law mentioned his edicts in terms which seem to import that he possessed legislative as well as judicial power, and make it difficult to describe with accuracy what is to be understood by the prætor's edict.

Publication of edicts.

The magistrates had the right of publishing edicts.

An analogy exists between some parts of the law of which the honorary law of Rome was composed, and some important branches of the law of England.

Prætors' edicts, denoted the general body of law, to which their edicts gave rise.

First, by the prætor's edict, as those words apply to the subject now under consideration, civilians do not refer to a particular edict, but use the words to denote that general body of the law, to which the edicts of the prætors gave rise.

The legislative acts of any state, form a very small proportion to its laws.

Secondly, the legislative acts of any state, form a very small proportion of its laws: a much greater proportion of them consists of that explanation of the general body of the national law, which is to be collected from the decisions of its courts of judicature, and which has, therefore, the appearance of being framed by the courts. A considerable part of the law, distinguished by the name of the prætor's edict, was of the last

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kind; and, as it was a consequence of his decisions, received the general name of his law. In this respect, the legal policy of England is not unlike that of Rome; for, voluminous as is the Statute Book of England, the mass of law it contains, bears no proportion to that, which lies scattered in the volumes of legal reports; and perhaps it would be difficult to find, in any edict of a prætor, a more direct contradiction of the established law of the land, than the decisions of the English judges, which, in direct opposition to the spirit and language of the statute *De Donis*, supported the effect of common recoveries in barring estates tail.

The edicts of the prætors not of a more contradictory character, than the decisions of the English judges.

Thirdly, Experience shows, that the provisions of law, on account of the general terms in which they are expressed, or the generality of the subjects to which they are applicable, have frequently an injurious operation in particular cases, and that circumstances frequently arise, for which the law has made no provision. To remedy these inconveniences, the courts of judicature of most countries, which have attained a certain degree of political refinement, have assumed to themselves a right of administering justice in particular instances, by certain equitable principles, which they think more likely to answer the general ends of justice, than a rigid adherence to law; and, where law is silent, to supply its defects by provisions of their own. These privileges were allowed the prætor by the law of Rome; in virtue of them, he pronounced decrees, the general object of which had sometimes a corrective, and sometimes a suppletory operation on the subsisting laws. They were innovations, but it may be questioned, whether any part of the prætor's law was a greater innovation on the subsisting jurisprudence of the country, than the decisions of English courts of equity on the Statute of Frauds.

The provisions of law, have frequently an injurious operation in particular cases.

Fourthly, The laws of every country allow its courts a considerable degree of power and discretion in regulating the forms of their proceedings, and carrying them into effect; further than this, the prætor's power of publishing an edict, signifying the rules by which he intended the proceedings of his courts should be directed, does not appear to have extended; so that the nature of the prætor's jurisdiction, in the exercise of his judicial authority, was not so extravagant or irregular as it has been sometimes described.

The laws of every country allow its courts a considerable degree of power and discretion.

A second source of the unwritten law of Rome was, the *Actiones Legis*, and *Solemnes Legum Formulæ*, or the actions

Actiones Legis, Solemnes Legum Formulæ.

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at law, and forms of forensic proceedings, and of transacting legal acts. These, for some time, were kept a profound secret by the patricians; but Appius Claudius having made a collection of them for his private use, it was published by Cnæus Flavius, his secretary. The patricians then devised new forms, and those were made public by Sextus Ælius. These publications were called the Flavian and Ælian Collections; all we have of them is to be found in Brisson's celebrated work, De Formulis et Solemnibus Populi Romani Verbis.

Flavian and Ælian collections of laws.

A third source was derived from the *Disputationes Fori, et Responsa Prudentum.*

A third source of the unwritten law of Rome, was derived from the *Disputationes Fori*, and the *Responsa Prudentum.* To give his client legal advice was among the duties of the patron: insensibly, it became a general practice, that those who wanted legal assistance, should apply for it to the persons of whose legal skill they had the greatest opinion. This was the origin of the jurisconsulti, or civilians of Rome; they were generally of the patrician order, and from succeeding to this branch of the duty of patronage, received the name of patrons; while those by whom they were consulted were called clients. The patron received his client with a solemnity bordering on magisterial dignity; and generally delivered, in a few words, his opinion on the case which was submitted to his consideration; but he sometimes accompanied it with his reasons. These consultations usually took place at an early hour of the morning: the broken slumbers of the civilians are mentioned by almost every Roman poet, when describing the inconveniences which attend distinction and fame. Legal topics were often subjects of the conversations of civilians; and the Forum, from their frequent resort to it, being the usual scene of these friendly disputations, gave its name to them. They also published treatises on legal subjects. Their opinions and legal doctrines were highly respected; but till they were ratified by a judicial decision, they had no other weight than what they derived from the degree of public estimation in which the persons who delivered them were held.

Reception of the client by the patron.

The public esteem, which was entertained for the jurists.

The civilians divided into three classes.

The civilians are commonly divided into three classes;—those who flourished between the era of the Twelve Tables and the age of Cicero, those who flourished from the age of Cicero to the reign of Severus Alexander, and those who flourished from the beginning of his reign to that of the Emperor Justinian.

The second, is the antejustinianean jurisprudence. From

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Antejustinianean jurisprudence.

the fragments of the works of the civilians who flourished during that period, modern writers have described them as men of enlarged minds, highly cultivated understandings, and great modesty. In their judicial studies, they availed themselves of the learning and philosophy of the Greeks; carried the disputes of the schools of Athens into the Forum; and, early in the period of which we are speaking, branched into two sects, whose opposite tenets were founded on principles, not unlike those which gave rise to the distinctive doctrines of the disciples of Zeno and Epicurus.

Antistius Labeo. Ateius Capito.

Antistius Labeo was the founder of the former sect; Ateius Capito of the latter: from Proculus and Pegasus, two eminent followers of Labeo, the former were called Proculeians or Pegasians; from Masurius Sabinius, and Cassius Longinus, two eminent followers of Capito, the latter were called Sabinians or Cassians. The former contended for a strict adherence to the letter and forms of the law; the latter for a benign interpretation of it, and for allowing great latitude in the observance of its forms. Attempts were made to compromise the difference between them: they gave rise to a third sect,—the Jurisconsulti Erciscundi, or Miscalliones. Something of the difference which subsisted between the disciples of Labeo and Capito, has long subsisted in the jurisprudence of England; but the good sense of the English bar has prevented the maintainers of the different opinions from forming themselves into sects. Till the reign of Augustus every person was at liberty to deliver judicial opinions; Augustus confined this privilege to particular persons, with a view, it is supposed, of their propagating those doctrines of law which were favourable to his political system; the Emperor Adrian restored the general liberty; the Emperor Severus Alexander assigned it the limits within which it had been circumscribed by Augustus.

Till the reign of Augustus, every person was at liberty to deliver judicial opinions.

B.C. 46. Ab Urb. Cond. 708.

The power of Julius Cæsar, in consequence of his perpetual dictatorship, placed him above law; but it does not appear that he made many innovations, of a general nature, in the Roman jurisprudence. That was left to Augustus, his heir and successor. At different periods of his reign, the people conferred on Augustus the various titles of perpetual tribune, consul, proconsul, censor, augur, and high priest: thus, in effect, he acquired both the civil and military power of the state; but, as he professed to exercise it in virtue of those offices, his acts had the appearance of being the acts of the

THE FOURTH PERIOD OF THE HISTORY OF THE ROMAN LAW, from the time of the perpetual dictatorship of Cæsar, to the reign of Adrian.

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B.C. 16. Ab Urb. Cond. 735.

Lex Regia.

different magistrates, whose offices had been conferred on him. Finally, in the year of the city 735, power was given him to amend or make whatever laws he should think proper. This was the completion of the *Lex Regia*, or of those successive laws, which, while they permitted much of the outward form of the republic to remain, invested the emperor with absolute power:—during the whole of Augustus' reign, the forms of the leges and senatus consulta, those vestiges of dying liberty, as they are called by Tacitus, were preserved.

Augustus professed the greatest deference for the senate.

For the senate, Augustus uniformly professed the greatest deference; he attended their meetings, seemed to encourage their free discussion of every subject which came before them; and, when a law was approved of by them, he permitted it, agreeably to the ancient forms of the republic, to be referred to the people. The reference of laws to the people was abolished by Tiberius; so that, from his time, the laws of Rome originated, and were completed in the senate. At first their deliberations had the appearance of free discussion; by degrees even that vanished, and insensibly the senate served for little more than a nominal council of the emperor, an office to register his ordinances, and a court of judicature for great public causes.

The laws of Rome originated and were completed in the senate.

THE FIFTH PERIOD OF THE HISTORY OF THE ROMAN LAWS.

The reign of Adrian.

A. D. 120.

This memorable revolution in the functions of the senate, with which even the forms of Roman liberty expired, must be dated from the Emperor Adrian, and forms the fifth period of the history of the Roman law. He was the first of the emperors who exercised, without disguise, the plenitude of legislative power. With him, therefore, the *Imperial Constitutions*, under the various names of Rescripta, Epistolæ, Decreta, Edicta, Pragmaticæ Sanctiones, Orationes, and Annotationes, originated; they had the force of law in every part of the Roman state. Under his reign, Julian, a lawyer of great eminence, digested the prætor's edicts, and other parts of the *Jus Honorarium*, into a regular system of law, in fifty books. This compilation was much esteemed; it was referred to as authority, and obtained the title of *Edictum Perpetuum;* all the remains of it which have come down to us, are the extracts from it in the Digest.

A. D. 284.

Codex Gregorianus.

Codex Hermogenianus.

After this came the *Codex Gregorianus*, a collection of imperial constitutions, from Adrian to Dioclesian, by Gregorius or Gregorianus, prætorian præfect to Constantine the Great. This was succeeded by the *Codex Hermogenianus*, a continu-

ation of the former code, by Hermogenes, a contemporary of Gregorius or Gregorianus.

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The new forms of civil and military government introduced by Constantine, the legal establishment of Christianity, and the division of the empire between the sons of Theodosius the Great, induced important changes in the jurisprudence of Rome.

THE SIXTH PERIOD OF THE HISTORY OF THE ROMAN LAW.

The reign of Constantine the Great.

A. D. 306.

To the first may be referred numerous laws, respecting the privileges and police of the imperial city; to the second, an abundance of legal provisions, respecting the various offices of the empire, and the ceremonial of the Byzantine court; to the third, a succession of imperial edicts, by which Christianity was first tolerated, then legalized, and afterwards established as the religion of the state:—and the division of the empire between the sons of Theodosius, in 395, was attended with still more important effects on Roman jurisprudence.

A. D. 395.

The variety of laws introduced a considerable degree of confusion into the Roman jurisprudence. To remedy it, Theodosius II., the Emperor of the East, published, in 438, the celebrated code of law, called, from him, the *Theodosian Code*, which forms the seventh period of the history of the Roman law. It comprises all the imperial constitutions from 312, the year in which Constantine was supposed to have embraced Christianity, to the time of its publication. Immediately after the publication of the Theodosian Code in the Eastern Empire, it was received into the empire of the West, by an edict of Valentinian III. In the East, it retained its force, till it was superseded by the Justinianean collection.

THE SEVENTH PERIOD OF THE HISTORY OF THE ROMAN LAW.

The reign of Theodosius II.

Provisions in the Theodosian Code.

A. D. 438.

It retained, but indirectly, its authority longer in the West. The barbarians, who invaded the empire, permitted the Romans to retain the use of their laws. In 506, Alaric, king of the Visigoths in Gaul, ordered a legal code to be prepared, in which the Roman and Gothic laws and usages should be formed into one body of law, for the general use of all his subjects; this was accordingly done in the twenty-second year of his reign; and from Anianus, his referendary or chancellor, by whom it was either compiled or published, it was called the *Breviarium Aniani*. It is an extract from the Gregorian, Hermogenian, and Theodosian Codes, the novels of the subsequent emperors, the sentences of Paullus, the institutes of Gaius, and the works of Papinian. It superseded the use of

Breviarium Aniani.

A. D. 506.

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the former laws so far, that in a short time, they ceased to be cited in the courts, or by writers on the subject of law; and Anianus' collection, under the name of the Roman or Theodosian law, became the only legal work of authority[9].

THE EIGHTH PERIOD OF THE HISTORY OF THE ROMAN LAW.

The eighth, and most important period of the history of the Roman law, comprises the time in which the body of law, compiled by the direction of the Emperor Justinian, was framed.

The reign of Justinian. A. D. 528.

By his order, Trebonian, and nine other persons of distinction, in the first year of his reign, made a collection of the most useful laws in the Codex Theodosianus, the two earlier codes of Gregorius and Hermogenes, and the constitutions of some succeeding emperors. It was immediately published by Justinian, and is called the *Codex Justinianus Primæ Prælectionis.*

The Pandects. A. D. 533.

But his great work is his *Digest*, or *Pandects*. By his direction, Trebonian, with the assistance of sixteen persons, eminent either as magistrates or professors of law, extracted from the works of the former civilians, a complete system of law, and digested it into fifty books.

The Institutes.

Previously to its publication, an elementary treatise, comprising the general principles of the system of jurisprudence contained in it, was promulgated, by the emperor's direction, in four books. From its contents, it was called *The Institutes.*

The imperial laws.

Thus the Digest and Institutes were formed into a body of law by the authority of the emperor. He addressed them, as imperial laws, to his tribunals of justice, and to all the academies where the science of jurisprudence was taught: they were to supersede all other law, and to be the only legitimate system of jurisprudence throughout the empire.

Codex Repetitæ Prælectionis. A. D. 534.

In the following year he published a corrected edition of the code, under the title *Codex Repetitæ Prælectionis.* This wholly superseded the first code; and, except so far as it has been preserved in the latter, it is wholly lost.

The Novells. A. D. 566.

The edicts which he promulgated, after the new edition of the Codex, were collected into one volume in the last year of his reign, and published under the name of *Novellæ*[10].

[9] See the learned *Prolegomena ad Codicem Theodosianum* of Gothofred.

[10] Most of the Novellæ were written in the Greek language. In the last year of Justinian's life, a Latin translation was made of them; and, by the fidelity with which it was executed, obtained the appellation of the *Volumen Authenticum.* A.D. 568.

In most editions of the Corpus Juris Civilis, the Novells are followed by

NOTES.

RIGHT OF PERSONS AND OF THINGS.

The objects of the civil law are the rights of persons; the rights of things; actions, or the means of recovering what is due.

Persons considered either in their natural or civil capacities.

Persons are considered either in their natural or civil capacities. In their natural capacity, they are considered with regard to,—1. life; 2. sex; 3. age. In their civil capacity, their state is denominated from a respect,—1. to liberty; 2. city; 3. family.

The first division of persons, in a civil consideration, is into freemen and slaves. Slavery, in the civil law, had three origins,—1. captivity in war; 2. birth; 3. the sale of a man's self to another.

The distinction of ranks and persons is the firmest basis of a mixed and limited government.

The distinction of ranks and persons is the firmest basis of a mixed and limited government. The perfect equality of men is the point in which the extremes of democracy and despotism are confounded, since the majesty of the prince or people would be offended, if any heads were exalted above the level of their fellow-slaves or fellow-citizens.

In the decline of the Roman empire, the distinctions of the republic were abolished.

In the decline of the Roman empire, the proud distinctions of the republic were gradually abolished, and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth, or the memory of famous ancestors. He delighted to honour with titles and emoluments his generals, magistrates, and senators; and his precarious indulgence communicated some rays of their glory to the persons of their wives and children.

In the eye of the law, all Roman citizens were equal.

But in the eye of the law, all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was degraded to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his power; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted, with equal favour, to the civil and military command, which the citizen alone had been once entitled to assume over the conquests of his fathers.

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The first Cæsars guarded the distinctions of ingenuous and servile birth.

The first Cæsars had scrupulously guarded the distinction of *ingenuous* and *servile* birth, which was decided by the condition of the mother; and the candour of the laws was satisfied, if *her* freedom could be ascertained during a single moment between the conception and the delivery. The slaves who were liberated by a generous master, immediately entered into the middle class of *libertines*, or freedmen: but they could never be enfranchised from the duties of obedience and gratitude: whatever were the fruits of their industry, their patron and his family inherited the third part, or even the whole of their fortune if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen: whoever ceased to be a slave, obtained, without reserve or delay, the station of a citizen; and at length the dignity of an ingenuous birth, which nature had refused, was created, or supposed, by the omnipotence of the emperor.

PATERNAL POWER.

The absolute dominion of the father is peculiar to the Roman jurisprudence.

A Roman citizen in his father's house, was a mere thing.

The law of nature instructs most animals to cherish and educate their infant progeny. The law of reason inculcates to the human species the returns of that piety. But the exclusive, absolute, and perpetual dominion of the father over his children, is peculiar to the Roman jurisprudence[11], and seems to be coeval with the foundation of the city[12]. The paternal power was instituted or confirmed by Romulus; and after the practice of three centuries, it was inscribed on the fourth table of the decemvirs. In the forum, the senate, or the camp, the adult son of a Roman citizen enjoyed the public and private rights of a *person;* in his father's house, he was a mere *thing;* confounded by the laws with the moveables, the cattle, and the slaves, whom the capricious master might alienate or destroy without being responsible to any earthly tribunal. The hand which bestowed the daily sustenance might resume the voluntary gift; and whatever was acquired by the labour or fortune of the son, was immediately lost in the property of the father. His stolen goods (his oxen or his children) might be recovered by the same action of theft[13]; and if either had been guilty of trespass, it was in his own option to compensate the damage, or resign to the injured party the obnoxious

[11] Inst. lib. I. tit. 9. Pandects, lib. I. tit. 6, 7. Code, lib. VIII. tit. 47—49.
[12] Dionys. Hal. lib. II. 94, 95. Pandects, lib. I. tit. 6, leg. viii.
[13] Pandects, lib. XLVIII. tit. 2, leg. xxiv. n. 13; leg. xxxviii. n. 1.

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animal. At the call of indigence or avarice, the master of a family could dispose of his children or his slaves. But the condition of the slave was far more advantageous, since he regained, by the first manumission, his alienated freedom; the son was again restored to his unnatural father; he might be condemned to servitude a second and a third time; and it was not until after the third sale and deliverance[14], that he was enfranchised from the domestic power which had been so repeatedly abused.

The majesty of the parent was armed with the power of life and death.

According to his discretion, a father might chastise the real or imaginary faults of his children, by stripes, by imprisonment, by exile, by sending them to the country to work in chains among the meanest of his servants. The majesty of a parent was armed with the power of life and death[15]; and the examples of such bloody executions, which were sometimes praised, and never punished, may be traced in the annals of Rome, beyond the times of Pompey and Augustus. Neither age, nor rank, nor the consular office, nor the honours of a triumph, could exempt the most illustrious citizen from the bonds of filial subjection[16]: his own descendants were included in the family of their common ancestor; and the claims of adoption were not less sacred, or less rigorous, than those of nature. Without fear, though not without danger of abuse, the Roman legislators had reposed an unbounded confidence in the sentiments of paternal love; and the oppression was tempered by the assurance, that each generation must succeed in its turn to the awful dignity of parent and master[17].

The first limitation on paternal power, ascribed to Numa.

The first limitation to paternal power is ascribed to the justice and humanity of Numa: and the maid, who had espoused a freeman, with *his* father's consent, was protected from the disgrace of becoming the wife of a slave. In the first ages, when the city was pressed, and often famished by her Latin and Tuscan neighbours, the sale of children might be a frequent practice; but as a Roman could not legally purchase the liberty of his fellow-citizen, the market must gradually fail, and the trade would be destroyed by the conquests of the republic.

An imperfect right of property communicated to sons.

An imperfect right of property was at length communicated to sons; and the three-fold distinction of *profectious*, *adven-*

[14] Antiquities of Heineccius.
[15] Inst. lib. IV. tit. 9. Geldart's Hallifax.
[16] Aul. Gellius, Noctes Atticæ, ii. 2.
[17] 3 Gibbon, 184, 185.

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titious, and *professional*, was ascertained by the jurisprudence of the Code and the Pandects[18]. Of all that proceeded from the father, he imparted only the use, and reserved the absolute dominion; yet if his goods were sold, the filial portion was excepted, by a favourable interpretation, from the demands of the creditors. In whatever accrued by marriage, gift, or collateral succession, the property was secured to the son; but the father, unless he had been specially excluded, enjoyed the usufruct during his life. As a just and prudent reward of military virtue, the spoils of the enemy were acquired, possessed, and bequeathed by the soldier alone; and the fair analogy was extended to the emoluments of any liberal profession, the salary of public service, and the sacred liberality of the emperor or the empress. The life of a citizen was less exposed than his fortune to the abuse of paternal power. Yet his life might be adverse to the interest or passions of an unworthy father; the same crimes that flowed from the corruption, were more sensibly felt by the humanity of the Augustan age; and the cruel Erixo, who whipped his son till he expired, was saved by the emperor from the just fury of the multitude[19].

Property that accrued by marriage gift, or collateral succession, was secured to the son.

The Roman father, from the licence of servile dominion, was reduced to the gravity and moderation of the judge.

The Roman father, from the licence of servile dominion, was reduced to the gravity and moderation of a judge. The presence and opinion of Augustus confirmed the sentence of exile pronounced against an intentional parricide by the domestic tribunal of Arius. Adrian transported to an island the jealous parent, who, like a robber, had seized the opportunity of hunting, to assassinate a youth, the incestuous lover of his step-mother[20]. A private jurisdiction is repugnant to the spirit of monarchy; the parent was again reduced from a judge to an accuser; and the magistrates were enjoined by Severus Alexander to hear his plaints and execute his sentence. He could no longer take the life of a son without incurring the guilt and punishment of murder; and the pains of parricide, from which the son had been exempted by the Pompeian law, were finally inflicted by the justice of Constantine[21] [22].

[18] Inst. lib. II. tit. 9. Pandects, lib. XV. tit. 1; lib. XLI. tit. 1.
[19] Seneca de Clementia, 1, 14, 15.
[20] Marcian. Inst. lib. XIV. in Pandect, lib. XLVIII. tit. 9, leg. v.
[21] Pandects, lib. XLVIII. tit. 8, 9. Code, lib. IX. tit. 16, 17.
[22] 3 Gibbon, 186.

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THE PRIVILEGES OF ROMAN MATRONS.

After the Punic triumphs, the matrons of Rome aspired to the common benefits of a free and opulent republic: their wishes were gratified by the indulgence of fathers and lovers, and their ambition was unsuccessfully resisted by the gravity of Cato the Censor[23]. They declined the solemnities of the old nuptials, defeated the annual prescription by an absence of three days, and, without losing their name or independence, subscribed the liberal and definite terms of a marriage-contract. Of their private fortunes, they communicated the use, and secured the property; the estates of a wife could neither be alienated nor mortgaged by a prodigal husband; their mutual gifts were prohibited by the jealousy of the laws; and the misconduct of either party might afford, under another name, a future subject for an action of theft. To this loose and voluntary compact, religious and civil rites were no longer essential; and between persons of a similar rank, the apparent community of life was allowed as sufficient evidence of their nuptials.

The institution of marriage was exalted by the Christians.

The dignity of marriage was restored by the Christians, who derived all spiritual grace from the prayers of the faithful and the benediction of the priest or bishop. The origin, validity, and duties of the holy institution, were regulated by the tradition of the synagogue, the precepts of the Gospel, and the canons of general or provincial synods[24]; and the conscience of the Christians was awed by the decrees and censures of their ecclesiastical rulers. Yet the magistrates of Justinian were not subject to the authority of the church: their emperor consulted the unbelieving civilians of antiquity, and the choice of matrimonial laws in the Code and Pandects, is directed by the earthly motives of justice, policy, and the natural freedom of both sexes[25].

The Roman marriage required the previous approbation of the parents.

Besides the agreement of the parties, the essence of every rational contract, the Roman marriage required the previous approbation of the parents. A father might be forced by some recent laws to supply the wants of a mature daughter; but even his insanity was not generally allowed to supersede the necessity of his consent. The causes of the dissolution of

[23] Liv. XXXIV. 1—8.
[24] Bingham, lib. XXII. 6 Chardon, Hist. des Sacremens.
[25] Inst. lib. I. tit. 10. Pandects, lib. XXIII.—XXV. Code, lib. V. 3 Gibbon, 186, 187.

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matrimony have varied among the Romans[26]; but the most solemn sacrament, the confarreation itself, might always be done away by rites of a contrary tendency. In the first ages, the father of a family might sell his children, and his wife was reckoned in the number of his children: the domestic judge might pronounce the death of the offender, or his mercy might expel her from his bed and house; but the slavery of the wretched female was hopeless and perpetual, unless he asserted, for his own convenience, the manly prerogative of a divorce.

The law of divorce.

When the Roman matrons became the equal and voluntary companions of their lords, a new jurisprudence was introduced, that marriage, like other partnerships, might be dissolved by the abdication of one of the associates.

Passion, interest, or caprice, suggested motives for the dissolution of marriage.

In three centuries of prosperity and corruption, this principle was enlarged to frequent practice and pernicious abuse. Passion, interest, or caprice, suggested daily motives for the dissolution of marriage; a word, a sign, a message, a letter, the mandate of a freedman, declared the separation, the most tender of human connexions was degraded to a transient society of profit or pleasure. According to the various conditions of life, both sexes alternately felt the disgrace and injury; an inconstant spouse transferred her wealth to a new family, abandoning a numerous, perhaps a spurious, progeny to the paternal authority and care of her late husband; a beautiful virgin might be dismissed to the world, old, indigent, and friendless; "but the reluctance of the Romans, when they were pressed to marriage by Augustus, sufficiently marks that the prevailing institutions were least favourable to the males."

The liberty of divorce does not contribute to happiness or virtue.

A specious theory is confuted by this free and perfect experiment, which demonstrates that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute; the minute difference between a husband and a stranger, which might so easily be removed, might still more easily be forgotten; and the matron, who in five years can submit to the embraces of eight husbands, must cease to reverence the chastity of her own person[27].

Privilege of divorce, regulated by the censors.

Every act of a citizen was subject to the judgment of the

[26] Plutarch, 57.

[27] Juvenal. Satir. VI. 20. 3 Gibbon, 188.

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censors; the first who used the privilege of divorce assigned, at their command, the motives of this conduct[28]; and a senator was expelled for dismissing his virgin spouse without the knowledge or advice of his friends. Whenever an action was instituted for the recovery of a marriage portion, the prætor, as the guardian of equity, examined the cause and the characters, and generally inclined the scale in favour of the guiltless and injured party. Augustus, who united the powers of both magistrates, adopted their different modes of repressing or chastising the licence of divorce[29].

The presence of seven witnesses required for the validity of divorce.

The presence of seven Roman witnesses was required for the validity of this solemn and deliberate act; if any adequate provocation had been given by the husband, instead of the delay of two years, he was compelled to refund immediately, or in the space of six months; but if he could arraign the manners of his wife, her guilt or levity was expiated by the loss of the sixth or eighth part of her marriage portion.

The Christian princes were the first who specified the just causes of a private divorce.

The Christian princes were the first who specified the just causes of a private divorce; their institutions, from Constantine to Justinian, appear to fluctuate between the custom of the empire and the wishes of the church[30]; and the author of the Novells too frequently reforms the jurisprudence of the Code and Pandects. In the most rigorous laws, a wife was condemned to support a gamester, a drunkard, or a libertine, unless he were guilty of homicide, poison, or sacrilege; in which case the marriage, as it should seem, might have been dissolved by the hand of the executioner.

The sacred matrimonial rights of the husband, invariably maintained.

But the sacred right of the husband was invariably maintained to deliver his name and family from the disgrace of adultery; the list of *mortal* sins, either male or female, was curtailed and enlarged by successive regulations, and the obstacles of incurable impotence, long absence, and monastic profession, were allowed to rescind the matrimonial obligation. Whoever transgressed the permission of the law, was subject to various and heavy penalties. The woman was stripped of her wealth and ornaments, without excepting the bodkin of her hair; if a man introduced a new bride into his bed, *her* fortune might be lawfully seized by the vengeance of his

[28] Valerius Maximus, lib. II. c. 9.

[29] Heineccius, ad Legem Papiam Poppæam, c. 19, in Opp. tom. vi. P. i. 323—333.

[30] Selden, Uxor Ebraica, lib. III. c. 31, 847—853.

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exiled wife. Forfeiture was sometimes commuted to a fine; the fine was sometimes aggravated by transportation to an island, or imprisonment in a monastery: the injured party was released from the bonds of marriage; but the offender, during life, or a term of years, was disabled from the repetition of nuptials. The successor of Justinian yielded to the prayers of his unhappy subjects, and restored the liberty of divorce by mutual consent[31].

A legal marriage could only be contracted between the free citizens of Rome.

According to the maxims of the republic, a legal marriage could only be contracted by free citizens; an honourable, at least an ingenuous birth, was required for the spouse of a senator; but the blood of kings could never mingle in legitimate nuptials with the blood of a Roman; and the name of a stranger degraded Cleopatra and Berenice to live the concubines of Mark Anthony and Titus[32]. This appellation, indeed, so injurious to the majesty, cannot, without indulgence, be applied to the manners of these oriental queens.

A "concubine" defined.

A concubine, in the strict sense of the civilians, was a woman of servile or plebeian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station, below the honours of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws: from the age of Augustus to the tenth century, the use of this secondary marriage prevailed, both in the west and east, and the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. In this connexion, the two Antonines, the best of princes and of men, enjoyed the comforts of domestic love; the example was imitated by many citizens impatient of celibacy, but regardful of their families.

Legitimate children.

Legitimate children were those born in lawful wedlock: all others were considered as illegitimate. Illegitimate children were of four sorts,—1. natural children, or those born in concubinage; 2. spurious; 3. filii adulterini; 4. incestuosi[33].

Legitimation of children; and the term "natural" defined.

If at any time the parents desired to legitimate their natural children, the conversion was instantly performed by the celebration of their nuptials with a partner whose fruitfulness and fidelity they had already tried. By this epithet of *natural*, the offspring of the concubine were distinguished from the

[31] 3 Gibbon, 190.
[32] Æneid, viii. 688.
[33] Hoppii Comm. lib. I. tit. 10, s. 13. Geldart's Hallifax, 16.

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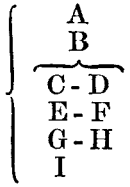
spurious blood of adultery, prostitution, and incest, to whom Justinian reluctantly grants the necessary aliments of life; and these natural children alone were capable of succeeding to a sixth part of the inheritance of their reputed father. According to the rigour of the law, bastards were entitled only to the name and condition of their mother, from whom they might derive the character of a slave, a stranger, or a citizen. The outcasts of every family were adopted, without reproach, as the children of the state[34]. Legitimation was also acquired by the natural son being made a decemvir, or by a rescript from the emperor[35].

Exclusive of the non-consent of the parent,—want of age,—want of citizenship,—natural defects of mind and body,—as forming impediments to a just marriage,—consanguinity and affinity were likewise obstructions.

DEGREES OF CONSANGUINITY.

The rules for computing degrees of consanguinity, in the right and oblique lines, by the civil and canon and English laws, are thus,—



The general rule concerning marriages prohibited on account of consanguinity and affinity was,—"All such as are *real* parents and children to each other, or in the place of parents and children, are forbidden to marry together."

In the right line, marriages were prohibited in infinitum.

In the right line, marriages were prohibited in infinitum; whether the relation of parent or child were derived from nature, or introduced by adoption, and that dissolved.

Marriages in the oblique line.

In the oblique line, marriages of brothers and sisters, of the whole blood or half, natural or adopted, whilst the adoption continued, as also of uncles and nieces, and of aunts and nephews, were forbidden: but from the time of the Emperor Claudius to that of Constantine, the marriage of a brother's daughter had been allowed.

Marriages of first cousins.

The marriages of first cousins, which, at different times, had been both allowed and forbidden by the emperors before Justinian, were by him declared to be lawful.

Marriages in the right line.

Marriages in the right line were forbidden, on account of affinity, no less than consanguinity. In the oblique line, the

[34] Inst. lib. I. tit. 10. Pandects, lib. I. tit. 7. Code, lib. V. tit. 25. Novells, lib. LXXIV., LXXXIX.
[35] Geldart's Hallifax, 16.

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The duties of a "curator."

by the civilians at fourteen; but as the faculties of the mind ripen more slowly than those of the body, a *curator* was interposed to guard the fortunes of the Roman youth from his own inexperience and headstrong passions. Such a trustee had been first instituted by the prætor, to save a family from the blind havoc of a prodigal or a madman; and the minor was compelled by the laws to solicit the same protection, to give validity to his acts, till he accomplished the full period of twenty-five years. Women were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. Such, at least, was the spirit of the ancient law, which had been insensibly mollified before the time of Justinian.

PROPERTY.

The subjects of property called "res."

The subjects of property are called "*res*," things. In things are to be considered, 1. their kinds; 2. the rights which may be acquired in them; 3. the ways of acquiring those rights.

Things were,—1. *extra patrimonium*, that is, incapable of being possessed by single persons exclusively of others; 2. *in patrimonio*, that is, capable of being so possessed.

Things extra patrimonium.

Things extra patrimonium, were of four sorts,—1. things common; 2. things public; 3. things belonging to a society or a corporation, called res universitatis; 4. things consecrated to religious uses, (i.) res sacræ, (ii.) religiosæ, (iii.) sanctæ.

In patrimonio.

Things in patrimonio, called res singulorum, were of two sorts,—1. corporeal, which included, (i.) moveables, (ii.) immoveables; 2. incorporeal[38].

The substance of things, originally belonged to mankind in common.

The substance of things, in the earliest ages, belonged to mankind in common; which supplied the place of property.

The inconvenience of such a communion of goods occasioned, in time, the introduction of a permanent and exclusive right to the substance as well as use of things. This[39] permanent and exclusive right is called property.

Property in things.

Property in things might be,—1. in possession; 2. in action. The former is called dominium, or jus in re; the latter, obligatum, or jus ad rem.

Dominion in things.

Dominion in things is,—1. simple, called dominium plenum; 2. qualified, called dominium minus plenum,—the latter is of two kinds, (i.) directum, (ii.) utile.

[38] Geldart's Hallifax, 26, 27.

[39] Taylor, El. Civil Law (Property). Wood's Inst. Civil Law, b. II. c. 1. Heinecc. lib. II. tit. 1, s. 310—339. Geldart's Hallifax, 26, 27.

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The ways of acquiring a right to things.

The ways of acquiring a right to things are derived from the law of nature or nations[40]; and from the civil law. The natural modes of acquiring a right to things are three; occupancy, accession, tradition[41].

Things incorporeal.

Things incorporeal are capable only of an improper, or *quasi*-possession, which is proved from the allowed use and exercise of those rights, such as real and personal services,—and, under the latter, may be comprised usufruct, use, habitation[42]:—so likewise, property might be acquired mediately, by others; as by a son and a slave[43].

The civil modes of acquiring a right to things.

The civil modes of acquiring a right to things were chiefly these: usucaption or prescription; donation; succession[44]. There are also four other modes mentioned in the Institutes:—arrogatio; bonorum addictio; libertatum servandarum causa; sectio bonorum; and "ex scto Claudiano," but which was abolished by Justinian[45].

Original right of property can only be justified by occupancy.

These regulations were founded on justice, because, in the successive states of society, the hunter, the shepherd, the husbandman, could have defended their possessions by two reasons which forcibly appeal to the feelings of the human mind,—that whatever they enjoy is the fruit of their own industry; and that every man who envies that felicity, may purchase similar acquisitions by the exercise of similar diligence. Such, in truth, may be the freedom and plenty of a small colony cast on a fruitful island. But the colony multiplies, while the space still continues the same: the common rights, the equal inheritance of mankind, are engrossed by the bold and the crafty; each field and forest is circumscribed by the landmarks of a jealous master; and it is the peculiar praise of the Roman jurisprudence, that it asserts the claim of the first occupant to the wild animals of the earth, the air, and the waters.

In the progress of primitive equity to final injustice, the steps are silent.

In the progress of primitive equity to final injustice, the steps are silent, the shades are almost imperceptible, and the absolute monopoly is guarded by positive laws and artificial reason. The active, insatiate principle of self-love, can only supply the arts of life and the wages of

[40] Vattel, Droit des Gens, b. IV. VII. Taylor's El. Civil Law, 448—479 (Property). Geldart's Hallifax, 26, 27.

[41] Inst. lib. II. tit. 1, s. 11—47; tit. 8. Geldart's Hallifax, 28.

[42] Wood's Inst. Civil Law, b. II. c. 2. Geldart's Hallifax, 32.

[43] Taylor's El. Civil Law (Powers of the Father), 395—397.

[44] Inst. lib. II. tit. 6, 7.

[45] Inst. lib. III. tit. 11, 12, 13; tit. 30, s. 2—8. Vide Senâtus Consultum, Tacit. Annal. lib. XII. c. 53.

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industry; and as soon as civil government and exclusive property have been introduced, they become necessary to the existence of the human race. Except in the singular institutions of Sparta, the wisest legislators have disapproved an agrarian law as a false and dangerous innovation.

An agrarian law, a false and dangerous innovation.

Succession is the right of coming into the estate, real or personal, which a deceased person had at the time of his death. Such succession might take place,—1. by testament: 2. by law; 3. by the bonorum possessio granted by the prætor.

TITLE BY SUCCESSION.

Property naturally ceases at the death of the proprietor; but, by the law of many societies, may be continued by him, after his decease, in such persons as he shall expressly name.

This natural inheritance has been protected by the legislators of every climate and age, and the father is encouraged to persevere in slow and distant improvements, by the tender hope that a long posterity will enjoy the fruits of his labour, and that those who have been the associates of his toil might be the possessors of his wealth.

Title of the first proprietor how determined.

On the death of a Roman citizen, all his descendants, unless they were already freed from his paternal power, were called to the inheritance of his possessions. The insolent prerogative of primogeniture was unknown; the two sexes were placed on a just level; and all the sons and daughters were entitled to an equal portion of the patrimonial estate; and if any of the sons had been intercepted by a premature death, his person was represented, and his share was divided, by his surviving children. On the failure of the direct line, the right of succession must diverge to the collateral branches.

All the descendants of a Roman citizen, called to the inheritance of his possessions.

A testament, in the Roman law, is the legal declaration of a man's intentions, which he wills to be performed upon the event of his death, with the direct appointment of an heir[46].

A Roman testament defined.

The power of making private testaments was not allowed among the Romans till the laws of the Twelve Tables. Before the laws of the Twelve Tables, a testamentary heir might be made two ways,—1. in the form of a legislative act, comitiis calatis; 2. in procinctu, by such persons as belonged to the army.

Private testaments not allowed previous to the Twelve Tables.

The Twelve Tables gave an absolute power to every man to make the law of his own succession, but prescribed no

The Twelve Tables gave an absolute power to every man to make the law of his own succession.

[46] Inst. lib. II. tit. 10.

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form. As a testament was an alienation of the testator's property and family after his death, the form of mancipation, used in other transfers of property or family, was followed in this; which occasioned a third kind of testament, per æs et libram.

The prætor took away the ceremony of the symbolical sale.

Afterwards, when testaments came to be in writing, the prætor took away the ceremony of the symbolical sale; requiring no more to the validity of a will than seven witnesses (instead of five required before) and their seals; this was called testamentum prætorium. This regulation was followed by another, and the last, from which was formed the testamentum mixtum, so called, because made up of three sorts of law, the civil, the prætorian law, and the constitutions of the emperors.

Testamentum mixtum.

A Roman testament was either solemn or privileged.

A Roman testament was,—1. solemn; 2. privileged: and both were either written, or nuncupative. The solemnities were,—(i.) external; (ii.) internal. In a solemn written testament it was required that it should be,—(a.) written or subscribed by the testator; (b.) subscribed and sealed by seven persons, all freemen, citizens of Rome, fourteen years of age at least, in the sight and hearing of the testator, and solemnly required to bear witness; (c.) that the whole should be done uno contextu.

Capacities and incapacities of witnesses.

The condition or positive capacity of the witnesses was to be judged of at the time of their attestation; yet, by an equitable construction, general reputation was sufficient. Neither the heir, nor any of his family, could be witnesses, but legatees, and fide-committees might; and the omission of any solemnity in a written unprivileged will made the whole invalid.

Nuncupative will.

In a solemn nuncupative testament it was required, that the testator should declare his will, by word of mouth, before seven witnesses especially asked to attest it.

The military testament.

Privileged testaments were those, which were valid without the formalities required in such as were solemn. Among these, the military testament was the chief. The privilege of unsolemn testaments granted to soldiers extended only to such as were in actual service; and a will so made continued in force a whole year after their dismission from the army. Other instances of privileged testaments were,—(i.) those that were publicly registered; (ii.) those made by parents for the

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benefit of their children; (iii.) by rustics; (iv.) in time of plague; (v.) for pious causes[47].

Codicils were unsolemn wills.

Codicils were unsolemn wills, which contained no appointment of an heir; and might be made by one that died testate or intestate. Codicils differed from testaments,—(i.) in their formalities; (ii.) in their use. Thus a will defective in form might often be supported by a codicillary clause.

Persons incapable of making a testament.

Those who were incapacitated from making a testament were, a son under power, slaves, strangers, deaf and dumb, prisoners of war during their captivity, those under the age of puberty, madmen, prodigals, traitors, heretics, incestuous, libellers, &c.

The appointment of an heir.

The appointment of an heir to represent the testator was an *internal* ceremony, which made the essence of a Roman testament. He is called heir in the civil law, who succeeds to the whole estate of the deceased, real or personal, without distinction. There were three kinds of heirs in the Roman Law,—1. necessarii; 2. sui et necessarii; 3. extranei.

Necessary heirs.

Necessary heirs were the testator's slaves, effects of the appointment of a slave for heir, in the case of Servus proprius, alienus, communis, hæreditarius.

Hæredes sui et necessarii.

Hæredes sui et necessarii were all the children of the testator, of whatever sex or degree, born or posthumous; and under Justinian, all children, of whatever sex or degree, born or posthumous, were to be instituted or disinherited by name.

Extraneous heirs.

Extraneous heirs were those, who were neither the slaves nor the children of the testator; they were sometimes called voluntary heirs; but those only could be extraneous heirs, who had a capacity to accept the inheritance, both at the time of making the will, and at the time of the testator's death[48].

Bequests in trust.

Bequests in trust were either universal or particular. An universal fidei-commissum was the disposal of an inheritance, in whole or in part; to an heir, in trust that he should convey it, or dispose of the profits to another. He, to whom the inheritance was given in trust, was called hæres fiduciarius; he, who had a beneficial interest in the inheritance, was called hæres fidei-commissarius. A particular fidei-commissum was the disposal of one particular thing to an heir, in trust that he should deliver it to another[49].

Hæres fiduciarius.

SPECIFIC OBLIGATIONS OF

The general duties of mankind are imposed by their public

[47] Wood's Inst. Civil Law, b. II. c. 4. [48] Geldart's Hallifax, 40, 53.
[49] Wood's Inst. Civil Law, b. II. c. 4. 2 Black. Com. B. II. c. 1, 23, 32.

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MANKIND TO EACH OTHER ARE THE EFFECT OF A PROMISE, A BENEFIT, OR AN INJURY.

and private relations; but their specific obligations to each other can only be the effect of,—1. a promise; 2. a benefit; or, 3. an injury; and where these obligations are ratified by law, the interested party may compel the performance by a judicial action[50], which is the legal demand of a man's right, or the means which the law puts into his hands of pursuing and recovering those rights, whether perfect or imperfect, of which he is unjustly deprived.

Property in action.

From the adoption of these principles another species of property was created;—viz., property in action, which arose from contracts proper, such as innominate and nominate.

Innominate contracts.

Under the former, contracts were usually ranged under four classes, expressive of the consideration on which they were founded,—1. Do ut des; 2. Do ut facias; 3. Facio ut des; —4. Facio ut facias.

Nominate contracts.

Nominate contracts were of four kinds, expressive of the ways in which they were formed,—(i.) real; (ii.) verbal; (iii.) literal; (iv.) consensual[51].

Obligations quasi ex contractu.

Property in action also arose from obligations *quasi ex contractu* (but equally subject with contracts proper, of being dissolved by solution, compensation, confusion, oblation, novation, acceptitation, and mutual consent); offences proper, such as furtum, rapina, damnum, injuria; and offences improper, such as erroneous sentences, things thrown or poured from a house, things stolen from a ship or inn, &c.[52].

Admission of evidence.

The prætors, as the guardians of social faith, admitted every rational evidence of a voluntary and deliberate act, which in their tribunal produced an equitable obligation, and for which they gave an action and a remedy, but a naked fact or promise, or even an oath, did not create any civil obligation, unless confirmed by the legal form of a stipulation.

Real contracts.

The obligations of the second class were denominated real contracts, and were four in number,—(i.) mutuum; (ii.) commodum; (iii.) depositum; (iv.) pignus. A grateful return is due to the author of a benefit; and whoever is intrusted with the property of another, has bound himself to the sacred duty of restitution. In the case of a friendly loan, the merit of generosity is on the side of the lender only; in a deposit, on the side of the receiver; but in a pledge, and in the rest of the

[50] Sir W. Jones (Bailments), 127. Fonblanque's Equity, b. I. IV. Black. Com., B. II. c. 30; B. III. c. 9.

[51] 2 Dion Cass. liv. 814.

[52] Inst. lib. III. 28, 29. Geldart's Hallifax, 92—109.

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selfish commerce of ordinary life, the benefit is compensated by an equivalent, and the obligation to restore is variously modified by the nature of the transaction.

The distinction between the "commodatum" and the "mutuum."

The Latin language very happily expresses the fundamental difference between the commodatum and the mutuum, which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had been accommodated for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this mutual engagement by substituting the same specific value, according to a just estimate of number, of weight, and of measure.

The obligation of location.

In the contract of sale, the absolute dominion is transferred to the purchaser, and he repays the benefit with an adequate sum of gold, or silver, the price and universal standard of all earthly possessions. The obligation of another contract, that of location, is of a more complicated kind. Lands or houses, labour or talents, may be hired for a definite term; at the expiration of the time, the thing itself must be restored to the owner, with an additional reward for the beneficial occupation and employment. In these lucrative contracts, to which may be added those of partnership and commissions, the civilians sometimes imagine the delivery of the object, and sometimes presume the consent of the parties.

The mortgage, or hypotheca.

The substantial pledge has been refined into the invisible rights of a mortgage, or hypotheca; and the agreement of sale, for a certain price, imputes, from that moment, the chances of gain or loss to the account of the purchaser. It may be fairly supposed, that every man will obey the dictates of his interest; and if he accepts the benefit, he is obliged to sustain the expense of the transaction. In this boundless subject, the historian will observe the location of land and money, the rent of the one, and the interest of the other, as they materially affect the prosperity of agriculture and commerce. The landlord was often obliged to advance the stock and instruments of husbandry, and to content himself with a partition of the fruits. If the feeble tenant was oppressed by accident, contagion, or hostile violence, he claimed a proportionable relief from the equity of the laws; five years were the customary term, and no solid or costly improvements could be expected from a farmer, who, at each moment, might be ejected by the

Every man will obey the dictates of his interest.

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sale of the estate[53]. Usury, the inveterate grievance of the city, had been discouraged by the Twelve Tables[54], and abolished by the clamours of the people; it was revived by their wants and idleness, tolerated by the discretion of the prætors, and finally determined by the code of Justinian.

The laws and prejudices against usury.

Persons of illustrious rank were confined to the moderate profit of four per cent.; six was pronounced to be the ordinary and legal standard of interest; eight was allowed for the convenience of manufacturers and merchants; twelve was granted to nautical insurance, which the wiser ancients had not attempted to define; but except in this perilous adventure, the practice of exorbitant usury was severely restrained[55]. The most simple interest was condemned by the clergy of the East and West; but the sense of mutual benefit, which had triumphed over the laws of the republic, has resisted with equal firmness the decrees of the church, and even the prejudices of mankind.

"FURTUM," "RAPINA," "DAMNUM," et "INJURIA," DEFINED.

Private offences are fourfold:—I. Furtum, which is the fraudulent taking and carrying away the moveable goods of another. II. Rapina, which is the violent taking from the person of another of money or goods for the sake of gain. III. Damnum, which is the loss or diminution of what is a man's own, occasioned by the fraud or fault of a freedman. IV. Injuria, or injury, which is anything maliciously done or said, by which another is hurt in his body or reputation. Injuries were,—1. real; 2. verbal; and both were divided into,—(i.) simple; (ii.) atrocious. Real injuries were those in which an unlawful act was done. Verbal injuries were those in which slanderous and malicious words were spoken. Injuries might be committed against a man's own person, or against those who were under his protection. An injury done to a slave was an injury to his master.

The injurious party, besides a civil, was liable to a criminal prosecution.

The injurious party, besides a civil, was liable to a criminal prosecution, both by the prætorian and Cornelian laws. In a criminal prosecution, the punishment for atrocious injuries was death, or banishment; for injuries of a less heinous sort, the offender was rendered incapable of being a witness, or of making a testament.

Nature and society impose the obligation of repairing an injury.

Nature and society impose the strict obligation of repairing an injury; and the sufferer by private injustice, acquires a

[53] Pandects, lib. XIX. Code, lib. IV. tit. 65. [54] Tac. Ann. 6, 16.
[55] Pandects, lib. XXII. tit. 1, 2. Code, lib. IV. tit. 32, 33.

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personal right and a legitimate action. If the property of another be entrusted to our care, the requisite degree of care may rise and fall according to the benefit which we derive from such temporary possession; we are seldom made responsible for inevitable accident, but the consequences of a voluntary fault must always be imputed to the author. A Roman pursued and recovered his stolen goods by a civil action of theft; they might pass through a succession of pure and innocent hands, but nothing less than a prescription of thirty years could extinguish the original claim. They were restored by the sentence of the prætor, and the injury was compensated by double, or threefold, or even quadruple damages, as the deed had been perpetrated by secret fraud or open rapine, as the robber had been surprised in the fact, or detected by a subsequent research. The Aquilian law defended the living property of a citizen, his slaves and cattle, from the stroke of malice or negligence: the highest price was allowed that could be ascribed to the domestic animal at any moment of the year preceding his death; a similar latitude of thirty days was granted on the destruction of any other valuable effects.

Stolen goods recovered by a civil action of theft.

The equity of the prætors examined and estimated the distinct merits of each particular complaint. In the adjudication of civil damages, the magistrate assumed a right to consider the various circumstances of time and place, of age and dignity, which may aggravate the shame and sufferings of the injured person; but if he admitted the idea of a fine, a punishment, an example, he invaded the province, though, perhaps, he supplied the defects, of the criminal law.

The prætors examined the distinct merits of each particular complaint.

Improper offences, or *quasi delicta*, were those in which an unlawful act was committed through negligence, without ill design.

Obligations *quasi ex delicta*, or from improper offences.

Thus, if a judge through ignorance of the law, pronounced an erroneous sentence, he made the suit his own, and became liable to pay the damage which such sentence had occasioned.

When things were thrown or poured from a house, without design, by which passengers were hurt or incommoded, the inhabitant of that house, whether proprietor or tenant, was compellable to make reparation for the damage done.

Injury from accident,

When things were hung or placed in any such way as to be dangerous to those who passed under them, the owner was punishable by fine, whether any one were hurt by their fall or not.

Or negligence.

When things were damaged or stolen by any of the servants belonging to a ship or inn, the master of such ship or inn was

Goods stolen from a ship or inn.

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liable to pay the double value; when the damage or theft was done by a stranger or persons unknown, the master was simply obliged to make good the loss[56].

In criminal cases the citizens of Rome could only be tried by their country.

The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country[57]. The administration of justice is the most ancient office of a prince: it was exercised by the Roman kings, and abused by Tarquin; who alone, without law or council, pronounced his arbitrary judgments. The first consuls succeeded to this royal prerogative; but the sacred right of appeal soon abolished the jurisdiction of the magistrates, and all public causes were decided by the supreme tribunal of the people. But a wild democracy, superior to the forms, too often disdains the essential principles, of justice; the pride of despotism was envenomed by plebeian envy, and the heroes of Athens might sometimes applaud the happiness of a Persian, whose fate depended upon the caprice of a *single* tyrant.

The penal statutes form a very small proportion of the Code and Pandects.

The penal statutes form a very small proportion of the fifty books of the Pandects, and the twelve books of the Codex repetitæ prælectionis; and, in all judicial proceedings, the life or death of a citizen is determined with less caution and delay than the most ordinary question of covenant or inheritance. This singular distinction, though something may be allowed for the urgent necessity of defending the peace of society, is derived from the nature of criminal and civil jurisprudence. Our duties to the state are simple and uniform; the law by which he is condemned, is inscribed, not only on brass or marble, but on the conscience of the offender, and his guilt is commonly proved by the testimony of a single fact. But our relations to each other are various and infinite; our obligations are created, annulled, and modified, by injuries, benefits, and promises; and the interpretation of voluntary contracts and testaments, which are often dictated by fraud or ignorance, affords a long and laborious exercise to the sagacity of the judge[58].

The business of life is multiplied by the extent of commerce and dominion.

The business of life is multiplied by the extent of commerce and dominion, and the residence of the parties in the distant provinces of an empire, is productive of doubt, delay, and inevitable appeals from the local to the supreme magistrate.

[56] Inst. lib. IV. tit. 5. Wood's Inst. Civil Law, b. III. c. 8. Geldart's Hallifax, 108, 109.

[57] Sigon. lib. III. de Judiciis in Opp. tom. iii. 679—864. Heinecc. ad Pandect. lib. I. et II. ad Institut. l. IV. tit. 17. Element. ad Antiquitat.

[58] 3 Gibbon, 406.

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Justinian, the Greek emperor of Constantinople and the East, was the legal successor of the Latian shepherd, who had planted a colony on the banks of the Tiber. In a period of thirteen hundred years, the laws had reluctantly followed the changes of government and manners; and the laudable desire of conciliating ancient names with recent institutions, destroyed the harmony, and swelled the magnitude, of the obscure and irregular system.

The laws which excuse the ignorance of their own imperfections.

The laws which excuse, on any occasions, the ignorance of their subjects, confess their own imperfections; the civil jurisprudence, as it was abridged by Justinian, still continued a mysterious science and a profitable trade, and the innate perplexity of the study was involved in tenfold darkness by the private industry of the practitioners. The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, for the unequal pressure serves only to increase the influence of the rich, and to aggravate the misery of the poor: but such forms and delays are sometimes necessary to guard the person and property of the citizen; and the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry; for the discretion of the judge is the first engine of tyranny. But the government of Justinian united the evils of liberty and servitude; and the Romans were oppressed at the same time by the multiplicity of their laws, and the arbitrary will of their master.

NINTH PERIOD OF THE HISTORY OF THE ROMAN LAW.

From Justinian till the fall of the empire in the East.

One circumstance is an unquestionable proof of the Justinianean collection's possessing a very high degree of intrinsic merit. Notwithstanding the different forms of the governments of Europe, and the great variety of their political and judicial systems, the civil law has obtained either a general or a partial admittance into the jurisprudence of almost all of them; and, where it has been least favourably received, it has been pronounced a collection of written wisdom: this could not have happened, if it had not been deeply and extensively grounded on principles of justice and equity, applicable to the public and private concerns of mankind, at all times, and in every situation.

The reign of the third successor of Justinian, was the last, in which the Roman law maintained its authority in the

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West. After that time, all law and regular government were rapidly destroyed by the barbarians who invaded and overturned the Roman empire. The exarchate of Ravenna, the last of their Italian victories, was conquered by them in 753; and that year is assigned as the era of the final extinction of the Roman law in Italy.

A.D. 753.

It lingered longer in the East; in strictness even, it cannot be said to have wholly lost its authority, in that part of the empire, till the taking of Constantinople, by Mahomet II. In the life-time of Justinian, the Pandects were translated into Greek by Thaleleus: a translation of the Code was made, perhaps by the same hand, and the Institutes were translated by Theophilus.

Translation of the Pandects by Thaleleus.

The successors of Justinian published different laws, some of which have reached us. In the reign of Basilius the Macedonian, and his sons, Leo the Philosopher, and Constantine Porphyrogeneta, an epitome, in sixty books, of Justinian's Code, and of the constitutions of succeeding emperors, was framed, under the title of Basilica[59].

Laws published by the successors of Justinian.

A.D. 906.

That the Basilica superseded, in the Eastern empire, the immediate authority of the Justinianean collection is true; but that the Justinianean collection formed a considerable part, and was, in fact, the groundwork of the Basilica, is unquestionable. Thus, through the medium of the Basilica, the code of Justinian, in a great degree, directed or influenced the jurisprudence of the Eastern empire, to the latest moment of its existence.

A.D. 1453.

TENTH PERIOD OF THE HISTORY OF THE ROMAN LAW.

Discovery of the Pandects at Amalphi.

The text of the Pandects being almost wholly lost, accident led, sometime about the year 1137, to the discovery of a complete copy of them, at Amalphi, a town in Italy, near Salerno. This forms the tenth period of the history of Roman law. From Amalphi the copy found its way to Pisa; and Pisa having submitted to the Florentines, in 1406, the copy was removed in great triumph to Florence.

A.D. 1406.

THE PRINCIPAL SCHOOLS IN WHICH THE CIVIL LAW HAS BEEN TAUGHT SINCE ITS REVIVAL IN EUROPE.

It has been previously stated that, in the early days of the republic, it was usual for such as desired to gain a knowledge of the laws of their country, to attend on those who were consulted on legal subjects, at the hours in which these consultations generally took place. Tiberius Coruncanius is said,

[59] Forty-one of the sixty books were splendidly published by Fabrotti, at Paris, in 1647, in seven tomes in folio; four more have been published in Meerman's Thesaurus.

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by Cicero, to have been the first among the Romans who professed to give regular instructions on legal subjects. Afterwards, public schools of jurisprudence were established; the most celebrated were those at Rome and Constantinople: Justinian founded a third at Berytus, and used all means in his power to promote its success; he gave the professors large salaries, and advanced some of them to offices of high distinction in the state;—as the authority of his law decreased, they fell into decay.

Revival of the study of the civil law.

With the discovery of the Pandects at Amalphi, the study of the civil law revived: it was introduced into several universities, and exercises were performed, lectures read, and degrees conferred in this, as in other branches of science; and several nations of the Continent, adopted it, as the basis of their several constitutions. From this time there has been a regular succession of civil lawyers, distinguished by some circumstance or other into different classes, or, as it is usually expressed, into different schools.

The school of Irnerius.

The first is the school of Irnerius, a German, who had acquired his knowledge of the civil law at Constantinople. He taught it at Bologna with great applause: the legal schism, which had divided the Sabineans and Proculeians, was revived, in some degree, among his scholars; one of them was the celebrated Azo, a Proculeian, whose writings Montesquieu is said to have preferred to all other on the subject of civil law. A more important subject, the contest between the emperors and popes, produced a more serious warfare between the disciples of Irnerius. The German emperors, who pretended to succeed to the empire of the Cæsars, claimed the same extent of empire in the West, and with the same privileges as it had been held by the Cæsars; to this claim, the spirit and language of the civil law being highly favourable, the emperors encouraged the civilians, and, in return for it, had their pens at command. The popes were supported by the canonists, and the canonists found in the decree of Gratian, as much to favour the pretensions of the popes, as the civilians found in the law of Justinian, to favour the pretensions of the emperors. Thus, generally speaking, the civilians were Ghibelins,—the name given to the partisans of the emperors; and the canonists were Guelphs,—the name given to the partisans of the popes. But this distinction did not prevail so far as to prevent many canonists from being

The German emperors claimed the same extent of empire in the West, with the same privileges as it had been held by the Cæsars.

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Ghibelins, or many civilians from being Guelphs: those among the civilians who sided with the canonists in these disputes, were called, from the decree of Gratian, Decretistæ, in opposition to the rest of the body, who assumed the appellation of Legistæ, from their adherence to the supposed Ghibelin doctrines of the civil law.

The school of Acursius.

A new school began with Acursius:—his Gloss is a perpetual commentary on the text of Justinian; it was once considered as legal authority, and was therefore usually published with the text: it is even now respected as an useful commentary. Acursius had many disciples, whose Glosses had great celebrity in their day, but are now wholly forgotten.

Bartolus and Baldus.

Bartolus, and Baldus his disciple and rival, gave rise to a new school, famous for copious commentaries on Justinian's text, for the idle subtleties with which they abound, and their barbarous style.

The Cujacian school.

Andrew Alciat was the first who united the study of polite learning and antiquity with the study of the civil law; he was the founder of a new school, which is called the Cujacian from Cujas, the glory of civilians. That school has subsisted to the present time; it has never been without writers of the greatest judgment and erudition,—among whom may be classed Cujacius, Augustinus, the Gothofredi, Heineccius, Voetius, Gravina, Pothier, and Mr. Justice Blackstone.

THE INFLUENCE OF THE CIVIL LAW ON THE JURISPRUDENCE OF THE MODERN STATES OF EUROPE.

The laws of Germany,

On the degree of its influence on the law of Germany, the German lawyers are not agreed; but it is a mere dispute of words; all of them allow that more causes are decided in their courts by the rules of the civil law, than by the laws of Germany, and that where the laws of Germany do not interfere, the subject in dispute must be tried by the civil law: after these concessions, it is not material to inquire whether, to use the language of the German lawyers, the civil law be the dominant law of Germany, or subsidiary to it. And the same may be said of its influence in Bohemia, Hungary, Poland, and Scotland.

Scotland, &c.

Rome, Italy, and the Two Sicilies.

At Rome, and in all the territories of the pope, it is received without limitation; in most other parts of Italy, including Naples and the Two Sicilies, it has nearly the same influence, except where the feudal policy intervenes.

Influence of the civil law in Spain and Portugal.

Its influence in Spain and Portugal is more qualified; but it appears to be admitted that, where the law of the country

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does not provide the contrary, the civil law shall decide: and it is the settled practice, that no person shall be appointed a judge, or received an advocate, in any of the courts of law, who has not been a student in some academy of civil or canon law for ten years.

The provinces of France.

The provinces of France which lie nearest to Italy, were the first conquered by the Romans, and the last conquered by the Francs. At the time of the conquest of them by the Francs, they were wholly governed by the Roman law; they are the provinces of Guyenne, Provençe, Dauphiné, and, speaking generally, all the provinces under the jurisdiction of Toulouse, Bourdeaux, Grenoble, Aix, and Pau, the Lyonnais, Fouz, Beaujolois, and a great part of Auvergne. Their Francic conquerors permitted them to retain the Roman law; where it has not been altered, they are still governed by it; and, from this circumstance, they are known under the general name of the Pays du Droit Ecrit. The remaining part of France is governed by the different laws and customs of the provinces of which it is composed; and, from this circumstance, is called Pays Coutumier.

Pays du Droit Ecrit.

Pays Coutumier.

Venice.

With respect to the Venetians, they have always disclaimed the authority of the civil law.

Introduction of the civil law into England.

It was introduced into England by Theobald, a Norman abbot, who was elected to the see of Canterbury. He placed Roger, surnamed Vacarius, in the University of Oxford: students flocked to him in such abundance, as to excite the jealousy of government; and the study of the civil law was prohibited by King Stephen. It continued, however, to be encouraged by the clergy, and became so favourite a pursuit, that almost all who aspired to the high offices of church or state, thought it necessary to go through a regular course of civil law to qualify themselves for them: it became a matter of reproach to the clergy, that they quitted the canon for the civil law; and Pope Innocent prohibited the very reading of it by them[60].

Its study prohibited by Stephen and Innocent.

[60] Those who are desirous of acquiring an intimate knowledge of the civil law, will derive information from perusing La Republique Romaine, M. de Beaufort; Letters between Lord Hervey and Middleton, concerning the Roman Senate; Montesquieu's Esprit des Loix; Bever's Roman Polity; Schomberg's Elements of Roman Law; Gravina, De Ortu et Progressu Juris Civilis; Ferriere's Histoire du Droit Romaine; and M. Bouchard's Recherches Historiques sur les Edits des Magistrats Romains, Quatrieme Memoire, Mem. de l'Academie, tom. 41.

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Neither the canon or civil law have any force in England.

Neither the canon or civil law have, in an abstract sense, any force in England, because the constitution doth not, nor ever did, recognise any foreign power as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest of its subjects. But all the strength that either the papal or imperial laws have obtained in this realm, is only because they have been admitted and received by immemorial usage and custom in some particular cases, and in some particular courts, and then they form a branch of the leges non scriptæ, or customary laws; or else because they are in some other cases introduced by consent of parliament, and then they owe their validity to the leges scriptæ, or statute law.

Stat. 25 Henry VIII. c. 21.

This is expressly declared by Stat. 25 Henry VIII. c. 21, addressed to the king:—"This, your grace's realm, recognising no superior under God but only your grace, hath been, and is, free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm, for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the customed and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise."

The courts in which the civil and canon laws are permitted to be restrictively used.

There are four species of courts in which the civil and canon laws are permitted (under different restrictions) to be used:—1. the courts of the archbishops and bishops, and their derivative officers, usually called curiæ Christianitatis, or ecclesiastical courts; 2. military courts; 3. courts of admiralty; 4. the courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parliament, ratifying those charters which confirm the customary law of the universities.

The courts of common law have a superintendence over these courts.

The courts of common law have the superintendence over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess[61], and to punish the officer who executes, and in

[61] R. v. *Eyre*, 2 Str. 1067. Exparte *Jenkins*, 1 B. & C. 655.

NOTES.

some cases the judge who enforces, the sentence so declared to be illegal: the latter is also liable to an action on the case who excommunicates a party for refusing to obey an order which the court has no authority to make, or where the party has not been previously served with a citation or monition, nor had due notice of the order[62].

The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts, or the matters depending before them. And, therefore, if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

The common law courts possess the power of restraining these courts.

An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own.

An appeal lies to the king in the last resort.

CHAPTER X.

On the Law that is observed in England, in regard to Civil Matters.

DE LOLME.

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

The beginning of a civil process in England, or the first step usually taken in bringing an action, is the seizing, by public authority, the person against whom that action is brought. This is done with a view to secure such person's appearance before a judge, or at least make him give sureties for that purpose[1]. In most of the countries of Europe, where the forms,

Commencement of civil process.

[62] *Beaurain* v. *Scott*, 3 Camp. 388. 2 Inst. 623. Black. Com. B. iii. c. 7.
[1] Vide Note (3.) p. 700.

De Lolme.

introduced into the Roman civil law in the reigns of the later emperors, have been imitated, a different method has been adopted to procure a man's appearance before a court of justice. The usual practice is to have the person sued, summoned to appear before the court, by a public officer belonging to it, a week before-hand: if no regard is paid to such summons twice repeated, the plaintiff (or his attorney) is admitted to make before the court a formal reading of his demand, which is then granted to him, and he may proceed to execution*.

Summons of the defendant.

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

A person who declines to answer the demand of another, acknowledges the justice of such demand.

In the times we mention, when laws begin to be formed in a country, the administration of justice between individuals is commonly lodged in the same hands which are entrusted with the public and military authority of the state. Judges, invested with a power of this kind, like to carry on their operations with a

The administration of justice originally entrusted with the public and military authorities.

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

high hand; they consider the refusal of a man to appear before them, not as being barely an expedient to avoid doing that which is just, but as a contempt of their authority; they of course look upon themselves as being bound to vindicate it; and a writ of *capias* is speedily issued to apprehend the refractory defendant. A preliminary writ or order of this kind becomes in time the first regular step of a lawsuit; and hence it seems to have happened, that, in the English courts of law, if I am rightly informed, a writ of *capias* is either issued before the *original* writ itself (which contains the summons of the plaintiff, and a formal delineation of his case), or is joined to such writ, by means of an *ac etiam capias*, and is served along with it[2].

The writ of "capias" issued against those in contempt.

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

In Rome, the distribution of civil justice was lodged in the hands of the king.

A very singular degree of violence even took place in Rome, in the method used to secure the persons of those against whom a legal demand was preferred. In England, the way to seize a man under such circumstances, is by means of a public officer, supplied with a writ or order for that purpose, supposed to be directed

Mode of personal arrest.

[2] Vide Note (3.) p. 700.

De Lolme.

Distinction between the Roman and English modes of arrest.

to him (or to the sheriff his employer) from the king himself. But, in Rome, every one became a kind of public officer in his own cause, to assert the prætor's prerogative; and, without any ostensible legal licence or badge of public authority, had a right to seize by force the person of his opponent, wherever he met him. The practice was, that the plaintiff first summoned the person sued with a loud voice, to follow him before the court of the prætor*. When the defendant refused to obey such summons, the plaintiff, by means of the words *licet antestari?* requested the by-standers to be witnesses of the fact; as a remembrance of which, he touched the ears of each of them: and then proceeded to seize his opponent, by throwing his arms round his neck *(obtorto collo)*, thus endeavouring to drag him before the prætor. When the person sued was, through age or sickness, disabled from following the plaintiff, the latter was directed by the law of the Twelve Tables to supply him with a horse *(jumentum dato)*.

The law of the Twelve Tables.

The above method of proceeding was however in after-times mitigated, though very late and slowly. In the first place, it became unlawful to seize a man in his own house, as it was the abode of his domestic gods. Women of good family were in time protected from the severity of the above custom, and they could no longer be dragged by force before the tribunal of the prætor. The method of placing a sick or aged person by force upon a horse seems to have been abolished during the later times of the republic. Emancipated sons, and freed slaves, were afterwards restrained from summoning their parents, or late masters, without having expressly obtained the prætor's leave, under the penalty of fifty pieces of gold. However, so late as the time of Pliny, the old mode of

Emancipated sons, and freed slaves, restrained from summoning their parents or masters

* Ad tribunal sequere, in jus ambula.

summoning, or carrying by force, before a judge, continued in general to subsist; though, in the time of Ulpian, the necessity of expressly obtaining the prætor's leave was extended to all cases and persons; and, in Constantine's reign, the method began to be established of having the legal summons served only by means of a public officer appointed for that purpose. After that time, other changes in the former law were introduced, from which the mode of proceeding now used on the continent of Europe has been borrowed.

Law and practice of arrests in England.

In England likewise, some changes, we may observe, have been wrought in the law and practice concerning the arrests of sued persons, though as slowly and late as those effected in the Roman republic or empire, if not more so; which evinces the great impediments of various kinds that obstruct the improvement of laws in every nation. So late as the reign of King George I., an act was passed[3] to prohibit the practice of previous personal arrest, in cases of demands under two pounds sterling; and, since that time, those courts, justly called *of Conscience*, have been established, in which such demands are to be summarily decided, and simple summons, without arrest, can only be used[4]. A bill was afterwards enacted* (on the motion of Lord

Courts of Conscience.

* In 1779[5].

[3] Stat. 12 George I. c. 29, which was amended by 5 George II. c. 27; 21 George II. c. 3; 19 George III. c. 70; 43 George III. c. 43; and 7 & 8 George IV. c. 71.

[4] These local courts of requests, or conscience, have, *generally*, jurisdiction of cases not exceeding 2*l.*, to be decided by at least three commissioners, and from 2*l.* to 5*l.* to be decided by at least five commissioners. Vide Tidd's "Practice," tit. "COURTS OF REQUESTS."

By Stat. 3 & 4 William IV. c. 42, in any action depending in any of the superior courts for any debt or demand not exceeding 20*l.*, the court in which such suit shall be depending, or any judge thereof, if satisfied that the trial will not involve any difficult question of fact or law, can order that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county.

[5] 19 George III. c. 70; which was rendered more effectual by 43 George III. c. 46; 7 & 8 George IV. c. 71.

De Lolme.

Beauchamp, whose name deserves to be recorded), by which the prohibition of arrest was extended to all cases of debt under ten pounds sterling[6]; a bill, the passing of which was of twenty, or even a hundred times more real importance than the rise or fall of a favourite, or a minister, though it has, perhaps, been honoured with a less degree of attention by the public.

Refinements, formalities, and strictness of the English civil law.

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

The origin of a regular system of laws, is the absence of military power.

The time at which the power of administering justice to individuals becomes separated from the military power (an event which happens sooner or later in different countries), is the real era of the origin of a regular system of laws in a nation. Judges being now deprived of the power of the sword, or (which amounts to the same) being obliged to borrow that power from other persons, endeavour to find their resources within their own courts, and, if possible, to obtain submission to their decrees from the great regularity of their

[6] Vide Stat 7 & 8 George IV. c. 71, where prohibition from arrest is extended to 20*l.*

proceedings, and the reputation of the impartiality of their decisions. At the same time, also, lawyers begin to crowd in numbers to courts, which it is no longer dangerous to approach, and add their refinements to the rules already set down, either by the legislature or the judges. As the employing of them, especially in the beginning, is a matter of choice, and they fear, that, if bare common-sense were thought sufficient to conduct a lawsuit, everybody might imagine he knows as much as they do, they contrive difficulties to make their assistance needful. As the true science of the law, which is no other than the knowledge of a long series of former rules and precedents, cannot as yet exist, they endeavour to create an artificial one to recommend themselves by. Formal distinctions and definitions are invented to express the different kinds of claims that men may set up against one another; in which almost the same nicety is displayed as that used by philosophers in classing the different subjects, or *kingdoms*, of natural history. Settled forms of words, under the name of *writs*, or the like, are devised to set forth those claims; and, like introductory passes, serve to usher claimants into the temple of justice. For fear their clients should desert them, after their first introduction, like a sick man who rests contented with a single visit of the physician, lawyers contrive other ceremonies and technical forms for the farther conduct of the process and the *pleadings;* and, in order still more safely to bind their clients to their dominion, they at length make every error relating to their professional regulations, whether it be a *misnomer*, a *mispleading*, or the like transgression, to be of as fatal a consequence as a failure against the laws of strict justice. Upon the foundation of the above-mentioned distinctions and metaphysical distinctions of cases and actions, a number of strict rules of law

Science of the law is a knowledge of a long series of former rules and precedents.

Misnomers and mispleadings cause a failure, against the laws of strict justice.

De Lolme.

are moreover raised, with which none can be acquainted but such as are complete masters of those distinctions and definitions[7].

Professional regulations are useful for uniformity.

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

Amplification of the Twelve Tables.

Very singular law formalities and refined practices, of the kind here alluded to, had been contrived by the first jurisconsults in Rome, with a view to amplify the rules set down in the laws of the Twelve Tables; which, being

[7] Vide Note (1.) p. 697. Ibid. (3.) p. 700.

few, and engraven on brass, every body could know as well as they; it even was a general custom to give those laws to children to learn, as we are informed by Cicero.

Distinct branches of cases and actions contrived by the first Roman jurisconsults.

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

Roman jurisconsults and pontiffs kept the exclusive knowledge of the laws.

Of the above *actiones legis*, the Roman jurisconsults and pontiffs had carefully kept the exclusive knowledge to themselves, as well as of those days on which

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

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

De Lolme.

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

Jus Ælianum.

Jus Flavianum.

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

* Dies fasti et nefasti.

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

‡ The words addressed to the plaintiff, by the person sued, when the latter made his appearance on the day for which he had been compelled to give sureties, were as follow, and are alluded to by Plaut. *Curcul.* I. 3, v. 5. "Where art thou who hast obliged me to give sureties? Where art thou who summonedst me? Here I stand before thee: do thyself stand before me." To which the plaintiff made answer, "Here I am." The defendant

Extremely like the above *actiones legis* are the *writs* used in the English courts of law. Those writs are framed for, and adapted to, every branch or denomination of actions, such as *detinue, trespass, action upon the case, accompt, and covenant,* &c.; the same strictness obtains in regard to them as did in regard to the Roman *formulæ* above-mentioned: there is the same danger in misapplying them, or in failing in any part of them: and, to use the words of an English law-writer on the subject, "Writs must be rightly directed, or they will be nought:—In all writs, care must be had that they be laid and formed according to their case, and so pursued in the process thereof*."

Writs must be rightly directed or they will be nought.

replied, "What dost thou say?" The plaintiff answered, "I say (Aio)" —and then followed the form of words by which he chose to express his action: "Ubi tu es, qui me vadatus es? Ubi tu es, qui me citâsti? Ecce ego me tibi sisto; tu contra et te mihi siste," &c.

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

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

* Jacob's Law Dictionary. See *Writ.*

De Lolme.

English pleadings have the same formalities as the Roman law.

The same formality likewise prevails in the English *pleadings* and conduct of the process as obtained in the old Roman law proceedings: and in the same manner as the Roman jurisconsults had their *actionis postulationes et editiones*, their *inficiationes, exceptiones, sponsiones, replicationes, duplicationes*, &c. so the English lawyers have their *counts, bars, replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters*,&c. A scrupulous accuracy, in observing certain rules, is moreover necessary in the management of those pleadings: the following are the words of an English law-writer on the subject: "Though the art of pleading was in its nature and design only to render the fact plain and intelligible, and to bring the matter to judgment with convenient certainty, it began to degenerate from its primitive simplicity. Pleaders, yea and judges, having become too curious in that respect, pleadings at length ended in a piece of nicety and curiosity, by which the miscarriage of many a cause, upon small trivial objections, has been occasioned[8]*."

The abuses which have arisen in pleadings.

Difference between the actiones legis, and the English writs.

There is, however, a difference between the Roman *actiones legis*, and the English writs, which is, that the former might be framed when new ones were necessary, by the prætor or judge of the court, or, in some cases, by the body of the jurisconsults themselves,—whereas *writs*, when wanted for such new cases as may offer, can only be devised by a distinct judge or court, exclusively invested with such powers, viz. the High Court of Chancery. The issuing of writs already existing, for the different cases to which they belong, is also expressly reserved to this court; and so important has its office on those two points been deemed by lawyers, that it has been called, by way of eminence, the manufactory of justice (*officina justitiæ*). Original

Original writs.

* Cunningham's Law Dictionary. See *Pleadings*.

[8] Vide Note (1.) p. 697.

writs, besides, when once framed, are not at any time to be altered, except by parliamentary authority*.

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

Authority of parliament requisite to create a new writ.

In fine, those precious writs, those valuable briefs (*brevia*), as they are also called by way of eminence, which are the elixir and quintessence of the law, have been committed to the special care of officers appointed for that purpose, whose offices derive their names from the peculiar instruments they respectively use for the

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

De Lolme.

The Hanaper and Petty Bag Office.

preservation of the deposit with which they are intrusted; the one being called the office of the *Hanaper*, and the other of the *Small Bag**.

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

A new writ amounts, in its consequences, to a new law.

Imperfections in the distribution of justice.

From the above-mentioned real difficulty in creating new writs on one hand, and the absolute necessity of such writs in the courts of common law on the other, many new species of claims and cases (the arising of which is, from time to time, the unavoidable consequence of the progress of trade and civilization) are

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

left unprovided for, and remain like so many vacant spaces in the law, or rather like so many inaccessible spots which the laws in being cannot reach: now this is a great imperfection in the distribution of justice, which should be open to every individual, and provide remedies for every kind of claim which men may set up against each other.

Legal fictions.

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

Law fictions of the kind we mention were not unknown to the old Roman jurisconsults; and, as an instance of their ingenuity in that respect, may be mentioned that kind of action, in which a daughter was called a son*. Several instances might also be quoted of the fictitious use of writs in the English courts of common law. A very remarkable expedient of that sort occurs in the method generally used to sue for the payment of certain kinds of debt, before the Court of Common Pleas; such (if I mistake not) as a salary for work done, indemnity for fulfilling orders received, &c. The writ issued in these cases is grounded on the supposition, that the person sued has trespassed on the ground of the plaintiff, and broken, by force of arms, through his fences and inclosures; and, under this predicament, the defendant is brought before the court: this species of writ, which lawyers have found of most convenient use, to introduce before a court of common law the kinds of claim we mention, is called

Process in the Court of Common Pleas.

Clausum fregit.

* From the above instance it might be concluded that the Roman jurisconsults possessed still greater power than the English parliament; for it is a fundamental principle with the English lawyers, that parliament can do every thing, *except* making a woman a man, or a man a woman[9].

[9] Vide Note (2.) p. 699.

De Lolme.

Process in the Court of King's Bench.

Latitat.

in technical language a *clausum fregit.* In order to bring a person before the Court of King's Bench, to answer demands of much the same nature with those above, a writ, called a *latitat,* is issued, in which it is taken for granted that the defendant insidiously conceals himself, and is lurking in some county, different from that in which the court is sitting; the expressions used in the writ being, that "he runs up and down and secretes himself:" though no such fact is seriously meant to be advanced either by the attorney or the party.

The same principle of strict adherence to certain forms long since established, has also caused lawyers to introduce into their proceedings fictitious names of persons, who are supposed to discharge the office of sureties; and in certain cases, it seems, the name of a fictitious person is introduced in a writ with that of the principal defendant, as being joined in a common cause with him. Another instance of the same high regard of lawyers, and judges too, for certain old forms, which makes them more unwilling to depart from such forms than from the truth itself of facts, occurs in the above-mentioned expedient used to bring ordinary causes before the Court of Exchequer, in order to be tried there at common law; which is, by making a declaration that the plaintiff is a king's debtor, though neither the court, nor the plaintiff's attorney, lay any serious stress on the assertion*.

Fictions in the Court of Exchequer.

* Another instance of the strict adherence of the English lawyers to their old established forms, in preference even to the truth of facts, occurs in the manner of executing the very act mentioned in this chapter, passed in the reign of George I. for preventing personal arrest for debts under forty shillings[10]. If the defendant, after being personally served with a copy of the process, does not appear on the appointed days, the method is to suppose that he has actually made his appearance, and the cause is proceeded upon according to this supposition: fictitious names of bails are also resorted to.

[10] Vide Note (3.) p. 700.

NOTES.

AMENDMENT OF THE RECORD.

(1.) Great expense was often incurred, and delay or failure of justice took place at trials, by reason of variances between writings produced in evidence, and the recital or setting forth thereof upon the record on which the trial was had, in matters not material to the merits of the case; and such record could not in any case have been amended at the trial, and in some cases could not be amended at any time. For remedy of which, it was enacted, by 9 George IV. c. 15, that it should "be lawful for every court of record holding plea in civil actions, any judge sitting at nisi prius, and any court of oyer and terminer and general gaol delivery in England, Wales, the town of Berwick-upon-Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanour, where any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular, by some officer of the court, on payment of such costs, if any, to the other party, as such judge or court shall think reasonable; and thereupon the trial shall proceed, as if no such variance had appeared; and in case such trial shall be had at nisi prius, the order for the amendment shall be indorsed on the postea, and returned, together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

Amendable by 9 George IV. c. 15, in cases where a variance shall appear between written or printed evidence and the record, on payment of costs.

Order for amendment to be indorsed on the postea.

This statute, which authorizes a judge to order amendments of variances between written or printed evidence and the record, invests him with a discretion, which cannot, it seems, be revised by the court above. And when a judgment was stated on the record as in one court, and it appeared, by the production of an examined copy, to have been obtained in another, the judge, at nisi prius, ordered the record to be amended.

The judge has an absolute power to amend variances between written or printed evidence.

Stat. 9 George IV. c. 15, being confined to such variances only as appeared between any matter in writing or in print produced in evidence and the recital or setting forth thereof on the record whereon the trial was pending, was extended by 3 & 4 William IV. c. 42; whereby, after reciting that great expense was often incurred, and delay or failure of justice took place at trials, by reason of variances, as to some particular or particulars, between the proof and the record, or setting forth on

Stat. 9 George IV. c. 15. extended by 3 & 4 William IV. c. 42.

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the record, or document on which the trial was had, of contracts, customs, prescriptions, names, and other matters or circumstances, not material to the merits of the case, and by the misstatement of which the opposite party could not have been prejudiced, and the same could not in any case be amended at the trial, except where the variance was between any matter in writing or in print produced in evidence, and the record; and that it was expedient to allow such amendments, as thereinafter mentioned, to be made on the trial of the cause; it is enacted, that "it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at nisi prius, if such court or judge shall see fit so to do, to cause the record, writ, or document, on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto, or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document, on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable.

Amendments may be made, when any variance appears between the proof or recital or setting forth on the record, of any contract, &c. in any particular not material to the merits of the case, and by which the opposite party cannot have been prejudiced.

Terms of amendment.

"And in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record, or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment, the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no

Trial to proceed, after amendment, as if no variance had appeared.

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such variance had appeared: and in case such trial shall be had at nisi prius, or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned, together with the record or writ, and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document, upon which the trial shall be had.

Order for amendment to be indorsed on the postea, and entered on the roll.

"Provided, that it shall be lawful for any party who is dissatisfied with the decision of such judge at nisi prius, sheriff, or other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued, for a new trial upon that ground; and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet."

Party dissatisfied with the decision of judge, may apply to the court for a new trial.

Under this statute, the judge at nisi prius will in general amend any variance, which does not go at all to affect the matter really in dispute between the parties, and which was not likely to mislead the opposite party.

The judge at nisi prius, will amend any variance which does not affect the matter really in dispute between the parties.

By 3 & 4 William IV. c. 42,—"The court and judge shall and may, if they or he think fit, in all such cases of variances, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts according to the evidence; and thereupon such finding shall be stated on such record or document, and notwithstanding the finding on the issue joined, the said court from which the record has issued, shall, if they shall think the said variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case."

The court or judge can direct facts to be found specially.

(2.) "The power and jurisdiction of parliament, says Sir Edward Coke, (4 Inst. 36,) is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court, he adds, it may be truly said,—'Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capa-

POWER AND JURISDICTION OF PARLIAMENT.

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cissima.' It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom, and of parliaments themselves; as was done by the Act of Union, and the several statutes for triennial and septennial elections[1]. It can, in short, do any thing that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament. True it is, that what the parliament doth, no authority upon earth can undo."

Parliament can change; and create the constitution of the kingdom.

RECENT AMENDMENTS IN THE LAW.

(3.) The proceedings in civil actions have been essentially changed by recent statutes, particularly by those of 1 George IV. c. 87; 1 George IV. c. 55; 3 George IV. c. 39; 6 George IV. c. 96; 7 & 8 George IV. c. 71; 9 George IV. c. 14; 9 George IV. c. 15; 11 George IV. and 1 William IV. c. 38; 1 William IV. c. 3; 1 William IV. c. 7; 1 William IV. c. 21; 1 William IV. c. 22; 1 William IV. c. 70; 1 & 2 William IV. c. 58; 2 William IV. c. 39; 3 & 4 William IV. c. 42; 3 & 4 William IV. c. 67; 6 William IV. c. 62; in consequence of which, the observations of De Lolme relative to the extreme verbosity of pleading, the fictions adopted in order to give the courts jurisdiction, and the introduction of fictitious names as pledges into legal proceedings, have been rendered inaccurate.

Stat. 2 William IV. c. 39.

By 2 William IV. c. 39, the writs authorised by that statute, and which are now used for the commencement of personal actions, are as follow:

[1] Black. Com. b. I. c. 2. Vide ante, 166, 471, 473, 474; 178—207, 215—252, 256, 289—311; 559—565; 486.

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1. A writ of summons, which is of two kinds,—(i.) in ordinary cases where the action is not of a bailable nature, or it is not intended to hold the defendant to special bail;—(ii.) against members of parliament, to enforce the provisions of Stat. 6 George IV. c. 16.

Writ of summons.

Stat. 6 George IV. c. 16.

2. A writ of capias, when the defendant is at large, or in custody of the sheriff, &c., and it is intended to hold him to special bail.

Writ of capias.

3. A writ of detainer, when the defendant is in custody of the marshal of the King's Bench, or warden of the Fleet Prison, and it is intended to detain him in such custody.

Writ of detainer.

These are, by 2 William IV. c. 39, declared to be the only writs for the commencement of personal actions in any of the superior courts of law, in the cases to which such writs are applicable; original writs are consequently abolished, in personal actions against peers, corporations, and hundredors, as well as against common persons; together with the mode of commencing such actions by bill, against members of the House of Commons, attorneys, and officers of the courts, and prisoners in custody of the marshal or sheriff, &c., and by attachment, or capias, of privilege, at the suit of attorneys and officers of the courts, in cases to which the writs authorised by the statute are applicable: and thus terminated the distinction between the proceedings by original writ and by bill.

Writs for the commencement of personal actions.

Commencement of personal actions.

This statute being confined to personal actions, does not apply to such as are purely real, as the writ of right, formedon, &c., or to mixed actions, as dower unde nihil habet, quare impedit, ejectment, waste, &c.

But by 3 & 4 William IV. c. 27, s. 36, real and mixed actions are abolished, except the writ of right of dower, writ of dower unde nihil habet, quare impedit, and ejectment.

Abolition of real and mixed actions.

Stat. 3 & 4 William IV. c. 27.

These excepted actions, however, may still be commenced by original writ, and the action of ejectment may be brought as before 2 William IV. c. 39, either by original writ, in the King's Bench, or Common Pleas, or by both in the King's Bench or Exchequer of Pleas.

Actions that may be commenced by original writ.

The action of replevin, also, which is a personal action, and other personal actions, commenced in inferior courts, and removed from thence into superior ones, are not within the statute; for, besides that these actions are not commenced in any of the superior courts of law at Westminster, there is a clause in 2 William IV. c. 39, that "nothing therein contained shall

The action of replevin.

Stat. 2 William IV. c. 39, s. 19.

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extend to any cause removed into either of the said courts, by writ of pone, certiorari, recordari facias loquelam, habeas corpus, or otherwise." The king not being named in this statute, is not bound thereby, and consequently may proceed by scire facias; which is a judicial writ, issuing out of and under the seal of the Court of Exchequer, for the recovery of a debt due to him on bond, recognizance, or judgment, &c., or found by inquisition on an outlawry, or extent, or by an original writ of scire facias, to repeal letters patent; and a subject is not prohibited by the statute from suing out a scire facias, which is for some purposes considered as a personal action, to obtain execution on a judgment or recognizance, or a writ of error or false judgment, which are original writs for reversing a judgment.

The Writ of Summons.

Commencement of action.

The writ of summons, for bringing the defendant into court, in actions not bailable, is a judicial writ, and is considered as the commencement of the action for all purposes; and may, it seems, be issued, in cases not bailable, against prisoners in custody of the sheriff, &c., or of the marshal of the King's Bench, or warden of the Fleet Prison, as well as against defendants who are not in custody.

Direction and form of the writ of summons.

This writ is directed to the defendant, commanding him, that within eight days after the service of the writ on him, inclusive of the day of such service, he do cause an appearance to be entered for him, in the court in which the action is brought, in an action on promises (or of debt, &c., as the case may be), at the suit of the plaintiff; and requiring the defendant to take notice that, in default of his so doing, the plaintiff may cause an appearance to be entered for him, and proceed therein to judgment and execution. In this writ, and every copy thereof, the place and county of the residence or supposed residence of the defendant, or wherein he is, or shall be supposed to be, are required to be mentioned. The street, and county, however, in which a defendant resides, is a sufficient description in a writ of summons; and it is not necessary to give any addition to the defendant in such writ:—but the form of the writ prescribed by 2 William IV. c. 39, must, in general, be strictly adhered to.

Form to be strictly adhered to.

Names of parties; misnomer in.

The writ of summons should contain the christian and surnames of the parties; but a misnomer, or mistake in their names, cannot now be pleaded in abatement, the 3 & 4 William IV. c. 42, having declared that "no plea in abatement for a misnomer shall be allowed in any personal action; but that

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in all cases in which a misnomer would, but for that act, have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons, founded on an affidavit of the right name; and in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit."

Description of the defendant.

In describing the defendant, if not privileged[2], it is sufficient, in general, to designate him by his christian and surname, without any further addition:—and in stating the nature of the action, accuracy is requisite.

Date and teste of writ of summons.

With respect to the date and teste of writs of summons, &c. the rule is, that "every writ issued by authority of 2 William IV. c. 39, shall bear date on the day on which the same shall be issued; and shall be tested in the name of the Lord Chief Justice, or Lord Chief Baron, of the court from which the same shall issue; or, in case of a vacancy of such office, then in the name of a senior puisne judge of the said court;" which requisite is not satisfied, by a day being indorsed on the writ; and a writ of summons, bearing date on a Sunday, is a nullity.

When to be returned.

There is no particular time appointed for the return of the writ of summons: but the defendant is required thereby to cause an appearance to be entered for him, in the court out of which the writ issues, within eight days after the service of the writ, inclusive of the day of such service.

Memorandum, and indorsements thereon.

A memorandum is required to be subscribed to the writ of summons, stating that it is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards; and it must be indorsed with the name and place of abode of the plaintiff, or his attorney, by whom the same was issued, and the amount of the debt and costs claimed by the plaintiff; but an indorsement on a writ of summons, that the writ was issued by E. F., of, &c., "attorney for the said plaintiff," is sufficient.

From what court, and by what officer, the writ of summons is issued.

The writ of summons may issue from either of the superior courts of law at Westminster; and must be issued by the officer of the courts respectively, by whom process serviceable in the county therein mentioned, hath been heretofore issued from such court.

[2] Vide post, 712, Process against Privileged Persons.

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Alias and pluries writs of summons.

If the defendant has not been personally served with the writ of summons, it may be continued by alias and pluries, as the case may require. These writs, which are seldom necessary, except for preventing the operation of the Statutes of Limitations, are directed to the defendant, commanding him (as before, or as theretofore he was commanded), that within eight days after the service of the writ on him, inclusive of the day of such service, he do cause an appearance to be entered, &c. (as in the first writ of summons). In these writs, the place and county of the residence, or supposed residence, of the defendant, or wherein he is, or may be supposed to be, should be inserted, as in the former writ; and there should be the like memorandum and indorsements thereon, as on that writ. The alias and pluries writs are issued, on proper præcipes; and by a general rule of all the courts, they may, if the plaintiff shall think it desirable, be issued into another county; the plaintiff in such case, describing the defendant therein, as late of the place of which he was described in the first writ of summons.

Memorandums and indorsements.

May be issued into another county.

Proceedings when defendant cannot be personally served.

When the defendant cannot be met with, but keeps out of the way, to avoid being served with the writ of summons, alias, or pluries, the plaintiff may apply to the court, or a judge, on a proper affidavit, for leave to issue a distringas, to compel his appearance. The plaintiff, however, cannot move for a distringas on this statute, until the expiration of eight days after a copy of the writ of summons has been left for the defendant, on the last attempt to serve him personally: and a distringas was refused, where a writ of summons had been issued more than four months, without being continued by an alias writ.

The writs of summons and capias, are primary and auxiliary writs.

The writs of summons and capias are only primary, or writs taken out in the first instance, to compel the defendant to appear, or put in and perfect special bail to the action: but, besides these, and consequent upon them, other auxiliary writs are authorised by the statute to be issued, for the same purposes. These writs are:—1. The writ of distringas, which issues where the defendant has not been personally served with the writ of summons, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process; 2. The writ of alias or pluries summons, or capias, for continuing the cause, if the defendant has not been served therewith, or arrested thereon;

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3. The writ of exigi facias, and proclamation, &c., for outlawing or waiving the defendant, upon the return of non est inventus to a writ of capias, or of non est inventus, and nulla bona, to a writ of distringas. When the writ is to be served, it is said to be serviceable, and when the defendant is to be arrested thereon, it is of a bailable nature.

Serviceable and bailable writs.

THE WRIT OF DISTRINGAS.

Stat. 2 William IV. c. 39.

The writ of distringas is founded on 2 William IV. c. 39; by which it is enacted, that, "in case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as therein before mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do, without some more efficacious process, then and in any such case, it shall be lawful for such court, or judge, to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to that act, marked No. 3."

The facts that are required to be stated in the affidavit for obtaining the writ of distringas.

In order to obtain a distringas, the affidavit (which is similar to that before required to ground a motion for a distringas, on Stat. 51 George III. c. 124, s. 2, and 7 & 8 George IV. c. 71, s. 5,) must state that there have been three attempts at least, to serve the defendant with the writ of summons, by calling at his dwelling-house, or place of abode, if he has one; service at the office of an employer, in such case, not being deemed sufficient; that on each of the first two calls, deponent apprised the person whom he saw of the nature of his business, and made an appointment to call again for seeing the defendant, and that on the last call (which must appear to have been eight days at least before the application to the court), a copy of the writ was left at the defendant's residence. The answers given to the deponent, on the different applications, must be stated in the affidavit; and he must not only swear that he has not been able to serve defendant with a copy of the writ, but must state in his affidavit such circumstances as will satisfy the court, or a judge, that the defendant keeps out of the way to avoid being served.

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It must also be positively sworn, that the defendant has not appeared to the action according to the exigency of the writ, and cannot be compelled to do so, without some more efficacious process. If it can be inferred, however, from the affidavit, that the defendant purposely kept out of the way to avoid being served with the writ of summons, the court will grant a distringas, although the person who made the calls omitted to specify the day and hour on which he would call again: and the last two calls may, it seems, under circumstances, be made on the same day. It also seems that, though the court will not in general grant a distringas, except on an affidavit that a copy of the writ has been left at the defendant's house, still the mere want of that averment in the affidavit, is not sufficient to enable the defendant to move to set aside the distringas, as being irregular.

Where the defendant purposely avoids being served.

By 2 William IV. c. 39, a distringas may be issued either to compel an appearance, or for the purpose of proceeding to outlawry: and a distringas will be granted, for enabling a plaintiff to proceed to outlawry, in some cases, where the affidavits are not sufficient to ground a distringas, for entering an appearance. But the court will not grant a distringas in the alternative; and where it was not clear, on the face of the affidavit, whether the defendant was in this country or abroad, the court put the plaintiff to make his election as to the purpose for which he sought to obtain the distringas. When there is reason to believe that the defendant is abroad, a distringas to compel an appearance, it is said, will not be allowed: and, in order to proceed to outlawry, the affidavit must state, not only that the defendant went abroad for the purpose of avoiding the demands of his creditors, but also satisfy the court, or a judge, by a statement of the circumstances, that he keeps out of the way to avoid being served. When the defendant is not abroad, a distringas, for the purpose of outlawry, will not, it seems, be granted: and when his residence is unknown, endeavours must be made to serve him personally, before the distringas can be obtained; and grounds must be stated in the affidavit to induce the court to believe that he keeps out of the way to avoid being served.

Distringas to compel appearance, or for the purpose of proceeding to outlawry.

When defendant is abroad, a distringas to compel appearance will not be allowed.

When the residence of the defendant is unknown.

If the court or a judge are satisfied by affidavit that the defendant has not appeared to the action, and cannot be compelled to do so without some more efficacious process, they will make a rule, or order, for issuing the distringas, which is

Rule or order for distringas.

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absolute in the first instance, and drawn up by the clerk of the rules in the King's Bench and Exchequer, or secondaries in the Common Pleas. But if the affidavit be insufficient, the plaintiff may sue out an alias or pluries writ of summons for continuing the cause; which is sometimes done when the first writ has not been personally served, to prevent the operation of the Statute of Limitations.

Teste of distringas.

The writ of distringas must be tested in the name of the Chief Justice of the King's Bench or Common Pleas, or Chief Baron of the Exchequer; or, in case of a vacancy of any such office, then in the name of a senior puisne judge of the court from which it issues: and "every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof; and shall bear teste on the day of the issuing thereof, whether in term or in vacation." But "no such writ shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed."

When returnable.

For proceeding to outlawry.

Notice to be subscribed to the writ of distringas.

A notice is required to be subscribed to the writ of distringas, which is addressed to the defendant, requiring him to take notice, that the sheriff has distrained upon his goods and chattels for the sum of forty shillings, in consequence of his not having appeared in court, to answer to the plaintiff, according to the exigency of the writ of summons; and that in default of his appearance to the writ of distringas, within eight days inclusive after the return thereof, the plaintiff will cause an appearance to be entered for him, and proceed thereon to judgment and execution; or, (if the defendant be subject to outlawry,) will cause proceedings to be taken to outlaw him: And the writ of distringas is to be indorsed with the name of the plaintiff or his attorney, in like manner as the writ of summons; and the amount of the debt and costs claimed by the plaintiff, when the action is brought for the recovery of a debt, should, it seems, be indorsed thereon.

Indorsements on such writs.

THE WRIT OF CAPIAS.

Stat. 2 William IV. c. 39.

The writ of capias, now used for the commencement of bailable actions, is founded on 2 William IV. c. 39, by which "in all personal actions, wherein it is intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet prison, the process shall

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be by writ of capias, according to the form contained in the schedule (No. 4.) annexed to that act."

Direction and form of the writ of capias.

This writ (which lies in all cases where the plaintiff has a bailable cause of action, and against all persons who are not exempted or privileged from arrest,) is a non omittas writ, directed to the sheriff or other officer or person by whom the same is to be executed, in like manner as the writ of distringas, commanding him that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take the defendant (stating his place of residence), if he shall be found in his bailiwick, and him safely keep until he shall have given the said sheriff, &c. bail, or made deposit with him, according to law, in an action on promises (or of debt, &c.), at the suit of the plaintiff, or until the defendant shall by other lawful means be discharged from his custody; and that on execution thereof, the said sheriff, &c. do deliver a copy thereof to the defendant; and require the defendant to take notice, that within eight days after the execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him, in the court where the action is brought, to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written, or indorsed thereon: and further commanding the said sheriff, &c. that immediately after the execution thereof, he do return the writ to the said court, together with the manner in which he shall have executed the same, and the day of the execution thereof: or if the same shall remain unexecuted, then that he do so return the same, at the expiration of four calendar months from the date thereof, or sooner, if he should be thereto required by order of the said court, or by any judge thereof.

Notice to defendant, to cause the entry of special bail.

When the writ is to be returned.

A capias quousque.

As this writ does not command the sheriff, or other officer, to whom it is directed, to take and keep the defendant, to answer the plaintiff, &c., it cannot, with propriety, be called, as formerly, a capias ad respondendum; but as it commands the sheriff, &c., to take and keep the defendant, until he shall have given bail, &c. it may not improperly be called a capias quousque, to distinguish it from the capias ad satisfaciendum.

Form of writ to be strictly adhered to.

The form of the writ, as prescribed by 2 William IV. c. 39, must be strictly adhered to.

Defendant's christian and

The christian and surnames of the defendant, if known,

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should be inserted in the writ; the surname only of the defendant being set out therein is insufficient. And by a general rule of all the courts, "where the defendant is described in the process, or affidavit, to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail-bond delivered up to be cancelled, on motion for that purpose, if it shall appear to the court, that due diligence has been made to obtain knowledge of the proper name."

surnames should be inserted in the writ.

And by 3 & 4 William IV. c. 42, "in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters, or some contraction of the christian or first name or names, it shall be sufficient, in every affidavit, to hold to bail, and in the process or declaration to designate such person by the same initial letter or letters, or contraction of the christian or first name or names, instead of stating the christian or first name or names, in full."

Stat. 3 & 4 William IV. c. 42.

The writ of capias, and copy thereof, and writs which purport to be a continuance of the capias, must state the place where the defendant resides; and if that be unknown, the place where he is supposed to reside: and the actual or supposed place of his residence must be stated in that part of the body of the writ prescribed by the schedule to Stat. 2 William IV. c. 39, No. 4.

Defendant's residence or place of abode.

If the defendant's place of residence, be not inserted in the writ of capias, it may be set aside, at the instance of the defendant, though his residence be stated in the copy of the writ; and it is not sufficient to indorse it on the writ, or copy thereof. But it is not necessary to give a particular description of the defendant's place of residence in the process; a place at which he may be expected to be found is sufficient; and it does not appear that the same degree of particularity is required in the writ of capias, as in the writ of summons.

If the defendant's place of residence be not inserted in the writ of capias, it may be set aside.

In describing the nature of the action, the forms in the schedule to 2 William IV. c. 39, must be strictly adhered to.

Nature of the action.

The writ of capias must bear date on the day on which it is issued; which requisite is not satisfied by a day being indorsed on the writ; and the omission of the day of the month in the teste of the copy of the writ, though the month itself is named, is fatal. This writ must be tested in the name of the Lord Chief Justice, or Lord Chief Baron, of

Date and teste of writ.

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the court from which it issues; or, in case of a vacancy in such office, then in the name of the senior puisne judge of the said court; and, by the terms of it, is to be returned by the sheriff, &c., immediately after the execution thereof; but it is not sufficient, for the purpose of outlawry, or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed.

Memorandum and warning to the defendant to be indorsed on the writ.

A memorandum is required to be subscribed to the writ, stating that it is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards: and the following warning to the defendant must be thereunder written, or indorsed thereon;—1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant, before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution: 2. If a defendant, being arrested on this writ, shall have made a deposit of money, according to 7 & 8 George IV. c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution: 3. If a defendant, having given bail on the arrest, shall omit to put in special bail, as required, the plaintiff may proceed against the sheriff, or on the bail bond: 4. If a defendant, having been only served with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Defendant when in custody.

Deposit of money under Stat. 7 & 8 George IV. c. 71.

Omission to put in special bail.

Entry of common appearance.

Indorsements on the writ of capias.

The sum for which the defendant is to be arrested and holden to special bail, by affidavit or judge's order, must also be indorsed on the writ; with the name and place of abode of the plaintiff, or his attorney, by whom the same was issued, and the amount of the debt and costs claimed by the plaintiff. It also seems, that the place of abode and addition of the party against whom the writ issues, or such other description of him as the plaintiff's attorney or agent may be able to give, should, at least in the King's Bench, be indorsed on the writ. And there is a clause in 2 William IV. c. 39, that "all such proceedings as are mentioned in any writ notice or warning

2 William IV. c. 39.

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issued under that act, shall and may be had and taken in default of the defendant's appearance, or putting in special bail, as the case may be."

Proceedings in default of appearance, or special bail.

In bailable cases, it is usual to make an affidavit of the cause of action, at the time of issuing the writ, and to indorse the sum sworn to thereon.

Affidavit of cause of action.

If the defendant cannot be taken on the writ of capias, the sheriff, on being required to return it, by order of the court or a judge, should return, non est inventus; and, thereupon, the plaintiff may either sue out an alias, and afterwards, if necessary, a pluries capias, for arresting the defendant, or issue an exigi facias, and proceed to outlawry;—and, except for the purpose of preventing the effect of the Statute of Limitations, or of proceeding to outlawry, a capias need not be returned, previously to issuing an alias. There is a clause, however, in 2 William IV. c. 39, that "nothing therein contained shall subject any person to outlawry, or waiver, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom."

Proceedings when defendant cannot be arrested.

The writ of exigi facias, and process of outlawry, as now used, are founded on 2 William IV. c. 39; by which, "upon the return of non est inventus and nulla bona, as to any defendant against whom such writ of capias shall have been issued, and also upon the return of non est inventus and nulla bona, as to any defendant against whom such writ of distringas as thereinbefore mentioned shall have issued, whether such writ of capias or distringas shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant, by writs of exigi facias, and proclamation, and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of capias ad respondendum, issued after an original writ: but it was provided, that every such writ of exigent, proclamation, and other writ subsequent to the writ of capias or distringas, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of capias or distringas, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ: and no such writ of capias or dis-

Proceedings to outlawry, or waiver, on mesne process. Stat. 2 William IV. c. 39.

Writs of exigi facias, and proclamation.

The return of the writs of "capias" or "distringas" must be certain.

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tringas shall be sufficient, for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff, or other officer to whom the same shall be directed."

Where the cause of action amounts to 20*l.* or upwards, the process is bailable.

Stat. 2 William IV. c. 39.

Where the cause of action amounts to twenty pounds or upwards, and an affidavit is made thereof, and filed according to the statutes, the process is bailable, and the defendant may, in general, be arrested and holden to special bail:—but there is a proviso in the Uniformity of Process Act, that "nothing therein contained shall subject any person to arrest, who, by reason of any privilege, usage, or otherwise, may now by law be exempt therefrom." The persons to whom a writ of capias does not lie, and who cannot therefore be arrested and held to special bail, are (not to mention the king and queen), ambassadors, or other public ministers; peers of the realm of England, and peeresses, whether by birth or marriage; Scotch or Irish peers and peeresses; members of the House of Commons, or of convocation; members of corporations aggregate, for anything done in their corporate capacity; hundredors, on Stat. 7 & 8 George IV. c. 31; attorneys, when privileged from arrest, or officers of the courts of justice.

PROCESS AGAINST PRIVILEGED PERSONS.

Ambassadors.

Members of parliament; or of convocation.

There are also other persons, who, though subject to a writ of capias, are not liable to be arrested thereon; as the servants in ordinary of the king or queen regent, without notice first given to, and leave obtained from the lord chamberlain of the royal household; executors and administrators, when they merely act en autre droit, and have duly administered the effects of the deceased; heirs and devisees, when sued on the bond or obligation of their ancestors, or devisors; married women, for debts contracted before or after coverture, unless, in the latter case, they have appeared and acted as femes sole, and obtained credit in that character, under false and fraudulent pretences; seamen, marines, and soldiers, for debts under a certain amount; bankrupts, in coming to surrender, and finish their examination, and, after they have obtained their certificates, for debts contracted prior to their bankruptcy; and insolvent debtors, discharged under 7 George IV. c. 57, for debts due at the the time of filing their petitions.

Servants in the royal household.

Executors and administrators.

Married women.

Seamen, marines, and soldiers.

Bankrupts.

Insolvent debtors.

Persons having temporary, or local privilege, from arrest.

Attorneys.

Witnesses.

Defendants have, in some cases, only a temporary or local privilege from arrest: thus, the parties to a suit, and their attorneys, witnesses, &c., are, for the sake of public justice, privileged from arrest, in coming to, attending upon, and returning from

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the courts; or, as it is usually termed, eundo, morando, et redeundo: and it has been determined, that a practising barrister is so privileged; and that he does not lose his privilege, by going into a shop, on his return from court, unless he remain there an unreasonable time. Clergymen also are privileged, in going to or returning from church, or performing divine service: and every person is privileged from arrest on Sunday, except in cases of treason, felony, or breach of the peace; and in his own house, provided the outer door be shut; in the king's presence; within the verge of his royal palace, except by an order from the Board of Green Cloth, or unless the process issue out of the Palace Court; and in every place where the king's justices are actually sitting.

Clergymen.

At common law, peers of the realm, and members of the Honse of Commons, not being subject to a capias, could only have been sued by original writ; which was also formerly the only mode of commencing actions against corporations and hundredors on the statutes of hue and cry, &c.; but members of the House of Commons might have been sued, either by original writ, or by bill and summons, &c., on Stat. 12 & 13 William III. c. 3, s. 2. The mode of commencing actions, however, by original writ against peers, and by original writ or bill against members of the House of Commons, being abolished by the Uniformity of Process Act, they must now in general be sued, like other persons, by writ of summons and distringas. If the defendant be a peer, he should be described in the process by his name of dignity, as "the Right Honorable C. D., Duke, Marquis, or Earl of ———," &c.; and it is usual in an action against a peer, or member of the House of Commons, to describe the former as having privilege of peerage, and the latter, as having privilege of parliament; but this latter description does not seem to be necessary.

Of the process against peers of the realm, members of the House of Commons; and corporations and hundredors.

Must now be sued by writ of summons and distringas.

How described in process.

In all personal actions, wherein it shall be intended to proceed against a member of parliament, according to the statute made in the sixth of George IV., intituled, "An Act to amend the Laws relating to Bankrupts," the process is required, by the Uniformity of Process Act, to be according to the form contained in the schedule to that act, marked No. 6; and which process, and a copy thereof, is declared to be in lieu of the summons, or original bill and summons, and a copy thereof, mentioned in 6 George IV. c. 16, s. 10.

Proceedings in personal actions.

6 George IV. c. 16.

This process is issued on a proper præcipe, and directed to

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The writ must be directed to the defendant, stating his residence or place of abode.

the defendant (stating his residence or place of abode), commanding him, that within one calendar month next after personal service thereof on him, he do cause an appearance to be entered for him, in the court in which he is sued, in an action on promises, (or debt, &c., as the case may be,) at the suit of the plaintiff; and the defendant is thereby informed, that an affidavit of debt, for the sum of —*l.* hath been filed in the proper office, according to the provisions of 6 George IV. c. 16; and that unless he pay, secure, or compound for, the debt sought to be recovered in that action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for him, within one calendar month next after such service thereof, he will be deemed to have committed an act of bankruptcy, from the time of the service thereof.

Summons required to be indorsed as in the writ of capias

Signing, sealing, and service of writ of summons.

This summons is required to be indorsed with the name of the plaintiff, or his attorney, in like manner as the writ of capias; and the amount of the debt and costs claimed by the plaintiff, when the action is brought for the recovery of a debt, should, it seems, be indorsed thereon. The writ of summons against a member of parliament, should be signed and sealed, and personally served on the defendant, in like manner as the ordinary writ of summons. And where, in proceeding against a member of parliament, it appeared that the action was brought in 1823, but the defendant had since ceased to be a member; the action having been commenced by bill, and by writ of summons thereon, and the writ having been returned *non est inventus*, and entered of record; and no further steps having afterwards been taken, as the defendant had been out of the country; the court held, on the plaintiff's desiring to continue the proceedings, in order to save the Statute of Limitations, that a writ of distringas ought to issue, and would be the proper continuance of the suit.

The mode of commencing actions against corporations, and hundredors.

How described in process.

The mode of commencing actions against corporations, and hundredors, by original writ, being abolished by the Uniformity of Process Act, they must now be sued like other persons, by writ of summons and distringas; and in actions against corporations aggregate, they must be described in the process by their corporate name; as, in London, "the mayor, commonalty, and citizens of the city of London:" and, when hundredors are sued on Stat. 7 & 8 George IV. c. 31, they must be described as "men inhabiting within the hundred of ——, in the county of ——." But where a plaintiff, by mistake,

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had, in an action for damage done by rioters, proceeded against the inhabitants of the hundred, instead of the borough, of S., under the above statute, the court amended the writ and subsequent proceedings, by striking out the word "hundred," and substituting the word "borough," the time for bringing a fresh action having expired.

Writ of summons can be served on the mayor, or other head officer, &c.

When the writ of summons is issued against a corporation aggregate, it may be served on the mayor, or other head officer, or on the town clerk, clerk, treasurer, or secretary, of such corporation; and every such writ, issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof, or any one of the high constables thereof; and when issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred, or other like district, be served on some peace officer thereof[1].

POWER OF JUDGES TO MAKE GENERAL RULES.

The judges can make general rules for the regulation of the proceedings in their own courts. These powers are of two kinds; first, such as are exercised by the judges of each of the superior courts over the proceedings therein; and, secondly, such as are exercised by all the judges jointly, or any eight or more of them, in matters over which they have a common jurisdiction.

Judges of each court can make general rules for regulating their own proceedings.

The judges of each of the superior courts of law at Westminster, have an original and inherent jurisdiction and power of making general rules, for regulating their own proceedings; in the exercise of which power, general rules have been made by them, from time to time, as occasion has required. And by 2 William IV. c. 39, the judges are authorized, from time to time, to make such rules and orders for the government and conduct of the ministers and officers of their respective courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of that act, as such judges may think fit and reasonable; provided that no additional charge be thereby imposed on the suitors.

Stat. 2 William IV. c. 39.

Power of all the judges jointly to make rules. 1 William IV. c. 70.

By 1 William IV. c. 70, "in all cases relating to the practice of any of the Courts of King's Bench, Common Pleas, or Exchequer, in matters over which the said courts have a

[1] The authorities for all the foregoing propositions are embodied in the recent edition of Mr. Tidd's "*Practice*." Lond. 1837.

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common jurisdiction, or of or relating to the practice of the Court of Error therein mentioned, it shall be lawful for the judges of the said courts jointly, or any eight or more of them, including the chiefs of each court, to make general rules and orders for regulating the proceedings of all the said courts; which said rules and orders so made, shall be observed in all the said courts; and no general rule or order, respecting such matters, shall be made in any manner, except as aforesaid."

Power of all the judges jointly to make alterations in the mode of pleading. 3 & 4 William IV. c. 42.

By 3 & 4 William IV. c. 42, the judges of the superior courts of common law at Westminster, or any eight or more of them, the chiefs of the courts being three of them, were empowered by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when the act took effect, to make such alterations in the mode of pleading and of entering and transcribing pleadings, judgments, and other proceedings in actions, and such regulations as to the payment of costs, and otherwise for carrying into effect such alterations, as to them might seem expedient.

Under these statutes, the judges have settled "New Rules;" and they have been productive of the most beneficial public results;—in fact, the legislature and the judicial bench have done almost everything that can be effected, towards conciseness of pleading and saving of expense to the litigant parties.

Inconveniences that exist in the courts of common law.

Other inconveniences exist, and to a very great extent, but to which neither the legislature nor the bench can, constitutionally speaking, arbitrarily apply a corrective; namely, the number of reporters that exist in the superior courts of common law;—and every barrister practising indiscriminately in all such courts.

The number of reports, has created uncertainty in the law.

The number of reports of cases decided in the Courts of Queen's Bench, Common Pleas, and Exchequer, has recently so much increased, that considerable uncertainty in the law is arising, in consequence of such reports essentially differing from each other, and the judges have, in some instances, been called upon to decide the question de novo; and if this system be pursued, unprecedented litigation and endless doubts will be the result. This evil cannot be prevented, unless the profession agree either for the judges or for themselves to select one set of reporters for each court; and for the profession only to cite, in argument, the reports of such reporters.

It is no uncommon circumstance in term time, for the Courts

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of Common Pleas and Exchequer to adjourn at an early hour; and for the public business in all the courts to be otherwise impeded; and which has been of serious detriment to the litigant parties. This has originated from counsel being engaged in the other courts, and which, under the present system, must continually occur.

Absence of counsel, has impeded the speedy administration of justice.

If the rules of circuit practice were extended to the superior courts, namely, for every member of the bar to select one court to practise in, and not to practice in either of the other two courts, unless upon a special retainer, the public results would be highly beneficial. It is most respectfully urged, that the bench should suggest, and that the bar should adopt, some immediate measures to correct these evils;—it is not only a duty they owe to the public,—but it is also requisite for the maintenance of the high character of the profession, that it should not be subject to the just imputation of permitting selfish and pecuniary interests to thwart the speedy administration of justice.

The rules of circuit practice should be extended to the superior courts.

CHAPTER XI.

The Subject continued. The Courts of Equity.

DE LOLME.

HOWEVER, there are limits to these fictions and subtilities; and the remedies of the law cannot by their means be extended to all cases that may arise, unless too many absurdities are suffered to be accumulated; nay, there have been instances in which the improper application of writs, in the courts of law, has been checked by authority. In order, therefore, to remedy the inconveniences we mention—that is, in order to extend the administration of distributive justice to all possible cases, by freeing it from the professional difficulties that have gradually grown up in its way—a new kind of courts has been instituted in England, called *Courts of Equity*[1].

Courts of equity are intended to extend the administration of justice to all possible cases.

[1] The observations of De Lolme upon the powers of courts of equity, are in many respects essentially inaccurate, but they have been corrected in Note (1.) p. 729.

De Lolme.

False notions respecting the duties of courts of equity.

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

The chancellor hath power to moderate and temper the written law.

Certainly the power of the judges of equity cannot be to alter, by their own private power, the written law, that is, acts of parliament, and thus to control the legislature. Their office only consists, as will be proved in the sequel, in providing remedies for those cases for which the public good requires that remedies should be provided, and in regard to which the courts of common law, shackled by their original forms and institutions, cannot procure any:—or, in other words, the courts of equity have a power to administer justice to individuals, unrestrained (not by the law, but) by the professional law difficulties which lawyers have from time to time contrived in the courts of common law, and to which the judges of those courts have given their sanction.

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

The office of a judge of equity was assumed by the prætor.

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

Among the provisions made by the Roman prætors in their capacity of judges of equity, may be mentioned those which they introduced in favour of emancipated

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

De Lolme.

Emancipated sons were supposed to have ceased to be the children of their father.

sons, and of relatives by the women's side (*cognati*), in regard to the right of inheriting. Emancipated sons were supposed, by the laws of the Twelve Tables, to have ceased to be the children of their father, and, as a consequence, a legal claim was denied them on the paternal inheritance: of the relatives by the women's side no notice was taken, in that article of the same laws which treated of the right of succession, mention being only made of relatives by the men's side (*agnati*). The former the prætor admitted, by the edict *unde liberi*, to share their father's (or grandfather's) inheritance with their brothers; and the latter he put in possession of the patrimony of a kinsman deceased, by means of the edict *unde cognati*, when there were no relatives by the men's side. These two kinds of inheritance were not, however, called *hæreditas*, but only *bonorum possessio:* these words being very accurately distinguished, though the effect was in the issue exactly the same*.

The Twelve Tables provided relief only for cases of theft.

In the same manner, the laws of the Twelve Tables had provided relief only for cases of theft; and no mention was made, in them, of cases of goods taken away by force (a deed which was not looked upon in

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

so odious a light at Rome as theft, which was considered as the peculiar guilt of slaves). In process of time the prætor promised relief to such persons as might have their goods taken from them by open force, and gave them an action for the recovery of four times the value, against those who had committed the fact with an evil intention. *Si cui dolo malo bona rapta esse dicentur, ei in quadruplum* JUDICIUM DABO.

The Twelve Tables did not assign remedies except for very few cases of fraud.

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

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

† The law collection, or system that was formed by the series of edicts published at different times by prætors, was called *jus prætorium*, and also *jus honorarium* (not strictly binding). The laws of the Twelve Tables, together with all such other laws as had at any time been passed in the assembly of the people, were called, by way of eminence, *jus civile*. The distinction was exactly of the same nature as that which takes place in England between the common and statute laws and the law or practice of the courts of equity. The two branches of the prætor's judicial office were very accurately distinguished; and there was, besides, this capital diffe-

De Lolme.

Courts of equity provide remedies for cases in which the courts of law are powerless.

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

"Assumed origin" of the power of the Court of Chancery.

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

rence between the remedies or actions which he gave in his capacity of judge of civil law, and those in his capacity of judge of equity, that the former, being grounded on the *jus civile*, were perpetual, and were called *actiones civiles*, or *actiones perpetuæ*; the latter were obliged to be preferred within the year, and were accordingly called *actiones annuæ* or *actiones prætoriæ*.

DE LOLME.

The settled authority of the courts of equity.

To beginnings and circumstances like these, the English courts of equity, it is not to be doubted, owe their present existence. In our days, when such strict notions are entertained concerning the power of magistrates and judges, it can scarcely be supposed that those courts, however useful, could gain admittance. Nor indeed, even in the times when they were instituted, were their proceedings free from opposition; and afterwards so late as the reign of Queen Elizabeth, it was adjudged, in the case of *Colleston* and *Gardner*, that the killing a sequestrator from the Court of Chancery, in the discharge of his business, was no murder; which judgment could only be awarded on the ground that the sequestrator's commission, and consequently the power of his employers, were illegal*. However, the authority of the courts of equity has in process of time become settled; one of the constituent branches of the legislature even receives at present appeals from the decrees passed in those courts: and I have no doubt that several acts of the whole legislature might be produced, in which the office of the courts of equity is openly acknowledged.

The process in the Court of Chancery

The kind of process that has in time been established in the Court of Chancery is as follows. After a petition is received by the court, the person sued is served with a writ of *subpœna*, to command his appearance. If he does not appear, an attachment is issued against him; if a *non-inventus* is returned, that is, if he is not to be found, a proclamation goes forth against him; then a commission of rebellion is issued for apprehending him, and bringing him to the Fleet

* When Sir Edward Coke was Lord Chief Justice of the King's Bench, and Lord Ellesmere Lord Chancellor, during the reign of James I., a very serious quarrel also took place between the courts of law and those of equity, which is mentioned in the fourth chapter of the third book of Judge Blackstone's Commentaries: a work in which more might reasonably have been said on the subject of the courts of equity.

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prison. If the person sued stands farther in contempt, a serjeant at arms is to be sent out to take him; and, if he cannot be taken, a sequestration of his land may be obtained till he appears. Such is the power which the Court of Chancery, as a court of equity, hath gradually acquired to compel appearance before it. In regard to the execution of the decrees it gives, it seems that court has not been quite so successful; at least, those law-writers whose works I have had an opportunity of seeing, hold it as a maxim, that the Court of Chancery cannot bind the estate, but only the person; and as a consequence, a person who refuses to submit to its decree is only to be confined in the Fleet prison*.

The execution of decrees.

On this occasion I shall observe, that the authority of the lord chancellor in England, in his capacity of a judge of equity, is much more narrowly limited than that which the prætors in Rome had been able to assume. The Roman prætors, we are to remark, united in themselves the double office of deciding cases according to the civil law *(jus civile)*, and to the prætorian law, or law of equity; nor did there exist any other courts besides their own, that might serve as a check upon them: hence it happened that their proceedings in the career of equity were very arbitrary. In the first place, they did not use to make it any very strict rule to adhere to the tenour of their own edicts, during the whole year which their office lasted; and they assumed a power of altering them as they thought proper. To remedy so capital a defect

The Roman prætors decided according to the civil and prætorian laws.

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

Lex Cornelia.

in the distribution of justice, a law was passed so late as the year of Rome 687 (not long before Tully's time), which was called *Lex Cornelia*, from the name of C. Cornelius, a tribune of the people, who propounded it under the consulship of C. Piso and Man. Glabrio. By this law it was enacted, that prætors should in future constantly decree according to their own edicts, without altering any thing in them during the whole year of their prætorship. Some modern civilians produce a certain senatus-consult to the same effect, which, they say, had been passed a hundred years before; while others are of opinion that the same is not genuine: however, supposing it to be really so, the passing of the law we mention, shows that it had not been so well attended to as it ought to have been.

Temporary duration of the prætorian laws or edicts.

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

Perpetuum edictum.

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great repute; all the jurisconsults of those days vied with each other in writing commentaries upon it; and the emperor himself thought it so glorious an act of his reign, to have caused the same to be framed, that he considered himself on that account as being another Numa*.

Courts of equity have not superseded the common law courts.

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

Restrictions on courts of equity.

On the other hand, the courts of common law are alone invested with the power of punishing (or allowing

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

damages for) those cases of violence by which the proceedings of the courts of equity might be opposed; and thus they have been enabled to obstruct the enterprises of the latter, and prevent their effecting in themselves the like dangerous union of the two offices of judges of common law and of equity.

Jurisdiction of the courts of equity, has been exactly defined.

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

Chancery rolls.

* The master of the rolls is the keeper of these records, as the title of the office expresses. His employment in the Court of Chancery is of great

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Innovations not permitted by the common or statute law.

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

From all the above observations, it follows that, of the courts of equity, as established in England, the following definition may be given, which is, that they are a kind of *inferior experimental* legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the courts of common law, nor the legislature, have yet found it convenient or practicable to establish any; in doing which, they are to forbear to interfere with such cases as they find already in general provided for. A judge of equity is also to adhere, in his decisions, to the system of decrees formerly passed in his own court, regular records of which are kept for that purpose.

A judge of equity bound to adhere to the system of decrees formerly passed in his court.

From this latter circumstance, it again follows, that a judge of equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every prece-

importance, as he can hear and determine causes in the absence of the lord chancellor[2].

[2] Under Stat. 53 George III. c. 24, there was appointed an additional judge assistant to the lord high chancellor in the discharge of the judicial functions of his office, and called vice-chancellor of England, and holding his office during good behaviour; and all his decrees, orders, and acts have force and validity, and are executed, subject nevertheless in every case to reversal, discharge, or alteration by the lord chancellor; and such vice-chancellor has rank and precedence next to the master of the rolls.

dent he establishes, becomes a landmark or boundary which both he and his successors in office are afterwards expected to regard.

Appeals from decrees carried to the House of Lords.

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

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

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General rules not applicable to every individual case.

(1.) General rules are easily framed, but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance which may enter into and affect the particular case; and therefore, in all countries, those to whom the administration of the laws has been entrusted, have been compelled to have recourse to natural principles to assist them in the interpretation and application of positive law, and to supply its defects; and this resort to natural principles has been termed judging according to equity; in fact, it seems that equity bears something of the same proportion to positive law in the "moral," as art does to nature in the "material" world. For, as the universal laws of matter would, in many instances, prove

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hurtful to particulars, if it were not to interpose, and direct them aright, so the general precepts of the municipal law would oftentimes not be able to attain their end, if equity did not come in aid of them.

Distinction between positive law and equity.

Hence a distinction has arisen in jurisprudence between positive law and equity; but the administration of both has in most countries been left, at least in their superior courts, to the same tribunal. In prescribing forms of proceeding in courts of justice, human foresight has also been defective, and therefore it has been commonly submitted to the discretion of the courts themselves, to vary or add to established forms, as occasion, and the appearance of new cases, have required.

The courts established for the ordinary administration of justice, have been embarrassed by a rigid adherence to rules of decision.

The courts established for the ordinary administration of justice, usually styled courts of common law, have, in England, as in other countries, recourse to principles of equity in the interpretation and application of the positive law; but they are bound to established forms of proceedings; are in some degree limited in the objects of their jurisdiction; have been embarrassed by a rigid adherence to rules of decision, originally framed, and in general retained, for wise purposes, yet, in their application, sometimes incompatible with the principles of natural and universal justice, or not equal to the full application of those principles, and the modes of proceeding in those courts.

EARLY HISTORY OF THE COURTS OF EQUITY.

The Court of Chancery, as a court of equity, began to decide causes about the reign of Edward III., and continued to do so for at least three centuries, "secundum æquum et bonum," and not according to precise and predetermined rules[1], for neither Glanville, the Mirror, Bracton, Britton, Fleta, nor the "Diversite des Courtes," allude to it as a court of equity[2]. The earliest mention of a distinction betwixt equity and common law is in Bracton, lib. II. c. 7, where equity is placed in contra-distinction to strict law; but in Glanville, no such distinction occurs. The fountain of justice and equity was held to be in the sovereign, who took an oath, at the coronation, to dispense to his subjects "æquam et rectam justitiam." But this, in all cases, and in his own proper person, it was impossible for him to execute; therefore the administration of justice was delegated, in various courts, to

The administration of justice delegated to ministers.

[1] Cooper, sur la Cour de Chancellerie d'Angleterre, 62—72.
[2] 2 Inst. 552-4. Inst. 82.

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ministers and officers, and whose powers and modes of practice were defined and circumscribed within the limits of positive laws and regulations.

The crown reserved to itself a final appeal.

When Henry II. established a judicial tribunal in the Curia Regis, he reserved to himself the prerogative of finally deciding the law, and of calling to his assistance, when needful, the "Concilium sapientium regni[3]." This power was, however, no part of the ambition of some of his successors, whose inclinations and pursuits were directed more to the acquirement of military glory than to the exercise of their legislative functions. The responsible duties of a supreme judicature were therefore entrusted to those, who were qualified to discharge that important office.

The chancellor, the keeper of the king's conscience.

To the select council this jurisdiction was confided. The chancellor was at the head of this assembly; and being also the king's confessor[4], was deemed to be more intimately acquainted with his inclinations and wishes. Hence he was called the keeper of the king's conscience[5], and to him the council applied for aid, instruction and advice, upon any occasion of severity or defect in the law; and thus arose the origin of one of the principal employments of the chancellor, that of providing remedies for grievances not cognizable by statute or common law; or which originated from peculiar circumstances, to which neither the one nor the other was altogether applicable[6].

Origin of providing remedies for grievances not cognizable by statute.

To obtain relief, recourse was had to a petition to the king.

In order to obtain relief in such cases, recourse was had to a petition to the king, which was commonly directed to him in council; but to investigate and decide upon such petitions occasioned an overwhelming weight of business. To remedy which, an ordinance was made in 8 Edward I.[7], wherein (after reciting that great inconveniences had arisen from the multitude of petitions laid before the king, the greatest part whereof might be dispatched by the chancellor and the justices,) it was ordered, that all petitions, prior to their being presented to the council, should first be discussed before each of the judicial officers at the head of that court to which those petitions respectively belonged; and if the matter were of such importance, or of grace and favour, so that the

[3] Benedic. Abbas, 266.
[4] Hardy, on the Close Rolls, 105, 106.
[5] Selden, Office of Lord Chancellor, s. 3.
[6] Hardy, 107.
[7] Claus. 8 Edward I. m. 6, in dorso in ced.

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chancellor and others could not administer relief without the king, that then such petitions should be brought before the king in council, by the hands of the chancellor, to abide their decision[8].

The duty of judging of the merit of petitions, assigned to the chancellor.

Thus the important duty of attending to and judging of the merit of petitions, was assigned to the chancellor. That he was always attendant on the king is proved by Stat. 28 Edward I. c. 5, ordaining that the chancellor and other wise men of the law should always be near the king[9], to assist him with their advice in cases of difficulty and need. When, therefore, the Court of Chancery ceased to be ambulatory, (which was in the commencement of the reign of Edward III.,) the king and his council, from that time, were necessarily deprived of the ready and immediate assistance of the chancellor, who had theretofore taken such an active and important part in advising on and devising remedies for such causes of complaint as were laid before them[10]. The council was consequently obliged, from that time forward, in cases of need, to send to the chancellor; and hence it is, that after this period, the petitions are often endorsed with the answer of the council, expressed thus, "Adeat in Cancellaria," "Sequatur in Cancellaria."

Commencement of the chancellor's separate jurisdiction.

The commencement of the chancellor's separate and independent equitable jurisdiction occurred about 22 Edward III.[11] A writ, addressed to the sheriffs of London, entered on the Close Rolls, as of that year, p. 2, m. 2, in dorso, is almost conclusive on this point: "Rex Vicecomitibus London. salutem. Quia circa diversa negotia nos et statum regni nostri Angliæ concernentia sumus indies multipliciter occupati, volumus quod quilibet negotia tam communem legem regni nostri Angliæ quam gratiam nostram specialem concernentia penes nosmetipsos habens exnunc prosequenda, eadem negotia, videlicet, negotia *ad communem legem* penes venerabilem virum electum Cantuariensem confirmatum cancellarium nostrum, per ipsum expedienda, et alia negotia *de gratia nostra concedenda* penes eundem cancellarium, seu dilectum clericum nostrum custodem sigilli nostri privati prosequantur; ita quod ipsi vel eorum alter petitiones negotiorum quæ per eos, nobis inconsultis, expediri non poterunt, una cum avisa-

[8] Claus. 8 Edward I. m. 6, in dorso in ced.
[9] Lambard's Archion. 70, 129, 131. Hardy, 108.
[10] Fleta, lib. II. c. 13, p. 75, 76. [11] Hardy, 110.

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mentis suis inde ad nos transmittant vel transmittat, absque alia prosecutione penes nos inde facienda, ut hiis inspectis ulterius præfato cancellario, seu custodi inde significemus velle nostrum; et quod nullus alius hujusmodi negotia penes nosmetipsos de cætero prosequatur, vobis præcipimus quod statim visis præsentibus præmissa omnia et singula in civitate prædicta in locis ubi expedire videritis publice proclamari faciatis in forma prædicta. Et hoc nullatenus omittatis. Teste Rege apud Langele xxiiij die Januarii. per ipsum Regem."

The chancellor enabled to proceed in suits, secundum æquum et bonum.

The words "et alia negotia de gratia nostra concedenda penes eundem cancellarium," seem to have first laid the basis on which the equitable jurisdiction of the Court of Chancery was built, for previously the granting of matters of grace and favour was peculiar to the king alone[12]; but this enabled the chancellor to proceed in suits "secundum æquum et bonum." Although the chancellor had, prior to this time, taken the most active, and perhaps the principal part in administering "æquam et rectam justitiam;" he does not appear previously to have been the only responsible person, nor to have had for such exercise of judgment and authority a positive appointment from the king. Mr. Jeremy observes, "Although the chancery, and the name of the high officer who presided therein, are mentioned in many early statutes, it is not until the latter portion of the reign of Edward III. that a statute is met with which can be considered to give any sanction or even to bear any reference to the peculiar or equity part of his jurisdiction. By 36 Edward III. c. 9, which forms part of a capitulary of very comprehensive articles granted by the king with the assent of parliament, it was enacted, 'that if any man feel agrieved contrary to any of the articles above written, or others contained in divers statutes, and will come into the chancery, or any for him, and thereof make complaint, he shall presently there have remedy by force of the said articles and statutes, without elsewhere pursuing to have remedy.'"

Statutable recognition of the chancellor's authority. 36 Edward III. c. 9.

Increased authority of the chancellor, from the reign of Edward III.

Although this provision cannot be considered to have laid the foundation of the extraordinary jurisdiction of the chancellor, it might, according to the liberal interpretations of those times, have been regarded as having conferred upon him a more extensive and better sanctioned authority than he had previously any right to exercise; but whether his jurisdiction

[12] Hardy, 111.

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were assumed or delegated, it is obvious that, when once established, the more diligently he and his officers exerted their ingenuity in the framing of new writs to the courts of law, the more confined would be the opportunity or necessity of his extending it; and it is a matter of fact, that after the reign of this monarch, the number of the writs to the courts of law was little, if at all, increased[13].

The commons complain of the jurisdiction of chancery.

That the chancellor, from this time, exercised a jurisdiction in matters of equity, is proved from a petition addressed to him in 38 Edward III.[14], and by a petition from the commons in 7 Richard II.[15], which prayeth, "que desormes nule comision soit directe hors de la chancellerie, ne lettre de prive seal, pur destourber la possession d'aucum liege le Roy, sanz due proces & respons du partie, & especialment quant la partie est prest de faire ce que la loy demande," &c. The answer to which petition was, "Ceux qi se sentent grevez monstrent lour grevance en especial a chanceller, qui lour purvoiera de remede," &c.; and in 13 Richard II. the commons pray, that "neither the chancellor, nor any other person, may make any ordinance against the common law, or ancient custom of the realm, and the statutes already made, or to be made in this present parliament, but that the common law may run impartially for all the people; and that no judgment given shall be annulled without due process of law;" and the evasive reply to this was, "Soit use come ad este use devant ces hures, issint que la regalie du roi soit sauve. Et si ascun soi sente greve, monstre en especial, et droit luy serra fait[16]."

7 Richard II.

13 Richard II.

The commons pray, that the chancellor may not interfere with the course of the common law.

And by another petition in the same year, "the commons prayed that none of the king's lieges be made to come by writ Quibusdam certis de causis, nor by any other such writ, to appear before the chancellor or the king's council to answer any matter for which remedy might be obtained at common law, &c., on penalty to the chancellor of one hundred pounds, to be levied to the use of the king; and the clerk who wrote the writ to lose his office in the chancery, and never to be placed in any other office in the chancery;" and to this petition the king made answer, "Le roy voet sauver sa regalie, come ses progenitours ont faitz devant luy[17]."

[13] Jeremy, on the Court of Chancery, 20.
[14] Miscel. Petit. Turr. Lond.
[15] 3 Rot. Parl. 7 Richard II. 162.
[16] 3 Rot. Parl. 13 Richard II. 266, 267.
[17] Hardy, 115.

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These answers were equivalent to a negative, as no statute was made thereupon; and the commons gained nothing by their petitions; for Stat. 17 Richard II. c. 6, after reciting that people were compelled to come before the king's council, or into chancery, by writs grounded on untrue suggestions, enacts, that the chancellor for the time being, presently after such suggestions be duly found and proved to be untrue, shall have power to award and ordain damages, according to his discretion, to him who is so unduly troubled as aforesaid.

Stat. 17 Richard II. c. 6.

The statute merely gives the chancellor power to award damages to such as were compelled to come before him in chancery by writs founded on untrue suggestions. These suggestions, which seem to have been the cause of so much animadversion, were false allegations made by persons applying to the chancery for writs of subpœna, upon which the chancellor granted writs returnable before himself, instead of making the same returnable in the courts of common law; "paront les loialx liges du Roialme sont torcenousement travaillez et vexez, &c., sanz recoverir ent avoir de lour damages et coustages." It has been suggested by Mr. Cooper[18], that bills and petitions addressed to the chancellor were first filed in 17 Richard II. in consequence of this statute.

The chancellor acquires authority to award damages.

The equitable jurisdiction of the Court of Chancery made rapid advancement during the reigns of Richard II. and the three succeeding sovereigns, though many attempts were made to subvert its authority. That portion of equitable interference which appeared the most obnoxious to the people, was the writ of *subpœna;* and the commons, in their petitions, thus allude to the framer of the writ:—"Item, priont les communes que come plusours gentz de vostre roialme soy sentent graundment grevez de ceo que vos briefs appelles briefs *sub pena*, et certis de causis, faitz et suez hors de vostre chauncelerie et escheqer, des matiers determinables par vostre commune ley, que unques ne furent grauntez ne usez devaunt le temps de darrein Roy Richard, que Johan Waltham, nadgairs Evesque de Salesbirs, de sa subtiltee fist trover et commencier tiel novelrie encountre la fourme de la commune ley de vostre roialme, si bien a tres graunde perde et arrerisment des profitz que duissent sourder a vous soveraigne seigneur en voz courtes, &c. Et en outre, que si bien la peyne contenue

Advancement of the equitable jurisdiction during the reign of Richard II.

[18] On Public Records, i. 457.

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en tieux briefs patentz, come tout la proces d'ycelles, soient voidez et tenuz pur null; et si ascuns tieux briefs appellez *sub pena*, et certis de causis, et quia datum est nobis intelligi, soient suez hors de vos ditz courtz, encontre cest ordinance en temps a venir, que mesmes les briefs et tout la proces dependants sur ycelles, soient tout outrement voidez et tenuz pur null." The answer of the king was, "Le Roy soy avisera[19];" which shows that the writ of subpœna was esteemed, by those who knew its value, too efficacious a mode of effecting justice to be subverted without sufficient cause.

The writ of subpœna, an efficacious mode of effecting justice.

Commons pray, that restrictions be placed on the Court of Chancery.

The commons, however, presented another petition on the subject, in 9 Henry V., but it was not more successful in its results than the former one; "Soit il advisee par le roi. Et dureront tres toutz les ordinances suisditz tanque a le parlement proscheinement a tenir[20]," being the equivocal and unsatisfactory answer.

Henry V. did not live to convoke another parliament, but the commons remain dissatisfied, as they petitioned those who conducted the government in the name of Henry VI., to put a restriction on the equitable jurisdiction of the chancery. The answer given to this petition was, "Soit l'estatut ent fait l'an xvij. del regne du Roi Richard Secounde gardez et mys en due execution." Notwithstanding this positive answer, the commons renewed their remonstrances in 15 Henry VI. "Also prayen the communes that forasmuche as divers persones have been gretly vexed and greved by writtes *sub pena* purchased for maters determinables be the commune lawe of this lande, to the grete harmes of the persones so vexed, and in subversion and lettying of the saide commune law, &c." To this petition the following answer was given: "The king will that the statuits made therof be duely kept after the forme and effect of the same; and that no writ of *sub pena* be grauntid hereafter till seurtee be founde to satisfie the partie so vexed and greved for his damages and expenses, if it so be that the matier may not be made goode which is contenyd in the byll." It may be inferred that this statute satisfied the commons, or else they found it useless to make further remonstrances against the increasing power of equitable jurisdiction: and in 7 Edward IV., when Robert Kirkham, master of the rolls, had the great seal delivered to

Remonstrance of the commons in 15 Henry VI. respecting the writ of "sub pena."

[19] 4 Rot. Parl. 3 Henry V. 84.

[20] Ibid. 9 Henry V. 156.

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him by the king, the following memorandum was entered on the Close Roll of that year,—"And over this, the king willed and commanded there and thanne that all manere of maters, to be examyned and discussed in the Court of Chauncery, should be directed and determined accordyng to EQUITE and CONSCIENCE, and to the old cours and laudable custume of the same court, so that if in any such maters any difficultie or question of lawe happen to ryse, that he herein take th' advis and counsel of sume of the kynge's justices, so that right and justice may be duely ministred to every man."

The chancellor's powers, in all his important functions, not determined until the reign of James I.

From this time, the jurisdiction of the court of equity and the chancellor daily acquired additional power and importance, transacting everything *vice nomine et loco regis*, and deciding causes by the rules of his own conscience; in fact, he had become sole judge in matters of equity, and almost possessed potestatem absolutam; but the chancellor's power, in all its important functions, was not finally determined until the reign of James I.

The chancellor decides on principles of universal justice, when the interference of a court of judicature is requisite to prevent a wrong.

Early, therefore, in the history of our jurisprudence, the administration of justice by the ordinary courts appears to have been incomplete, and to supply the defect, the courts of equity have exerted their jurisdiction; assuming the power of enforcing the principles upon which the ordinary courts also decide, when the powers of those courts, or their modes of proceeding, are insufficient for the purpose; of preventing those principles, when enforced by the ordinary courts, from becoming (contrary to the purpose of their original establishment) instruments of injustice; and of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, and the positive law, as in the case of trusts, is silent.

Courts of equity remove impediments to the fair decision of a question in other courts.

The courts of equity also administer to the ends of justice, by removing impediments to the fair decision of a question in other courts; by providing for the safety of property in dispute, pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law intrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexatious and oppressive litigation, and preventing unnecessary multiplicity of suits: and, without

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pronouncing any judgment on the subject, by compelling a discovery, or procuring evidence which may enable other courts to give their judgment, and by preserving testimony when in danger of being lost before the matter to which it relates, can be made the subject of judicial investigation.

Cases which occur in chancery are decided on fixed principles.

There are certain principles on which courts of equity act, which are very well settled. The cases which occur are various; but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise, by the principles on which former cases have been decided, and may thus illustrate or enlarge the operation of those principles; but the principles are as fixed and certain as the principles on which the courts of common law proceed.

Preferring a bill in equity.

A suit to the extraordinary jurisdiction of the Court of Chancery, on behalf of a subject merely, is commenced by preferring a bill, in the nature of a petition, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal; or to the king himself in his court of chancery, in case the person holding the seal is a party, or the seal is in the king's hands. But if the suit is instituted on behalf of the crown, or of those who partake of its prerogative, or whose rights are under its particular protection, as the objects of a public charity, the matter of complaint is offered to the court by way of information, given by the proper officer, and not by way of petition. Except in some few instances, bills and informations have been always in the English language; and a suit preferred in this manner in the Court of Chancery, has been therefore commonly termed a suit by English bill, by way of distinction from the proceedings in suits within the ordinary jurisdiction of the court, as a court of common law, which, till Stat. 4 George II. c. 26, were entered and enrolled, more anciently, in the French or Norman tongue, and afterwards in the Latin, in the same manner as the pleadings in the other courts of common law.

Bills and informations have been always in the English language.

Every bill must have for its object one or more of the grounds upon which the jurisdiction of the court is founded.

Every bill must have for its object one or more of the grounds upon which the jurisdiction of the court is founded; and as that jurisdiction sometimes extends to decide on the subject, and in some cases is only ancillary to the decision of another court, or a future suit, the bill may either complain of some injury which the person exhibiting it suffers, and pray relief according to the injury; or, without praying relief, may

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seek a discovery of matter necessary to support or defend another suit; or, although no actual injury is suffered, it may complain of a threatened wrong, and stating a probable ground of possible injury, may pray the assistance of the court to enable the plaintiff, or person exhibiting the bill, to defend himself against the injury whenever it shall be attempted to be committed. As the Court of Chancery has general jurisdiction in matters of equity not within the bounds or beyond the powers of inferior jurisdictions, it assumes a control over those jurisdictions, by removing from them suits which they are incompetent to determine. To effect this, it requires the party injured to institute a suit in the Court of Chancery, the sole object of which is the removal of the former suit by means of a writ called a writ of *certiorari;* and the prayer of the bill used for this purpose is confined to that object.

The answer of the defendant must be upon oath.

The bill, except it merely prays the writ of certiorari, requires the answer of the defendant, or party complained of, upon oath, unless the defendant is entitled to privilege of peerage, or as a lord of parliament, or is a corporation aggregate, when the answer, in the first case, is required to be upon the "honour of the defendant," and in the latter, under the "common seal."

An answer required in the case of a bill seeking the decree of the court on the subject.

An answer is thus required, in the case of a bill seeking the decree of the court on the subject of the complaint, with a view to obtain an admission of the case made by the bill, either in aid of proof, or to supply the want of it; a discovery of the points in the plaintiff's case controverted by the defendant, and of the grounds on which they are controverted; and a discovery of the case on which the defendant relies, and of the manner in which he means to support it. If the bill seeks only the assistance of the court to protect the plaintiff against a future injury, the answer of the defendant, upon oath, may be required to obtain an admission of the plaintiff's title, and a discovery of the claims of the defendant, and of the grounds on which those claims are intended to be supported.

When the object of the bill is a discovery.

When the sole object of a bill is a discovery of matter necessary to support or defend another suit, the oath of the defendant is required to compel that discovery. The plaintiff may, if he thinks proper, dispense with this ceremony, by consenting to, or obtaining, an order of the court for the purpose, and this is frequently done for the convenience of parties where a discovery on oath happens not to be necessary.

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Matters of defence.

To the bill thus preferred, unless the sole object of it is to remove a cause from an inferior court of equity, it is necessary for the person complained of either to make defence, or to disclaim all right to the matters in question by the bill. As the bill calls upon the defendant to answer the several charges contained in it, he must do so, unless he can dispute the right of the plaintiff to compel such an answer, either from some impropriety in requiring the discovery sought by the bill, or from some objection to the proceeding to which the discovery is proposed to be assistant; or unless by disclaiming all right to the matters in question by the bill he shows a further answer from him to be unnecessary.

Defendant having an interest to support the plaintiff's case.

A defendant to a bill may have an interest to support the plaintiff's case, or his intent may not be adverse to that claim; he may be a mere trustee, or brought before the court in some character necessary to substantiate the suit, that there may be proper parties to it. In such cases, his answer may often be a mere matter of form, submitting the subject of the suit to the judgment of the court; and, if any act should be required to be done by him, desiring only to be indemnified by the decree of the court.

Right of the plaintiff to compel an answer.

The grounds on which defence may be made to a bill, either by answer, or by disputing the right of the plaintiff to compel the answer which the bill requires, are various. The subject of the suit may not be within the jurisdiction of a court of equity: or some other court of equity may have the proper jurisdiction: the plaintiff may not be entitled to sue by reason of some personal disability: if he has no such disability, he may not be the person he pretends to be: he may have no interest in the subject; or if he has an interest, he may have no right to call upon the defendant concerning it: the defendant may not be the person he is alleged to be by the bill: or he may not have that interest in the subject which can make him liable to the claims of the plaintiff; and, finally, if the matter is such as a court of equity ought to interfere in, and no other court of equity has the proper jurisdiction, if the plaintiff is under no personal disability, if he is the person he pretends to be, and has a claim of interest in the subject, and a right to call upon the defendant concerning it, if the defendant is the person he is alleged to be, and also claims an interest in the subject which may make him liable to the demands of the plaintiff; still the plaintiff may not be

Plaintiff not entitled to relief.

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entitled, in the whole or in part, to the relief or assistance he prays: or if he is so entitled, the defendant may also have rights in the subject which may require the attention of the court, and call for its interference to adjust the rights of all parties; the effecting complete justice, and finally determining, as far as possible, all questions concerning the subject, being the constant aim of courts of equity. Some of these grounds may extend only to entitle the defendant to dispute the plaintiff's claim to the relief prayed by the bill, and may not be sufficient to protect him from making the discovery sought by it; and where there is no ground for disputing the right of the plaintiff to the relief prayed, or if no relief is prayed, yet if there is any impropriety in requiring the discovery sought by the bill, or if the discovery can answer no purpose, the impropriety or immateriality of the discovery may protect the defendant from making it.

The answer may be founded on matter apparent in the bill.

The defence which may be made on these several grounds may be founded on the matter apparent in the bill, or on a defect either in its frame or in the case made by it; and may, on the foundation of the bill itself, demand the judgment of the court, whether the defendant shall be compelled to make any answer to the bill, and, consequently, whether the suit shall proceed: or it may be founded on matter not apparent on the bill, but stated in the defence, and may, on the matter so offered, demand the judgment of the court, whether the defendant shall be compelled to make any other answer to the bill, and, consequently, whether the suit shall proceed, except to try the truth of the matter so offered; or it may be founded on matter in the bill, or on further matter offered, or on both, and submit to the judgment of the court on the whole case made on both sides; and it may be more complex, and apply several defences differently founded to distinct parts of the bill.

The form of making defence varies according to the foundation on which it is made.

The form of making defence varies according to the foundation on which it is made, and the extent in which it submits to the judgment of the court. If it rest on the bill, and on the foundation of matter there apparent, demands the judgment of the court whether the suit shall proceed at all, it is termed a *demurrer;* if, on the foundation of new matter offered, it demands the judgment of the court whether the defendant shall be compelled to answer further, it assumes a different form, and is termed a *plea;* if it submits to answer

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generally the charges in the bill, demanding the judgment of the court on the whole case made on both sides, it is offered in a shape still different, and is simply called an *answer*. If the defendant disclaims all interest in the matters in question by the bill, his answer to the complaint made is again varied in form, and is termed a *disclaimer*. And all these several forms of defence, and disclaimer, or any of them, may be used together, if applying to separate and distinct parts of the bill.

Principal matters over which courts of equity exercise an equitable jurisdiction.

The principal matters over which the Court of Chancery maintains an equitable jurisdiction are, accident, mistake, fraud, account, specific performance of agreements, trusts, and infants.

ACCIDENT, MISTAKE, AND FRAUD.

Cases frequently occur in which the principles by which the ordinary courts are guided in their administration of justice give a *right*, but from accident or fraud, or defect in their mode of proceeding, those courts can afford no remedy, or cannot give the most complete remedy; and sometimes the effect of a remedy attempted to be given by a court of ordinary jurisdiction is defeated by fraud or accident.

Courts of equity will interpose with remedies, which the ordinary courts would have given, if their powers had been equal to the purpose.

In such cases, courts of equity will interpose to give those remedies which the ordinary courts would have given, if their powers had been equal to the purpose, or their mode of administering justice could have reached the evil; and also to enforce remedies attempted to be given by those courts where their effect is so defeated.

Courts of equity will not assume a jurisdiction, where the powers of the ordinary courts can afford justice.

But courts of equity will not assume jurisdiction, when the powers of the ordinary courts are sufficient for the purposes of justice; and therefore in general, when the plaintiff can have as effectual and complete remedy in a court of law as in a court of equity, and that remedy is clear and certain, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold.

Accident, made a ground to give jurisdiction to the court.

If an accident is made a ground to give jurisdiction to the court in a matter otherwise clearly cognizable in a court of common law, as the loss or want of an instrument on which the plaintiff's title is founded, the court will not permit a bare suggestion in a bill to support its jurisdiction; but requires a degree of proof of the truth of the circumstance on which it is sought to transfer the jurisdiction from a court of common law to a court of equity, by an affidavit of the plaintiff annexed to and filed with the bill. Thus, if a bill is brought to obtain the benefit of an instrument upon which an action at law would

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lie, alleging that it is lost, and that the plaintiff therefore cannot have remedy at law, an affidavit of the loss must be annexed to the bill, or a demurrer will hold.

Grants are in many cases presumed or supplied.

It is from the principle of relieving against accidents by loss of deeds, that grants are, in many cases, presumed or supplied. When, therefore, a person has been in possession for a great length of time without interruption, equity will supply all those circumstances or formal ceremonies, which the law deems necessary to the operation of the original conveyance. Where rent has been paid twenty years, equity will presume a grant; and where a common has been inclosed for thirty years, equity will presume the inclosure to have been with the consent of all persons interested, and will not allow it to be thrown open.

The ascertainment of boundaries, &c.

Equity will ascertain the boundaries, or fix the value, where lands have been intermixed by unity of possession: and also distinguish copyhold from freehold lands within the manor.

Penalties, forfeitures, &c.

Equity relieves against penalties which have been incurred by accident, as, for instance, for the non-payment of money at a certain day. Relief, however, in cases of penalties is dispensed only where the court can do it with safety to the other party; for if it cannot put him into as good a condition as if the agreement had been performed, the court will not relieve. It will only relieve, where the thing may be done afterwards, or a compensation made for it; but unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere, for such a jurisdiction would be arbitrary. There are some exceptions to this rule; one of which is, where a voluntary composition is to be paid at a time certain, and in a certain manner. In such case it is the voluntary bounty of the creditor to remit part of the debt, and the terms must be strictly complied with.

Equity will not interfere in penalties, unless a compensation can be given, so as to place the party in the same situation.

Where a penalty is inserted merely to secure the enjoyment of a collateral object.

Where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and therefore only to secure the damage really incurred: and in such cases, if the penalty of the bond is sued for at law, an injunction will be granted, and an issue, *quantum dammificatus*, directed.

Forfeitures under acts of

But forfeitures under acts of parliament, or conditions in law, which do not admit of compensation, or forfeitures which

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parliament cannot be relieved against.

may be considered as a limitation of an estate, which determines it when it happens, cannot be relieved against.

An undue advantage acquired by fraud or accident.

Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice; and it is therefore against conscience that he should use the advantage. In such cases, to prevent a manifest wrong, courts of equity have interposed, by restraining the party whose conscience is thus bound, from using the advantage he has improperly gained; and upon these principles bills to restrain proceedings in courts of ordinary jurisdiction are still frequent, though the courts of common law have been enabled, by the assistance of the legislature, as well as by a more liberal exertion of their inherent powers, to render applications of this nature to a court of equity unnecessary in many cases where formerly no other remedy was provided.

Bill to restrain proceedings in courts of ordinary jurisdiction.

Deed fraudulently obtained without consideration.

Thus, if a deed is fraudently obtained without consideration, or for an inadequate consideration, or if by fraud, accident, or mistake, a deed is framed contrary to the intention of the parties in their contract on the subject, the forms of proceeding in the courts of common law will not admit of such an investigation of the matter in those courts as will enable them to do justice.

The parties claiming under the deed have therefore an advantage in proceeding in a court of common law which it is against conseience that they should use; and a court of equity will, on this ground, interfere to restrain proceedings at law until the matter has been properly investigated; and if it finally appears that the deed has been improperly obtained, or that it is contrary to the intention of the parties in their contract, will in the first place compel the delivery and cancellation of the deed, or order it to be deposited with an officer of the court; and will compel a reconveyance of property, if any has been so conveyed that a reconveyance may be necessary;—and in the second case will either rectify the deed according to the intention of the parties, or will restrain the use of it in the points in which it has been framed contrary to, or in which it has gone beyond, their intention in their original contract. The instances of the exercise of the jurisdiction of courts of equity in these cases, and especially in the case of a deed fraudulently obtained, are numerous.

Rectification of deed, according to the intention of the parties.

The courts of equity will interfere upon the same ground to

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Relief against instruments which destroy rights.

relieve against instruments which destroy, as well as against instruments which create, rights; and therefore will prevent a release which has been fraudulently or improperly obtained from being made a defence in an action at law. And where a fine and non-claim were set up as a bar to an ejectment by an heir at law, who had filed a bill in equity before the time had run on the fine, for discovery of title deeds, and for other purposes, with a view to try his title at law, the House of Lords upon an appeal restrained the setting up the fine.

Lapse of time.

In many cases of accident, as lapse of time, the courts of equity will also relieve against the consequences of the accident in a court of law. Upon this ground they proceed in the common case of a mortgage, where the title of the mortgagee has become absolute at law upon default of payment of the mortgage money at the time stipulated for payment.

Charitable uses.

It has likewise been an uniform rule in equity, before as well as after the Stat. 43 Elizabeth, c. 4, that where uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses. Though, therefore, devises to corporations, were void under Stat. Henry VIII., yet they were always considered as good in equity, if made to charitable uses.

Settlement executed subsequent to marriage.

If a settlement executed subsequent to marriage, purporting to be in execution of articles entered into before marriage, does not take the effect, though it follows the words of the articles, the court will, on the ground of mistake, rectify that error in the frame of the settlement, nor is length of time any bar to such relief.

General principles upon which courts of equity interpose to carry marriage articles into execution.

The general principle upon which courts of equity interpose to carry marriage articles into execution by way of strict settlement, notwithstanding the articles themselves are not penned in that manner, is, that articles made in consideration of and previous to marriage, are considered as heads of agreement, or short notes to be afterwards drawn out at length according to the usual course of settlements, and that a provision for the issue of the marriage is one of the great and immediate objects of this agreement; and, consequently, a principal intention of such agreement must be to secure such a settlement as shall contain an effectual provision for that issue: which end, it is clear, cannot be answered in any degree by a settlement so framed as to leave it in the power of either parent alone to bar their issue by fine or recovery. The issue

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in these cases are considered as claiming a provision in the capacity of purchasers for a valuable consideration, under the purport and intention of the stipulated terms upon which the marriage was contracted which gave them birth.

Ignorance of law.

A mistake of parties as to the law, is not in general a ground for reforming a deed founded on such mistake. There are, however, several cases in which a party has been relieved from the consequences of acts founded on ignorance of law; and in one case it was said, "ignorantia juris non excusat," regarded only offences against the public peace, and that ignorance could not be pleaded in excuse of crimes;—but that such principles did not hold in civil cases. Ignorance, however, is not mistake, and relief cannot be given on a *supposition* merely that parties are ignorant of the legal effect of their acts. If, for instance, a tenant for life pays off an encumbrance, and takes a release of the debt which he paid off, it cannot be contended he meant to continue it as a subsisting debt; or, if a tenant for life, by planting or otherwise, improves his estate, such improvements are not claimable as distinct from the freehold.

Mistakes of judgment will not be relieved against.

Nor will mistakes of judgment be relieved against. If an agreement or composition of a cause be made, the court will not, upon the question whether either party is in the right or wrong, overturn such agreement, if made by parties with their eyes open, and rightly informed.

Agreements founded on mistake will be set aside.

But in general, agreements relating to real and personal estate, if *clearly* founded on mistake, will for that reason be set aside.

Mistakes in wills.

Mistakes in wills are frequently relieved against in equity: but in all these cases where a mistake in a will is relieved, it must appear *on the face of the will*, otherwise no relief will be given. Where there is a complete and plain will in writing, it cannot be altered or influenced by parol evidence as to the intention. Evidence as to matters *de hors* the will, to show the mistake, is not sufficient. Even the instructions for the will are inadmissible to show a mistake. The mistake must be clear and demonstrable; and wherever there is a clear mistake, or a clear omission, recourse is to be had to the general scope of the will, and the general intention to be collected from it, but the first thing to be proved is, that there is a mistake.

When there is a clear mistake, recourse must be had to the general scope of the will.

If a ring or picture be given, and neither can be found, the mistake cannot be rectified: a mistake in the name of a

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legatee may be corrected in favour of the legatee by articles of description, sufficiently pointing out the person intended to take, and this, though both the christian and surname be mistaken. So in the case of a legacy, parol evidence is admissible to explain a nick-name, or where there are two persons of the same name, but not to fill up a *blank* in a will, unless it be only as to a christian name. But where the words used in the gift of a legacy are plain, evidence as to the intention, and to show there was a mistake as to the fund, is inadmissible.

FRAUD defined.

Fraud has been defined to be, any kind of artifice by which another is deceived; all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is considered as fraud—thus, collusion in a court of equity is considered as fraud.

Species of fraud enumerated by Lord Hardwicke.

Lord Hardwicke enumerated four species of fraud:—"First, fraud arising from facts and circumstances of imposition, which is the plainest case; secondly, fraud may be apparent, from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice; a third is that which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be proved, not presumed; but it is wisely established in this court, to prevent taking surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience, as to take advantage of his ignorance;—a fourth kind of fraud may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons, not parties to the fraudulent agreement."

In cases of fraud, the remedy does not die with the person.

In all cases of fraud, the remedy does not die with the person, but the same relief may be obtained against the representative of the person committing the fraud: nor can the Statute of Limitations be pleaded to a bill for the discovery merely of a fraud, length of time forming no bar,—"No length of time can prevent the unkennelling of fraud."

Every delay arising from fraud adds to its injustice and

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Every delay arising from fraud adds to its injustice.

multiplies the oppression; and length of time is only available where it can be used to show acquiescence.

Though persons are embarrassed, and reduced by the fraud of others, yet the court cannot act upon such circumstances, for then there would be an end to all limitations of actions in the cases of distressed persons; for if relief might be given after twenty years on the ground of such distress, it might after thirty, forty, or fifty years.

Cases of fraud in which the court will not interfere.

Even in a case of gross fraud, the court will not decree an account, after a considerable length of time, against executors, legatees, and innocent persons, claiming under the fraudulent party. Fraud is a fact, and there is as much danger of evidence being lost in such case as in any other. In the case of a steward keeping his accounts in a fraudulent manner, it has been said, "there can be no period, however remote, through which the court will not look for the purpose of setting such an account right."

Cases of fraud not penal.

In all cases of fraud not penal, a court of equity has a concurrent jurisdiction with the courts of law.

Principal rules upon the subject of fraud.

The principal rules upon the subject of fraud are as follow:

1. Fraud is never to be presumed; but that may be a fraud in equity which is not so at law.

2. If the principal in a fraud be released, parties who would have been secondarily liable cannot be proceeded against.

3. An impeached deed cannot be supported by evidence of considerations wholly different from those alleged in it.

4. A deed cannot be set aside in part for fraud. If set aside at all, it must be *in toto:* and if obtained by fraud, it will be set aside *in toto*, though innocent persons are interested under it.

Letters patent vacated for fraud.

A court of equity will set aside its own decrees if founded upon fraud—and a bill lies to vacate letters patent obtained by fraud; and when a person is prevented by fraud from executing a deed, equity will regard it as already done.

Voluntary conveyances frequently declared to be fraudulent.

Voluntary conveyances are frequently declared by courts of equity to be fraudulent, and the court will determine the fact of fraud without a trial at law.

Every voluntary conveyance by a man for his own benefit is fraudulent against creditors, but every voluntary conveyance is not fraudulent. A voluntary conveyance of real estate, or a chattel interest in favour of a child, by one, not indebted at the time, though he afterwards becomes indebted, is good

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against future creditors, though not against purchasers, provided there be no particular evidence, or badge of fraud (a power of revocation, for instance, or retention of possession). A voluntary agreement by one not indebted, nor a trader, if executed, cannot be invalidated by creditors; but if not executed, it seems, it might.

When a voluntary agreement, cannot be invalidated.

With a view to prevent fraud, a trustee is not permitted to become a purchaser from himself of part, or the whole of the trust estate; and this principle of incapacity is extended to the solicitor of a trustee; to a bankrupt's commissioner, and his assignees, and their solicitors; to the committee or keeper of a lunatic; to governors of charities; &c.

TRUSTEES not permitted to become purchasers.

Transactions liable to no objections, as between man and man, have, between attorney and client, been overturned, on account of the danger from the influence of attorneys or counsel over clients, while having the care of their property; and whatever mischief may arise in particular cases, the law, with the view of preventing public mischief, says they shall take no benefit derived under such circumstances. If the relation has completely ceased, if the influence can be rationally supposed also to cease, a client may be generous to his attorney or counsel as to any other person.

Transactions between ATTORNEY and CLIENT, when impeachable.

A client may make a voluntary gift to his attorney or agent, and if unaffected by fraud, misrepresentation, or circumvention, it cannot be set aside; but, in such cases, third persons ought, from motives of delicacy and prudence, to be called in; for if not, a suspicion attaches upon the transaction, and so much so, that a court of equity will always give a party his costs, where such a transaction is inquired into by proceedings in equity.

A client may make a voluntary gift to his attorney.

An attorney may purchase of his client, but in such case the attorney, to support his purchase, must be able to show that he paid the full amount he could have obtained from any other person. The same rule prevails, in a sale by an attorney to his client. There are cases where, under the circumstances, the court has ordered the taxation of an attorney's bill after eight, seventeen, and twenty-one years, and an actual security given; and even after a security given and payment, if the client can point out in the bill gross errors and charges, amounting to imposition and fraud, he will be relieved.

An attorney may purchase of his client.

Inadequacy of consideration between persons who stand upon a precisely-equal footing, is, in courts of equity, of no

EXPECTANT HEIRS.

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Inadequacy of consideration, ground for setting aside the contract.

account, unless from its grossness it is of itself evidence of fraud; but, in regard to expectant heirs, (or, as it seems, any one dealing with another for an expectancy,) anything that can substantially be considered as inadequacy, is a ground for setting aside the contract: and in such case, the conveyance is set aside on payment of principal, interest, and costs, the defendant being considered as a mortgagee.

GUARDIAN AND WARD, transactions between, watched with jealousy.

Where a man acts as guardian, or trustee in nature of a guardian, for an infant, a court of equity is extremely watchful to prevent such person taking any advantage immediately upon his ward, or cestui que trust, coming of age, and at the time of settling his account, or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery, or by force, by good usage unfairly meant, or bad usage imposed, to take such advantage: and therefore the principle of the court is of the same nature with relief in courts of equity on the head of public utility, as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage-brokage bonds. All depend on public utility, and therefore the court will not suffer it, though perhaps, in a particular instance, there may not be actual unfairness.

The rule is, in some cases, productive of hardship; as where there has been great trouble, and the guardian has acted fairly and honestly: but courts of equity have established it from a persuasion of its utility, and on necessity, and on the principle, that it is a debt of humanity that one man owes to another, as every man is liable to be in the same circumstances.

When the ward can make a grant to his guardian.

If, however, the ward, or cestui que trust, comes of age, and, after being actually put in possession of his estate, thinks fit, when sui juris and at liberty, to make a reasonable grant, by way of reward for care and trouble, and does this with his eyes open, courts of equity will not set such gifts aside; but the court will not permit a gift at the very time of accounting and delivering up the estate, making that the terms of doing their duty.

On these principles, conveyances have not only been set aside by the ward himself, but by his representatives, and after great length of time. Where a gift of stock was made by a ward to his guardian immediately upon his coming of age, and before his guardian had delivered over everything to his ward, the deed of gift was decreed to be delivered up

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to be cancelled. The guardian insisted that the gift to him was as a reward for his trouble as guardian, but this defence was not admitted.

Husband releasing the guardians of his wife.

So where a husband before his marriage covenanted to release his wife's guardian of all accounts; this was held not to be binding, and was said to resemble a marriage-brokage agreement.

Voluntary grant of an annuity by a ward.

In like manner, a voluntary grant of an annuity by a ward, a year after he was of age, to his guardian, at the time when the guardian pretended to come to an account and deliver up the estate to the plaintiff, was set aside. And a guardian has not been allowed to purchase an encumbrance on the estate of his ward.

INJUNCTIONS granted to prevent fraud or injustice.

Injunctions, which are granted at discretion, are for the purpose of preventing fraud or injustice, and may be defined as being prohibitory writs, especially prayed for, by a bill, in which the plaintiff's title is set forth, restraining a person from committing or doing an act (other than any criminal act) which appears to be against equity or conscience.

Injunctions have been granted in the following cases:—to stay proceedings in other courts, as the exchequer, the spiritual courts, or court of admiralty, or to stay proceedings in a court of law; to restrain the infringement of patents; to stay waste; to restrain the sale of piracies of books, printed music, or prints; to restrain the negotiation of bills of exchange, notes, &c., or the transfer of stock; to prevent the committing of nuisances.

ACCOUNT.

The principle upon which courts of equity originally entertained suits for an account where the party had a legal title, was, that though he might support a suit at law, a court of law could not give so complete a remedy as a court of equity; and, by degrees, courts of equity assumed a concurrent jurisdiction in cases of account.

The same species of relief is given at law in an action of account, as under a bill in equity.

The same species of relief is given at law in the action of account, as under a bill in equity; but the great advantage of the latter, and the difficulty and delay where the account comes before auditors, has brought that action into disuse.

So established is the jurisdiction of courts of equity, that after a decree to account, a party is not allowed to bring an action at law on the same subject matter. If an action be brought, the defendant need not appear, but may apply to equity for an attachment.

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Cases in which equity will not interfere.

If in matter of account, the subject be matter of set-off at law, and capable of proof, equity will not interpose; but mutual dealing and demands between two parties, which are too complex to be accurately taken by trial at law, may be adjusted in equity: so likewise between landlord and tenant, when there have been complicated dealings; between parties engaged in a mining concern, though they are tenants in common of the land; and in matters of waste, as cutting down timber. A factor (unless he be an infant) must account to his principal, and likewise for his deceased co-factor; so must the representatives of a factor; and conuzee or conuzor under an elegit.

The period from which the rents and profits are given to a party demanding an account.

The period from which the rents and profits are given to a party demanding an account, is, on an equitable title, from the accruing of his title, but upon a legal title, for six years back only. Under special circumstances, as in a doubtful case, the court will decree an account from the time of filing the bill only. In the case of infants, the account is from the time of the title accruing, and in some other cases of legal title, as where the plaintiff has been kept out of his estate by the fraud, misrepresentation, or concealment of the defendant.

Infants.

In cases of legal partnership, where a court of law can give no relief, equity will give an account, and that without a dissolution of partnership.

Corporations.

A corporation, as a partnership, may be compelled, either by a member or a stranger, to account.

Bills for tithes.

Bills for tithes, as matters of account, are frequent in chancery; but the Court of Exchequer is the original and proper jurisdiction for tithes.

Reference to arbitration.

A reference to arbitration, made a rule of court at common law, does not oust chancery of its jurisdiction; but the court will deal less actively for a man who could have relieved himself at law, than for him who, by his bill, exhibits grounds for the peculiar interference of the Court of Chancery; but a bill to set aside an award, except for corruption, &c., in the arbitrators, will not lie.

An accountant, defendant.

An accountant, defendant, will be allowed, on his oath, all sums under 40*s.*; but then he must mention in his affidavit to whom, when, and for what the sums were paid, and the whole so allowed must not exceed 100*l.* But the plaintiff is not allowed anything on his oath; and, as at law so in equity, he must not swear to his belief only, but must swear positively.

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A stated account need not be signed.

A stated account to be good, and pleadable as such, need not be signed by the party; for it is not the signing, but the person to whom the account is sent keeping it by him any length of time without making any objection, which binds him, and prevents his entering into an open account afterwards. It is said, that among merchants it is looked upon as an allowance of an account current, if the merchant who receives it does not object against it in a second or third post: and with respect to foreign merchants, if one merchant sends an account current to another in a different country, on which a balance is made due to himself, and the other keeps it by him two years without objection, the rule of equity, and of merchants, is, that it is considered as a stated account.

Foreign merchants' accounts.

A stated account cannot be unravelled.

It is a rule that a stated account shall not be unravelled, and that such accounts carry interest; but where a fraud appears in a stated account, the whole will be opened, though of a great many years standing.

SPECIFIC PERFORMANCE OF AGREEMENTS.

By the common law, every covenant and agreement, when there was no proper conveyance to transfer the right of the thing itself, was personal, and being so, the party, if it were unperformed, could only recover damages. If, therefore, a man covenanted to settle his lands upon marriage, or to convey them for a valuable consideration, the covenantee or vendee could only recover damages at law for the breach of such covenant or agreement, but had no remedy there for the settlement or conveyance of the estate itself. This was thought much less than complete justice, because the party who had entered into the covenant or agreement was in conscience bound, not only to make compensation for the breach, where he could not perform it, but also actually to perform it where it was in his power; and on this ground a court of equity interposed.

The effect of a mere contract for the purchase of land is, in many respects, very different at law, from what it is in equity.

The effect of a mere contract for the purchase of land is, in many respects, very different at law, from what it is in equity. At law, the estate remains in the vendor, and the money in the vendee. It is not so in equity; there, in general, it is a rule, that what is contracted to be done for a valuable consideration is considered as done, and nearly all the consequences follow as if a conveyance had been made at the time to the vendee. The vendor of the estate, whether it be freehold or copyhold, is, from the time of his contract, considered only as a trustee for the purchaser: and the vendee is, as to the purchase-money, considered as a trustee for the vendor.

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An agreement to be specifically performed, must be according to the forms prescribed by law.

It may be stated, as a general rule, that an agreement, to be specifically performed, must be according to the forms prescribed by law, and between parties able and willing to contract, and that the agreement must be certain and defined, equal and fair.

Part performance of an agreement.

There are cases, where, though an agreement as to lands is not in writing, it will be decreed to be performed; as where a parol agreement has been partly performed, and is admitted, or proved, as it may be in such cases, by parol evidence, produced on the hearing of the cause, or, on some occasions, before the master: but where parol evidence is admitted it must clearly appear that *that* very agreement was in part executed.

What is considered a part performance of an agreement.

If it be clearly shown what the agreement was, and that it has been partly performed, that is, that an act has been done, not a mere voluntary act or merely introductory or ancillary to the agreement, but a part execution of the substance of the agreement, and which would not have been done unless on account of the agreement, an act, in short, unequivocally referring to, and resulting from, the agreement, and such, that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement; in such case, the agreement will be decreed to be specifically performed.

Agreements respecting personal chattels rarely enforced.

As equity only interferes where the party wants the thing in specie, and where the legal remedy is inadequate, it does not generally enforce those agreements, which relate to personal chattels, as the sale of stock, corn, hops, &c.; in such cases, the remedy is at law. Equity will relieve against a forfeiture incurred by the non-performance of a covenant in a lease to pay the rent at or within the time appointed; for the clause of re-entry in such a case, is only to secure the payment of rent, and when the rent is paid, the end is obtained.

Stat. 4 George II. c. 28.

But Stat. 4 George II. c. 28, circumscribed the lessee's right to relief, and imposed terms on his obtaining it; by enacting, that if the lessee in case of ejectment brought by the lessor, in consequence of the rent being in arrear, suffer judgment to be had, and execution thereon, without paying the rent and arrears, together with full costs, and without filing a bill for relief in equity within six calendar months after such execution, the lessee shall be barred from all relief in equity; that if the lessee shall, within such time, file a bill for relief in equity, he shall not have an injunction against the proceed-

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ings at law on such ejectment, unless he shall, within forty days after answer filed by the lessor, bring into court such sum of money as the lessor shall in his answer swear to be due in arrear, together with the costs taxed in the said suit; that if the tenant shall at any time before the trial in such ejectment, pay or tender to the lessor, or pay into court when the same cause is depending, all the rent and arrears, together with the costs, all further proceedings on the said ejectment shall cease; and that if such lessee should upon such bill filed as aforesaid be relieved in equity, he shall enjoy the demised lands according to the lease, without any new lease to be made to him.

Forfeiture by a breach of covenant in a lease.

Whether a court of equity will relieve against a forfeiture by a breach of other covenants in a lease, depends upon the question whether it is a case in which the court can afford compensation. In general the court will not relieve a tenant against a forfeiture for not repairing; and though a court of equity has, after a first default, relieved against a forfeiture by not insuring, yet the general rule seems otherwise.

Transfer of stock.

Equity will not enforce an agreement for the transfer of stock; but it has been held that a bill will lie for performance of agreement for purchase of government stock, where it prays for the delivery of the certificates which gave the legal title to stock. And it seems the court will entertain a suit for the specific performance of a contract for the purchase of a debt. So to sell the good-will of a trade, and the exclusive use of a secret in dyeing, but not without great caution. Agreements to indemnify will be enforced on the principle of quia timet bills. An agreement to divide what shall come to either party by will of another; to leave property by will, if for good consideration; and to make mutual wills, are enforced. And where the testator omits to charge a legacy on his real estate, in consequence of the devisee promising to pay it, he must perform such promise. And agreements are enforced sometimes to avoid circuity. A specific performance of an agreement to enter into partnership, will, under circumstances, be decreed. If, however, by the terms of the agreement the partnership would have no fixed duration or benefit, as, being determinable upon notice, equity will not interfere. Nor will equity decree a specific performance of an agreement to refer to arbitration. So agreements upon separation between husband and wife are not regarded in chancery unless a trustee

Purchase of a debt.

Partners.

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intervenes; such cases, otherwise, belong to the ecclesiastical court.

He that hath committed iniquity shall not have equity.

A party calling for the aid of a court of equity, must come, "with clean hands;" it being a maxim of equity, that "He that hath committed iniquity shall not have equity." A defendant, therefore, to a bill for a specific performance of an agreement is allowed to resist it, by showing that, under the circumstances, the plaintiff is not entitled to the prayer of his bill; as by evincing that there has been an omission or mistake in the agreement; or that it is unconscientious or unreasonable; or fraud or surprise; or that there has been concealment, misrepresentation, whether wilful or not, latent or patent, or any unfairness, (intoxication, for instance,) attending it: and in these cases parol evidence of such circumstances of defence is permitted; for though parol evidence is inadmissible on the part of a plaintiff, to explain, add to, or vary a written contract, (except in cases of fraud), it is admissible, on the part of a defendant to a bill for a specific performance, to show circumstances, dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance.

TRUSTS.

Principles under which courts of equity have assumed a jurisdiction in cases of trust.

The principles of law which guide the decisions of the courts of ordinary jurisdiction, and especially the courts of common law, were principally formed in times when the necessities of men were few, and their ingenuity was little exercised to supply their wants. This is particularly the case in matters of trust and confidence, of which the ordinary courts taking in a variety of instances no cognizance, and the positive law being silent on the subject, the courts of equity, considering the conscience of the party intrusted as bound to perform the trust, have interfered to compel the performance. And it has long been settled, that where trustees are desirous of acting under the direction and protection of a court of equity, they may file a bill for those purposes against the persons interested in the trust property. And in many other cases where the positive law has been silent, and there are rights in conscience for injuries to which the ordinary courts afford no remedy, the courts of equity have also interfered; enforcing the principles of universal justice, upon the ground of obligation on the conscience of the party against whom they are enforced.

Trusts may be created of real or personal estate, and are

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either "express" or "implied." Express trusts are created by deed, or by will; implied trusts arise, in general, by construction of law upon the acts or situation of parties;—and under the head of implied trusts may be included resulting trusts, and all such trusts as are not express.

Express and implied trusts.

Every cestui que trust, whether a volunteer or not, with or without consideration, is entitled to the aid of a court of equity, to avail himself of the benefit of the trust, and as between the cestui que trust and his trustee (unless the trustee is such by implication only) the Statute of Limitations does not apply.

Cestui que trust, entitled to the aid of a court of equity.

A trust is a right in the cestui que trust to receive the profits, and to dispose of the lands in equity, and is such a confidence between the parties that no action at law will lie. There may, however, be special trusts, as for the accumulation of profits, the sale of estates, or the conversion of one trust fund into another, which may preclude all power of interference on the part of the cestui que trust until such special trust is satisfied.

A trust is, a right in the cestui que trust to receive the profits.

In general, courts of equity, in the construction of words by which trusts are limited of real or personal estate, follow the rules which courts of law have laid down, in regard to the creation and limitation of legal estates, and this whether the trust be created by deed or by will. Whether the words in a deed or a will pass an absolute or a limited interest is decided by rules common to both courts, the only difference being, that, where a trust estate is created by deed or will, it is determined upon in courts of equity; and where a conveyance or a devise is of a legal estate, it is determined on in courts of common law; but the decision in each court in the construction of words of limitation is guided by the same rules:—the principal exception to this rule being in the cases of articles before marriage, and in executory trusts.

Construction of words by which trusts are limited.

The principal express trusts created by deed are those created in marriage settlements of real or personal property,—in conveyances to purchasers,—in conveyances by way of mortgage or otherwise, for the payment of debts, and in assignments of choses in action. With respect to trusts executory, they are more frequently to be met with in wills than in any other legal instrument.

The express trusts created by deed.

INFANTS.

The Court of Chancery, representing the king as parens patriæ, has a jurisdiction over infants; but it exercises no

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control over them unless they are wards of court; but filing a bill on their behalf makes them wards of court.

Removal o a child from its parents.

The grounds on which the custody of a child is given to a father are, first, protection, then, care and education; and when a parent has abused that trust, by constant habits of drunkenness, blasphemy, and immorality, the court has deprived him of the custody of his child; and it is upon these principles that the courts of common law will punish a parent if he fail to maintain his children, or if he treat them with undue severity.

The court will restrain the father from removing his child, or doing any act towards removing it out of the jurisdiction; and possession of the child will be refused to its mother, if she has withdrawn herself from her husband.

The court retains its jurisdiction over the property of a ward of court after twenty-one.

The court retains its jurisdiction over the property of a ward of court after twenty-one, if it remains in court; and if the ward, being a female, marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement, either in court, or under a commission.

In case the husband assign the property of the wife, who is a ward of court, it shall not prevail, but the court will direct even the whole of the property in question to be settled on the wife and her children, and the assignee will not be entitled even to the arrear of interest accrued since the marriage.

Punishment for marrying a ward of court.

A marriage of a ward of court under gross circumstances, is punishable beyond commitment, by indictment as a conspiracy.

STATUTABLE JURISDICTION.

COMMISSION OF REVIEW.

Stat. 25 Henry VIII. c. 19.

The Court of Chancery has been also invested with extensive jurisdiction, by various statutes. Thus, by 25 Henry VIII. c. 19, an appeal is given from the respective courts of the archbishops to the king in the Court of Chancery, and upon such appeal, a commission is to be directed to such persons as his majesty shall name:—but this commission is prayed of the grace and benignity of the crown. Its sound discretion, by which its grace and benignity are guided, has, upon obvious grounds of public expediency, usually induced it to withhold commissions of review, unless there are very cogent reasons for believing that the sentence sought to be reviewed, is founded upon error in fact, or in law; or, unless the doctrines of law upon which the sentence is supposed to be founded, are so questionable, or important, as to make it clearly fit that they should be considered in the most solemn manner.

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BANKRUPTCY.

Stat. 34 & 35 Henry VIII. c. 4.

By various statutes, the chancellor has been invested with jurisdiction in cases of bankruptcy. The first statute on this subject is 34 & 35 Henry VIII. c. 4, which gave the chancellor, the chief justices, and others therein mentioned, an authority to sell and distribute the property of persons therein described. And by this statute, in whatever rank in life the debtor was, who had obtained the goods of others, and afterwards fled, or kept his house, he was held subject to the operation of the statute. This statute was the foundation of many subsequent statutes on bankruptcy, and the object of such statutes was an equal and impartial distribution of all the bankrupt's property among his creditors; but the statutes which now principally apply to bankrupts are, 6 George IV. c. 16, and 1 & 2 William IV. c. 56.

Stat. 6 George IV. c. 16, and 2 William IV. c. 56.

LUNATICS.

Persons and estates of lunatics confided to the chancellor.

The care and commitment of the custody of the persons and estates of idiots and lunatics are the prerogative of the crown, and are always intrusted to the person holding the great seal by the royal sign manual, and the chancellor is alone responsible to the crown for the due exercise of this power.

Appointment of committee.

By virtue of this authority, upon an inquisition finding any person an idiot or lunatic, grants of the custody of the person and estate of the idiot or lunatic are made to such persons as the Lord Chancellor, or Lord Keeper, or lords commissioners for the custody of the great seal for the time being think proper.

Idiots and lunatics sue by their committees.

Idiots and lunatics, therefore, sue by the committees of their estates. Sometimes, indeed, informations have been exhibited by the attorney-general on behalf of idiots and lunatics, considering them as under the peculiar protection of the crown, and particularly if the interests of the committee have clashed with those of the lunatic. But in such cases a proper relator ought to be named, and when a person found a lunatic has had no committee, such an information has been filed, and the court has proceeded to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee. And persons incapable of acting for themselves, though not idiots or lunatics, have been permitted to sue by their next friend, without the intervention of the attorney-general.

Rules of law and equity are the same as to what amounts to insanity.

The rules of law and equity are the same as to what amounts to insanity. "Non compos mentis," has been defined by Lord Coke to be a person "who was of good and

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sound memory, and by the visitation of God has lost it;" and in another work, two sorts of persons are considered by Lord Coke to be non compos mentis;—1. "Idiota," which from his nativity, by a perpetual infirmity, is non compos mentis; 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding.

Motives by which the court is influenced in the issuing of a commission of lunacy.

In determining whether it is proper that a commission of lunacy should issue, the court is governed solely by the consideration of what is necessary for the protection of the person and property of the party, and has no regard to the possible result of the commission upon the validity of his antecedent acts, or to the motives which have actuated the proceedings.

Persons generally appointed the committee of a lunatic.

Some relation is generally appointed committee of the lunatic in preference to a stranger, unless there is a specific objection. The wife of a lunatic, jointly with a relation, has been appointed committee of the person of the lunatic; and the committee of the person is frequently appointed committee of the estate also.

The committee of a lunatic considered merely as a bailiff to the estate.

The committee is considered merely as a bailiff, appointed by the crown, and under its control, to take care of the property, and liable to account, to censure, to punishment, and to be removed, for misconduct.

Stat. 1 William IV. cc. 60, 65; 5 & 6 William IV. c. 17

The powers of the committee, under the directions of the chancellor, have, in the disposition of property, been much increased by Stat. 1 William IV. cc. 60, 65, and 5 & 6 William IV. c. 17.

Allowance to lunatics.

The court, in making an allowance to a lunatic, considers only his situation, always looking to the probability of his recovery, and never regarding the interest of the next of kin. But in cases where the estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the court, looking at what it is likely the lunatic himself would do, if he were in a capacity to act, will make some provision out of the estate for those persons. So where a large property devolves upon an elder son, who is a lunatic, as heir at law, and his brothers and sisters are slenderly, or not at all, provided for, the court will make an allowance to the former for the sake of the latter.

Allowance decreed to junior members of a lunatic's family

So, also, where the father of a family becomes a lunatic, the court does not look at the mere legal demands which his wife and children may have upon him, but considering what the

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lunatic would probably do, and what would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances.

An allowance made out of a lunatic's estate, in consideration of the marriage of one of his daughters.

Thus, the allowance made out of a lunatic's estate, for the maintenance of himself and his daughters, was increased in consideration of the intended marriage of one of the daughters, and a portion of such increased allowance was appropriated to the joint establishment of her and her husband, and was directed to be settled to her separate use: and a sum of money approved by the master was also ordered to be paid out of her father's estate, by way of outfit for her marriage.

Assistance given to collateral relations.

There are instances in which the court has, in its allowances to the relations of the lunatic, gone not only to grand-children, but to brothers, and other collateral kindred;—not because the parties are next of kin to the lunatic, or, as such, have any right to an allowance, but because the court will not refuse to do for the benefit of the lunatic that which it is probable the lunatic himself would have done:—and the chancellor will sometimes order maintenance for the children of the lunatic, or a sum for their advancement, or payment of their debts.

No remuneration allowed to the committee of a lunatic.

The committee of a lunatic's estate is never allowed anything for his care and trouble; but, under circumstances, the court will increase the allowance of maintenance, which will operate as an allowance for trouble. A committee will not be allowed moneys expended on the lunatic's estate, if laid out without a previous application to the court; and if the committee has not passed his accounts regularly, according to his recognizance, and as required by the general order, he will not be allowed his costs; nor is a committee suffered to pass his accounts without referring them to the master, to see what sums he has had in his hands from time to time, and if he is found to have kept money in his hands unnecessarily, he must pay interest for it.

The comfort and benefit of the lunatic, the great object of the court.

In the management of the lunatic's estate, the comfort and benefit of the lunatic, where no creditor complains, is the great object of the court, without looking to the interests of those, who upon his death may have eventual rights of succession.

Marriage of a lunatic. Stat. 15 George II. c. 30.

By 15 George II. c. 30, the marriage of a person duly found a lunatic, is null and void, unless he be previously declared sane by the lord chancellor, or his trustees; but it seems necessary that the marriage of a lunatic should be declared void by a sentence of the Ecclesiastical Court. A

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person marrying a non compos, the custody of whom has been assigned to a committee, is a contempt of court; and persons accessary to such marriage would it seems, be ordered to attend the court, and, on refusal, committed.

Every act of a lunatic, subsequent to the period at which he is proved to be a lunatic, is void.

Though at law, and, in general, in equity, every act of the lunatic subsequent to the period at which he is proved to be a lunatic, is void, according to the maxim, "Furiosus nullum negotium gerere potest, quia non intelligit quod agit," yet a court of equity has refused to enter into the consideration of a party's sanity, to impeach a conveyance made by such party, after a lapse of twenty years, and two subsequent purchases: so, also, a court of equity, owing to the great inconvenience, will not assist a party in giving effect to the legal consequence of lunacy, by setting aside contracts or dealings in the course of his trade. The interference, however, of courts of equity, in cases of this description, depends upon the circumstances of each case, and no general rule, it has been said, can be laid down.

Acts done during a lucid interval, are valid.

All acts done during a lucid interval are valid. Many questions have arisen upon the execution of wills during lucid intervals; and the intervals having been proved, the wills have been held valid. The validity of wills, under such circumstances, must materially depend on the reasonableness of the will, and on the circumstances of the attestation. The law is the same with respect to contracts, or any other disposition of property. An absolute conveyance made in a lucid interval is valid.

Party desirous of enforcing a contract, must show it was executed during a lucid interval.

If, however, general lunacy is established, it is necessary for the party wishing to enforce a contract, to show that it was executed in a lucid interval; and if lunacy be objected to the performance of a contract, an issue will be directed to ascertain whether the defendant was a lunatic at the time of the execution of the contract; and if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval.

CHARITIES.

Stat. 43 Elizabeth, c. 4.

By Stat. 43 Elizabeth, c. 4, authority is given to the chancellor or lord keeper, and to the chancellor of the Duchy of Lancaster, respectively, to grant commissions under their several seals, to inquire into any abuses of charitable donations, and rectify the same by their decree, which may be received in the respective courts of the several chancellors, upon exceptions thereto.

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Breaches of trust. Stat. 52 George III. c. 101.

In cases of breach of trust by trustees of a charity, a summary mode of relief is given by means of a petition under 52 George III. c. 101, which petition must have the signature of the attorney-general, or of the solicitor-general, in case there shall be no attorney-general at the time; and Lord Eldon has observed, that such signature was not to be affixed without the same deliberation as in the case of an information.

Under this statute, the lord chancellor, lord keeper, commissioners for the custody of the great seal, the master of the rolls, and the Court of Exchequer, are required to hear petitions in cases of charity trusts, in a summary way, and upon affidavits, or such other evidence as shall be produced upon such hearing, to determine the same, and to make such order therein, with respect to the costs of such applications, as to him or them shall seem just. Jurisdiction over the property of charities is also given to the chancellor, by 1 William IV. c. 60, and 2 William IV. c. 57.

Stat. 1 William IV. c. 60; 2 William IV. c. 57.

HABEAS CORPUS ACT.

By the Habeas Corpus Act, the chancellor is enabled to issue an habeas corpus to bring up persons committed to prison; and, if bailable, is enabled to discharge the party upon giving security to appear and answer to the accusation in the proper court of judicature.

Writs of habeas corpus demandable of right from the chancellor.

But, although the writ of habeas corpus is, unquestionably, demandable of right from the lord chancellor, yet it happens, in fact, that an application to him for that purpose is seldom made, except in cases in his own court, for the ordinary purpose of commitment, or of changing the custody.

FRIENDLY SOCIETY ACT. Stat. 33 George III. c. 54. 1 William IV. c. 60.

A jurisdiction is given by 33 George III. c. 54, and 1 William IV. c. 60, to proceed in a summary way in regard to friendly societies.

The preference given to friendly societies over creditors is confined to debts in respect of money received by officers of these societies, by virtue of their offices, and independent of contract; and therefore if these societies, instead of resting upon the security which the legislature gives them, lend money to one of their officers, or to any other person, upon a special contract between him and them, as, for instance, a promissory note, that is a loan, and is not considered as money in such person's hands within the protection of the act of parliament[23].

[23] Vide etiam 10 George IV. c. 56; 2 & 3 William IV. c. 37; 4 & 5 William IV. c. 40.

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JUSTICES OF THE PEACE.

Justices of the peace, as judges of record, were first created by 18 Edward III. Stat. 2, c. 2; 34 Edward III. c. 1. After their first institution, the choice of them appears to have been in the crown, and assigned by the king's commission, until Stat. 13 Richard II. c. 7, by which the chancellor, treasurer, and clerk of the rolls, and others were appointed "to name and make them." By 18 Henry VI. c. 11, the chancellor alone, "in case there be no man of sufficiency in the county, and where none of twenty pounds per annum are to be found," was enabled to appoint: but if there were men of sufficient estates in the county to be found, Prynne was of opinion that no appointment could be made unless by the persons mentioned in the statute of Richard II.

Since that period, however, justices of the peace have been appointed by the king's special commission under the great seal, and the chancellor may displace them at his discretion, though Prynne seems to have doubted whether some matter of record should not appear to disable one who is a justice of record.

Justices displaced at the discretion of the chancellor.

The power of the Court of Chancery, as to justices of the peace, extends only to the putting them in commission; but after they are once in the commission of the peace, this court has no right to punish them for any mal-behaviour; the only redress is to move the Court of King's Bench for an information, and afterwards the complainants may apply to this court to turn them out of the commission.

Justices can only be punished in the Court of King's Bench.

A jurisdiction is frequently given to the chancellor under public, local, and private acts. In all these cases the chancellor strictly and literally follows the authority given him by such acts,—they live and die with the occasion, and are not of general importance.

PRIVATE ACTS.

The general process of the Court of Chancery for enforcing obedience to its commands is by writs of attachment, rebellion, sequestration, and distringas[24].

[24] Those who are desirous of acquainting themselves, in detail, with the principles of Courts of Equity, will find all the information they can require, without resorting to the books of Reports, in the Treatises of Lord Redesdale, and Mr. Fonblanque, from whence, and from Mr. Maddock's "Practice," considerable assistance has been derived in the above observations.

CHAPTER XII.

Of Criminal Justice.

DE LOLME.

Criminal justice essentially interests the security of individuals.

WE are now to treat of an article, which, though it does not in England, and indeed should not in any state, make part of the powers which are properly constitutional, that is, of the reciprocal rights by means of which the powers that occur to form the government constantly balance each other, yet essentially interests the security of individuals, and, in the issue, the constitution itself; I mean to speak of criminal justice[1]. But, previous to an exposition of the laws of England on this head, it is necessary to desire the reader's attention to certain considerations.

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

For mutual preservation, each individual surrenders a share of his property and liberty.

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

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[1] Vide post Note (1.) to Chap. XXI. B. II.

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

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

The law proscribes the attempt of resistance.

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

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

The absolute will of the prince, spreads universal oppression.

In a state where, from a series of events, the will of the prince has at length attained to hold the place of law, he spreads an universal oppression, arbitrary and unresisted; even complaint is dumb: and the individual, undistinguishable by him, finds a kind of safety in his own insignificance. With respect to the few who surround him, as they are at the same time the

instruments of his greatness, they have nothing to dread but momentary caprices; a danger, against which, if there prevails a certain general mildness of manners, they are in a great measure secured.

That portion of public authority, deposited with the ministers of law, as the instrument of national tranquillity, is a formidable weapon.

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

Let us begin with the most favourable supposition, and imagine a prince whose intentions are in every case thoroughly upright; let us even suppose that he never lends an ear to the suggestions of those whose interest it is to deceive him: nevertheless, he will be subject to error; and this error, which, I will farther allow, solely proceeds from his attachment to the public welfare, yet may happen to prompt him to act as if his views were directly opposite.

When opportunities shall offer (and many such will occur) of procuring a public advantage by overleaping restraints, confident in the uprightness of his intentions, and being naturally not very earnest to discover the distant evil consequences of actions in which, from his very virtue, he feels a kind of complacency, he will not perceive that, in aiming at a momentary advantage, he strikes on the laws themselves on which the safety of the nation rests, and that those acts, so laudable when we only consider the motive of them, make a breach at which tyranny will one day enter.

Yet farther, he will not even understand the complaints that will be made against him. To insist upon them will appear to him to the last degree injurious: pride, when perhaps he is least aware of it, will enter the lists; what he began with calmness, he will prosecute with warmth; and if the laws shall not have taken

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every possible precaution, he may think he is acting a very honest part, while he treats, as enemies of the state, men whose only crime will be that of being more sagacious than himself, or of being in a better situation for judging of the results of measures.

The happiest dispositions are not proof against the allurements of power.

But it were to exalt human nature extravagantly, to think that this case of a prince, who never aims at augmenting his power, may, in any shape, be expected frequently to occur. Experience evinces that the happiest dispositions are not proof against the allurements of power, which has no charms but as it leads on to new advances; authority endures not the very idea of restraint; nor does it cease to struggle till it has beaten down every boundary.

The powers of a people can only be effectual as they are brought into action by private individuals.

Openly to level every barrier, and at once to assume the absolute master, as we said before, would be a fruitless attempt. But it is here to be remembered, that those powers of the people which are reserved as a check upon the sovereign, can only be effectual so far as they are brought into action by private individuals. Sometimes a citizen, by the force and perseverance of his complaints, opens the eyes of the nation; at other times, some member of the legislature proposes a law for the removal of some public abuse: these, therefore, will be the persons against whom the prince will direct all his efforts*.

And he will the more assuredly do so, as, from the error so usual among men in power, he will think that the opposition he meets with, however general, wholly depends on the activity of one or two leaders; and amidst the calculations he will make, both of the supposed smallness of the obstacle which offers to his view, and of the decisive consequence of the single blow he thinks necessary to strike, he will be urged on by the

* By the word *prince*, I mean those who, under whatever appellation, and in whatever government it may be, are at the head of public affairs.

despair of ambition on the point of being baffled, and by the most violent of all hatreds, that which is preceded by contempt.

The sovereign should be careful that he does not attempt to rule by military power.

In that case which I am still considering, of a really free nation, the sovereign must be very careful that military violence do not make the smallest part of his plan: a breach of the social compact like this, added to the horror of the expedient, would infallibly endanger his whole authority. But, on the other hand, if he be resolved to succeed, he will, in defect of other resources, try the utmost extent of the legal powers which the constitution has intrusted with him; and if the laws have not in a manner provided for every possible case, he will avail himself of the imperfect precautions themselves that have been taken, as a cover to his tyrannical proceedings; he will pursue steadily his particular object, while his professions breathe nothing but the general welfare, and destroy the assertors of the laws, under the very shelter of the forms contrived for their security*.

This is not all: independently of the immediate mischief he may do, if the legislature interpose not in time, the blows will reach the constitution itself; and, the consternation becoming general among the people, each individual will find himself enslaved, in a state which yet may exhibit all the common appearances of liberty.

Prerogative of dispensing punishments.

Not only, therefore, the safety of the individual, but that of the nation itself, requires the utmost precautions in the establishment of that necessary but formidable prerogative of dispensing punishments. The

* If any person should charge me with calumniating human nature (for it is her alone I am accusing here), I would desire him to cast his eyes on the history of Louis XI.—of a Richelieu, and, above all, on that of England before the Revolution: he would see the arts and activity of government increase, in proportion as it gradually lost its means of oppression.

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first to be taken, even without which it is impossible to avoid the dangers above suggested, is, that it never be left at the disposal, nor, if it be possible, exposed to the influence, of the man who is the depository of the public power.

The next indispensable precaution is, that this power shall not be vested in the legislative body[2]; and this precaution, so necessary alike under every mode of government, becomes doubly so, when only a small part of the nation has a share in the legislative power.

If the judicial authority were lodged in the legislative, great inconvenience must ensue.

If the judicial authority were lodged in the legislative part of the people, not only the great inconvenience must ensue of its thus becoming independent, but also that worst of evils, the supposition of the sole circumstance that can well identify this part of the nation with the whole, which is, a common subjection to the rules which they themselves prescribe. The legislative body, which could not, without ruin to itself, establish, openly and by direct laws, distinctions in favour of its members, would introduce them by its judgments: and the people, in electing representatives, would give themselves masters.

The judicial power ought to reside in a subordinate and dependant body.

The judicial power ought therefore absolutely to reside in a subordinate and dependant body,—dependant, not in its particular acts, with regard to which it ought to be a sanctuary, but in its rules and its forms, which the legislative authority must prescribe. How is this body to be composed? In this respect farther precautions must be taken.

In a state where the prince is absolute master, numerous bodies of judges are most convenient, inasmuch as they restrain in a considerable degree, that respect of persons which is one inevitable attendant on that mode of government. Besides, those bodies, what-

[2] Vide ante, 345, 347, 348, 391—417, 446—451.

ever their outward privileges may be, being at bottom in a state of great weakness, have no other means of acquiring the respect of the people than their integrity, and their constancy in observing certain rules and forms: nay, these circumstances, united, in some degree overawe the sovereign himself, and discourage the thoughts he might entertain of making them the tools of his caprice*.

In a limited monarchy, the powers of the state should be confined to the end of their institution.

But in a strictly limited monarchy, that is, where the prince is understood to be, and in fact is, subject to the laws, numerous bodies of judicature would be repugnant to the spirit of the constitution, which requires that all powers in the state should be as much confined as the end of their institution can allow; not to add, that in the vicissitudes incident to such a state, they might exert a very dangerous influence.

Besides, that awe which is naturally inspired by such bodies, and is so useful when it is necessary to strengthen the feebleness of the laws, would not only be superfluous in a state where the whole power of the nation is on their side, but would moreover have the mischievous tendency to introduce another sort of fear

* The above observations are in a great measure meant to allude to the French *parlemens*, and particularly that of Paris, which formed such a considerable body as to be once summoned as a fourth order to the general estates of the kingdom. The weight of that body, increased by the circumstance of the members holding their places for life, was in general attended with the advantage of placing them above being overawed by private individuals in the administration either of civil or criminal justice; it even rendered them so difficult to be managed by the court, that the ministers were at times obliged to appoint particular judges, or *commissaries*, to try such men as they resolved to ruin.

These, however, were only local advantages, connected with the nature of the French government, which was an uncontrolled monarchy, with considerable remains of aristocracy. But, in a free state, such a powerful body of men, invested with the power of deciding on the life, honour, and property of the citizens would be productive of very dangerous political consequences; and the more so, if such judges had, as is the case all over the world except here, the power of deciding upon the matter of law and the matter of fact.

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than that which men must be taught to entertain. Those mighty tribunals, I am willing to suppose, would preserve, in all situations of affairs, that integrity which distinguishes them in states of a different constitution; they would never inquire after the influence, still less the political sentiments, of those whose fate they were called to decide: but these advantages not being founded in the necessity of things, and the power of such judges seeming to exempt them from being so very virtuous, men would be in danger of taking up the fatal opinion, that the simple exact observance of the laws is not the only task of prudence: the citizen called upon to defend, in the sphere where fortune has placed him, his own rights, and those of the nation itself, would dread the consequence of even a lawful conduct, and, though encouraged by the law, might desert himself when he came to behold its ministers.

In the assembly of those who sit as his judges, the citizen might possibly descry no enemies: but neither would he see any man whom a similarity of circumstances might engage to take a concern in his fate: and their rank, especially when joined with their numbers, would appear to him to lift them above that which overawes injustice, where the law has been unable to secure any other check,—I mean the reproaches of the public.

The evils of secret tribunals.

And these his fears would be considerably heightened, if, by the admission of the jurisprudence received among certain nations, he beheld those tribunals, already so formidable, wrap themselves up in a mystery, and be made, as it were, inaccessible*.

* An allusion is made here to the secresy with which the proceedings, in the administration of criminal justice, are to be carried on, according to the rules of the civil law, which in that respect are adopted over all Europe. As soon as the prisoner is committed, he is debarred of the sight of every body, till he has gone through his several examinations. One or two judges are appointed to examine him, with a clerk to take his answers in writing:

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He could not think, without dismay, of those vast prisons within which he is one day perhaps to be immured—of those proceedings, unknown to him, through which he is to pass—of that total seclusion from the society of other men—or of those long and secret examinations, in which, abandoned wholly to himself, he will have nothing but a passive defence to oppose to the artfully varied questions of men, whose intentions he shall at least mistrust; and in which his spirits, broken down by solitude, shall receive no support, either from the counsels of his friends, or the looks of those who may offer up vows for his deliverance.

Security of the individual, and consciousness of that security, essential to the enjoyment of liberty.

The security of the individual, and the consciousness of that security, being then equally essential to the enjoyment of liberty, and necessary for the preservation of it, these two points must never be left out of sight,

and he stands alone before them in some private room in the prison. The witnesses are to be examined apart, and he is not admitted to see them till their evidence is closed; they are then *confronted* together before all the judges, to the end that the witnesses may see if the prisoner is really the man they meant in giving their respective evidences, and that the prisoner may object to such of them as he shall think proper. This done, the depositions of those witnesses who are adjudged upon trial to be exceptionable, are set aside: the depositions of the others are to be laid before the judges, as well as the answers of the prisoner, who has been previously called upon to confirm or deny them in their presence; and a copy of the whole is delivered to him, that he may, with the assistance of a counsel, which is now granted him, prepare for his justification. The judges are, as has been said before, to decide both upon the matter of law and the matter of fact, as well as upon all incidents that may arise during the course of the proceedings, such as admitting witnesses to be heard in behalf of the prisoner, &c.

This mode of criminal judicature may be useful as to the bare discovery of truth,—a point which I do not propose to discuss here; but, at the same time, a prisoner is so completely delivered up into the hands of the judges, who even can detain him almost at pleasure by multiplying or delaying his examinations, that, whenever it is adopted, men are almost as much afraid of being accused, as of being guilty, and especially grow very cautious how they interfere in public matters. We shall see presently how the trial by jury, peculiar to the English nation, is admirably adapted to the nature of a free state

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in the establishment of a judicial power; and I conceive that they necessarily lead to the following maxims.

The judicial authority ought not to reside in an independent body.

In the first place, I shall remind the reader of what has been laid down above, that the judicial authority ought never to reside in an independent body; still less in him who is already the trustee of the executive power.

The accused ought to be provided with all possible means of defence.

Secondly, the party accused ought to be provided with all possible means of defence. Above all things the whole proceedings ought to be public. The courts, and their different forms, must be such as to inspire respect, but never terror: and the cases ought to be so accurately ascertained, the limits so clearly marked, that neither the executive power, nor the judges, may ever hope to transgress them with impunity.

All judicial power is a necessary evil.

In fine, since we must absolutely pay a price for the advantage of living in society, not only by relinquishing some share of our natural liberty (a surrender which, in a wisely framed government, a wise man will make without reluctance), but even also by resigning part of our personal security,—in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce as far as possible the dangers of it.

As there is, however, a period at which the prudence of man must stop, at which the safety of the individual must be given up, and the law is to resign him to the judgment of a few persons, that is (to speak plainly), to a decision in some sense arbitrary, it is necessary that the law should narrow as far as possible this sphere of peril, and so order matters, that when the subject shall happen to be summoned to the decision of his fate by the fallible conscience of a few of his fellow-creatures, he may always find in them advocates, and never adversaries.

CHAPTER XIII.

The Subject continued.

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AFTER having offered to the reader, in the preceding chapter, such general considerations as I thought necessary, in order to convey a more just idea of the spirit of the criminal judicature in England, and of the advantages peculiar to it, I now proceed to exhibit the particulars.

Justice of the peace.

When a person is charged with a crime, the magistrate, who is called in England *a justice of the peace*, issues a warrant to apprehend him; but this warrant can be no more than an order for bringing the party before him: he must then hear him, and take down in writing his answers, together with the different informations. If it appears, on this examination, either that the crime laid to the charge of the person who is brought before the justice was not committed, or that there is no just ground to suspect him of it, he must be set absolutely at liberty; if the contrary results from the examination, the party accused must give bail for his appearance to answer to the charge, unless in capital cases; for then he must, for safer custody, be really committed to prison, in order to take his trial at the next sessions.

The grand jury

But this precaution, of requiring the examination of an accused person, previous to his imprisonment, is not the only care which the law has taken in his behalf; it has further ordained, that the accusation against him should be again discussed, before he can be exposed to the danger of a trial. At every session the sheriff appoints what is called the *grand jury*. This assembly must be composed of more than twelve men, and less than twenty-four; and is always formed out of the most

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considerable persons in the county. Its function is to examine the evidence that has been given in support of every charge: if twelve of those persons do not concur in the opinion that an accusation is well grounded, the party is immediately discharged; if, on the contrary, twelve of the grand jury find the proofs sufficient, the prisoner is said to be indicted, and is detained in order to go through the remaining process.

Arraignment of the prisoner.

On the day appointed for his trial, the prisoner is brought to the bar of the court, where the judge, after causing the bill of indictment to be read in his presence, must ask him how he would be tried; to which the prisoner answers, *By God and my country;* by which he is understood to claim to be tried by a jury, and to have all the judicial means of defence to which the law entitles him. The sheriff then appoints what is called the petit jury[1]: this must be composed of twelve men chosen out of the county where the crime was committed, and possessed of a landed income of ten pounds a year; their declaration finally decides on the truth or falsehood of the accusation.

The petit jury.

As the fate of the prisoner thus entirely depends on the men who compose this jury, justice requires that he should have a share in the choice of them; and this he has through the extensive right which the law has granted him, of challenging, or objecting to, such of them as he may think exceptionable.

Challenge to the array.

These challenges are of two kinds. One, which is called the challenge to the *array*, has for its object to have the whole pannel set aside; it is proposed by the prisoner when he thinks that the sheriff who formed the pannel is not indifferent in the cause; for instance, if he thinks he has an interest in the prosecution, that

[1] The principal statute relative to the capacities and incapacities of jurors, is 6 George IV. c. 50.

ne is related to the prosecutor, or in general to the party who pretends to be injured.

Challenge to the polls.

The other challenges are called, to the polls—(*in capita*): they are exceptions proposed against the jurors, severally, and are reduced to four heads by Sir Edward Coke.—That which he calls *propter honoris respectum*, may be proposed against a lord empannelled on a jury; or he might challenge himself. That *propter defectum* takes place when a juror is legally incapable of serving that office, as, if he is an alien; if he has not an estate sufficient to qualify him, &c. That *propter delictum* has for its object to set aside any juror convicted of such crime or misdemeanour as renders him infamous, as felony, perjury, &c. That *propter affectum* is proposed against a juror who has an interest in the conviction of the prisoner: one, for instance, who has an action depending between him and the prisoner; one who is of kin to the prosecutor, or his counsel, attorney, or of the same society or corporation with him, &c.*

Propter honoris respectum.

Propter defectum.

Propter delictum.

Propter affectum.

In fine, in order to relieve even the imagination of the prisoner, the law allows him, independently of the several challenges above-mentioned, to challenge peremptorily, that is to say, without showing any cause, twenty jurors successively†[2].

Peremptory challenge.

When at length the jury is formed, and they have taken their oath, the indictment is opened, and the prosecutor produces the proofs of his accusation. But, unlike to the rules of the civil law, the witnesses

The witnesses deliver their evidence in the presence of the prisoner.

* When a prisoner is an alien, one half of the jurors must also be aliens; a jury thus formed is called a jury *de medietate linguæ*.

† When these several challenges reduce too much the number of the jurors on the pannel, which is forty-eight, new ones are named on a writ of the judge, who are named the *tales*, from those words of the writ, *decem* or *octo tales*.

[2] 6 George IV. c. 50, s. 29.

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deliver their evidence in the presence of the prisoner: the latter may put questions to them; he may also produce witnesses on his behalf, and have them examined upon oath. Lastly, he is allowed to have a counsel to assist him, not only in the discussion of any point of law which may be complicated with the fact, but also in the investigation of the fact itself, and who points out to him the questions he ought to ask, or even asks them for him*[3].

The prisoner can be heard by his counsel.

Such are the precautions which the law has devised for cases of common prosecutions; but in those for high treason, and for misprision of treason, that is to say, for a conspiracy against the life of the king, or against the state, and for a concealment of it†,—accusations which suppose a heat of party and powerful accusers,—the law has provided for the accused party farther safeguards.

High treason.

First, no person can be questioned for any treason, except a direct attempt on the life of the king, after three years elapsed since the offence. 2. The accused party may, independently of his other legal grounds of challenging *peremptorily*, challenge thirty-five jurors. 3. He may have two counsel to assist him through the whole course of the proceedings. 4. That his witnesses may not be kept away, the judges must grant him the same compulsive process to bring them in, which they issue to compel the evidences against him.

* This last article, however, is not established by law, except in cases of treason; it is done only through custom and the indulgence of the judges.

† The penalty of a misprision of treason is the forfeiture of all goods, and imprisonment for life.

[3] Under Stat. 6 & 7 William IV. c. 114, the prisoner can, after the close of the case for the prosecution, make full answer and defence thereto by counsel, or by attorney, in courts where attorneys practise as counsel;—and the accused, either when held to bail, or committed to prison, can demand copies of the depositions that have been exhibited against him.

5. A copy of his indictment must be delivered to him ten days at least before the trial, in presence of two witnesses, and at the expense of five shillings; which copy must contain all the facts laid to his charge, the names, professions, and abodes, of the jurors who are to be on the pannel, and of all the witnesses who are intended to be produced against him*. DE LOLME.

When, either in cases of high treason, or of inferior crimes, the prosecutor and the prisoner have closed their evidence, and the witnesses have answered to the respective questions both of the bench and of jurors, one of the judges makes a speech, in which he sums up the facts which have been advanced on both sides. He points out to the jury what more precisely constitutes the hinge of the question before them; and he gives them his opinion both with regard to the evidences that have been given, and to the point of law which is to guide them in their decision. This done, the jury withdraw into an adjoining room, where they must remain without eating and drinking, and without fire, till they have agreed unanimously among themselves, unless the court give a permission to the contrary. Their declaration or verdict (*veredictum*) must (unless they choose to give a special verdict) pronounce expressly, either that the prisoner is guilty, or that he is not guilty, of the fact laid to his charge. Lastly, the fundamental maxim of this mode of proceeding is, that the jury must be unanimous.

Duties of the judge.

Verdict of the jury.

Unanimity of the jury.

And as the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever from men invested with any permanent official authority†, it is not only a settled principle that the opinion which the judge delivers has no

The accused are guarded against all decisions from men invested with any permanent official authority.

* Stat. 7 William III. c. 3, and 7 Anne, c. 21. The latter was to be in force only after the death of the late Pretender.

† "Laws," as *Junius* says extremely well, "are intended, not to trust to what men will do, but to guard against what they may do."

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The jury must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law.

weight but such as the jury choose to give it; but their verdict must besides comprehend the whole matter in trial, and decide as well upon the fact, as upon the point of law that may arise out of it: in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law*.

This is even so essential a point, that a bill of indictment must expressly be grounded upon those two objects. Thus an indictment for treason must charge, that the alleged facts were committed with a treasonable intent (*proditorie*). An indictment for murder must express that the fact has been committed with *malice prepense*, or afore-thought. An indictment for robbery must charge, that the things were taken with an intention to rob (*animo furandi*), &c.†

Juries are even so uncontrollable in their verdict,—

* Unless they choose to give a *special* verdict.—"When the jury," says Coke, "doubt of the law, and intend to do that which is just, they find the *special* matter; and the entry is, *Et super totâ materiâ petunt discretionem justiciorum.*"—Inst. iv. These words of Coke, we may observe, confirm, beyond a doubt, the power of the jury to determine on the whole matter in trial; a power which in all constitutional views is necessary; and the more so, since the prisoner cannot in England challenge the judge, as he can under the civil law, and for the same causes as he can a witness.

† The principle that a jury is to decide both on the fact and the *criminality* of it, is so well understood, that, if a verdict were so framed as only to have for its object the bare existence of the fact laid to the charge of the prisoner, no punishment could be awarded by the judge in consequence of it. Thus, in the prosecution of Woodfall, for printing Junius's Letter to the King (a supposed libel), the jury brought in the following verdict, *guilty of printing and publishing only;* the consequence of which was the discharge of the prisoner[4].

[4] The 32 George III. c. 60, after reciting that doubts had arisen whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants, on the plea of *not guilty* pleaded, it be competent to the jury empanelled to try the same to give their verdict upon the whole matter in issue, enacted, that on every such trial the jury may give a general verdict upon the whole matter in issue; and should not be required, or directed, by the court or judge, to find the defendant *guilty* merely on the proof of the publication, and of the sense ascribed to the same in the record.

Juries are uncontrollable in their verdicts.

so apprehensive has the constitution been lest precautions to restrain them in the exercise of their functions, however specious in the beginning, might in the issue be converted to the very destruction of the ends of that institution,—that it is a repeated principle that a juror, in delivering his opinion, is to have no other rule than his opinion itself,—that is to say, no other rule than the belief which results to his mind from the facts alleged on both sides, from their probability, from the credibility of the witnesses, and even from all such circumstances as he may have a private knowledge of[5]. Lord Chief Justice Hale expresses himself on this subject in the following terms:—

The general duties of jurors.

"In this recess of the jury, they are to consider the evidence, to weigh the credibility of the witnesses, and the force and efficacy of their testimonies; wherein (as I have before said) they are not precisely bound by the rules of the civil law, viz., to have two witnesses to prove every fact, unless it be in cases of treason, nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does upon other circumstances reasonably encounter them; for the trial is not here simply by witnesses, but *by jury:* nay, it may so fall out, that a jury upon their own knowledge may know a thing to be false, that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him—and may give their verdict accordingly*."

Effect of a verdict of guilty or not guilty.

If the verdict pronounces *not guilty*, the prisoner is set at liberty, and cannot, on any pretence, be tried again for the same offence. If the verdict declares him *guilty*, then, and not till then, the judge enters upon his function as a judge, and pronounces the

* History of the Common Law of England, chap. 12, sect. 11. The same principles and forms are observed in civil matters; only peremptory challenges are not allowed. [Vide 6 George IV. c. 50.]

[5] This is not law. Vide post, 791, *contra*.

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punishment which the law appoints*. But, even in this case, he is not to judge according to his own discretion only; he must strictly adhere to the letter of the law; no constructive extension can be admitted; and, however criminal a fact might in itself be, it would pass unpunished if it were found not to be positively comprehended in some one of the cases provided for by the law. The evil that may arise from the impunity of a crime,—that is, an evil which a new law may instantly stop,—has not by the English laws been considered as of magnitude sufficient to be put in comparison with the danger of breaking through a barrier on which so materially depends the safety of the individual †.

Rejection of the punishment of torture.

To all these precautions taken by the law for the safety of the subject, one circumstance must be added, which indeed would alone justify the partiality of the English lawyers to their laws in preference to the civil law;—I mean the absolute rejection they have made of torture‡[6]. Without repeating here what has been

* When the party accused is one of the lords temporal, he likewise enjoys the universal privilege of being judged by his peers; though the trial then differs in several respects. In the first place, as to the number of the jurors: all the peers are to perform the function of such, and they must be summoned at least twenty days beforehand. 2. When the trial takes place during the session, it is said to be in the *high court of parliament;* and the peers officiate at once as jurors and judges: when the parliament is not sitting, the trial is said to be in the court of the *high steward of England;* an office, which is not usually in being, but is revived on those occasions; and the high steward performs the office of judge. 3. In either of these cases, unanimity is not required: and the majority, which must consist of twelve persons at least, is to decide.

† I shall here give an instance of the scruple with which the English judges proceed upon occasions of this kind. Sir *Henry Ferrers* having been arrested by virtue of a warrant, in which he was termed a *knight*, though he was a baronet, Nightingale, his servant, took his part, and killed the officer; but it was decided, that, as the warrant "was an ill warrant, the killing of an officer in executing that warrant could not be murder, because no good warrant: wherefore he was found not guilty of the murder and manslaughter."—See Croke's Rep. P. III. p. 371.

‡ Coke says (Inst. III. p. 35.), that when John Holland, duke of Exeter,

[6] Vide ante, 261.

said on the subject by the admirable author of the treatise on *Crimes and Punishments**, I shall only observe, that the torture, in itself so horrible an expedient, would, more especially in a free state, be attended with the most fatal consequences. It was absolutely necessary to preclude, by rejecting it, all attempts to make the pursuit of guilt an instrument of vengeance against the innocent. Even the convicted criminal must be spared, and a practice at all rates exploded, which might so easily be made an instrument of endless vexation and persecution†.

Publicity of the trials of criminals.

For the farther prevention of abuses, it is an invariable usage that the trial be public. The prisoner neither makes his appearance, nor pleads, but in places where every body may have free entrance; and the witnesses when they give their evidence, the judge when he delivers his opinion, the jury when they give their verdict, are all under the public eye. Lastly, the judge cannot change either the place, or the kind of punishment ordered by the law; and a sheriff who should take away the life of a man in a manner different from that which the law prescribes, would be prosecuted as guilty of murder‡.

Inflexibility of the law.

and William de la Pole, duke of Suffolk, renewed under Henry VI. the attempts made to introduce the civil law, they exhibited the torture as a *beginning thereof.* The instrument was called the duke of Exeter's daughter.

* Beccaria.

† Judge Foster relates, from Whitlocke, that the bishop of London having said to Felton, who had assassinated the duke of Buckingham, "If you will not confess, you *must go to the rack;*" the man replied, "If it must be so, I know not whom I may accuse in the extremity of the torture; Bishop Laud, perhaps, or any lord at this board."

"Sound sense (adds Foster) in the mouth of an enthusiast and a ruffian."

Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used.

‡ And if any other person but the sheriff, even the judge himself, were to cause death to be inflicted upon a man, though convicted, it would be deemed homicide. See Blackstone, book iv. chap. 14.

De Lolme.

In a word, the constitution of England, being a free constitution, demanded from that circumstance alone (as I should already have but too often repeated, if so fundamental a truth could be too often urged) extraordinary precautions to guard against the dangers which unavoidably attend the power of inflicting punishments; and it is particularly when considered in this light, that the trial by jury proves an admirable institution.

By means of it, the judicial authority is not only placed out of the hands of the man who is invested with the executive authority—it is even out of the hands of the judge himself. Not only the person who is trusted with the public power cannot exert it, till he has, as it were, received the permission to that purpose, of those who are set apart to administer the laws; but these latter are also restrained in a manner exactly alike, and cannot make the law speak, but when, in their turn, they have likewise received permission.

The executive powers restrained by the trial by jury.

And those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted,—those men without whose declaration the executive and the judicial powers are both thus bound down to inaction, do not form among themselves a permanent body, who may have had time to study how their power can serve to promote their private views or interest: they are men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again.

The advantages that are derived from the extensive right of challenging.

As the extensive right of challenging effectually baffles, on one hand, the secret practices of such as, in the face of so many discouragements, might still endeavour to make the judicial power subservient to their own views, and on the other excludes all personal

resentments, the sole affection which remains to influence the integrity of those who alone are entitled to put the public power into action, during the short period of their authority, is, that their own fate, as subjects, is essentially connected with that of the man whose doom they are going to decide.

In fine, such is the happy nature of this institution, that the judicial power, a power so formidable in itself, which is to dispose, without finding any resistance, of the property, honour, and life of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain arbitrary, may be said, in England, to exist,—to accomplish every intended purpose,—and to be in the hands of nobody*.

In all these observations on the advantages of the English criminal law, I have only considered it as connected with the constitution, which is a free one; and it is in this view alone, that I have compared it with the jurisprudence received in other states. Yet, abstractedly from the weighty constitutional considerations which I have suggested, I think there are still other interesting grounds of pre-eminence on the side of the laws of England.

Access not refused to a prisoner.

The grand jury.

In the first place, they do not permit that a man should be made to run the risk of a trial, but upon the declaration of twelve persons at least (*the grand jury*). Whether he be in prison, or on his trial, they never for an instant refuse free access to those who have either advice or comfort to give him; they even allow him to summon all who may have anything to say in his favour. And lastly, what is of very great importance, the witnesses against him must deliver their

* The consequence of this institution is, that no man in England ever meets the man of whom he may say, "That man has a power to decide on my death or life." If we could for a moment forget the advantages of that institution, we ought at least to admire the ingenuity of it.

De Lolme.

The witnesses must deliver their evidence in the presence of the prisoner.

testimony in his presence; he may cross-examine them, and, by one unexpected question, confound a whole system of calumny; indulgences these, all denied by the laws of other countries.

The petty jury.

Hence, though an accused person may be exposed to have his fate decided by persons (*the petty jury*), who possess not, perhaps, all that sagacity which, in some delicate cases it is particularly advantageous to meet with in a judge, yet this inconvenience is amply compensated by the extensive means of defence with which the law, as we have seen, has provided him. If a juryman does not possess that expertness which is the result of long practice, yet neither does he bring to judgment that hardness of heart which is, more or less, also the consequence of it: and bearing about him the principles (let me say, the unimpaired instinct) of humanity, he trembles while he exercises the awful office to which he finds himself called, and in doubtful cases always decides for mercy.

Special verdict.

It is to be farther observed, that, in the usual course of things, juries pay great regard to the opinions delivered by the judges; that, in those cases where they are clear as to the fact, yet find themselves perplexed with regard to the degree of guilt connected with it, they leave it, as has been said before, to be ascertained by the discretion of the judge, by returning what is called a *special verdict;* that, whenever circumstances seem to alleviate the guilt of a person, against whom nevertheless the proof has been positive, they temper their verdict by recommending him to the mercy of the king (which seldom fails to produce at least a mitigation of the punishment): that, though a man once acquitted can never, under any pretence whatsoever, be again brought into peril for the same offence, yet a new trial would be granted if he had been found guilty upon evidence strongly suspected of being false.

A man, when once acquitted, can never be tried again for the same offence.

DE LOLME.

Lastly, what distinguishes the laws of England from those of other countries in a very honourable manner, is, that as the torture is unknown to them, so neither do they know any more grievous punishment than the simple deprivation of life.

Criminals not punished with undue severity.

All these circumstances have combined to introduce such a mildness into the exercise of criminal justice, that the trial by jury is that point of their liberty to which the people of England are most thoroughly and universally wedded; and the only complaint I have ever heard uttered against it, has been by men who, more sensible of the necessity of public order than alive to the feelings of humanity, think that too many offenders escape with impunity.

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TRIAL BY JURY.

(1.) Without certain modes of investigating truth, in cases where its light is ever liable to be obscured by fraudulent practices exercised for the evasion of justice, the wisest laws are but vain and ineffectual: they may embellish the statute book, as beautiful in theory, but in other respects they are a dead letter; frequently even worse; for where offenders cannot be detected and punished, the laws may do mischief in holding out a show of protection, which, being but delusive, tends to induce a false and dangerous sense of security; what is still worse, whilst the criminal escapes, they may stamp the innocent with infamy, and crush them with judgments designed only for the guilty: and under an arbitrary constitution, may be converted into a dangerous instrument in the hands of power for the destruction of those, whose possessions are tempting, or principles obnoxious.

The wisest laws are vain and ineffectual without certain modes of investigating truth.

The English Constitution has defined, distinguished, and applied legal consequences to ascertained facts; but whether a fact be probable or improbable, true or false, admits of no legal definition. The principles on which the investigation and ascertainment of truth depend, are fixed and invariable, however the particular process prescribed by the different systems of law for the purpose of investigation may vary.

The English law has defined, distinguished, and applied legal consequences to ascertained facts.

As the power of discriminating between truth and falsehood depends rather upon the exercise of an experienced

The power of discriminating between truth

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and falsehood depends upon an intelligent mind.

and intelligent mind, than upon the application of artificial and technical rules: the law of England has delegated this important office to a jury of the country.

Origin of trial by jury.

The origin of the English jury is derived from the "patria," or body of suitors who decided causes in the Saxon county courts; and as illustrative of that position, the celebrated trial in the county court, before Odo, Bishop of Baieux, during the reign of William I., may be cited, where the verdict by the "patria" was required to be confirmed by the oaths of twelve selected for the purpose from the body of suitors.

An appeal from the "Patria" to a select number, was a practice of great antiquity.

An appeal from the "patria" to a select number, was a practice of great antiquity; thus, in the "Monumenta Danica" it is stated, "Erat universa ditio in certas parœcias sive curias divisa: hæ statis temporibus locisque per se quæque seorsim suis cum armis, patente sub Dio in campis conveniebant, aderantque ejusdem loci viri nobiles qui velut testes judicio assiderent. Ibi in medium prodibant qui contra alios litem se habere existimabant, auditisque et cognitis partis utriusque actionibus defensionibusque, conventus universus in concilium, ibat, idque temporis spatium quod interim deliberando terebatur, curam vocabant. Expensis diligenter et velitatis in partem utramque controversiis, in consessum redibant, vocatisque litigatoribus, de jure pronunciabant. Si quis stare judicio non vellet, ad duodecim constitutos sive judices *sive arbitros* et ab his ad universæ ditionis conventum provocare ei licebat."

Duties of juries temp. Henry III.

In the reign of Henry III. juries exercised a mixed duty, partly as witnesses, partly as judges of the effect of testimony; in the case of a disputed deed, the witnesses were enrolled amongst the jury, and the trial was *per patriam et per testes;* and to so great an extent was their character then of a testimonial nature, that it was doubted whether they were capable of deciding in the case of a crime secretly committed, and when the "patria" could have no actual knowledge of the fact.

It was, however, during the reign of Henry III. that important changes in the functions of the jury commenced, that the capacity of juries to exercise a far wider and more important function, in judging of the weight of testimony and circumstantial evidence, began to be appreciated, for about this time the trial by ordeal fell into disuse; and when this superstitious invention, the ancient refuge of ignorance, had

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been rejected as repugnant from the more enlightened notions of the age, it happily became a matter of necessity to substitute a rational mode of inquiry by the aid of reason and experience for such inefficacious and unrighteous practices.

Absolute certainty is not essential to satisfy the mind of the jury.

Evidence which satisfies the mind of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact; absolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact.

Distinctions between full proof, and mere preponderance of evidence.

The distinction between full proof and mere preponderance of evidence, is in its application very important. In all criminal cases whatsoever, it is essential to a verdict of condemnation that the guilt of the accused should be fully proved; neither a mere preponderance of evidence, nor any weight of preponderant evidence, is sufficient for the purpose, unless it generate full belief of the fact, to the exclusion of all reasonable doubt.

But in many cases of a civil nature, where the right is dubious, and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side may be sufficient to turn the scale. This happens, as it seems, in all cases where no presumption of law, or *primâ facie* right, operates in favour of either party; as, for example, where the question between the owners of contiguous estates is, whether a particular tree near the boundary grows on the land of one or the other. But even where the contest is as to civil rights only, a mere preponderance of evidence, such as would induce a jury to incline to the one side rather than the other, is frequently insufficient. It would be so in all cases where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law.

Direct and indirect evidence.

Except where a jury determine by the actual evidence of their senses, all evidence is either, first, direct, that is, where witnesses state or depose to facts of which they have had

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actual knowledge: or, secondly, it is indirect; and indirect evidence is either artificial or natural.

Artificial evidence.

Artificial, where the law, by arbitrary appointment, annexes to particular evidence a force or efficacy beyond that which naturally belongs to it; as in the case of records, which for the sake of public convenience are usually made final and conclusive evidence of the facts recorded. So in all instances of legal presumptions, whether they be absolute or conclusive, like the *præsumptiones juris et de jure* of the Roman law; or, as the *præsumptiones juris*, be operative only until they be rebutted by proof to the contrary:—or such artificial evidence may be of a conventional nature, as where parties by deed or other written agreement, constitute the particular instrument to be the appropriate expositor of their intentions, and the legal memorial of the facts which it contains. In these, and some other instances, the law prescribes the extent to which the evidence shall operate: and in these and all other cases, where a rule of law intervenes, a jury is bound by that rule of law, even though it be in opposition to their own conclusion as to the truth of the fact drawn from all the circumstances.

Legal presumptions.

Conventional evidence.

Natural evidence.

Secondly, the evidence is purely natural, where the jury decide according to the natural weight and effect of circumstances, either by the aid of experience, where former experience supplies such natural presumptions, or by the aid of reason exercised upon the circumstances, or by the joint and united aid of experience and reason.

Allegations upon the record.

The allegations upon the record are nothing more than an amplified specification of facts and circumstances which, in point of law, are essential to support the charge or claim.

The court can only adjudge upon such facts as have been found by a jury.

In order to substantiate every charge or claim as alleged on the record, it is essential that the jury should find some predicament or state of facts falling within the description contained in each essential allegation, and that the court should adjudge such special modes or facts to be sufficient in law to sustain those allegations. This must be done in one or other of two ways: either the court must inform the jury hypothetically, that the facts which the evidence tends to prove will, if proved, satisfy the allegations, being but particular modes which fall within the essentials enumerated in the general definition, or the jury must find those predicaments or modes, specially, and then the court can afterwards

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apply the law, and pronounce whether the facts proved, be or be not such, as to satisfy the general and defined essentials to the charge or claim.

General restrictions on juries.

Juries are bound by the rules and presumptions of law, as far as they apply: they are to confine themselves strictly to the matters put in issue by the pleadings; they are bound by the admissions of the parties upon record; and although they are not bound by estoppels, as the parties might have been, had the matter of estoppel been pleaded, yet they are usually bound by legal estoppels which could not have been pleaded, and also by all such matters in the nature of estoppels as in point of law conclude the parties. They are bound to give the proper legal effect to all instruments established by competent evidence, and to notice all matters which are noticed by the court, they are to be governed by the order of proof which the law prescribes, and their verdict must be founded on the evidence adduced in the cause.

A juror cannot give a verdict on his own private knowledge.

A juror cannot give a verdict founded on his own private knowledge[1], for it could not be known whether the verdict was according to or against the evidence: it is very possible that the private grounds of belief might not amount to legal evidence.

And if such evidence were to be privately given by one juror to the rest, it would want the sanction of an oath, and the juror would not be subject to cross-examination. If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts, it will be a ground of motion for a new trial.

Evidence admitted for one purpose, may be no evidence for another purpose.

It sometimes happens that evidence which is admitted for one purpose may be no evidence for another purpose, and in such cases a jury is bound to apply the evidence so far only as it is legally applicable. Thus, if A. and B. be tried at the same time, a confession made by the one, but which criminates the other, ought not to operate with the jury against the latter.

The jury must find facts, and not mere evidence.

In order to enable the court to apply the law to the facts, the jury must find, not merely evidence or circumstances which *tend* to prove or disprove facts falling within the particulars which are essential to support the charge or claim, but must

[1] Comm. 375; And. 321, cited 1 Starkie, 477.

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either find particular modes included within the description, or such facts as negative one or more of the circumstances essential to the charge or claim. Thus, if, in the case of larceny, the jury were to find specially, that the prisoner *took* the goods described in the house of A. B. with the intention of stealing them, *removed* them for the space of one hundred yards; and that A. B., the alleged owner, had a special property in them as a bailee to carry the goods; then, as the finding would embrace facts which were special modes, falling within each of the descriptive allegations essential to the offence, the court would be enabled afterwards to apply the law by pronouncing the prisoner to be guilty. So if, on the other hand, the jury were in such case to find, *inter alia*, that a bale of goods was taken by the prisoner and removed, but that it still remained connected with the shop from which it was taken by a rope or chain, such a finding would negative every mode or species of asportation, and the court would pronounce accordingly[2].

The court cannot pronounce judgment on a verdict of mere evidence.

But if the jury were in such case to find *mere evidence*[3], however cogent in its nature, of any of the essential facts, the court could not draw the conclusion. Thus if they were to find, that immediately after the goods were missed the prisoner was seized with the goods in his possession, and that he confessed that he was guilty, this might be abundant evidence to prove his guilt, but would be *mere* evidence[4], and the court could pronounce no judgment;—and where a general verdict is given, the same process occurs at the trial; the jury decide what facts are proved, and receiving and applying the law, expounded by the court, as the court would have applied it had the jury found the facts simply, pronounce a general verdict involving both law and fact.

Questions of fact and conclusions of law.

The distinction between questions of fact and conclusions of law is, that a question or inference of fact is one which the jury can find upon the evidence by virtue of their own knowledge and experience, without any legal aid derived from the court; and an inference or conclusion of law, is one which the court can draw from the mere circumstances of the case as ascertained by a jury, independently of any general inference or conclusion drawn by the jury.

[2] R. v. *Phillips*, East's P. C. 662.
[3] *Hubbard* v. *Johnston*, 3 Taunt. 309. *Thompson* v. *Giles*, 2 B. & C. 422.
[4] *Harwood* v. *Goodright*, Cowp. 87.

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No human sagacity can, in framing laws, provide specifically for the almost infinite variety of cases which occur in practice; and therefore all that can be done in many instances is to define, not by an enumeration of facts, which, in cases depending on a great variety of minute and varying circumstances, would be impracticable, but by means of some general result or inference from them.

The law cannot in general prescribe, what shall be reasonable time.

Thus, the law cannot prescribe in general what shall be a *reasonable time*, by any defined combinations of facts[6]. So much does the question depend upon the situation of the parties and the minute and peculiar circumstances incident to each case. If a man has a right, by contract or otherwise, to cut and take crops from the land of another, the law, it is obvious, can lay down no rule as to the precise time when they shall be cut and removed; all that can be done is to direct or imply that this shall be done in a reasonable and convenient time; and this must obviously depend on the state of the weather, and other circumstances which cannot, from their nature, form the basis of any legal rule or definition[7].

General terms which involve matters of law as well as of fact.

General terms, such as "reasonable time," "probable cause," and others of a similar nature, being technical and legal expressions in the abstract, involve matter of law as well as matter of fact; for in the application of all legal expressions, it is a question of legal judgment and discretion to pronounce whether the facts as found by a jury do or do not satisfy that legal expression or allegation[8]. It is therefore in all cases for the court to pronounce whether the facts show that the time was reasonable, or the cause was probable in point of law; just as it is for the court to decide whether the facts found show an alleged asportation or conversion, or bankruptcy, in point of law[9].

Test of deciding whether a general inference as to reasonable time, be one of law or of fact.

The test of deciding whether such a general inference as to reasonable time, probable cause, &c. be one of law or of fact, is this: if the court, in the particular case, can draw the conclusion, by the application of any legal rules or principles, the

[6] Vide dict. Abbott, C. J., *Smith* v. *Doe d. Lord Jersey*, 2 B. & B. 592.

[7] *Eaton* v. *Southby*, Willes, 131. *Bell* v. *Wardell*, Willes, 202. *Hobart* v. *Hammond*, Cro. J. 204.

[8] *Dodsworth* v. *Anderson*, cited 1 Stark. 453. *Hearle q. t.* v. *Boulter*, Say. 11; Bac. Ab. tit. Stat. H.; Stat. 4 & 5 William III. c. 3, s. 10; 2 Stark. tit. "Trespass," 802; Co. Litt. 56, b.; 2 Stark. 541. *Stodden* v. *Harvey*, Cro. J. 204. *Doe* v. *Smith*, 2 T. R. 436; 1 B. & P. 388. *Hurst* v. *Roy. Ex. Ass. Co.* 5 M. & C. 47; 2 Stark. tit. "Sheriff," 745.

[9] Fost. 256.

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conclusion is a legal one[10]: for the rules and principles of law must prevail against the opinion of a jury. But if, on the other hand, the circumstances be so numerous and complicated as to exclude the application of any general principle, or definite rule of law, the further inference is necessarily one of mere fact, to be made by the jury. In other words, the rules of ordinary practice and convenience become the legal measure and standard of right.

Reasonable time, where a question of law.

Thus in the case of a bill of exchange, where the law requires notice of dishonour to be given within a reasonable time; if it appear on the facts proved in evidence, that the case is one falling within a rule by which the law itself prescribes and defines what shall be considered to be reasonable time, the question is a mere question of law, for the law itself from the mere *res gestæ* makes the inference that the time was reasonable time[11]. The duty of the jury in such a case is obviously confined to the finding and ascertaining of the simple facts and *res gestæ;* any inference of theirs upon the subject, that the time was or was not reasonable, would be either simply nugatory, or both nugatory and illegal.

Reasonable time, &c. where a question of fact.

Where, on the other hand, the law is silent, and does not by the operation of any principle or established rule decide upon the legal quality of the simple facts, or *res gestæ*, it is for the jury to draw the general inference of reasonable or unreasonable, or of probable or improbable, in point of fact[12]. In such cases the legal conclusion follows the inference in fact; in other words, the question as to reasonable time, probable cause, &c. is one of fact, and the time is reasonable or unreasonable, or the cause probable or improbable in point of law, according to the finding of the jury in point of fact.

The inference of fraud is sometimes a question of law, at other times a question of fact.

The inference of fraud is also in some cases a mere question of law arising upon the facts, in others it is a mere matter of fact[13]. Where a trader alienes the whole of his effects, he is guilty of fraud against his creditors, and commits an act of bankruptcy;

[10] Co. Litt. 56, b., 59, b.; 4 Co. 27, b. *Hobart* v. *Hammond*, Cro. J. 204. *Stodden* v. *Harvey*, Cro. Eliz. 583. *Bell* v. *Wardell*, Willes, 202; Ld. Raym. 241. *Wright* v. *Court*, 4 B. & C. 596.

[11] *Williams* v. *Smith*, 2 B. & A. 496. *Wright* v. *Shawcross*, ib. 501. *Tindal* v. *Brown*, 1 T. R. 167. *Smith* v. *Doe d. Lord Jersey*, 2 B. & B. 592.

[12] *Fry* v. *Hill*, 7 Taunt. 397; 2 Stark. 158. *Doe* v. *Sandham*, 1 T. R. 705. *Facey* v. *Hurdam*, 3 B. & C. 213. *Pitt* v. *Adams*, 4 B. & A. 206.

[13] *Foxcroft* v. *Devonshire*, 2 Burr. 931, 937. *Doe* v. *Manning*, 9 East, 59. *Pease* v. *Nayler*, 5 T. R. 80; 2 Stark. tit. "Settlement," 728, "Bills of Exchange," 140. *Grew* v. *Bevan*, 3 Stark. C. 134.

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and the court will infer fraud from the facts, without the aid of a jury[14]. So under the statute of Elizabeth, where a transfer is made of chattels without delivery of the possession[15]. But if a creditor, knowing that his debtor was going to break, were, before any direct act of bankruptcy, to procure payment by *threats*, the law would pronounce that this was not fraudulent[16].

Or the question may be one of fact for the jury. As where it depends not on the mere act done, but upon the particular intention with which it was done[17]. As where a trader conveys part of his property[18], or a debtor assigns his property, to defraud creditors[19]. So it is a question of fact, whether fraud has been practised in procuring a blind man to execute a will[20].

The inference as to malice and intention.

The inference as to *malice* and *intention*, also, may be one either of mere law, as in cases of homicide, where the law frequently infers malicious intention from the facts, independently of any conclusion drawn by the jury[21]; or of mere fact, as in all cases where some malicious intention in particular is essential to the offence[22]; or where the nature of an act depends on the particular intention of the parties[23]. The question whether a party had knowledge of a particular fact, is usually a question of fact, to be left to the jury[24].

The inference of negligence, &c.

The question whether a sheriff, attorney, or agent, has been guilty of negligence, is usually one of fact for the decision of the jury[25].

Reputed ownership.

And in questions of property, reputed ownership is a question of fact rather than of law[26].

[14] *Newton* v. *Chantler*, 7 East, 145. *Linton* v. *Bartlett*, 3 Wils. 47. *Wilson* v. *Day*, 2 Burr. 827. *Estwick* v. *Caillaud*, 5 T. R. 420; 2 Stark. 358.

[15] *Edwards* v. *Harben*, 2 T. R. 587, *Bamford* v. *Baron*, ib. in Not. *Reid* v. *Blades*, 5 Taunt. 212.

[16] Dict. Lord Mansfield, 2 Burr. 938.

[17] 2 Stark. tit. "Intention," 416.

[18] *Newton* v. *Chantler*, 7 East, 145; 2 Stark. 154.

[19] 2 Stark. 358.

[20] *Longchamp* v. *Fish*, 2 N. R. 418.

[21] 2 Stark. tit. "Libel," 452; "Malicious Prosecution," 489; "Malicious Arrest," 497; "Murder," 513.

[22] 2 Stark. tit. "Intention," 417; tit. "Malice," ib. 487; "Malicious Injuries," ib. 500; "Libel," ib. 461.

[23] *Power* v. *Smith*, 5 B. & A. 550; Dict. Gould, J., 1 H. B. 312. *Goodright* v. *Corder*, 6 T. R. 319.

[24] *Harratt* v. *Wise*, 9 B. & C. 712. *Leggatt* v. *Reed*, 1 Carr. C. 16. *Bentley* v. *Griffin*, 5 Taunt. 356. *Doe* v. *Wilson*, 11 East, 56; 2 Stark. 243. R. v. *Phillips*, East's P. C. 662; 2 Stark. tit. "Larceny," 442.

[25] 2 Stark. tit. "Negligence," 526.

[26] *Walker* v. *Burnell*, Doug. 317. *Horn* v. *Baker*, 9 East, 241; 2 Stark. 180, et seq.

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Collateral matters of law, arising in the course of a trial.

It also belongs to the court to decide all collateral matters arising in the course of a trial. Thus, it is for the court in all cases to determine upon the competency of witnesses, and the admissibility of particular evidence with reference to the facts in issue, or to the allegations on the record, even although the admissibility of the evidence should depend upon matter of fact;—and it is a question for the court, whether a declaration made by one *in articulo mortis* be admissible under the circumstances of the case[27]. It is also the province of the court to decide all matters which depend on an inspection of the record[28]. And the court will, *ex officio*, exclude illegal evidence, without regard to the compact of counsel[29].

Construction of written documents is a matter of pure law; except where the meaning is to be judged of by the aid of extrinsic circumstances.

The construction of a written document is matter of pure law, as it seems, in all cases where the meaning and intention of the framers is by law to be collected from the document itself,—as in the instances of judicial records, deeds, &c.; but where the meaning is to be judged of by the aid of extrinsic circumstances, the construction is usually a question of fact for the jury. Thus, in the case of libel, the meaning of the writer, and the truth of the inuendos, are questions of fact. So in a prosecution for sending a threatening letter, the question whether it contains a threat, if doubtful, is to be decided by the jury[30]. The construction of all deeds and other express contracts, is matter of law for the decision of the court[31].

And where the agreement is not contained in any formal instrument, but is collected from letters which have passed between the parties, their construction, where their terms are plain and unambiguous, is also for the consideration of the court; but where they are written in so dubious and uncertain a manner as to be capable of different constructions, and can be explained by other circumstances, it is for the jury to decide on the whole of the evidence[32]. And it seems that, in general, where the evidence of a contract is matter of inference from circumstances, it is a matter of fact for the jury[33].

Province of the jury to draw the proper conclusion in fact, from mere circumstantial evidence of the fact.

It is the peculiar province of the jury to draw the proper conclusion in fact, from mere circumstantial evidence of the fact, and to deduce the proper inference in all cases of indirect evidence, except in those instances where the law makes

[27] R. v. *Hucks*, 1 Stark. C. 522. [28] Ibid.
[29] *Shaw* v. *Roberts*, 2 Stark. C. 455. *Hodgson* v. *Glover*, 6 East, 321.
[30] *Girdwood's* case, Leach, C. C. L. 169.
[31] Per Lord Mansfield, *Macbeath* v. *Hallimand*, 1 T. R. 180.
[32] *Stammers* v. *Dixon*, 7 East, 200. [33] 1 Starkie, 463.

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particular facts the foundation of a legal presumption; and even in such instances, where the legal presumption is not conclusive, it is still for the jury to decide on the evidence, whether the legal *primâ facie* presumption or intendment is repelled by contrary evidence.

Demurrer to evidence.

A party who admits the facts which the adverse evidence tends to prove, but desires to withdraw the application of the law to those facts from the jury, and to submit them for that purpose to the court above, is at liberty to do so by his demurrer to the evidence[34]. But his demurrer cannot be allowed, unless he admit the truth of the facts which the evidence of his adversary, though it be but presumptive or circumstantial, tends to prove[35]. For though he has a right to submit the legal effect of the facts to the judgment of the court, yet, as the jury are the proper judges of matters of fact, the evidence must either be submitted to the jury, or the facts themselves must be admitted[36].

And if in the case of an information, or any other suit, evidence be given for the king, the king's counsel cannot be compelled to join in a demurrer to the evidence, but in such a case, the court will direct the jury to find the special matter[37].

Moving the court for a new trial.

Tendering bills of exceptions, demurring to the evidence, or proceeding against the jury by writ of attaint, has in a great measure been superseded by the more modern[38] practice of moving the court for a new trial; in the granting or refusing of which, the courts exercise a discretionary power according to the exigency of the case, upon principles of substantial justice or equity[39].

Grounds upon which new trials are granted.

The two principal grounds upon which new trials are granted, are,—first, some misdirection or misruling on the part of the judge; or, secondly, error or misconduct[40] on the part of the jury[41].

[34] 1 Starkie, 467.

[35] *Gibson* v. *Hunter*, 2 H. B. 187. *Wright* v. *Pindar*, Alleyn, 18. *Cocksedge* v. *Fanshaw*, Doug. 119.

[36] Ib. and *Baker's* case, 5 Co. 104. B. N. P. 314. *Vere* v. *Lewis*, 3 T. R. 182. *Cort* v. *Birkbeck*, Doug. 218.

[37] *Baker's* case, 5 Co. 104. B. N. P. 313.

[38] *Bright* v. *Eynon*, 1 Burr. 390. *Stevens* v. *Aldridge*, 5 Price, 392.

[39] Ibid.

[40] R. v. *Burdett*, 4 B. & A. 167. *Goslin* v. *Wilcock*, 2 Wils. 302. *Smith* v. *Page*, 2 Salk. 644.

[41] *Jackson* v. *Duchaire*, 3 T. R. 553. R. v. *Burdett*, 1 Ld. Raym. 148. *Lady Joy's* case, cited ib.; Bro. Verd. pl. 19.

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Mistake or misdirection of the judge.

First, a new trial will be granted where the judge has misdirected the jury upon a matter of law; as where he states to the jury that the evidence does not prove an alleged custom, where the testimony of the witnesses, if believed, does prove the custom[42]. So if the judge reject evidence which ought to have been admitted, or admit that which ought to have been rejected[43].

Reception of improper evidence.

But the court will not grant a new trial on the ground of the reception of improper evidence, where there is sufficient evidence without it to warrant the verdict[44]. Neither will a new trial be granted on the ground of the rejection of a witness as incompetent, who was really competent, where the fact which he was called to prove, was established by another witness, and was not disputed, and the verdict was founded on a collateral point, on which the defence was rested[45]; or upon an objection that was not taken at the time.

Rejection of a competent witness.

Mistake or misunderstanding of the jury.

The courts do not interfere for the purpose of granting new trials, but in order to remedy some manifest abuse, or to correct some manifest error in law or fact. Where there is a contrariety of evidence, the court will not grant a new trial, unless it clearly appear that the jury have drawn an erroneous conclusion, even although there are circumstances in the case pregnant with suspicion, and which lead to a contrary conclusion, or although the verdict be contrary to the opinion and direction of the judge who tried the cause[46].

Presumption contrary to evidence.

Neither will the courts grant a new trial where the plaintiff is in conscience entitled to recover, although he has obtained a verdict upon a presumption contrary to evidence[47], or upon a point of law not reserved on the trial[48]. It is also a matter of discretion with the court, in *all* cases, whether they will grant a new trial for excessive damages[49]. Where a plaintiff

Excessive damages.

[42] *How* v. *Strode*, 2 Wils. 269; 2 Salk. 649; 7 Mod. 64. *Jarrett* v. *Leonard*, 2 M. & S. 265.

[43] *Thomkins* v. *Hill*, 7 Mod. 64.

[44] *Nathan* v. *Buckland*, 2 Moore, 153. *Horford* v. *Wilson*, 1 Taunt. 12. R. v. *Ball*, Russ. & Ry. C. C. L. 132. *Tinkler's* case, ib. in not. 1 East, P. C. 354. R. v. *Treble*, Russ. & Ry. C. C. L. 166.

[45] *Edwards* v. *Evans*, 3 East, 451.

[46] *Carstairs* v. *Stein*, 4 M. & S. 192.

[47] *Wilkinson* v. *Payne*, 4 T. R. 468.

[48] *Cox* v. *Kitchen*, 1 B. & P. 338.

[49] *Ducker* v. *Wood*, 1 T. R. 277. *Jones* v. *Sparrow*, 5 T. R. 257. *Goldsmith* v. *Lord Sefton*, 3 Anst. 808. *Hewlett* v. *Crutchley*, 5 Taunt. 277. *Duberly* v. *Gunning*, 4 T., R. 651. *Chambers* v. *Caulfield*, 6 T. R. 244. *Bennett* v. *Allcott*, 2 T. R. 166. *Pleydell* v. *Lord Dorchester*, 7 T. R. 529.

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is entitled to recover for part of his demand, and is also entitled to recover the residue, but in a different form of action, the court will not reduce the damages, a verdict having been obtained for the whole demand[50].

Advantages resulting from the institution of juries.

Mr. Starkie has justly observed[51], that this celebrated institution is not more strongly recommended by its intrinsic excellence as a mode of attaining to the truth, than by considerations of extrinsic policy.

Secret and complicated transactions, such as are usually the subject of legal investigation, are too various in their circumstances to admit of decision by any systematic and formal rules; the only sure guide to truth, whether the object be to explore the mysteries of nature, or unravel the hidden transactions of mankind, is reason aided by experience.

The only sure guide to truth is reason, aided by experience.

It is obvious that the experience which would best enable those whose duty it is to decide on matters of fact, arising out of the concerns and dealings of society, to discharge that duty, must be that which results, and which can only result, from an intimate intercourse with society, and an actual knowledge of the habits and dealings of mankind: and that the reasoning faculties best adapted to apply such knowledge and experience to the best advantage in the investigation of a doubtful state of facts, are the natural powers of strong and vigorous minds, unincumbered and unfettered by the technical and artificial rules by which permanent tribunals would be apt to regulate their decisions.

Trial by jury constitutes the strongest security to the liberties of the people.

Nor is the trial by jury less recommended by considerations of extrinsic policy. It constitutes the strongest security to the liberties of the people that human sagacity can devise; for, in effect, it confides the keeping and guardianship of their liberties to those whose interest it is to preserve them inviolable; and any temptation to misapply so great an authority for unworthy purposes, which might sway a permanent tribunal, can have no influence when entrusted to the mass of the people, to be exercised by particular individuals but occasionally.

[50] *Mayfield* v. *Wadsly*, 3 B. & C. 357.
[51] 1 Vol. 6.

Chapter XIV.

The Subject concluded. Laws relative to Imprisonment.

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But what completes that sense of independence which the laws of England procure to every individual (a sense which is the noblest advantage attending liberty), is the greatness of their precautions upon the delicate point of imprisonment.

Enlargement upon bail.

In the first place, by allowing, in most cases, enlargement upon bail, and by prescribing, on that article, express rules for the judges to follow, they have removed all pretexts, which circumstances might afford, for depriving a man of his liberty.

It is against the executive power, that the legislature has directed its efforts.

But it is against the executive power that the legislature has, above all, directed its efforts: nor has it been but by slow degrees that it has been successful in wresting from it a branch of power which enabled it to deprive the people of their leaders, as well as to intimidate those who might be tempted to assume the function; and which, having thus all the efficacy of more odious means without the dangers of them, was perhaps the most formidable weapon with which it might attack public liberty.

Writs of mainprize, de odio et atia, and de homine replegiando.

The methods originally pointed out by the laws of England for the enlargement of a person unjustly imprisoned, were the writs of *mainprize, de odio et atia,* and *de homine replegiando.* Those writs, which could not be denied, were an order to the sheriff of the county in which a person was confined, to inquire into the causes of his confinement; and, according to the circumstances of his case, either to discharge him completely, or upon bail.

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The writ of habeas corpus.

But the most useful method, and which even, by being most general and certain, has tacitly abolished all the others, is the writ of *habeas corpus*, so called, because it begins with the words *habeas corpus ad subjiciendum*[1]. This writ being a writ of high prerogative, must issue from the Court of King's Bench: its effects extend equally to every county; and the king by it requires, or is understood to require, the person who holds one of his subjects in custody, to carry him before the judge, with the date of the confinement, and the cause of it, in order to discharge him, or continue to detain him, according as the judge shall decree.

Its early history.

But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a feeble one, or rather was no resource at all against the prerogative of the prince, especially under the sway of the Tudors, and in the beginning of that of the Stuarts. And even in the first years of Charles I., the judges of the King's Bench, who, in consequence of the spirit of the times, and of their holding their places *durante bene placito*, were constantly devoted to the court, declared, "that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council."

The Petition of Right.

Those principles, and the mode of procedure which resulted from them, drew the attention of parliament; and in the bill called the Petition of Right[2], passed in the third year of the reign of Charles I., it was enacted, that no person should be kept in custody, in consequence of such imprisonments.

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[1] Vide ante, 454, 455.

[2] Ibid, 377.

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But the judges knew how to evade the intention of this act: they indeed did not refuse to discharge a man imprisoned without a cause; but they used so much delay in the examination of the causes, that they obtained the full effect of an open denial of justice.

Stat. 16 Charles I. c. 10.

The legislature again interposed, and in the act passed in the sixteenth year of the reign of Charles I., the same in which the Star-chamber was suppressed[3], it was enacted, that "if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without delay upon any pretence whatsoever, a writ of *habeas corpus;* and that the judge shall thereupon, within three court-days after the return is made, examine and determine the legality of such imprisonment."

Evasion of the statute by the connivance of the judges.

This act seemed to preclude every possibility of future evasion: yet it was evaded still; and, by the connivance of the judges, the person who detained the prisoner could, without danger, wait for a second, and a third writ, called an *alias* and a *pluries*, before he produced him.

Stat. 31 Charles II. c. 2.

All these different artifices gave at length birth to the famous act of *Habeas Corpus* (passed in the thirty-first year of the reign of Charles II.), which is considered in England as a second Great Charter, and has extinguished all the sources of oppression*[4].

The principal articles of this act are,—

Bringing up the prisoner.

1. To fix the different terms allowed for bringing a prisoner: those terms are proportioned to the distance; and none can in any case exceed twenty days.

The officer neglecting to make a due return.

2. That the officer and keeper neglecting to make

* The real title of this is, "An Act for better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas."

[3] Vide ante, 393, 394.

[4] Ibid. 454, 455.

due returns, or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in the act) shall for the first offence forfeit one hundred pounds, and for the second two hundred, to the party aggrieved, and be disabled to hold his office.

A person, once delivered by habeas corpus, cannot be recommitted.

3. No person, once delivered by *habeas corpus*, shall be committed for the same offence, on penalty of five hundred pounds.

Traitors and felons can demand a trial.

4. Every person committed for treason or felony, shall, if he require it, in the first week of the next term, or the first day of the next session, be indicted in that term or session, or else admitted to bail, unless it should be proved upon oath, that the king's witnesses cannot be produced at that time: and if not indicted and tried in the second term or session, he shall be discharged of his imprisonment for such imputed offence.

Denial of the writ.

5. Any of the twelve judges[5], or the lord chancellor, who shall deny a writ of *habeas corpus*, on sight of the warrant, or on oath that the same is refused, shall forfeit severally to the party aggrieved five hundred pounds.

Transportation from England.

6. No inhabitant of England (except persons contracting, or convicts praying to be transported) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any place beyond the seas, within or without the king's dominions,—on pain, that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than five hundred pounds, to be recovered with treble costs, shall be disabled to bear any office of trust or profit—shall incur

[5] Vide ante, Note (1.) 595.

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the penalties of a *præmunire**, and be incapable of the king's pardon.

* The statutes of *præmunire*, thus called from the writ for their execution, which begins with the words *præmunire* (for *præmoneri*) *facias*, were originally designed to oppose the usurpations of the popes. The first was passed under the reign of Edward I., and was followed by several others, which, even before the Reformation, established such effectual provisions as to draw upon one of them the epithet of *execrabile statutum*. The offences against which those statutes were framed were likewise distinguished by the appellation of *præmunire;* and under that word were included all attempts to increase the power of the pope at the expense of the royal authority. The punishment decreed for such cases, was also called a *præmunire;* it has since been extended to several other kinds of offence, and amounts to imprisonment at the king's pleasure, or for life, and forfeiture of all goods and rents of lands[6].

[6] This kind of prosecution is now obsolete.

BOOK II.

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

CHAPTER I.

Some Advantages peculiar to the English Constitution. 1. *The Unity of the Executive Power.*

DE LOLME.

WE have seen in former chapters the resources allotted to the different parts of the English government for balancing each other, and how their reciprocal actions and re-actions produce the freedom of the constitution, which is no more than an equilibrium between the ruling powers of the state. I now propose to show that the particular nature and functions of these same constituent parts of the government, which give it so different an appearance from that of other free states, are moreover attended with peculiar and very great advantages, which have not hitherto been sufficiently observed.

The nature and functions of the constituent parts of government.

The first peculiarity of the English government, as a free government, is its having a king,—its having thrown into one place the whole mass, if I may use the expression, of the executive power, and having invariably and for ever fixed it there. By this very circumstance also has the *depositum* of it been rendered sacred and inexpugnable;—by making one great, very great man in the state, has an effectual check been put to the pretensions of those who otherwise would strive to become such; and disorders have been prevented, which, in all republics, ever brought on the ruin of

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liberty, and, before it was lost, obstructed the enjoyment of it.

Limitations on the kingly power rarely prevailed.

If we cast our eyes on all the states that ever were free, we shall see that the people ever turning their jealousy, as it was natural, against the executive power, but never thinking of the means of limiting it, so happily prevalent in England*, never employed any other expedients besides the obvious one of trusting that power to magistrates whom they appointed annually; which was, in great measure, the same as keeping the management of it to themselves: whence it resulted, that the people, who, whatever may be the frame of the government, always possess, after all, the reality of power, thus uniting in themselves with this reality of power the actual exercise of it, in form as well as in fact, constituted the whole state. In order, therefore, legally to disturb the whole state, nothing more was requisite than to put in motion a certain number of individuals.

The people possess the reality of power.

In a state which is small and poor, an arrangement of this kind is not attended with any great inconveniences, as every individual is taken up with the care of providing for his subsistence, as great objects of ambition are wanting, and as evils cannot, in such a state, ever become much complicated. In a state that strives for aggrandisement, the difficulties and danger attending the pursuit of such a plan inspire a general spirit of caution, and every individual makes a sober use of his rights as a citizen.

Every individual aims at the exercise of a share of power.

But when, at length, those exterior motives cease, and the passions, and even the virtues, which they excited, are thus reduced to a state of inaction, the people turn their eyes back towards the interior of the republic; and every individual, in seeking then to con-

* The rendering that power dependant on the people for its supplies.—See on this subject Chap. VI. Book I.

cern himself in all affairs, seeks for new objects that may restore him to that state of exertion which habit, he finds, has rendered necessary to him, and aims at the exercise of a share of power which, small as it is, yet flatters his vanity.

As the preceding events must have given an influence to a certain number of citizens, they avail themselves of the general disposition of the people, to promote their private views: the legislative power is thenceforth continually in motion; and, as it is badly informed and falsely directed, almost every exertion of it is attended with some injury to the laws, or the state.

General assemblies gratify their political caprices.

This is not all; as those who compose the general assemblies cannot, in consequence of their numbers, entertain any hopes of gratifying their private ambition, or, in general, their private passions, they at least seek to gratify their political caprices, and they accumulate the honours and dignities of the state on some favourite whom the public voice happens to raise at that time.

Popular favourites, ultimately become the masters of the people.

But, as in such a state there can be, from the irregularity of the determinations of the people, no such thing as a settled course of measures, it happens that men never can exactly tell the present state of public affairs. The power thus given away has already become very great before those for whom it was given so much as suspect it; and he himself who enjoys that power does not know its full extent: but then, on the first opportunity that offers, he suddenly pierces through the cloud which hid the summit from him, and at once seats himself upon it. The people, on the other hand, no sooner recover sight of him, than they see their favourite now become their master, and discover the evil, only to find that it is past remedy.

As this power, thus surreptitiously acquired, is destitute of the support both of the law and of the

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ancient course of things, and is even but indifferently respected by those who have subjected themselves to it, it cannot be maintained but by abusing it. The people at length succeed in forming somewhere a centre of union; they agree in the choice of a leader: this leader in his turn rises; in his turn also he betrays his engagements; power produces its wonted effects; and the protector becomes a tyrant.

Rival powers cause continual convulsions.

This is not all: the same causes which have given one master to the state, give it two, give it three. All those rival powers endeavour to swallow up each other; the state becomes a scene of endless quarrels and broils, and is in a continual convulsion.

If amidst such disorders the people retained their freedom, the evil must indeed be very great to take away all the advantages of it; but they are slaves, and yet have not what in other countries makes amends for political servitude; I mean tranquillity.

In order to prove all these things, if proofs were deemed necessary, I would only refer the reader to what every one knows of Pisistratus and Megacles, of Marius and Sylla, of Cæsar and Pompey. However, I cannot avoid translating a part of the speech which a citizen of Florence addressed once to the senate: the reader will find in it a kind of abridged story of all republics; at least of those which, by the share allowed to the people in the government, deserved that name, and which, besides, attained a certain degree of extent and power.

In all states certain destructive families arise, who are the bane and ruin of them.

"That nothing human may be perpetual and stable, it is the will of Heaven that, in all states whatsoever, there should arise certain destructive families, who are the bane and ruin of them. Of this our own republic affords as many and more deplorable examples than any other, as it owes its misfortunes, not only to one, but to several such families. We had at first the

Buondelmonti and the *Huberti.* We had afterwards the *Donati* and the *Cerchi:* and at present (shameful and ridiculous conduct!) we are waging war among ourselves for the *Ricci* and the *Albizzi.*

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"When in former times the Ghibelins were suppressed, every one expected that the Guelfs, being then satisfied, would have chosen to live in tranquillity; yet, but a little time had elapsed, when they again divided themselves into the factions of the *whites* and the *blacks.* When the whites were suppressed, new parties arose, and new troubles followed. Sometimes battles were fought in favour of the exiles; and, at other times, quarrels broke out between the nobility and the people. And, as if resolved to give away to others what we ourselves neither could, nor would, peaceably enjoy, we committed the care of our liberty sometimes to King Robert, and at other times to his brother, and at length to the duke of Athens; never settling or resting in any kind of government, as not knowing either how to enjoy liberty or support servitude*."

The English constitution has avoided numerous and general assemblies.

The English constitution has prevented the possibility of misfortunes of this kind. By diminishing the power, or rather *actual exercise* of the power, of the people†, and making them share in the legislature only by their representatives, the irresistible violence has been avoided of those numerous and general assemblies, which, on whatever side they throw their weight, bear down everything. Besides, as the power of the people, when they have any kind of power, and know how to use it, is at all times really formidable, the constitution has set a counterpoise to it; and the royal authority is this counterpoise.

* See the History of Florence, by Machiavel, lib. iii.

† We shall see in the sequel, that this diminution of the *exercise* of the *power* of the people has been attended with a great increase of their *liberty.*

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The executive power vested in the king.

In order to render it equal to such a task, the constitution has, in the first place, conferred on the king, as we have seen before, the exclusive prerogative of calling and dismissing the legislative bodies, and of putting a negative on their resolutions[1].

Secondly, it has also placed on the side of the king the whole executive power in the nation.

Lastly, in order to effect still nearer an equilibrium, the constitution has invested the man whom it has made the sole head of the state, with all the personal privileges, all the pomp, all the majesty, of which human dignities are capable. In the language of the law, the king is sovereign lord, and the people are his subjects;—he is universal proprietor of the kingdom; he bestows all the dignities and places; and he is not to be addressed but with the expressions and outward ceremony of almost eastern humility. Besides, his person is sacred and inviolable; and any attempt whatsoever against it is, in the eye of the law, a crime equal to that of an attack upon the whole state[2].

The royal power insures a salutary steadiness to the vessel of the state.

In a word, since, to have too exactly completed the equilibrium between the power of the people and that of the crown, would have been to sacrifice the end to the means, that is, to have endangered liberty with a view to strengthen the government, the deficiency which ought to remain on the side of the crown, has at least been, in appearance, made up, by conferring on the king all that sort of strength that may result from the opinion and reverence of the people; and, amidst the agitations which are the unavoidable attendants of liberty, the royal power, like an anchor that resists both by its weight and the depth of its hold, ensures a salutary steadiness to the vessel of the state.

The greatness of the prerogative of the king, by

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[1] Vide ante, 535—537.

[2] Ibid, 111, et post, Note (1.), Chap. XXI.

thus procuring a great degree of stability to the state in general, has much lessened the possibility of the evils we have above described; it has even, we may say, totally prevented them, by rendering it impossible for any citizen to rise to any dangerous greatness.

The nobility dwindle almost to nothing in comparison with the splendour of the throne.

And to begin with an advantage by which the people easily suffer themselves to be influenced, I mean that of birth, it is impossible for it to produce in England effects in any degree dangerous; for though there are lords who, besides their wealth, may also boast of an illustrious descent, yet that advantage, being exposed to a continual comparison with the splendour of the throne, dwindles almost to nothing; and, in the gradation universally received of dignities and titles, that of sovereign prince and king places him who is invested with it out of all degree of proportion.

The ceremonial of the court of England is even formed upon that principle. Those persons who are related to the king have the title of princes of the blood, and, in that quality, an undisputed pre-eminence over all other persons*. Nay, the first men in the nation think it an honourable distinction to themselves, to hold the different menial offices, or titles, in his household. If we, therefore, were to set aside the extensive and real power of the king, as well as the numerous means he possesses of gratifying the ambition and hopes of individuals, and were to consider only the majesty of his title, and that kind of strength founded on public opinion which results from it, we should find that advantage so considerable, that to attempt to enter into a competition with it, with the bare advantage of high birth, which itself has no other foundation than public opinion, and that too in a very

The bare advantage of high birth, has no other foundation than public opinion.

* This, by stat. of the 31st of Hen. VIII. extends to the sons, grandsons, brothers, uncles, and nephews, of the reigning king.

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subordinate degree, would be an attempt completely extravagant.

If this difference is so great as to be thoroughly submitted to, even by those persons whose situation might incline them to disown it, much more does it influence the minds of the people. And if, notwithstanding the value which every Englishman ought to set upon himself as a man, and a free man, there were any whose eyes were so very tender as to be dazzled by the appearance and the arms of a lord, they would be totally blinded when they came to turn them towards the royal majesty.

The only door which the constitution leaves open to the ambition of any man, is a place in the administration, during the pleasure of the king.

The only man, therefore, who, to persons unacquainted with the constitution of England, might at first sight appear in a condition to put the government in danger, would be one who, by the greatness of his abilities and public services, might have acquired in a high degree the love of the people, and obtained a great influence in the House of Commons.

But how great soever this enthusiasm of the public may be, barren applause is the only fruit which the man whom they favour can expect from it. He can hope neither for a dictatorship, nor a consulship, nor in general for any power under the shelter of which he may at once safely unmask that ambition with which we might suppose him to be actuated, or, if we suppose him to have been hitherto free from any, grow insensibly corrupt. The only door which the constitution leaves open to his ambition, of whatever kind it may be, is a place in the administration, during the pleasure of the king. If, by the continuance of his services, and the preservation of his influence, he becomes able to aim still higher, the only door which again opens to him is that of the House of Lords.

But this advance of the favourite of the people towards the establishment of his greatness is at the

same time a great step towards the loss of that power which might render him formidable.

The power of a popular leader is destroyed by the privileges of the peerage.

In the first place, the people seeing that he is become much less dependant on their favour, begin, from that very moment, to lessen their attachment to him. Seeing him moreover distinguished by privileges which are the objects of their jealousy, I mean their political jealousy, and member of a body whose interests are frequently opposite to theirs, they immediately conclude that this great and new dignity cannot have been acquired but through a secret agreement to betray them. Their favourite, thus suddenly transformed, is going, they make no doubt, to adopt a conduct entirely opposite to that which has till then been the cause of his advancement and high reputation, and, in the compass of a few hours, completely to renounce those principles which he has so long and so loudly professed. In this, certainly the people are mistaken; but yet neither would they be wrong, if they feared that a zeal hitherto so warm, so constant, I will even add, so sincere, when it concurred with their favourite's private interest, would, by being thenceforth often in opposition to it, become gradually much abated.

Nor is this all: the favourite of the people does not even find in his new dignity all the increase of greatness and *éclat* that might at first be imagined.

Hitherto he was, it is true, only a private individual; but then he was the object in which the whole nation interested themselves; his actions and words were set forth in the public prints; and he everywhere met with applause and acclamation.

All these tokens of public favour are, I know, sometimes acquired very lightly: but they never last long, whatever people may say, unless real services are performed: now, the title of benefactor to the nation,

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The first commoner possesses greater authority as such, than as a peer.

when deserved, and universally bestowed, is certainly a very handsome title, and which does no-wise require the assistance of outward pomp to set it off. Besides, though he was only a member of the inferior body of the legislature, we must observe, he was the first; and the word *first* is always a word of very great moment.

But now that he is made a lord, all his greatness, which hitherto was indeterminate, becomes defined. By granting him privileges established and fixed by known laws, that uncertainty is taken from his lustre which is of so much importance in those things which depend on imagination; and his value is lowered, just because it is ascertained.

Besides, he is a lord; but then there are several men who possess but small abilities, and few estimable qualifications, who also are lords; his lot is, nevertheless, to be seated among them; the law places him exactly on the same level with them; and all that is real in his greatness is thus lost in a crowd of dignities, hereditary and conventional.

Nor are these the only losses which the favourite of the people is to suffer. Independently of those great changes which he descries at a distance, he feels around him alterations no less visible, and still more painful.

Seated formerly in the assembly of the representatives of the people, his talents and continual success had soon raised him above the level of his fellow-members; and, being carried on by the vivacity and warmth of the public favour, those who might have been tempted to set up as his competitors were reduced to silence, or even became his supporters.

Jealousy of the peers, towards a powerful commoner.

Admitted now into an assembly of persons invested with a perpetual and hereditary title, he finds men hitherto his superiors,—men who see with a jealous eye the shining talents of the *homo novus*, and who are

firmly resolved, that after having been the leading man in the House of Commons, he shall not be the first in theirs.

The reward which the constitution prepares for the favourite of the people, is a kind of ostracism.

In a word, the success of the favourite of the people was brilliant, and even formidable; but the constitution, in the very reward it prepares for him, makes him find a kind of ostracism. His advances were sudden, and his course rapid; he was, if you please, like a torrent ready to bear down everything before it; but this torrent is compelled, by the general arrangement of things, finally to throw itself into a vast reservoir, where it mingles and loses its force and direction.

I know it may be said, that, in order to avoid the fatal step which is to deprive him of so many advantages, the favourite of the people ought to refuse the new dignity which is offered to him, and wait for more important successes, from his eloquence in the House of Commons, and his influence over the people.

The laws of England open no door to those accumulations of power, which have destroyed so many republics.

But those who give him this counsel have not sufficiently examined it. Without doubt there are men in England, who, in their present pursuit of a project which they think essential to the public good, would be capable of refusing for a while a dignity which would deprive their virtue of opportunities of exerting itself, or might more or less endanger it: but woe to him who should persist in such a refusal, with any pernicious design! and who, in a government where liberty is established on so solid and extensive a basis, should endeavour to make the people believe that their fate depends on the persevering virtue of a single citizen. His ambitious views being at last discovered (nor could it be long before they were so), his obstinate resolution to move out of the ordinary course of things would indicate aims, on his part, of such an extraordinary nature, that all men whatever,

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who have any regard for their country, would instantly rise up from all parts to oppose him, and he must fall overwhelmed with so much ridicule, that it would be better for him to fall from the Tarpeian rock*.

Stability which the power of the crown gives to the state.

In fine, even though we were to suppose that the new lord might, after his exaltation, have preserved all his interest with the people, or, what would be no less difficult, that any lord whatever could, by dint of his wealth and high birth, rival the splendour of the crown itself, all these advantages, how great soever we may suppose them, as they would not of themselves be able to confer on him the least executive authority, must for ever remain mere showy unsubstantial advantages. Finding all the active powers of the state concentred in that very seat of power which we suppose him inclined to attack, and there secured by formidable provisions, his influence must always evaporate in ineffectual words; and after having advanced himself, as we suppose, to the very foot of the throne, finding no branch of independent power which he might so far appropriate to himself, as at last to give a reality to his political importance, he would soon see it, however great it might have at first appeared, decline and die away†.

* The reader will, perhaps, object, that no man in England can entertain such views as those I have suggested here: this is precisely what I intended to prove. The essential advantage of the English government above all those that have been called *free*, and which in many respects were but apparently so, is, that no person in England can entertain so much as a thought of ever rising to the level of the power charged with the execution of the laws. All men in the state, whatever may be their rank, wealth, or influence, are thoroughly convinced that they must, in reality as well as in name, continue to be *subjects;* and are thus compelled really to love, defend, and promote, those laws which secure liberty to the subject.

† Several events, in the English history, put in a very strong light this idea of the stability which the power of the crown gives to the state.

One is, the facility with which the great duke of Marlborough, and his party at home, were removed from their employments. Hannibal, in circumstances nearly similar, had continued the war against the will of the

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The people of England, not tied down to inaction by the nature of their government.

God forbid, however, that I should mean that the people of England are so fatally tied down to inaction, by the nature of their government, that they cannot, in times of oppression, find means of appointing a leader[3]! No; I only meant to say that the laws of England open no door to those accumulations of power, which have been the ruin of so many republics; that they offer to the ambitious no means of taking advantage of the inadvertence or even the gratitude of the people, to make themselves their tyrants; and that the public power, of which the king has been made the exclusive depository, must remain unshaken in his hands, so long as things continue in the legal order; which, it may be observed, is a strong inducement to him constantly to endeavour to maintain them in it.

senate of Carthage: Cæsar had done the same in Gaul: and when at last he was expressly required to deliver up his commission, he marched his army to Rome, and established a military despotism. But the duke, though surrounded, as well as the above-named generals, by a victorious army, and by allies, in conjunction with whom he had carried on such a successful war, did not even hesitate to surrender his commission. He knew that all his soldiers were inflexibly prepossessed in favour of that power against which he must have revolted: he knew that the same prepossessions were deeply rooted in the minds of the whole nation, and that everything among them concurred to support the same power: he knew that the very nature of the claims he must have set up would instantly have made all his officers and captains turn themselves against him, and, in short, that, in an enterprise of this nature, the arm of the sea he had to repass was the smallest of the obstacles he would have to encounter.

The other event I shall mention here, is that of the Revolution of 1689. If the long-established power of the crown had not beforehand prevented the people from accustoming themselves to fix their eyes on some particular citizens, and in general had not prevented all men in the state from attaining too considerable a degree of power and greatness, the expulsion of James II. might have been followed by events similar to those which took place at Rome after the death of Cæsar.

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[3] Vide ante, 83—102, 104—110, 117—119, 131—137, 178—207, 215—252, 289—311, 321—353, 468—470, 472—478, 486, 575—609.

Chapter II.

The Subject concluded.—The Executive Power is more easily confined when it is ONE.

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Advantages that are derived, from the union of the executive authority.

Another great advantage, and which one would not at first expect, in this *unity* of the public power in England,—in this union, and if I may so express myself, in this coacervation, of all the branches of the executive authority,—is the greater facility it affords of restraining it.

In those states where the execution of the laws is intrusted to several hands, and to each with different titles and prerogatives, such division, and the changeableness of measures which must be the consequence of it, constantly hide the true cause of the evils of the state: in the endless fluctuation of things, no political principles have time to fix among the people: and public misfortunes happen, without ever leaving behind them any useful lesson.

Tyranny under the Romans.

At some times military tribunes, and at others consuls, bear an absolute sway: sometimes patricians usurp everything, and at other times those who are called nobles*: at one time the people are oppressed by decemvirs, and at another by dictators.

Tyranny, in such states, does not always beat down the fences that are set around it; but it leaps over them. When men think it confined to one place,

* The capacity of being admitted to all places of public trust (at length gained by the plebeians) having rendered useless the old distinction between them and the patricians, a coalition was then effected between the great plebeians, or commoners, who got into these places, and the ancient patricians. Hence a new class of men arose, who were called *nobiles* and *nobilitas*. These are the words by which Livy, after that period, constantly distinguishes those men and families who were at the head of the state.

it starts up again in another;—it mocks the efforts of the people, not because it is invincible, but because it is unknown; seized by the arm of a Hercules, it escapes with the changes of a Proteus.

Indivisibility of the public power, has kept the views and efforts of the people directed to one object.

But the indivisibility of the public power in England has constantly kept the views and efforts of the people directed to one and the same object; and the permanence of that power has also given a permanence and a regularity to the precautions they have taken to restrain it.

Constantly turned towards that ancient fortress, the royal power, they have made it for seven centuries the object of their fear; with a watchful jealousy they have considered all its parts; they have observed all its outlets; they have even pierced the earth to explore its secret avenues and subterraneous works.

United in their views by the greatness of the danger, they regularly formed their attacks. They established their works, first at a distance; then brought them successively nearer; and, in short, raised none but what served afterwards as a foundation or defence to others.

Every national calamity has served to procure a new bulwark for public liberty.

After the Great Charter was established, forty successive confirmations strengthened it[1]. The act called the *Petition of Right*[2], and that passed in the sixteenth year of Charles I., then followed; some years after, the *Habeas Corpus* act was established; and the Bill of Rights[3] at length made its appearance. In fine, whatever the circumstances may have been, the people always had, in their efforts, that inestimable advantage of knowing with certainty the general seat of the evils they had to defend themselves against; and each calamity, each particular eruption, by pointing out some weak place, served to procure a new bulwark for public liberty.

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[1] Vide ante, 67—69, 116, 117. [2] Vide ante, 377.
[3] Vide ante, 454, 455; 472, 473.

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The executive power is formidable, but its nature is known.

To conclude in a few words;—the executive power in England is formidable, but then it is for ever the same; its resources are vast, but their nature is at length known; it has been made the indivisible and inalienable attribute of one person alone, but then all other persons, of whatever rank or degree, became really interested to restrain it within its proper bounds*.

Chapter III.

A second Peculiarity. The Division of the Legislative Power.

The second peculiarity which England, as an individual state and a free state, exhibits in its constitution, is the division of its legislature[1]. That the reader may be more sensible of the advantages of this division, he is desired to attend to the following considerations.

For securing the constitution of a state, it is necessary to restrain the executive power.

It is, without doubt, absolutely necessary, for securing the constitution of a state, to restrain the executive power: but it is still more necessary to restrain the legislative. What the former can only do by successive steps (I mean subvert the laws), and through a longer or shorter train of enterprises, the latter can do in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and, if I may be permitted the expression, the legislative power can change the constitution, as God created the light.

* This last advantage of the greatness and indivisibility of the executive power, viz., the obligation it lays upon the greatest men in the state, sincerely to unite in a common cause with the people, will be more amply discussed hereafter, when a more particular comparison between the English government and the republican form shall be offered to the reader.

[1] Vide ante, 136, 137, 147—149, 472—477, 486, 575—629.

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In order, therefore, to ensure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But here we must observe a difference between the legislative, and the executive powers. The latter may be confined, and even is the more easily so, when undivided: the legislature, on the contrary, in order to its being restrained, should absolutely be divided. For, whatever laws it may make to restrain itself, they never can be, relatively to it, anything more than simple resolutions: as those bars which it might erect to stop its own motions must then be within it, and rest upon it, they can be no bars. In a word, the same kind of impossibility is found, to fix the legislative power when it is *one*, which Archimedes objected against his moving the earth*.

The advantages of the legislature being divided into three parts.

Nor does such a division of the legislature only render it possible for it to be restrained, since each of those parts into which it is divided can then serve as a bar to the motions of the others, but it even makes it to be actually so restrained. If it has been divided into only two parts, it is probable that they will not in all cases unite, either for *doing* or *undoing:*—if it has been divided into three parts, the chance that no changes will be made is greatly increased. Nay more; as a kind of point of honour will naturally take place between these different parts of the legislature, they will therefore be led to offer to each other only such propositions as will at least be plausible; and all very prejudicial changes will thus be prevented, as it were, before their birth.

If the legislative and executive powers differ so greatly with regard to the necessity of their being divided, in order to their being restrained, they differ no less with regard to the other consequences arising from such division.

* He wanted a spot whereupon to fix his instruments.

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The division of the executive introduces actual oppositions.

The division of the executive power necessarily introduces actual oppositions, even violent ones, between the different parts into which it has been divided; and that part which in the issue succeeds so far as to absorb, and unite in itself, all the others, immediately sets itself above the laws. But those oppositions which take place, and which the public good requires should take place, between the different parts of the legislature, are never anything more than oppositions between contrary opinions and intentions; all is transacted in the regions of the understanding; and the only contention that arises is wholly carried on with those inoffensive weapons, assents and dissents, *ayes* and *noes*.

Besides, when one of these parts of the legislature is so successful as to engage the others to adopt its proposition, the result is, that a law takes place which has in it a great probability of being good: when it happens to be defeated, and sees its propositions rejected, the worst that can result from it is, that a law is not made at that time; and the loss which the state suffers thereby, reaches no farther than the temporary setting aside of some more or less useful speculation.

The division of the executive, is the establishment of the right of the strongest.

In a word, the result of a division of the executive power is either a more or less speedy establishment of *the right of the strongest*, or a continued state of war*: —that of a division of the legislative power, is either truth, or general tranquillity.

That the laws of a state may be permanent, the legislative power should be divided.

The following maxims will therefore be admitted. That the laws of a state may be permanent, it is requisite that the legislative power should be divided;—that

* Every one knows the frequent hostilities that took place between the Roman senate and the tribunes. In Sweden there have been continual contentions between the king and the senate, in which they have overpowered each other by turns. And in England, when the executive power became double, by the king allowing the parliament to have a perpetual and independent existence, a civil war almost immediately followed.

they may have weight, and continue in force, it is necessary that the executive power should be *one*.

If the reader should conceive any doubt as to the truth of the above observations, let him cast his eyes on the history of the proceedings of the English legislature down to our times, and he will readily find a proof of them. He would be surprised to see how little variation there has been in the political laws of this country, especially during the last hundred years[2], though, it is most important to observe, the legislature has been as it were in a continual state of action, and (no dispassionate man will deny) has generally promoted the public good[3]. Nay, if we except the act passed under William III.[4], by which it had been enacted, that parliaments should sit no longer than three years, and which was repealed by a subsequent act, under George I.[5], which allowed them to sit for seven years, we shall not find that any law, which may really be called constitutional, and which has been enacted since the Restoration, has been changed afterwards.

Permanent character of the political laws of England.

Now, if we compare this steadiness of the English government with the continual subversions of the constitutional laws of some ancient republics, with the imprudence of some of the laws passed in their assemblies*, and with the still greater inconsiderateness with which they sometimes repealed the most salutary regulations, as it were, the day after they had been enacted, —if we call to mind the extraordinary means to which the legislature of those republics, at times sensible how

* The Athenians, among other laws, had enacted one to forbid the application of a certain part of the public revenues to any other use than the expenses of the theatres and public shows.

[2] Vide ante, 21.
[3] Vide Introd. passim.
[4] Vide ante, 486.
[5] Vide ante, Ibid.

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its very power was prejudicial to itself and to the state, was obliged to have recourse, in order, if possible, to tie its own hands*, we shall remain convinced of the great advantages which attend the constitution of the English legislature†.

Nor is this division of the English legislature accompanied (which is indeed a very fortunate circumstance) by any actual division of the nation; each constituent part of it possesses strength sufficient to ensure respect to its resolutions; yet no real division has been made of the forces of the state. Only a greater proportional share of all those distinctions which are calculated to gain the reverence of the people, has been allotted to those parts of the legislature which could not possess their confidence in so high a degree as the others; and the inequalities in point of real strength between them have been made up by the magic of dignity.

The inequalities of the several parts of the legislature, have been made up by the magic of dignity.

Thus the king, who alone forms one part of the legislature, has on his side the majesty of the kingly title: the two houses are, in appearance, no more than councils entirely dependant on him; they are bound to follow his person; they only meet, as it seems, to advise him; and never address him but in the most solemn and respectful manner.

As the nobles, who form the second order of the

* In some ancient republics, when the legislature wished to render a certain law permanent, and at the same time mistrusted their own future wisdom, they added a clause to it, which made it death to propose the revocation of it. Those who afterwards thought such revocation necessary to the public welfare, relying on the mercy of the people, appeared in the public assembly with a halter about their necks.

† We shall perhaps have occasion to observe hereafter, that the true cause of the equability of the operations of the English legislature is the opposition that happily takes place between the different views and interests of the several bodies that compose it; a consideration this, without which all political inquiries are no more than airy speculations, and the only one that can lead to useful practical conclusions.

legislature, bear, in point both of real weight and numbers, no proportion to the body of the people*, they have received, as a compensation, the advantage of personal honours, and of an hereditary title.

Besides, the established ceremonial gives to their assembly a great pre-eminence over that of the representatives of the people. They are the *upper* house, and the others are the *lower* house. They are in a more special manner considered as the king's council; and it is in the place where they assemble that his throne is placed.

Privileges of the lords and commons.

When the king comes to the parliament, the commons are sent for, and make their appearance at the bar of the House of Lords. It is, moreover, before the lords, as before their judges, that the commons bring their impeachments. When, after passing a bill in their own house, they send it to the lords to desire their concurrence, they always order a number of their own members to accompany it†: whereas the lords send down their bills to them, only by some of the assistants of their house‡. When the nature of the alterations which one of the two houses may wish to make in a bill sent to it by the other, renders a con-

Conferences between the lords and commons.

* It is for want of having duly considered this subject, that M. Rousseau exclaims somewhere against those who, when they speak of the general estates of France, "dare to call the people the *third* estate." At Rome, where all the order we mention was inverted,—where the *fasces* were laid at the feet of the people,—and where the tribunes, whose function, like that of the king of England, was to oppose the establishment of new laws, were only a subordinate kind of magistracy,—many disorders followed. In Sweden, and in Scotland (before the union), faults of another kind prevailed: in the former kingdom, for instance, an overgrown body of two thousand nobles frequently overruled both king and people.

† The speaker of the House of Lords must come down from the woolpack to receive the bills which the members of the commons bring to their house.

‡ The [fifteen] judges and the masters in chancery. There is also a ceremonial established with regard to the manner and marks of respect with which those two of them, who are sent with a bill to the commons, are to deliver it.

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ference between them necessary, the deputies of the commons to the committee, which is then formed of members of both houses, are to remain uncovered. Lastly, those bills which (in whichever of the two houses they have originated) have been agreed to by both, must be deposited in the House of Lords, there to remain till the royal pleasure is signified.

The lords are members of the legislature by virtue of a right inherent in their persons.

Besides, the lords are members of the legislature by virtue of a right inherent in their persons[6]; and they are supposed to sit in parliament on their own account, and for the support of their own interests[7]. In consequence of this they have the privilege of giving their votes by *proxy**; and, when any of them dissent from the resolutions of their house, they may enter a protest against them, containing the reasons of their particular opinion. In a word, as this part of the legislature is destined frequently to balance the power of the people, what it could not receive in real strength it has received in outward splendour and greatness; so that, when it cannot resist by its weight, it overawes by its apparent magnitude.

The balance of the legislature.

In fine, as these various prerogatives, by which the component parts of the legislature are thus made to balance each other, are all intimately connected with the fortune of the state, and flourish and decay according to the vicissitudes of public prosperity or adversity, it thence follows, that, though differences of opinion may sometimes take place between those parts, there can scarcely arise any, when the general welfare is really in question. And when, to resolve the doubts that may arise on political speculations of this kind,

* The commons have not that privilege, because they are themselves *proxies* for the people.—4 Inst. 41.

[6] Vide ante, 114, 130, 131, 135—137.

[7] This remark is applicable to the English peers, but not to the representative peers of Scotland and Ireland. Vide ante, 557—565.

we cast our eyes on the debates of the two houses for a long succession of years, and see the nature of the laws which have been proposed, of those which have passed, and of those which have been rejected, as well as of the arguments that have been urged on both sides, we shall remain convinced of the goodness of the principles on which the English legislature is formed.

CHAPTER IV.

A third Advantage peculiar to the English Government.—The Business of proposing Laws, lodged in the hands of the People.

A THIRD circumstance, which I propose to show to be peculiar to the English government, is the manner in which the respective offices of the three component parts of the legislature have been divided, and allotted to each of them.

In most of the ancient free states, the share of the people in the business of legislation was to approve or reject the propositions which were made to them, and to give the final sanction to the laws. The function of those persons (or in general those bodies), who were intrusted with the executive power, was to prepare and frame the laws, and then to propose them to the people: and, in a word, they possessed that branch of the legislative power which may be called the *initiative*, that is, the prerogative of putting that power in action*.

In the ancient free states, the share of the people in legislation, was to approve or reject the propositions which were made to them.

* This power of previously considering and approving such laws as were afterwards to be propounded to the people, was, in the first times of the Roman republic, constantly exercised by the senate: laws were made, *populi jussu, ex auctoritate senatûs.* Even in cases of elections, the previous

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This *initiative*, or exclusive right of proposing in legislative assemblies, attributed to the magistrates, is indeed very useful, and perhaps even necessary, in states of a republican form, for giving a permanence to the laws, as well as for preventing the disorders and struggles for power which have been mentioned before; but, upon examination, we shall find that this expedient is attended with inconveniences of little less magnitude than the evils it is meant to remedy.

When the exclusive right of proposing laws is vested in the magistrates, the legislature are considered by them as an enemy.

These magistrates, or bodies, at first indeed apply frequently to the legislature for a grant of such branches of power as they dare not of themselves assume, or for the removal of such obstacles to their growing authority as they do not yet think it safe for them peremptorily to set aside. But when their authority has at length gained a sufficient degree of extent and stability, as farther manifestations of the will of the legislature could then only create obstructions to the exercise of their power, they begin to consider the legislature as an enemy whom they must take great care never to rouse. They consequently convene the assembly of the people as seldom as they can. When they do it, they carefully avoid proposing any thing favourable to public liberty. They soon even entirely cease to convene the assembly at all; and the people,

approbation and *auctoritas* of the senate, with regard to those persons who were offered to the suffrages of the people, were required. *Tum enim non gerebat is magistratum qui caperat si patres auctores non erant facti.*—Cic. pro Plancio, 3.

At Venice the senate also [exercised] powers of the same kind, with regard to the *grand council* or assembly of the nobles. In the canton of Bern, all propositions must be discussed in the *little* council, which is composed of twenty-seven members, before they are laid before the council of the *two hundred*, in whom resides the sovereignty of the whole canton. And, in Geneva, the law [was], "that nothing shall be treated in the *general council* or assembly of the citizens, which has not been previously treated and approved in the council of the *two hundred*: and that nothing shall be treated in the *two hundred* which has not been previously treated and approved in the council of the *twenty-five*."

after thus losing the power of legally asserting their rights, are exposed to that which is the highest degree of political ruin, the loss of even the remembrance of them, unless some direct means are found, by which they may from time to time give life to their dormant privileges; means which may be found, and succeed pretty well in small states, where provisions can more easily be made to answer their intended ends; but, in states of considerable extent, have always been found, in the event, to give rise to disorders of the same kind with those which were at first intended to be prevented.

The people of England possess the initiative in legislation.

But as the capital principle of the English constitution totally differs from that which forms the basis of republican governments, so it is capable of procuring to the people advantages that are to be found unattainable in the latter. It is the people in England, or at least those who represent them, who possess the *initiative* in legislation, that is to say, who perform the office of framing laws and proposing them. And, among the many circumstances in the English government, which would appear entirely new to the politicians of antiquity, that of seeing the person intrusted with the executive power bear that share in legislation which they looked upon as being necessarily the lot of the people, and the people enjoy that which they thought the indispensable office of its magistrates, would not certainly be the least occasion of their surprise.

I foresee that it will be objected, that, as the king of England has the power of dissolving, and even of not calling parliaments, he is hereby possessed of a prerogative, which, in fact, is the same with that which I have just now represented as being so dangerous.

To this I answer, that all circumstances ought to be combined. Doubtless, if the crown had been under

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no kind of dependance whatever on the people, it would long since have freed itself from the obligation of calling their representatives together; and the British parliament, like the national assemblies of several other kingdoms, would most likely have no existence now, except in history.

The necessities of the state compel a frequent recourse to parliament.

But, as we have above seen, the necessities of the state, and the wants of the sovereign himself, put him under a necessity of having frequent recourse to his parliament[1]; and then the difference may be seen between the prerogative of not calling an assembly, when powerful causes nevertheless render such a measure necessary, and the exclusive right, when an assembly is convened, of *proposing* laws to it.

In the latter case, though a prince, let us even suppose, in order to save appearances, might condescend to mention anything besides his own wants, it would be, at most, to propose the giving up of some branch of his prerogative upon which he set no value, or to reform such abuses as his inclination does not lead him to imitate; but he would be very careful not to touch any points which might materially affect his authority.

Besides, as all his concessions would be made, or appear to be made, of his own motion, and would, in some measure, seem to spring from the activity of his zeal for the public welfare, all that he might offer, though in fact ever so inconsiderable, would be represented by him as grants of the most important nature, and for which he expects the highest gratitude. Lastly, it would also be his province to make restrictions and exceptions to laws thus proposed by himself; he would also be the person who would choose the words to express them, and it would not be reasonable to expect

[1] Vide ante, 83—102, 104—110, 117—121, 126—128, 153, 154, 160—163, 260, 325—353, 368—394, 451, 452, 485—487.

that he would give himself any great trouble to avoid all ambiguity*.

The correction of abuse fearlessly executed.

But the parliament of England is not, as we said before, bound down to wait passively and in silence for such laws as the executive power may condescend to propose to them. At the opening of every session, they of themselves take into their hands the great book of the state; they open all the pages, and examine every article[2].

When they have discovered abuses, they proceed to inquire into their causes:—when these abuses arise from an open disregard of the laws, they endeavour to strengthen them; when they proceed from their insufficiency, they remedy the evil by additional provisions†.

* In the beginning of the existence of the House of Commons, bills were presented to the king under the form of *petitions*. Those to which the king assented were registered among the rolls of parliament, with his answers to them; and at the end of each parliament the judges formed them into statutes. Several abuses having crept into that method of proceeding, it was ordained that the judges should in future make the statute before the end of every session. Lastly, as even that became, in process of time, insufficient, the present method of framing bills was established: that is to say, both Houses now frame the statutes in the very form and words in which they are to stand when they have received the royal assent.

† No popular assembly ever enjoyed the privilege of starting, canvassing, and proposing new matter, to such a degree as the English commons. In France, when their General Estates were allowed to sit, their *remonstrances* were little regarded; and still less regard could the particular Estates of the provinces expect. In Sweden, the power of proposing new subjects was lodged in an assembly called the *secret committee*, composed of nobles, and a few of the clergy; and is now possessed by the king. In Scotland, until the *Union*, all propositions to be laid before the parliament were to be framed by the persons called the *lords of the articles*. In regard to Ireland[3], all bills must be prepared by the king in his privy council, and are to be laid before the parliament by the lord-lieutenant, for their assent or dissent: only they are allowed to discuss, among them, what they call *heads of a bill*, which the lord-lieutenant is desired afterwards to transmit to the king, who selects out of them what clauses he thinks proper, or sets the whole aside; and is not expected to give, at any time, a precise answer to them. And, in republican governments, magistrates are never at rest till they have

[2] Vide ante, 105, 531—537. [3] Ibid. 559—565.

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The commons are sole judges of the ways and means of raising subsidies.

Nor do they proceed with less regularity and freedom, in regard to that important object, subsidies. They are to be the sole judges of the quantity of them, as well as of the ways and means of raising them; and they need not come to any resolution with regard to them till they see the safety of the subject completely provided for[4]. In a word, the making of laws is not, in such an arrangement of things, a *gratuitous* contract, in which the people are to take just what is given them, and as it is given them:—it is a contract, in which they *buy* and *pay*, and in which they themselves settle the different conditions, and furnish the words to express them.

The executive cannot propose laws and remedies.

The English parliament have given a still greater extent to their advantages on so important a subject. They have not only secured to themselves a right of proposing laws and remedies, but they have also prevailed on the executive power to renounce all claim to do the same[5]. It is even a constant rule, that neither the king nor his privy council can make any amendments in the bills preferred by the two Houses; but the king is merely to accept or reject them; a provision this, which, if we pay a little attention to the subject, we shall find to have been also necessary for completely securing the freedom and regularity of the parliamentary deliberations*.

entirely secured to themselves the important privilege of *proposing:* nor does this follow merely from their ambition; it is also the consequence of the situation they are in, from the principles of that mode of government.

* The king, indeed, at times, sends messages to either House; and nobody, I think, can wish that no means of intercourse should exist between him and his parliament. But these messages are always expressed in very general words: they are only made to desire the House to take certain subjects into their consideration: no particular articles or clauses are expressed; the commons are not to declare, at any settled time, a

[4] Vide ante, 98—101, 105, 119—121, 127, 135—137, 161, 271—273, 288, 325—330, 368—394, 451, 472, 486, 520, 575—600.

[5] Ibid. 135—137.

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I indeed confess, that it seems very natural, in the modelling of a state, to intrust this very important office of framing laws to those persons who may be supposed to have before acquired experience and wisdom in the management of public affairs. But events have unfortunately demonstrated, that public employments and power improve the understanding of men in a less degree than they pervert their views; and it has been found in the issue, that the effect of a regulation which, at first sight, seems so perfectly consonant with prudence, is to confine the people to a mere passive and defensive share in the legislation, and to deliver them up to the continual enterprises of those who, at the same time that they are under the greatest temptations to deceive them, possess the most powerful means of effecting it.

In ancient governments, the executive was in a state of dependance on the legislature.

If we cast our eyes on the history of the ancient governments, in those times when the persons intrusted with the executive power were still in a state of dependance on the legislature, and, consequently, were frequently obliged to have recourse to it, we shall see almost continual instances of selfish and insidious laws proposed by them to the assemblies of the people.

And those men, in whose wisdom the law had at first placed so much confidence, became, in the issue, so lost to all sense of shame and duty, that when arguments were found to be no longer sufficient, they had recourse to force; the legislative assemblies became so many fields of battle, and their power a real calamity.

solemn acceptance or rejection of the proposition made by the king; and, in short, the House follow the same mode of proceeding, with respect to such messages, as they usually do in regard to petitions presented by private individuals. Some member makes a motion upon the subject expressed in the king's message: a bill is framed in the usual way: it may be dropped at every stage of it; and it is never the proposal of the crown, but the motions of some of their own members, which the House discuss, and finally accept or reject.

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The King of England, unites in himself the whole public power and majesty.

I know very well, however, that there are other important circumstances besides those I have just mentioned, which would prevent disorders of this kind from taking place in England*. But, on the other hand, let us call to mind that the person who, in England, is invested with the executive authority[6], unites in himself the whole public power and majesty. Let us represent ourselves the great and sole magistrate of the nation pressing the acceptance of those laws which he had proposed, with a vehemence suited to the usual importance of his designs, with the warmth of monarchical pride, which must meet with no refusal, and exerting for that purpose all his immense resources[7].

Limitations on the prerogative.

It was therefore a matter of indispensable necessity, that things should be settled in England in the manner they are. As the moving springs of the executive power are, in the hands of the king, a kind of sacred *depositum*, so are those of the legislative power in the hands of the two houses[8]. The king must abstain from touching them, in the same manner as all the subjects of the kingdom are bound to submit to his prerogatives. When he sits in parliament, he has left, we may say, his executive power without doors, and can only assent or dissent[9]. If the crown had been allowed to take an active part in the business of making laws, it would soon have rendered useless the other branches of the legislature.

* I particularly mean here the circumstance of the people having entirely delegated their power to their representatives; the consequences of which institution will be discussed in the next chapter.

[6] Vide ante, 566—574.
[7] Ibid. 151—391.
[8] Ibid. 531—565.
[9] Ibid. 566—629.

CHAPTER V.

In which an Inquiry is made, whether it would be an Advantage to public Liberty, that the Laws should be enacted by the Votes of the People at large.

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BUT it will be said, whatever may be the wisdom of the English laws, how great soever their precautions may be with regard to the safety of the individual; the people, as they do not themselves expressly enact them, cannot be looked upon as a free people. The author of the "Social Contract" carries this opinion even farther: he says, that, "though the people of England think they are free, they are much mistaken; they are so only during the election of members for parliament: as soon as these are elected, the people are slaves,—they are nothing*."

The word "liberty," is one of those, which have been most misunderstood.

Before I answer this objection, I shall observe that the word *liberty* is one of those which have been most misunderstood or misapplied.

Thus, at Rome, where that class of citizens who were really masters of the state were sensible that a lawful regular authority, once trusted to a single ruler, would put an end to their tyranny, they taught the people to believe, that, provided those who exercised a military power over them, and overwhelmed them with insults, went by the names of *consules, dictatores, patricii, nobiles*, in a word, by any other appellation than that horrid one of *rex*, they were free, and that such a valuable situation must be preferred at the price of every calamity.

In the same manner, certain writers of the present age, misled by their inconsiderate admiration of the

* See M. Rousseau's Social Contract, c. xv.

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governments of ancient times, and, perhaps, also by a desire of presenting lively contrasts to what they call the degenerate manners of our modern times, have cried up the governments of Sparta and Rome, as the only ones fit for us imitate. In their opinions, the only proper employment of a free citizen is, *to be either incessantly assembled in the forum, or preparing for war. Being valiant, inured to hardships, inflamed with an ardent love of one's own country*, which is, after all, nothing more than an ardent desire of injuring all mankind for the sake of that society of which we are members,—*and with an ardent love of glory*, which is likewise nothing more than an ardent desire of committing slaughter, in order to make afterwards a boast of it,—have appeared to these writers to be the only social qualifications worthy of our esteem, and of the encouragement of lawgivers*. And while, in order to support such opinions, they have used a profusion of exaggerated expressions without any distinct meaning, and perpetually repeated, though without defining them, the words *dastardliness, corruption, greatness of soul*, and *virtue*, they have not once thought of telling us the only thing that was worth our knowing, which is, whether men were happy under those governments which they have so much exhorted us to imitate.

The governments of Sparta and Rome, misapprehended the only rational design of civil societies.

Nor, while they have thus misapprehended the only rational design of civil societies, have they better understood the true end of the particular institutions by which they were to be regulated. They were satisfied when they saw the few, who really governed every thing in the state, at times performed the illusory ceremony of assembling the body of the people, that they might appear to consult them; and the mere

Neither did they understand the true end of the particular institutions by which they were to be regulated.

* I have used all the above expressions in the same sense in which they were used in the ancient commonwealths, and still are by most of the writers who describe their governments.

giving of votes, under any disadvantage in the manner of giving them, and how much soever the law might afterwards be neglected that was thus pretended to have been made in common, has appeared to them to be liberty.

"A man who contributes by his vote to the passing of a law, has himself made the law; in obeying it, he obeys himself;" he therefore is free.

But those writers are seemingly in the right: a man who contributes by his vote to the passing of a law, has himself made the law; in obeying it, he obeys himself;—he therefore is free. A play on words, and nothing more. The individual who has voted in a popular legislative assembly has not made the law that has passed in it; he has only contributed, or seemed to contribute, towards enacting it, for his thousandth, or even ten thousandth, share; he has had no opportunity of making his objections to the proposed law, or of canvassing it or of proposing restrictions to it; and he has only been allowed to express his assent or dissent. When a law has passed agreeably to his vote, it is not as a consequence of this his vote that his will happens to take place; it is because a number of other men have accidentally thrown themselves on the same side with him:—when a law contrary to his intentions is enacted, he must nevertheless submit to it.

This is not all; for though we should suppose that to give a vote is the essential constituent of liberty, yet such liberty could only be said to last for a single moment, after which it becomes necessary to trust entirely to the discretion of other persons; that is, according to this doctrine, to be no longer free. It becomes necessary, for instance, for the citizen who has given his vote, to rely on the honesty of those who collect the suffrages; and more than once have false declarations been made of them.

The citizen must trust other persons, for the

The citizen must also trust to other persons for the execution of those things which have been resolved

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execution of those things, which have been resolved upon in common.

upon in common: and when the assembly shall have separated, and he shall find himself alone, in the presence of the men who are invested with the public power, of the consuls, for instance, or of the dictator, he will have but little security for the continuance of his liberty, if he has only that of having contributed by his suffrage towards enacting a law which they are determined to neglect.

Liberty defined.

What then is liberty?—Liberty, I would answer, so far as it is possible for it to exist in a society of beings whose interests are almost perpetually opposed to each other, consists in this, that *every man, while he respects the persons of others, and allows them quietly to enjoy the produce of their industry, be certain himself likewise to enjoy the produce of his own industry, and that his person be also secure.* But to contribute by one's suffrage to procure these advantages to the community,—to have a share in establishing that order, that general arrangement of things by means of which an individual, lost as it were in the crowd, is effectually protected;—to lay down the rules to be observed by those who, being invested with a considerable power, are charged with the defence of individuals, and provide that they should never transgress them;—these are functions, are acts of government, but not constituent parts of liberty.

To concur, by suffrage, in the enactment of laws, is to enjoy a share of power.

In a word: to concur by one's suffrage in enacting laws, is to enjoy a share, whatever it may be, of power; to live in a state where the laws are equal for all, and sure to be executed (whatever may be the means by which these advantages are attained), is to be free.

Be it so: we grant that to give one's suffrage is not liberty itself, but only a mean of procuring it, and a mean too which may degenerate to mere form; we grant also, that other expedients might be found for that purpose; and that for a man to decide that a state

with whose government and interior administration he is unacquainted, is a state in which the people *are slaves, are nothing*, merely because the *comitia* of ancient Rome are no longer to be met with in it, is a somewhat precipitate decision. Yet many, perhaps, will continue to think that liberty would be much more complete, if the people at large were expressly called upon to give their opinion concerning the particular provisions by which it is to be secured, and that the English laws, for instance, if they were made by the suffrages of all, would be wiser, more equitable, and, above all, more likely to be executed. To this objection, which is certainly specious, I shall endeavour to give an answer.

In the first formation of civil society, the several duties which every individual owes to others and to the state are alone regarded.

If, in the first formation of a civil society, the only care to be taken was that of establishing, once for all, the several duties which every individual owes to others and to the state;—if those who are entrusted with the care of procuring the performance of these duties, had neither any ambition, nor any other private passions, which such employment might put in motion, and furnish the means of gratifying:—in a word, if, looking upon their function as a mere task of duty, they were never tempted to deviate from the intentions of those who had appointed them:—I confess that, in such a case, there might be no inconvenience in allowing every individual to have a share in the government of the community of which he is a member; or rather, I ought to say, in such a society, and among such beings, there would be no occasion for any government.

But experience teaches us that many more precautions, indeed, are necessary to oblige men to be just towards each other; nay, the very first expedients that may be expected to conduce to such an end, supply the most fruitful source of the evils which are proposed to

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be prevented. Those laws which were intended to be equal for all, are soon warped to the private convenience of those who have been made the administrators of them: instituted at first for the protection of all, they soon are made only to defend the usurpations of a few; and, as the people continue to respect them, while those to whose guardianship they were intrusted make little account of them, they at length have no other effect than that of supplying the want of real strength in those few who have contrived to place themselves at the head of the community, and of rendering regular and free from danger the tyranny of the smaller number over the greater.

To remedy, therefore, evils which thus have a tendency to result from the very nature of things,—to oblige those who are in a manner masters of the law, to conform themselves to it,—to render ineffectual the silent, powerful, and ever-active conspiracy of those who govern, requires a degree of knowledge, and a spirit of perseverance, which are not to be expected from the multitude.

The greater number of citizens must trust to those who have more abilities than themselves for the purposes of legislation.

The greater part of those who compose this multitude, taken up with the care of providing for their subsistence, have neither sufficient leisure, nor even, in consequence of their more imperfect education, the degree of information requisite for functions of this kind. Nature, besides, who is sparing of her gifts, has bestowed upon only a few men an understanding capable of the complicated researches of legislation: and, as a sick man trusts to his physician, a client to his lawyer, so the greater number of the citizens must trust to those who have more abilities than themselves for the execution of things, which, at the same time that they so materially concern them, require so many qualifications to perform them with any degree of sufficiency.

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The multitude, in consequence of their being a multitude, are incapable of coming to any mature resolution.

To these considerations, of themselves so material, another must be added, which is, if possible, of still greater weight. This is, that the multitude, in consequence of their being a multitude, are incapable of coming to any mature resolution[1].

Those who compose a popular assembly are not actuated, in the course of their deliberations, by any clear and precise views of present or positive personal interest[2]. As they see themselves lost, as it were, in the crowd of those who are called upon to exercise the same function with themselves—as they know that their individual votes will make no change in the public resolutions, and that, to whatever side they may incline, the general result will nevertheless be the same;—they do not undertake to inquire how far the things proposed to them agree with the whole of the laws already in being, or with the present circumstances of the state, because men will not enter upon a laborious task, when they know that it can scarcely answer any purpose.

It is, however, with dispositions of this kind, and each relying on all, that the assembly of the people meet. But, as very few among them have previously considered the subjects on which they are called upon to determine, very few carry along with them any opinion or inclination, or at least any inclination of their own, and to which they are resolved to adhere. As, however, it is necessary at last to come to some resolution, the major part of them are determined by reasons which they would blush to pay any regard to on much less serious occasions. An unusual sight, a change of the ordinary place of the assembly, a sudden disturbance, a rumour, are, amidst the general want of a spirit of decision, the *sufficiens ratio* of the determina-

The resolutions of an assembly of the people, are determined by reasons which they would blush to pay any regard to, on less serious occasions.

[1] Vide ante, 392—417.
[2] Vide ante, 54, 69—79, 345, 370, 392—417, 460—463.

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tion of the greatest part*; and from this assemblage of separate wills, thus formed hastily, and without reflection, a general will results, which is also void of reflection.

If, amidst these disadvantages, the assembly were left to themselves, and nobody had an interest to lead them into error, the evil, though very great, would not, however, be extreme, because such an assembly never being called upon but to determine upon an affirmative or negative (that is, only having two cases to choose between), there would be an equal chance of their choosing either; and it might be hoped that at every other turn they would take the right side.

Those who share in the actual exercise of public power, are not allowed to sit down in inaction.

But the combination of those who share either in the actual exercise of the public power, or in its advantages, do not thus allow themselves to sit down in inaction. They wake, while the people sleep. Entirely taken up with the thoughts of their own power, they live but to increase it. Deeply versed in the management of public business, they see at once all the possible consequences of measures. And, as they have the exclusive direction of the springs of government, they give rise, at their pleasure, to every incident that may influence the minds of a multitude who are not on their guard, and who wait for some event or other that may finally determine them.

The tractableness of the people during public calamities, and its heedlessness in times of prosperity, are equally taken advantage of.

It is they who convene the assembly, and dissolve it: it is they who offer propositions, and make speeches to it. Ever active in turning to their advantage every circumstance that happens, they equally avail themselves of the tractableness of the people during public calamities, and its heedlessness in times of prosperity.

* Every one knows of how much importance it was, in the Roman commonwealth, to assemble the people in one place rather than another. In order to change entirely the nature of their resolutions, it was often sufficient to hide from them, or let them see, the Capitol.

When things take a different turn from what they expected, they dismiss the assembly. By presenting to it many propositions at once, and which are to be voted upon in the lump, they hide what is destined to promote their own private views, or give a colour to it, by joining it with things which they know will take hold of the mind of the people*. By presenting, in their speeches, arguments and facts which men have no time to examine, they lead the people into gross, and yet decisive errors: and the common-places of rhetoric, supported by their personal influence, ever enabled them to draw to their side the majority of votes.

The resolutions adopted at an assembly of the people, are nothing more than the effect of the artifices of a few designing men.

On the other hand, the few (for there are, after all, some) who, having meditated on the proposed question, see the consequences of the decisive step which is just going to be taken, being lost in the crowd, cannot make their feeble voices to be heard amidst the universal noise and confusion. They have it no more in their power to stop the general motion, than a man in the midst of an army, on a march, has it in his power to avoid marching. In the mean time, the people are giving the suffrages; a majority appears in favour of the proposal; it is finally proclaimed as the general will of all; and it is at bottom nothing more than the effect of the artifices of a few designing men, who are exulting among themselves†.

* It was thus the senate of Rome assumed to itself the power of laying taxes. They promised, in the time of the war against the Veientes, to give pay to such citizens as would enlist; and to that end they established a tribute. The people, solely taken up with the idea of not going to war at their own expense, were transported with so much joy, that they crowded at the door of the senate, and laying hold of the hands of the senators, called them their fathers—*Nihil unquam, acceptum à plebe tanto gaudio traditur: concursum itaque ad curiam esse, prehensatasque exeuntium manus, patres vere appellatos, &c.* See Tit. Liv. book iv.

† I might confirm all these things by numberless instances from ancient history; but if I may be allowed, in this case, to draw examples from my own country, *et celebrare domestica facta*, I shall relate facts which will be no

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The evils of republican governments.

In a word, those who are acquainted with republican governments, and, in general, who know the manner in which business is transacted in numerous assemblies, will not scruple to affirm that the few who are united, who take an active part in public affairs, and whose

less to the purpose.—In Geneva, in the year 1707, a law was enacted, that a general assembly of the people should be held every five years, to treat of the affairs of the republic: but the magistrates, who dreaded those assemblies, soon obtained from the citizens themselves the repeal of the law; and the first resolution of the people, in the first of those periodical assemblies (in the year 1712), was to abolish them for ever. The profound secresy with which the magistrates prepared their proposal to the citizens on that subject, and the sudden manner in which the latter, when assembled, were acquainted with it, and made to give their votes upon it, have indeed accounted but imperfectly for this strange determination of the people; and the consternation which seized the whole assembly when the result of the suffrages was proclaimed, has confirmed many in the opinion that some unfair means had been used. The whole transaction has been kept secret to this day; but the common opinion on this subject, which has been adopted by M. Rousseau, in his *Lettres de la Montagne*, is this: The magistrates, it is said, had privately instructed the secretaries in whose *ears* the citizens were to *whisper* the suffrages: when a citizen said *approbation*, he was understood to approve the proposal of the magistrates: when he said *rejection*, he was understood to reject the *periodical assemblies*.

In the year 1738, the citizens enacted at once into laws a small code of forty-four articles, by one single line of which they bound themselves for ever to elect the four *syndics* (the chiefs of the council of the twenty-five) out of the members of the same council; whereas they were before free in their choice. They at that time suffered also the word *approved* to be slipped into the law mentioned in the note, p. 828, which was transcribed from a former code; the consequence of which was to render the magistrates absolute masters of the legislature.

The citizens had thus been successively stripped of all their *political* rights, and had little more left to them than the pleasure of being called a *sovereign assembly*, when they met (which idea, it must be confessed, preserved among them a spirit of resistance which it would have been dangerous for the magistrates to have provoked too far), and the power of at least *refusing* to elect the four *syndics*. Upon this privilege the citizens, a few years ago (A.D. 1765 to 1768), made their last stand: and a singular conjunction of circumstances having happened at the same time, to raise and preserve among them, during three years, an uncommon spirit of union and perseverance, they in the issue succeeded, in a great measure, to repair the injuries which they had been made to do to themselves for two hundred years and more.

[A total change has since that time been effected by foreign forces, in the government of the republic.]

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station makes them conspicuous, have such an advantage over the many who turn their eyes towards them, and are without union among themselves, that, even with a middling degree of skill, they can at all times direct, at their pleasure, the general resolutions[3]; that, as a consequence of the very nature of things, there is no proposal, however absurd, to which a numerous assembly of men may not, at one time or other, be brought to assent,—and that laws would be wiser, and more likely to procure the advantage of all, if they were to be made by drawing lots, or casting dice, than by the suffrages of a multitude.

There is no proposal, however absurd, to which a numerous assembly of men may not, at one time or other, be brought to assent.

CHAPTER VI.

Advantages that accrue to the People from appointing Representatives.

How then shall the people remedy the disadvantages that necessarily attend their situation? How shall they resist the phalanx of those who have engrossed to themselves all the honours, dignities, and power in the state?

A small number of persons, can deliberate on every occurrence, and never come to any resolutions but such, as are maturely weighed.

It will be by employing for their defence the same means by which their adversaries carry on their attack: it will be by using the same weapons as they do,—the same order,—the same kind of discipline.

They are a small number, and consequently easily united;—a small number must therefore be opposed to them, that a like union may also be obtained. It is because they are a small number, that they can deliberate on every occurrence, and never come to any resolutions but such as are maturely weighed;—it is because they are few, that they can have forms which

[3] Vide ante, 151, 157, 166—168, 345—349, 367 (Note 4), 394—417, 446—450, 461—463, 480—483.

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continually serve them for general standards to resort to, approved maxims to which they invariably adhere, and plans which they never lose sight of:—here, therefore, I repeat it, oppose to them a small number, and you will obtain the like advantages.

Those who govern being few in number, have a deeper interest in the success of their enterprises.

Besides, those who govern, as a farther consequence of their being few, have a more considerable share, consequently feel a deeper concern in the success, whatever it may be, of their enterprises. As they usually profess a contempt for their adversaries, and are at all times acting an offensive part against them, they impose on themselves an obligation of conquering. They, in short, who are all alive from the most powerful incentives, and aim at gaining new advantages, have to do with a multitude, who, wanting only to preserve what they already possess, are unavoidably liable to long intervals of inactivity and supineness. But the people, by appointing representatives, immediately gain to their cause that advantageous activity which they before stood in need of, to put them on a par with their adversaries; and those passions become excited in their defenders, by which they themselves cannot be actuated.

A representative body, will assert the rights of which they have been made the guardians, with all that warmth, which the *esprit de corps* is used to inspire.

Exclusively charged with the care of public liberty, the representatives of the people will be animated by a sense of the greatness of the concerns with which they are intrusted. Distinguished from the bulk of the nation, and forming among themselves a separate assembly, they will assert the rights of which they have been made the guardians, with all that warmth which the *esprit de corps* is used to inspire*. Placed

* If it had not been for an incentive of this kind, the English commons would not have vindicated their right of taxation with so much vigilance as they have done, against all enterprises (often perhaps involuntary) of the lords[1].

[1] Vide ante, 100, 105, 132, 135—137, 288, 351, 352, 377, 451, 472, 473, 486, 531—565.

on an elevated theatre, they will endeavour to render themselves still more conspicuous; and the arts and ambitious activity of those who govern will now be encountered by the vivacity and perseverance of opponents actuated by the love of glory.

The representatives of the people will naturally be selected from among those citizens, who are most favoured by fortune.

Lastly, as the representatives of the people will naturally be selected from among those citizens who are most favoured by fortune, and will have consequently much to preserve, they will, even in the midst of quiet times, keep a watchful eye on the motions of power[2]. As the advantages they possess will naturally create a kind of rivalship between them and those who govern, the jealousy which they will conceive against the latter will give them an exquisite degree of sensibility on every increase of their authority. Like those delicate instruments which discover the operations of nature, while they are yet imperceptible to our senses, they will warn the people of those things which of themselves they never see but when it is too late; and their greater proportional share, whether of real riches, or of those which lie in the opinions of men, will make them, if I may so express myself, the barometers that will discover in its first beginning, every tendency to a change in the constitution*.

* All the above reasoning essentially requires that the representatives of the people should be united in interests with the people[3]. We shall soon see that this union really prevails in the English constitution, and may be called the masterpiece of it.

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[2] Vide ante, 100, 105, 132, 135—137, 351, 352, 451, 472, 473, 486, 487, 531—565, 575—629.

[3] Ibid. 531—565.

CHAPTER VII.

The Subject continued.—The Advantages that accrue to the People from their appointing Representatives are very inconsiderable, unless they also entirely trust their Legislative Authority to them.

DE LOLME.

The people in popular governments have never themselves remedied the disadvantages attending their situation.

THE observations made in the preceding chapter are so obvious, that the people themselves, in popular governments, have always been sensible of the truth of them, and never thought it possible to remedy, by themselves alone, the disadvantages necessarily attending their situation. Whenever the oppressions of their rulers have forced them to resort to some uncommon exertion of their legal powers, they have immediately put themselves under the direction of those few men who had been instrumental in informing and encouraging them: and when the nature of the circumstances has required any degree of firmness and perseverance in their conduct, they have never been able to attain the ends they proposed to themselves, except by means of the most explicit deference to those leaders whom they had thus appointed.

But, as these leaders, thus hastily chosen, are easily intimidated by the continual display which is made before them of the terrors of power;—as that unlimited confidence which the people now repose in them only takes place when public liberty is in the utmost danger, and cannot be kept up otherwise than by an extraordinary conjunction of circumstances, in which those who govern seldom suffer themselves to be caught more than once;—the people have constantly sought to avail themselves of the short intervals of superiority which the chance of events had given them, for render-

But they have always availed themselves of short intervals

ing durable those advantages which they knew would, of themselves, be but transitory, and for getting some persons appointed, whose peculiar office it may be to protect them, and whom the constitution shall thenceforward recognise. Thus it was that the people of Lacedæmon obtained their *ephori*, and the people of Rome their tribunes.

of superiority, in order to acquire power.

We grant this, will it be said; but the Roman people never allowed their tribunes to *conclude anything definitively;* they, on the contrary, reserved to themselves the right of *ratifying** any resolutions the latter should take. This, I answer, was the very circumstance that rendered the institution of tribunes totally ineffectual in the event. The people—thus wanting to interfere, with their own opinions, in the resolutions of those on whom they had, in their wisdom, determined entirely to rely—and endeavouring to settle with a hundred thousand votes things which would have been settled equally well by the votes of their advisers,—defeated in the issue every beneficial end of their former provisions: and while they meant to preserve an appearance of their sovereignty (a chimerical appearance, since it was under the direction of others that they intended to vote), they fell back into all those inconveniences which we have before mentioned.

The Romans never allowed their tribunes to conclude anything definitively.

The senators, the consuls, the dictators, and the other great men of the republic, whom the people were prudent enough to fear, and simple enough to believe, continued still to mix with them, and play off their political artifices. They continued to make speeches to them†, and still availed themselves of their

The political artifices of the "senators," "consuls," and "dictators."

* See Rousseau's Social Contract.

† Valerius Maximus relates, that the tribunes of the people having offered to propose some regulations in regard to the price of corn, in a time of great scarcity, Scipio Nasica overruled the assembly merely by saying, "Silence, Romans! I know better than you what is expedient for the republic."—"Which words were no sooner heard by the people, than they

De Lolme.

privilege of changing at their pleasure the place and form of the public meetings. When they did not find it possible by such means to direct the resolutions of the assemblies, they pretended that the omens were not favourable, and under this pretext, or others of the same kind, they dissolved them*. And the tribunes, when they had succeeded so far as to effect an union among themselves, thus were obliged to submit to the pungent mortification of seeing those projects which they had pursued with infinite labour, and even through the greatest dangers, irrecoverably defeated by the most despicable artifices.

Principles under which the Roman "consuls" and "dictators" were appointed.

When, at other times, they saw that a confederacy was carrying on with uncommon warmth against them, and despaired of succeeding by employing expedients of the above kind, or were afraid of diminishing their efficacy by a too frequent use of them, they betook themselves to other stratagems. They then conferred on the consuls, by the means of a short form of words for the occasion†, an absolute power over the lives of the citizens, or even appointed a dictator. The people, at the sight of the state masquerade which was displayed before them, were sure to sink into a state of consternation: and the tribunes, however clearly they might see through the artifice, also trembled in their turn, when they thus beheld themselves left without defenders‡.

showed by a silence full of veneration, that they were more affected by his authority, than by the necessity of providing for their own subsistence." *Tacete, quæso, Quirites! Plus enim ego quam vos quid reipublicæ expediat intelligo.—Quæ voce auditâ, omnes, pleno venerationis silentio, majorem ejus auctoritatis quam alimentorum suorum euram egerunt.*

* *Quid enim majus est, si de jure augurum quærimus,* (says Tully, who was himself an augur, and a senator also,) *quàm posse a summis imperiis et summis potestatibus commitiatus et concilia vel instituta dimittere vel habita rescindere? Quid gravius quam rem susceptam dirimi, si unus augur* ALIUM (id est, alium diem) *dixerit?* See De Legib. lib. ii. § 12.

† *Videat consul ne quid detrimenti respublica capiat.*

‡ "The tribunes of the people," says Livy, who was a great admirer of

At other times, they brought false accusations against the tribunes before the assembly itself; or, by privately slandering them with the people, totally deprived them of their confidence. It was through artifices of this kind, that the people were brought to behold, without concern, the murder of Tiberius Gracchus, the only Roman that was really virtuous,—the only one who truly loved the people. It was also in the same manner that Caius, who was not deterred by his brother's fate from pursuing the same plan of conduct, was in the end so entirely forsaken by the people, that nobody could be found among them who would even lend him a horse to fly from the fury of the nobles; and he was at last compelled to lay violent hands upon himself, while he invoked the wrath of the gods on his inconstant fellow-citizens.

Popular assemblies attended by tumult and confusion.

At other times, they raised divisions among the people. Formidable combinations broke out suddenly on the eve of important transactions; and all moderate men avoided attending assemblies, where they saw that all was to be tumult and confusion[1].

In fine, that nothing might be wanting to the insolence with which they treated the assemblies of the people, they sometimes falsified the declarations of the number of the votes; and once they even went so far as to carry off the urns into which the citizens were to throw their suffrages*.

the aristocratical power, "and the people themselves, durst neither lift up their eyes, nor ever mutter, in the presence of the dictator." *Nec adversus dictatoriam vim, aut tribuni plebis, aut ipsa plebs, attollere oculus, aut hiscere, audebant.* See Tit. Liv. lib. vi. § 16.

* The reader, with respect to all the above observations, may see Plutarch's Lives, particularly the Lives of the two Gracchi. I must add, that I have avoided drawing any instance from those assemblies in which one-half of the people were made to arm themselves against the other. I have

[1] Vide ante, 367 (Note 4), 400—417.

Chapter VIII.

The Subject concluded—Effects that have resulted in the English Government, from the People's Power being completely delegated to their Representatives.

De Lolme.

Advantages arise, when the people have entirely trusted their power to a moderate number of persons.

But when the people have entirely trusted their power to a moderate number of persons, affairs immediately take a widely different turn. Those who govern are from that moment obliged to leave off all those stratagems which had hitherto ensured their success. Instead of those assemblies which they affected to despise, and were perpetually comparing to storms, or to the current of the *Euripus**, and in regard to which they accordingly thought themselves at liberty to pass over the rules of justice, they now find that they have to deal with men who are their equals in point of education and knowledge, and their inferiors only in point of rank and form. They, in consequence, soon find it necessary to adopt quite different methods; and, above all, become very careful not to talk to them any more about the sacred chickens, the *white* or *black* days, and the Sibylline books.—As they see their new adversaries expect to have a proper regard paid to them, that single circumstances inspires them with it:—as they see them act in a regular manner, observe constant rules, in a word, proceed with *form*, they come to look upon them with respect, for the very

here only alluded to those times which immediately either preceded or followed the third Punic war, as these are commonly called the *best periods* of the republic.

* Tully makes no end of his similes on this subject. *Quod enim fretum, quem Euripum, tot motus, tantas et tam varias habere putatis agitationes fluctuum, quantas perturbationes et quantos æstus habet ratio comitiorum?* See Orat. pro Murænâ.—*Concio*, says he, in another place, *quæ ex imperitissimis constat, &c.* De Amicitiâ, § 25.

same reason which makes them themselves to be reverenced by the people.

The representatives of the people, on the other hand, do not fail soon to procure for themselves every advantage that may enable them effectually to use the powers with which they have been intrusted, and to adopt every rule of proceeding that may make their resolutions to be truly the result of reflection and deliberation. Thus it was that the representatives of the English nation, soon after their first establishment, became formed into a separate assembly[1]; they afterwards obtained the liberty of appointing a president:—soon after, they insisted upon their being consulted on the last form of the acts to which they had given rise:—lastly, they insisted on thenceforth framing them themselves[2].

The representatives of the people have acquired every power to make their resolutions the result of reflection and deliberation.

In order to prevent any possibility of surprise in the course of their proceedings, it is a settled rule with them, that every proposition, or bill, must be read three times, at different prefixed days[3], before it can receive a final sanction: and before each reading of the bill, as well as at its first introduction, an express resolution must be taken to continue it under consideration. If the bill be rejected in any one of those several operations, it must be dropped, and cannot be proposed again during the same session* [4].

* It is, moreover, a settled rule in the House of Commons, that no member is to speak more than once in the same debate. When the number and nature of the clauses of a bill require that it should be discussed in a

[1] Vide ante, 100, 104—110, 131—137.

[2] Ibid. 104—110, 131—137, 377, 451, 472, 473, 486, 531—565.

[3] The standing orders are sometimes suspended, by a "resolution of the House," in order to allow a bill of urgent necessity to pass through the whole, or several, of its stages in one day.

[4] In 1605, a bill to regulate or suppress purveyance which had passed the commons was rejected by the lords:—another bill to the same effect was sent up, which the Upper House rejected without discussion, by a rule then first established, that the same bill could not be proposed twice in one session.—Sloane MSS. 461. Journ. Feb. 20 & 22, 1605.

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The commons have been, above all, jealous of the freedom of speech in their assembly[6]. They have expressly stipulated, as we have mentioned above, that none of their words or speeches should be questioned in any place out of their house. In fine, in order to keep their deliberations free from every kind of influence, they have denied their president the right to give his vote, or even his opinion[7];—they moreover have settled it as a rule, not only that the king could not send to them any express proposal about laws, or other subjects, but even that his name should never be mentioned in the deliberations*.

The people, by acting only through their representatives, become the moving springs of the legislative authority.

But that circumstance which, of all others, constitutes the superior excellence of a government in which the people act only through their representatives, that is, by means of an assembly formed of a moderate number of persons, and in which it is possible for every member to propose new subjects, and to argue and to canvass the questions that arise,—is, that such a constitution

free manner[5]; a committee is appointed for the purpose, who are to make their report afterwards to the House. When the subject is of importance, this committee is formed of the whole House, which still continues to sit at the same place, but in a less solemn manner, and under another president, who is called the chairman of the committee. In order to form the House again, the mace is replaced on the table, and the speaker goes again into his chair.

* If any person should mention in his speech, what the king *wishes should be, would be glad to see*, &c. he would be immediately *called to order*, for attempting to *influence the debate*.

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[5] Every bill is obliged to be committed either to a committee of the whole House, or a select committee, who make their report to the House; and resolutions are either taken to go into committee, or grant the committee:—resolutions are also taken on each clause of the bill in committee, for reporting it, receiving the report, and taking the same into consideration, &c.

[6] Vide ante, 136, 283, 328, 472, 531—565.

[7] If the numbers are equal, the speaker has the casting vote. When, also, the house resolves itself into committee, and the speaker is, consequently, out of the chair, he has the right, equally with the other members, of both voting and delivering his sentiments, and, as every subject of importance goes to a committee, the speaker has a stage in which he can, if he please, make known his opinion upon it.

is the only one capable of the immense advantage (of which perhaps I did not convey an adequate idea to the reader when I mentioned it before*) of putting into the hands of the people the moving springs of the legislative authority.

The boasted power of the people, sometimes rendered completely illusory.

In a constitution where the people at large exercise the function of enacting the laws, as it is only to those persons towards whom the citizens are accustomed to turn their eyes, that is, to the very men who govern, that the assembly have either time or inclination to listen, they acquire, at length, as has constantly been the case in all republics, the exclusive right of proposing, if they please, when they please, in what manner they please: a prerogative this, of such extent, that it would suffice to put an assembly, formed of men of the greatest parts, at the mercy of a few dunces, and renders completely illusory the boasted power of the people. Nay more, as this prerogative is thus placed in the very hands of the adversaries of the people, it forces the people to remain exposed to their attacks, in a condition perpetually passive, and takes from them the only legal means by which they might effectually oppose their usurpations[8].

A representative constitution, places the remedy in the hands of those who feel the disorder—a popular constitution, in the hands of those who cause it.

To express the whole in a few words—*A representative* constitution places the remedy in the hands of those who feel the disorder: but a *popular* constitution places the remedy in the hands of those who cause it: and it is necessarily productive, in the event, of the misfortune, of the political calamity, of trusting the care and the means of repressing the invasions of power, to the men who have the enjoyment of power.

* See Chap. IV. of this Book.

[8] Vide ante, 394—417.

Chapter IX.

A farther Disadvantage of Republican Governments.—The People are necessarily betrayed by those in whom they trust.

De Lolme.

However, those general assemblies of a people who were made to determine upon things which they neither understood nor examined,—that general confusion in which the ambitious could at all times hide their artifices, and carry on their schemes with safety, were not the only evils attending the ancient commonwealths. There was a more secret defect, and a defect that struck immediately at the very vitals of it, inherent in that kind of government.

It is impossible for the people ever to have faithful defenders, under republican governments.

It was impossible for the people ever to have faithful defenders[1]. Neither those whom they had expressly chosen, nor those whom some personal advantages enabled to govern the assemblies (for the only use, I must repeat it, which the people ever make of their power, is either to give it away, or allow it to be taken from them), could possibly be united to them by any common feeling of the same concerns. As their influence put them, in a great measure, upon a level with those who were invested with the executive authority, they cared little to restrain oppressions out of the reach of which they saw themselves placed. Nay, they feared they should thereby lessen a power which they knew was one day to be their own; if they had not even already an actual share in it*.

* How could it be expected that men who entertained views of being prætors, would endeavour to restrain the power of the prætors,—that men who aimed at being one day consuls, would wish to limit the power of the consuls,—that men whom their influence among the people made sure of getting into the senate, would seriously endeavour to confine the authority of the senate?

[1] Vide ante, 54, 69—79, 166—168, 345, 396—417, 480—483.

DE LOLME.

The only end which the tribunes pursued with sincerity, was to procure for themselves an admission to all public dignities.

Thus, at Rome, the only end which the tribunes ever pursued with any degree of sincerity and perseverance, was to procure to the people, that is, to themselves, an admission to all the different dignities in the republic. After having obtained that a law should be enacted for admitting plebeians to the consulship, they procured for them the liberty of intermarrying with the patricians. They afterwards rendered them admissible to the dictatorship, to the office of military tribune, to the censorship: in a word, the only use they made of the power of the people, was to increase privileges which they called the privileges of all, though they and their friends alone were ever likely to have the enjoyment of them.

The powers of the Roman people were not employed in things really beneficial to themselves.

We do not find that they ever employed the power of the people in things really beneficial to the people. We do not find that they ever set bounds to the terrible power of its magistrates,—that they ever repressed that class of citizens who knew how to make their crimes pass uncensured,—in a word, that they ever endeavoured, on the one hand to regulate, and on the other to strengthen, the judicial power; precautions these, without which men might struggle to the end of time, and never attain true liberty*.

The judicial power at Rome, was a mere instrument of tyranny.

And indeed the judicial power, that sure *criterion* of the goodness of a government, was always, at Rome, a mere instrument of tyranny. The consuls were at all times invested with an absolute power over the lives of the citizens. The dictators possessed the same right; so did the prætors, the tribunes of the people, the judicial commissioners named by the senate, and so, of course, did the senate itself: and the fact of the three hundred and seventy deserters whom it commanded to be thrown at one time, as Livy relates, from the Tar-

* Without such precautions, laws must always be, as Pope expresses it,
"Still for the strong too weak, the weak too strong."

De Lolme.

peian rock, sufficiently shows that it well knew how to exert its power upon occasion.

At Rome, the power of life and death, was annexed to every kind of authority.

It even may be said, that, at Rome, the power of life and death, or rather the right of killing, was annexed to every kind of authority whatever, even to that which results from mere influence, or wealth; and the only consequence of the murder of the Gracchi, which was accompanied by the slaughter of three hundred, and afterwards of four thousand unarmed citizens, whom the nobles *knocked on the head*, was to engage the senate to erect a temple to *Concord*. The *Lex Porcia de tergo civium*, which has been so much celebrated, was attended with no other effect than that of more completely securing, against the danger of a retaliation, such consuls, prætors, quæstors, &c., as, like Verres, caused the inferior citizens of Rome to be scourged with rods, and put to death upon crosses, through mere caprice and cruelty*.

The treachery of the tribunes exemplified, by their permitting the senate to invest itself with the powers of taxation.

In fine, nothing can more completely show to what degree the tribunes had forsaken the interests of the people, whom they were appointed to defend, than the fact of their having allowed the senate to invest itself with the powers of taxation; they even suffered it to assume to itself the power, not only of dispensing with the laws, but also of abrogating them†.

* If we turn our eyes to Lacedæmon, we shall see, from several instances of the justice of the *ephori*, that matters were little better ordered there, in regard to the administration of public justice. And in Athens itself, the only one of the ancient commonwealths in which the people seem to have enjoyed any degree of real liberty, we see the magistrates proceed nearly in the same manner as they now do among the Turks: and I think no other proof needs to be given than the story of that barber in the Piræus, who having spread about the town the news of the overthrow of the Athenians in Sicily, which he had heard from a stranger who had stopped at his shop, was put to the torture, by the command of the archons, because he could not tell the name of his author.—See *Plut. Life of Nicias.*

† There are frequent instances of the consuls taking away from the capitol the tables of the laws passed under their predecessors. Nor was this, as we might at first be tempted to believe, an act of violence which success

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The consequence of communicability of power, in republican governments is, that it cannot be restrained.

In a word, as the necessary consequence of the *communicability* of power, a circumstance essentially inherent in the republican form of government, it is impossible for it ever to be restrained within certain rules. Those who are in a condition to control it, from that very circumstance become its defenders. Though they may have risen, as we may suppose, from the humblest stations, and such as seemed totally to preclude them from all ambitious views, they have no sooner reached a certain degree of eminence, than they begin to aim higher[1]. Their endeavours had at first no other object, as they professed, and perhaps with sincerity, than to see the laws impartially executed: their only view now is to set themselves above them; and seeing themselves raised to the level of a class of men who possess all the power and enjoy all the advantages of the state, they make haste to associate themselves with them*.

alone could justify; it was a consequence of the acknowledged power enjoyed by the senate, *cujus erat gravissimum judicium de jure legum*, as we may see in several places in Tully. Nay, the augurs themselves, as this author informs us, enjoyed the same privilege. "If laws had not been laid before the people in a legal form, they (the augurs) may set them aside; as was done with respect to the *Lex Tatia*, by the decree of the college, and to the *Leges Liviæ*, by the advice of Philip, who was consul and augur." *Legem, si non jure rogata est, tollere possunt; ut Tatiam, decreto collegii, ut Livias, consilio Philippi, consulis et auguris.* (See *De Legib.* lib. ii. § 12.)

* Which always proves an easy thing. It is in commonwealths the particular care of that class of men who are at the head of the state, to keep a watchful eye over the people, in order to draw over to their own party any man who happens to acquire a considerable influence among them; and this they are (and indeed must be) the more attentive to do, in proportion as the nature of the government is more democratical.

The constitution of Rome had even made express provisions on that subject. Not only the censors could at once remove any citizen into what tribe they pleased, and even into the senate (and we may easily believe that they made a political use of this privilege); but it was moreover a settled rule, that all persons who had been promoted to any public office by

[1] Vide ante, 69—79, 395—417.

De Lolme.

Republican governments are opposed to civil liberty.

Personal power and independence from the laws, being, in such states, the immediate consequence of the favour of the people, they are under an unavoidable necessity of being betrayed. Corrupting, as it were, every thing they touch, they cannot show a preference to a man, but they thereby attack his virtue; they cannot raise him, without immediately losing him and weakening their own cause; nay, they inspire him with views directly opposite to their own, and send him to join and increase the number of their enemies.

Thus, at Rome, after the feeble barrier which excluded the people from offices of power and dignity had been thrown down, the great plebeians, whom the votes of the people began to raise to those offices, were immediately received into the senate, as has been just now observed. From that period, their families began to form, in conjunction with the ancient patrician families, a new combination, or political association of persons*; and as this combination was formed of no particular class of citizens, but of all those who had influence enough to gain admittance into it, a single overgrown head was now to be seen in the republic, which, consisting of all who had either wealth or power of any kind, and disposing at will of the laws and the power of the people†, soon lost all regard to moderation and decency.

The ambitious principles which influence all parties.

Every constitution, therefore, whatever may be its form, which does not provide for inconveniences of the kind here mentioned, is a constitution essentially imperfect. It is in man himself that the source of the

the people, such as the consulship, the ædileship, or tribuneship, became, *ipso facto*, members of the senate. (Middleton's "Dissertation on the Roman Senate.")

* Called *nobiles* and *nobilitas*.

† It was, in several respects, a misfortune for the people of Rome, whatever may have been said to the contrary, by writers on this subject, that the distinction between the patricians and the plebeians was ever abolished; though, to say the truth, this was an event which could not be prevented.

evils to be remedied lies: general precautions, therefore, can only prevent them. If it be a fatal error entirely to rely on the justice and equity of those who govern, it is an error no less dangerous to imagine, that, while virtue and moderation are the constant companions of those who oppose the abuses of power, all ambition, all thirst after dominion, have retired to the other party[2].

Precautions ought to be taken against all those, who can influence the execution of the laws.

Though wise men, led astray by the power of names, and the heat of political contentions, may sometimes lose sight of what ought to be their real aim, they nevertheless know that it is not against the *Apii*, the *Coruncanii*, the *Cethegi*, but against all those who can influence the execution of the laws, that precautions ought to be taken; that it is not the consul, the prætor, the archon, the minister, the king, whom he ought to dread, nor the tribune, or the representative of the people, on whom we ought implicitly to rely: but that all those persons, without distinction, ought to be the objects of our jealousy, who, by any methods, and under any names whatsoever, have acquired the means of turning against each individual, the collective strength of all, and have so ordered things around themselves, that whoever attempts to resist them, is sure to find himself engaged alone against a thousand[3].

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[2] Vide ante, 54, 69—79, 345, 395—417, 446, 447, 455, 480—483.
[3] Ibid. 531—565.

Chapter X.

Fundamental Difference between the English Government, and the Governments just described.—In England all Executive Authority is placed out of the Hands of those in whom the People trust.—Usefulness of the Power of the Crown.

De Lolme.

In what manner then has the English constitution contrived to find a remedy for evils which, from the very nature of men and things, seem to be irremediable? How has it found means to oblige those persons to whom the people have given up their power, to make them effectual and lasting returns of gratitude?—those who enjoy an exclusive authority, to seek the advantage of all?—those who make the laws, to make only equitable ones? It has been by subjecting themselves to those laws, and for that purpose excluding them from all share in the execution of them.

The mode in which all executive authority is taken from those, to whom the legislative authority has been confided.

Thus, the parliament can establish as numerous a standing army as it will; but immediately another power comes forward, which takes the absolute command of it, fills all the posts in it, and directs its motion at its pleasure. The parliament may lay new taxes; but immediately another power seizes the produce of them, and alone enjoys the advantages and glory arising from the disposal of it. The parliament may even, if you please, repeal the laws on which the safety of the subject is grounded; but it is not their own caprices and arbitrary humours, it is the caprices and passions of other men, which they will have gratified, when they shall thus have overthrown the columns of public liberty.

And the English constitution has not only excluded

from any share in the execution of the laws, those in whom the people trust for the enacting them, but it has also taken from them what would have had the same pernicious influence on their deliberations,—the hope of ever invading that executive authority, and transferring it to themselves.

This authority has been made in England one single, indivisible prerogative: it has been made for ever the inalienable attribute of one person, marked out and ascertained beforehand by solemn laws and long-established customs; and all the active forces in the state have been left at his disposal.

Securities for the preservation of the kingly prerogative.

In order to secure this prerogative still farther against all possibility of invasions from individuals, it has been heightened and strengthened by everything that can attract and fix the attention and reverence of the people. The power of conferring and withdrawing places and employments has also been added to it; and ambition itself has thus been interested in its defence and service.

The power of conferring and withdrawing places and employments.

A share in the legislative power.

A share in the legislative power has also been given to the man to whom this prerogative has been delegated; a passive share indeed, and the only one that can, with safety to the state, be trusted to him, but by means of which he is enabled to defeat every attempt against his constitutional authority.

The crown is the only permanent power in the state.

Lastly, he is the only self-existing and permanent power in the state. The generals, the ministers of state, are so only by the continuance of his pleasure. He would even dismiss the parliament itself, if ever he saw it begin to entertain dangerous designs; and he needs only to say one word to disperse every power in the state that may threaten his authority. Formidable prerogatives these; but with regard to which we shall be inclined to lay aside our apprehensions, if on one hand we consider the great privileges of the people

De Lolme.

by which they have been counterbalanced, and, on the other, the happy consequences that result from their being thus united.

From this unity, and, if I may so express myself, this total sequestration of the executive authority, this advantageous consequence in the first place results,—the attention of the whole nation is directed to one and the same object. The people, besides, enjoy this most essential advantage, which they would vainly endeavour to obtain under the government of many;—they can give their confidence, without giving power over themselves, and against themselves; they can appoint trustees, and yet not give themselves masters.

The legislative cannot invest itself with the executive.

Those men to whom the people have delegated the power of framing the laws, are thereby made sure to feel the whole pressure of them. They can increase the prerogatives of the executive authority[1], but they cannot invest themselves with it[2]:—they have it not in their power to command its motions, they only can unbind its hands.

They are made to derive their importance from (nay, they are indebted for their existence to) the need in which that power stands of their assistance; and they know that they would no sooner have abused the trust of the people, and completed the treacherous work, than they would see themselves dissolved, spurned, like instruments now spent and become useless.

In England the cause of the people is not continually deserted and betrayed.

This same disposition of things also prevents in England that essential defect, inherent in the government of many, which has been described in the preceding chapter.

In that sort of government, the cause of the people, as has been observed, is continually deserted and betrayed. The arbitrary prerogatives of the governing

[1] Vide ante, 566—574.

[2] Ibid. 531—629.

powers are at all times either openly or secretly favoured, not only by those in whose possession they are,—not only by those who have good reason to hope that they shall at some future time share in the exercise of them,—but also by the whole crowd of those men who, in consequence of the natural disposition of mankind to overrate their own advantages, fondly imagine, either that they shall one day enjoy some branch of this governing authority, or that they are even already, in some way or other, associated to it.

All persons are interested, in confining the executive to its proper boundaries.

But as this authority has been made, in England, the indivisible, inalienable attribute of one alone, all other persons in the state are, *ipso facto*, interested to confine it within its due bounds. Liberty is thus made the common cause of all; the laws that secure it are supported by men of every rank and order; and the *Habeas Corpus* Act, for instance, is as zealously defended by the first nobleman in the kingdom as by the meanest subject.

The minister is equally interested with his fellow-citizen in maintaining the laws on which public liberty is founded.

Even the minister himself, in consequence of this *inalienability* of the executive authority, is equally interested with his fellow-citizens to maintain the laws on which public liberty is founded. He knows, in the midst of his schemes for enjoying or retaining his authority, that a court-intrigue or a caprice may at every instant confound him with the multitude, and the rancour of a successor, long kept out, send him to linger in the same prison which his temporary passions might tempt him to prepare for others.

In consequence of this disposition of things, great men are made to join in a common cause with the people, for restraining the excesses of the governing power; and, which is no less essential to the public welfare, they are also, from the same cause, compelled to restrain the excess of their own private power and

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influence; and a general spirit of justice becomes thus diffused through all parts of the state.

The commoner and the peer are compelled to wish only for equitable laws, and to observe them with exactness.

The wealthy commoner, the representative of the people, the potent peer, always having before their eyes the view of a formidable power,—of a power, from the attempts of which they have only the shield of the laws to protect them, and which would, in the issue, retaliate a hundred-fold upon them their acts of violence,—are compelled, both to wish only for equitable laws, and to observe them with scrupulous exactness.

Let then the people dread (it is necessary to the preservation of their liberty), but let them never entirely cease to love, the throne, that sole and indivisible seat of all the active powers in the state.

The arm of justice equally brings to account, as well the most powerful as the meanest offender.

Let them know, it is that, which, by lending an immense strength to the arm of justice, has enabled her to bring to account, as well the most powerful as the meanest offender,—which has suppressed, and, if I may so express myself, weeded out all those tyrannies, sometimes confederated with, and sometimes adverse to, each other, which incessantly tend to grow up in the middle of civil societies, and are the more terrible in proportion as they feel themselves to be less firmly established.

Let them know, it is that, which, by making all honours and places depend on the will of one man, has confined within private walls those projects, the pursuit of which, in former times, shook the foundations of whole states;—has changed into intrigues the conflicts, the outrages of ambition:—and that those contentions which, in the present times, afford them only matter of amusement, are the volcanoes which set in flames the ancient commonwealths.

It is that, which, leaving to the rich no other

security for his palace than that which the peasant has for his cottage, has united his cause to that of the latter;—the cause of the powerful to that of the helpless,—the cause of the man of extensive influence and connexions to that of him who is without friends.

It is the throne above all, it is this jealous power, which makes the people sure that its representatives never will be anything more than its representatives: at the same time it is the ever-subsisting Carthage, which vouches to it for the duration of their virtue.

It is the throne, which makes the people sure that its representatives, never will be any thing more than its representives.

CHAPTER XI.

The Power which the People themselves exercise.—The Election of Members of Parliament.

THE English constitution having essentially connected the fate of the men to whom the people trust their power with that of the people themselves, really seems, by that caution alone, to have procured the latter a complete security.

However, as the vicissitudes of human affairs may, in process of time, realize events which at first had appeared most improbable, it might happen that the ministers of the executive power, notwithstanding the interest they themselves have in the preservation of public liberty, and in spite of the precautions expressly taken to prevent the effect of their influence, should at length employ such efficacious means of corruption as might bring about a surrender of some of the laws upon which this public liberty is founded[1]. And though we should suppose that such a danger would really be chimerical, it might at last happen, that, con-

Precautionary measures against the corruption of the representative power.

[1] Vide ante, 124—126, 131—137, 141—149, 255—258, 275, 458, 459, 531—565, 575—629.

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niving at a vicious administration, and being over-liberal of the produce of general labour, the representatives of the people might make them suffer many of the evils which attend worse forms of government.

The duties of representatives are to prevent an arbitrary government, and to procure the best administration of the laws.

Lastly, as their duty does not consist only in preserving their constituents against the calamities of an arbitrary government, but moreover in procuring them the best administration possible, it might happen that they would manifest, in this respect, an indifference which would, in its consequences, amount to a real calamity.

It was, therefore, necessary that the constitution should furnish a remedy for all the above cases: now, it is in the right of electing members of parliament, that this remedy lies.

Discretionary power vested in the people in the re-election of their representatives.

When the time is come at which the commission given by the people to their delegates expires[1], they again assemble in their several towns or counties: on these occasions they have it in their power to elect again those of their representatives whose former conduct they approve, and to reject those who have contributed to give rise to their complaints: a simple remedy this, and which only requiring, in its application, a knowledge of matters of fact, is entirely within the reach of the abilities of the people; but a remedy, at the same time, which is the most effectual that could be applied; for, as the evils complained of arise merely from the peculiar dispositions of a certain number of individuals, to set aside those individuals is to pluck up the evil by the roots.

But I perceive that, in order to make the reader sensible of the advantages that may accrue to the people of England from their right of election, there is another of their rights, of which it is absolutely necessary that I should first give an account.

[1] Vide ante, 531—565.

CHAPTER XII.

The same Subject continued.—Liberty of the Press.

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Political evils arise from the defects, and also from the non-execution of laws.

As the evils that may be complained of in a state do not always arise merely from the defect of the laws, but also from the non-execution of them; and this non-execution of such a kind, that it is often impossible to subject it to any express punishment, or even to ascertain it by any previous definition; men, in several states, have been led to seek for an expedient that might supply the unavoidable deficiency of legislative provisions, and begin to operate, as it were, from the point at which the latter begin to fail: I mean here to speak of the censorial power,—a power which may produce excellent effects, but the exercise of which (contrary to that of the legislative power) must be left to the people themselves.

The end of legislation is to adopt that, which is most conducive to the public good; and not the particular intentions of individuals.

As the proposed end of legislation is not, according to what has been above observed, to have the particular intentions of individuals, upon every case, known and complied with, but solely to have what is most conducive to the public good, on the occasions that arise, found out and established, it is not an essential requisite in legislative operations that every individual should be called upon to deliver his opinion; and since this expedient, which at first sight appears so natural, of seeking out by the advice of all that which concerns all, is found liable, when carried into practice, to the greatest inconveniences, we must not hesitate to lay it aside entirely. But as it is the opinion of individuals alone which constitutes the check of a censorial power, this power cannot produce its intended effect any

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farther than this public opinion is made known and declared: the sentiments of the people are the only thing in question here: it is therefore necessary that the people should speak for themselves, and manifest those sentiments. A particular court of censure would essentially frustrate its intended purpose: it is attended, besides, with very great inconveniences.

The people have the province of canvassing and arraigning the conduct of those, who are invested with any branch of public authority.

As the use of such a court is to determine upon those cases which lie out of the reach of the laws, it cannot be tied down to any precise regulations. As a farther consequence of the arbitrary nature of its functions, it cannot even be subjected to any constitutional check; and it continually presents to the eye the view of a power entirely arbitrary, and which in its different exertions may affect, in the most cruel manner, the peace and happiness of individuals. It is attended, besides, with this very pernicious consequence, that, by dictating to the people their judgment of men or measures, it takes from them that freedom of thinking, which is the noblest privilege, as well as the firmest support of liberty*.

We may therefore look upon it as a farther proof of the soundness of the principles on which the English

* M. de Montesquieu, and M. Rousseau, and indeed all the writers on this subject I have met with, bestow vast encomiums on the censorial tribunal that had been instituted at Rome:—they have not been aware that this power of censure, lodged in the hands of peculiar magistrates, with other discretionary powers annexed to it, was no other than a piece of statecraft, like those described in the preceding chapters, and had been contrived by the senate as an additional mean of securing its authority. Sir Thomas More has also adopted similar opinions on the subject: and he is so far from allowing the people to canvass the actions of their rulers, that in his System of Policy, which he calls *An Account of Utopia* (the happy region, ευ and τοπος), he makes it death for individuals to talk about the conduct of government.

I feel a kind of pleasure, I must confess, to observe, on this occasion that though I have been called by some an advocate for power, I have carried my ideas of liberty farther than many writers who have mentioned that word with much enthusiasm.

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constitution is founded, that it has allotted to the people themselves the province of openly canvassing and arraigning the conduct of those who are invested with any branch of public authority; and that it has thus delivered into the hands of the people at large the exercise of the censorial power. Every subject in England has not only a right to present petitions to the king, or to the houses of parliament, but he has a right also to lay his complaints and observations before the public, by means of an open press: a formidable right this, to those who rule mankind; and which, continually dispelling the cloud of majesty by which they are surrounded, brings them to a level with the rest of the people, and strikes at the very being of their authority.

Every subject has a right to lay his complaints and observations before the public, by means of an open press.

And indeed this privilege is that which has been obtained by the English nation with the greatest difficulty, and latest in point of time, at the expense of the executive power. Freedom was in every other respect already established, when the English were still, with regard to the public expression of their sentiments, under restraints that may be called despotic. History abounds with instances of the severity of the Court of Star-chamber, against those who presumed to write on political subjects[1]. It had fixed the number of printers and printing-presses, and appointed a *licenser*, without whose approbation no book could be published[2]. Besides, as this tribunal decided matters by its own single authority, without the intervention of a jury, it was always ready to find those persons guilty whom the court was pleased to look upon as such: nor was it indeed without grounds that the chief-justice, Coke, whose notions of liberty were somewhat tainted with the prejudices of the times in which he lived, concluded the eulogiums he bestowed on this court, with

Despotic restraints upon the press, by the Court of Star-chamber.

[1] Vide ante, 273, 274.

[2] Ibid. 274.

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saying, that "the right institution and orders thereof being observed, it doth keep all England in quiet."

After the Court of Star-chamber had been abolished, the Long Parliament[3], whose conduct and assumed power were little better qualified to bear a scrutiny, revived the regulations against the freedom of the press. Charles II.[4], and after him James II., procured farther renewals of them. These latter acts having expired in the year 1692, were at this æra, although posterior to the Revolution, continued for two years longer; so that it was not till the year 1694, that, in consequence of the parliament's refusal to prolong the prohibitions, the freedom of the press (a privilege which the executive power could not, it seems, prevail upon itself to yield up to the people) was finally established.

The freedom of the press was established in 1694.

Liberty of the press, in what it consists.

In what, then, does this liberty of the press precisely consist? Is it a liberty left to every one to publish anything that comes into his head? to calumniate, to blacken, whomsoever he pleases? No; the same laws that protect the person and the property of the individual, do also protect his reputation; and they decree against libels, when really so, punishments of much the same kind as are established in other countries. But, on the other hand, they do not allow, as in other states, that a man should be deemed guilty of a crime for merely publishing something in print; and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case, with the precautions we have before described.

The liberty of the press, as established in England, consists therefore (to define it more precisely) in this, that neither the courts of justice, nor any other judges

[3] Vide ante, 391—417.

[4] Ibid. 453.

whatever, are authorised to take notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the trial by jury.

It is even this latter circumstance which more particularly constitutes the freedom of the press. If the magistrates, though confined in their proceedings to cases of criminal publications, were to be the sole judges of the criminal nature of the things published, it might easily happen that, with regard to a point which, like this, so highly excites the jealousy of the governing powers, they would exert themselves with so much spirit and perseverance, that they might, at length, succeed in completely striking off all the heads of the hydra.

The sole office of the judge, is to declare the punishment established by law.

But whether the authority of the judges be exerted at the motion of a private individual, or whether it be at the instance of the government itself, their sole office is to declare the punishment established by the law:—it is to the jury alone that it belongs to determine on the matter of law, as well as on the matter of fact; that is, to determine, not only whether the writing, which is the subject of the charge, has really been composed by the man charged with having done it, and whether it be really meant of the person named in the indictment,—but also whether its contents are criminal.

And though the law in England does not allow a man, prosecuted for having published a libel, to offer to support by evidence the truth of the facts contained in it* (a mode of proceeding which would be attended with very mischievous consequences, and is everywhere prohibited), yet, as the indictment is to express that

* In actions for damages between individuals, the case, *if I mistake not*, is different, and the defendant is allowed to produce evidence of the facts asserted by him.

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The jury are the sole masters of their verdict.

the facts are *false, malicious*, &c., and the jury, at the same time, are sole masters of their verdict,—that is, may ground it upon what considerations they please,—it is very probable that they would acquit the accused party, if the fact, asserted in the writing before them, were matter of undoubted truth, and of a general evil tendency. They, at least, would certainly have it in their power.

And it is still more likely that this would be the case, if the conduct of the government itself was arraigned; because, besides this conviction which we suppose in the jury, of the certainty of the facts, they would also be influenced by their sense of a principle generally admitted in England, and which, in a late celebrated cause, was strongly insisted upon, *viz.*, That, "though to speak ill of individuals deserved reprehension, yet the public acts of government ought to lie open to public examination, and that it was a service done to the state to canvass them freely*."

The extreme security with which every man is enabled to communicate his sentiments, has multiplied public papers.

And indeed this extreme security with which every man in England is enabled to communicate his sentiments to the public, and the general concern which matters relative to the government are always sure to create, have wonderfully multiplied all kinds of public papers[5]. Besides those which, being published at the

* See Serjeant Glynn's Speech for Woodfall in the prosecution against the latter, by the attorney-general, for publishing Junius' Letter to the King.

[5] The extensive circulation of newspapers is proved by the following return to the House of Commons of the gross and net amount of duty received from stamps on newspapers in the United Kingdom, in each of the three years ended October 10, 1837, distinguishing each year.

GREAT BRITAIN.	Gross Amount.	Net Amount.
Year ended October 10, 1835 - -	£523,036 10 2	£424,998 3 1
October 10, 1836 - -	473,835 7 11	388,018 14 0
October 10, 1837 - -	196,867 6 9	196,867 6 9

IRELAND.	Gross Amount.	Net Amount.
Year ended October 10, 1835 - -	£31,518 5 10¾	£31,249 18 2¼
October 10, 1836 - -	28,591 8 5	27,866 7 2½
October 10, 1837 - -	20,757 11 8½	15,757 17 8½

end of every year, month, or week, present to the reader a recapitulation of every thing interesting that may have been done or said during their respective periods, there are several others, which, making their appearance every day, or every other day, communicate to the public the several measures taken by the government, as well as the different causes of any importance, whether civil or criminal, that occur in the courts of justice, and sketches from the speeches either of the advocates, or the judges, concerned in the management and decision of them. During the time the parliament continues sitting, the votes or resolutions of the House of Commons are daily published by authority; and the most interesting speeches in both houses are taken down in short-hand, and communicated to the public in print[6].

From the circulation of newspapers, every individual becomes acquainted with the state of the nation, and the three kingdoms seem as if they were one single town.

Lastly, the private anecdotes in the metropolis, and the country, concur also towards filling the collection: and as the several public papers circulate, or are transcribed into others, in the different country towns, and even find their way into the villages, where every man, down to the labourer, peruses them with a sort of eagerness, every individual thus becomes acquainted with the state of the nation, from one end to the other; and by these means the general intercourse is such, that the three kingdoms seem as if they were one single town.

Under the 56 George III. c. 56, stamps on newspapers in Ireland were 2*d.* Irish currency, equal to 1¾*d.* present currency, and the discount allowed was 1*l.* 10*s.* per cent.

By the 6 & 7 William IV. c. 76, the duty was made 1*d.* British, from September 15, 1836, with an allowance, limited to Ireland, of 25*l.* per cent.

[6] The taking down, and publication, of the members' speeches, are breaches of the positive orders of both houses; but the practice has been so long connived at that it would be dangerous to the public peace to attempt to prevent it. Any member can, by merely noticing the presence of strangers in the house, cause their exclusion; or bring the publisher of a newspaper to the bar of the house for a false report of his speech,—an offence which both houses have power to punish. Vide ante, 334—345.

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The notoriety of all things constitutes a check on those, who enjoy public authority.

And it is this public notoriety of all things that constitutes the supplemental power, or check, which, we have above said, is so useful to remedy the unavoidable insufficiency of the laws, and keep within their respective bounds all those persons who enjoy any share of public authority.

As they are thereby made sensible that all their actions are exposed to public view, they dare not venture upon those acts of partiality, those secret connivances at the iniquities of particular persons, or those vexatious practices which the man in office is but too apt to be guilty of, when, exercising his office at a distance from the public eye, and as it were in a corner, he is satisfied, that, provided he be cautious, he may dispense with being just. Whatever may be the kind of abuse in which persons in power may, in such a state of things, be tempted to indulge themselves, they are convinced that their irregularities will be immediately divulged. The juryman, for example, knows that his verdict—the judge, that his direction to the jury—will presently be laid before the public: and there is no man in office, but who thus finds himself compelled, in almost every instance, to choose between his duty, and the surrender of all his former reputation.

Any subject in which the public welfare is concerned, excites unreserved observations and complaints.

It will, I am aware, be thought that I speak in too high terms of the effects produced by the public newspapers. I indeed confess that all the pieces contained in them are not patterns of good reasoning, or of the truest Attic wit; but, on the other hand, it scarcely ever happens that a subject in which the laws, or in general the public welfare, are really concerned, fails to call forth some able writer, who, under some form or other, communicates to the public his observations and complaints. I shall add here, that, though an upright man, labouring for a while under a strong popular prejudice, may, supported by the consciousness of his

innocence, endure with patience the severest imputations; the guilty man, hearing nothing in the reproaches of the public but what he knows to be true, and already upbraids himself with, is very far from enjoying any such comfort; and that, when a man's own conscience takes part against him, the most despicable weapon is sufficient to wound him to the quick*.

Those persons whose greatness seems to set them above the reach of public censure, are not those who least feel its effects.

Even those persons whose greatness seems most to set them above the reach of public censure, are not those who least feel its effects. They have need of the suffrages of that vulgar whom they affect to despise, and who are, after all, the dispensers of that glory which is the real object of their ambitious cares. Though all have not so much sincerity as Alexander, they have equal reason to exclaim, *O people! what toils do we not undergo, in order to gain your applause!*

I confess that in a state where the people dare not speak their sentiments, but with a view to please the ears of their rulers, it is possible that either the prince, or those to whom he has trusted his authority, may sometimes mistake the nature of the public sentiments; or that, for want of that affection of which they are denied all possible marks, they may rest contented with inspiring terror, and make themselves amends in beholding the overawed multitude smother their complaints.

But when the laws give a full scope to the people

* I shall take this occasion to observe, that the liberty of the press is so far from being injurious to the reputation of individuals (as some persons have complained), that it is, on the contrary, its surest guard. When there exists no means of communication with the public, every one is exposed, without defence, to the secret shafts of malignity and envy. The man in office loses his reputation, the merchant his credit, the private individual his character, without so much as knowing either who are his enemies, or which way they carry on their attacks. But when there exists a free press, an innocent man immediately brings the matter into open day, and crushes his adversaries, at once, by a public challenge to lay before the public the grounds of their several imputations.

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The laws give a full scope to the people for the expression of their complaints.

for the expression of their sentiments, those who govern cannot conceal from themselves the disagreeable truths which resound from all sides. They are obliged to put up even with ridicule; and the coarsest jests are not always those which give them the least uneasiness, Like the lion in the fable, they must bear the blows of those enemies whom they despise the most; and they are, at length, stopped short in their career, and compelled to give up those unjust pursuits which, they find, draw upon them, instead of that admiration which is the proposed end and reward of their labours, nothing but mortification and disgust.

Freedom of the press induces the spirit of liberty.

In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible sensibility of man to the opinion of his fellow-creatures, will not hesitate to affirm, that if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty would alone form a counterpoise to the power of the prince. If, for example, in an empire of the East, a place could be found which, rendered respectable by the ancient religion of the people, might ensure safety to those who should bring thither their observations of any kind, and from this sanctuary printed papers should issue, which, under a certain seal, might be equally respected, and which, in their daily appearance, should examine and freely discuss the conduct of the cadis, the pashas, the vizir, the divan, and the sultan himself,—that would immediately introduce some degree of liberty.

CHAPTER XIII.

The Subject continued.

DE LOLME.

ANOTHER effect, and a very considerable one, of the liberty of the press, is, that it enables the people effectually to exert those means which the constitution has bestowed on them, of influencing the motions of the government.

It has been observed in a former place, how it came to be a matter of impossibility for any large number of men, when obliged to act in a body, and upon the spot, to take any well-weighed resolution. But this inconvenience, which is the inevitable consequence of their situation, does in nowise argue a personal inferiority in them, with respect to the few who, from some accidental advantages, are enabled to influence their determinations. It is not fortune, it is nature, that has made the essential differences between men; and whatever appellation a small number of persons, who speak without sufficient reflection, may affix to the general body of their fellow-creatures, the whole difference between the statesman, and many a man from among what they call the dregs of the people, often lies in the rough outside of the latter,—a disguise which may fall off on the first opportunity: and more than once has it happened, that from the middle of a multitude, in appearance contemptible, a Viriatus has been suddenly seen to rise, or a Spartacus to burst forth.

It is not fortune, it is nature, that has made the essential differences between men.

Time, and a more favourable situation, are therefore the only things wanting to the people; and the freedom of the press affords the remedy to these disadvantages.

Constitutional advantages of the press.

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Through its assistance, every individual may, at his leisure and in retirement, inform himself of everything that relates to the questions on which he is to take a resolution. Through its assistance, a whole nation, as it were, holds a council, and deliberates,—slowly, indeed (for a nation cannot be informed like an assembly of judges), but after a regular manner, and with certainty. Through its assistance, all matters of fact are at length made clear; and, through the conflict of the different answers and replies, nothing at last remains but the sound part of the arguments*.

Through the assistance of the press, all matters of fact are at length made clear; and, through the conflict of answers and replies, nothing remains but the sound part of the arguments.

Hence, though all good men may not think themselves obliged to concur implicitly in the tumultuary resolutions of a people whom their orators take pains to agitate, yet, on the other hand, when this same people, left to itself, perseveres in opinions which have for a long time been discussed in public writings, and from which (it is essential to add) all errors concerning facts have been removed, such perseverance is certainly a very respectable decision; and then it is,

* This right of publicly discussing political subjects is alone a great advantage to a people who enjoy it; and if the citizens of Geneva preserved their liberty better than the people were able to do in the other commonwealths of Switzerland, it was, I think, owing to the extensive right they possessed of making public remonstrances to their magistrates. To these remonstrances the magistrates (for instance, the council of *twenty-five*, to which they were usually made) were obliged to give an answer. If this answer did not satisfy the remonstrating citizens, they took time, perhaps two or three weeks, to make a reply to it, which must also be answered; and the number of citizens who went up with each new remonstrance increased, according as they were thought to have reason on their side. Thus, the remonstrances which were made on account of the sentence against Rousseau, and were delivered at first by only forty citizens, were afterwards often accompanied by about nine hundred. This circumstance, together with the ceremony with which those remonstrances or *representations* were delivered, rendered them a great check on the conduct of the magistrates: they were even still more useful to the citizens of Geneva, as preventives than as remedies; and nothing was more likely to deter the magistrates from taking a step of any kind than the thought that it might give rise to a *representation*.

though only then, that we may with safety say,—"the voice of the people is the voice of God."

How, therefore, can the people of England *act*, when, having formed opinions which may really be called their own, they think they have just cause to complain of the administration? It is, as has been said above, by means of the right they have of electing their representatives; and the same method of general intercourse that has informed them with regard to the objects of their complaints, will likewise enable them to apply the remedy to them.

The press serves as a check upon parliament.

Through this medium they are acquainted with the nature of the subjects that have been deliberated upon in the assembly of their representatives;—they are informed by whom the different motions were made,—by whom they were supported;—and the manner in which the suffrages are delivered, is such, that they always can know the names of those who have voted constantly for the advancement of pernicious measures.

And the people not only know the particular dispositions of every member of the House of Commons, but, from the general notoriety of affairs, have also a knowledge of the political sentiments of a great number of those whom their situation in life renders fit to fill a place in that House. And, availing themselves of the several vacancies that happen, and still more of the opportunity of a general election, they purify, either successively or at once, the legislative assembly; and thus, without any commotion or danger to the state, they effect a material reformation in the views of the government.

Modes in which the people express their censure upon parliamentary proceedings.

I am aware that some persons will doubt these patriotic and systematic views, which I am here attributing to the people of England, and will object to me the disorders that sometimes happen at elections. But this reproach, which, by the way, comes with little

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propriety, from writers who would have the people transact everything in their own persons,—this reproach, I say, though true to a certain degree, is not, however, so much so, as it is thought by certain persons who have taken only a superficial survey of the state of things.

Without doubt, in a constitution in which all important causes of uneasiness are so effectually prevented, it is impossible but that the people will have long intervals of inattention. Being then suddenly called from this state of inactivity, to elect representatives, they have not examined before-hand the merits of those who solicit their votes; and the latter have not had, amidst the general tranquillity, any opportunity of making themselves known to them.

The candidate who gives the best entertainment to a certain class of parliamentary electors, has the greatest chance to get the better of his competitors.

The elector, persuaded, at the same time, that the person whom he will elect will be equally interested with himself in the support of public liberty, does not enter into laborious disquisitions, and from which he sees he may exempt himself. Obliged, however, to give the preference to somebody, he forms his choice on motives which would not be excusable, if it were not that some motives are necessary to make a choice, and that, at this instant, he is not influenced by any other; and indeed it must be confessed, that, in the ordinary course of things, and with electors of a certain rank in life, that candidate who gives the best entertainment has a great chance to get the better of his competitors [1].

Modes in which the people can redress the perfidy of their representatives.

But if the measures of government, and the reception of these measures in parliament, by means of a too complying House of Commons, should ever be such as to spread a serious alarm among the people, the same causes which have concurred to establish public liberty would, no doubt, operate again, and like-

[1] Vide ante, 458, 551—557, 621—629.

wise concur in its support. A general combination would then be formed, both of those members of parliament who have remained true to the public cause, and of persons of every order among the people. Public meetings, in such circumstances, would be appointed; general subscriptions would be entered into to support the expenses, whatever they might be, of such a necessary opposition; and all private and unworthy purposes being suppressed by the sense of the national danger, the choice of the electors would then be wholly determined by the consideration of the public spirit of the candidates, and the tokens given by them of such spirit.

Unsuccessful attempts of the Stuarts to tyrannize over the people.

Thus were those parliaments formed, which suppressed arbitrary taxes and imprisonments[2]. Thus was it, that, under Charles II.[3], the people, when recovered from that enthusiasm of affection with which they received a king so long persecuted, at last returned to him no parliaments but such as were composed of a majority of men attached to public liberty. Thus it was, that, persevering in a conduct which the circumstances of the times rendered necessary, the people baffled the arts of the government; and Charles dissolved three successive parliaments, without any other effect than that of having those same men re-chosen, and set again in opposition to him, of whom he hoped he had rid himself for ever[4].

Nor was James II.[5] happier in his attempts than Charles had been. This prince soon experienced that his parliament was actuated by the same spirit as those which had opposed the designs of his late brother; and having suffered himself to be led into measures of violence, instead of being better taught

[2] Vide ante, 98—100, 105—107, 119—121, 126—128, 134—137, 288, 325—330, 373—394, 451—453, 472—479, 531—565.
[3] Ibid. 413—417. [4] Ibid. 418—459. [5] Ibid. 459—470.

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by the discovery he made of the real sentiments of the people, his reign was terminated by that catastrophe with which every one is acquainted.

The complaints of the people, if adhered to, must be ultimately redressed.

Indeed, if we combine the right enjoyed by the people of England, of electing their representatives[6], with the whole of the English government, we shall become continually more and more sensible of the excellent effects that may result from that right. All men in the state are, as has been before observed, really interested in the support of public liberty. Nothing but temporary motives, and such as are quite peculiar to themselves, can induce the members of any House of Commons to connive at measures destructive of this liberty. The people, therefore, under such circumstances, need only change these members, in order effectually to reform the conduct of that House; and it may fairly be pronounced beforehand, that a House of Commons, composed of a new set of persons, will, from this bare circumstance, be in the interests of the people.

Hence, though the complaints of the people do not always meet with a speedy and immediate redress (a celerity which would be the symptom of a fatal unsteadiness in the constitution, and would, sooner or later, bring on its ruin); yet, when we attentively consider the nature and the resources of this constitution, we shall not think it too bold an assertion to say, that it is impossible but that complaints in which the people persevere (that is, well-grounded complaints) will, sooner or later, be redressed.

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[6] Vide ante, 531—565.

CHAPTER XIV.

Right of Resistance.

DE LOLME.

BUT all those privileges of the people, considered in themselves, are but feeble defences against the real strength of those who govern. All those provisions, all those reciprocal rights, necessarily suppose that things remain in their legal and settled course: what would then be the resource of the people, if ever the prince, suddenly freeing himself from all restraint, and throwing himself, as it were, out of the constitution, should no longer respect either the person or the property of the subject, and either should make no account of his conventions with the parliament, or attempt to force it implicitly to submit to his will?—It would be resistance.

Resistance, is the ultimate and lawful resource against the violences of power.

Without entering here into the discussion of a doctrine which would lead us to inquire into the first principles of civil government, consequently engage us in a long disquisition, and with regard to which, besides, persons free from prejudices agree pretty much in their opinions, I shall only observe here (and it will be sufficient for my purpose) that the question has been decided in favour of this doctrine by the laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violences of power[1].

It was resistance that gave birth to the Great Charter[2], that lasting foundation of English liberty, and the excesses of a power established by force were

[1] Vide ante, 468, 469, 470—473.
[2] Ibid. 50—54, 67—69, 98, 99, 119.

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also restrained by force*. It has been by the same means that, at different times, the people have procured the confirmation of the same charter. Lastly, it has also been the resistance to a king who made no account of his own engagements, that has, in the issue, placed on the throne the family which is now in possession of it.

The throne of England declared vacant, because the king had violated the fundamental laws.

This is not all; this resource, which till then had only been an act of force opposed to other acts of force, was, at that era, expressly recognised by the law itself. The lords and commons, solemnly assembled, declared, that "King James II., having endeavoured to subvert the constitution of the kingdom, by breaking the original contract between king and people, and having violated the fundamental laws, and withdrawn himself, had abdicated the government; and that the throne was thereby vacant† [3]."

And, lest those principles, to which the Revolution thus gave a sanction, should, in process of time, become mere *arcana* of state, exclusively appropriated, and only known to a certain class of subjects; the same act, we have just mentioned, expressly ensured to individuals the right of publicly preferring complaints against the abuses of government, and, moreover, of being provided with arms for their own defence. Judge Blackstone expresses himself in the following terms, in his Commentaries on the Laws of England.

* Lord Lyttleton says, extremely well, in his Persian Letters, "If the privileges of the people of England be concessions from the crown, is not the power of the crown itself a concession from the people?" It might be said with equal truth, and somewhat more in point to the subject of this chapter,—If the privileges of the people be an encroachment on the power of kings, the power itself of kings was at first an encroachment (no matter whether effected by surprise) on the natural liberty of the people.

† The Bill of Rights has since given a new sanction to all these principles [4].

[3] Vide ante, 468—471.

[4] Ibid. 472.

"To vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence."

Lastly, this right of opposing violence, in whatever shape, and from whatever quarter it may come, is so generally acknowledged, that the courts of law have sometimes grounded their judgments upon it. I shall relate on this head a fact which is somewhat remarkable.

Courts of law have grounded their judgments on the right of resistance.

A constable, being out of his precinct, arrested a woman whose name was *Anne Dekins;* one *Tooly* took her part, and, in the heat of the fray, killed the assistant of the constable.

Being prosecuted for murder, he alleged, in his defence, that the illegality of the imprisonment was a sufficient provocation to make the homicide *excusable,* and entitle him to the benefit of clergy. The jury, having settled the matter of fact, left the *criminality* of it to be decided by the judge, by returning a *special verdict.* The cause was adjourned to the King's Bench, and thence again to Serjeants' Inn, for the opinion of the twelve judges. Here follows the opinion delivered by Chief Justice Holt, in giving judgment.

"If one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, much more so when it is done under colour of justice; and when the liberty of the subject is invaded, it is a provocation to all the subjects of England. A man ought to be concerned for *Magna Charta* and the laws; and if any one against law imprison a man, he is an offender against Magna Charta." After some debate, occasioned chiefly by Tooly's appearing not to

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have known that the constable was out of his precinct, seven of the judges were of opinion that the prisoner was guilty of manslaughter, and he was admitted to the benefit of clergy*.

The right of ultimate resistance, displays the advantages of a free press.

But it is with respect to this right of an ultimate resistance, that the advantage of a free press appears in a most conspicuous light. As the most important rights of the people, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows,—so this right of *resisting*, itself, is but vain, when there exist no means of effecting a general union between the different parts of the people.

Private individuals, unknown to each other, are forced to bear in silence injuries in which they do not see other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern: and as the latter well know (and are even apt to over-rate) the advantages of their own situation, they think that may venture upon any thing.

The cause of each individual is really the cause of all, and to attack the lowest among the people, is to attack the whole people.

But when they see that all their actions are exposed to public view,—that, in consequence of the celerity with which all things become communicated, the whole nation forms, as it were, one continued *irritable* body, no part of which can be touched without exciting an universal *tremor*,—they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the people is to attack the whole people.

Here also we must remark the error of those who, as they make the liberty of the people consist in their power, so make their power consist in their action.

* See Reports of Cases argued, debated, and adjudged, *in Banco Reginæ*, in the time of Queen Anne.

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When the people are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things.

When the people are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things. The event of one day effaces the notions which they had begun to adopt on the preceding day; and amidst the continual change of things, no settled principle, and, above all, no plans of union, have time to be established among them.—You wish to have the people love and defend their laws and liberty; leave them, therefore, the necessary time to know what laws and liberty are, and to agree in their opinion concerning them; you wish an union, a *coalition*, which cannot be obtained but by a slow and peaceable *process;* forbear therefore continually to shake the vessel.

It is a contradiction, that the people should act, and at the same time retain any real power.

Nay, farther, it is a contradiction, that the people should *act*, and at the same time retain any real power. Have they, for instance, been forced by the weight of public oppression to throw off the restraints of the law, from which they no longer received protection?—they presently find themselves suddenly become subject to the command of a few leaders, who are the more absolute in proportion as the nature of their power is less clearly ascertained: nay, perhaps they must even submit to the toils of war, and to military discipline.

If it be in the common and legal course of things that the people are called to move, each individual is obliged, for the success of the measures in which he is then made to take a concern, to join himself to some party; nor can this party be without a head. The citizens thus grow divided among themselves, and contract the pernicious habit of submitting to leaders. They are, at length, no more than the clients of a certain number of patrons; and the latter soon becoming able to command the arms of the citizens in the same manner as they at first governed their votes, make

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little account of a people, with one part of which they know how to curb the other.

When the springs of government are placed out of the body of the people, their action is thereby disengaged from all that can render it complicated.

But when the moving springs of government are placed entirely out of the body of the people, their action is thereby disengaged from all that could render it complicated, or hide it from the eye. As the people thenceforward consider things speculatively, and are, if I may be allowed the expression, only spectators of the game, they acquire just notions of things; and as these notions, amidst the general quiet, gain ground and spread themselves far and wide, they at length entertain, on the subject of their liberty, but one opinion.

Forming thus, as it were, one body, the people, at every instant, have it in their power to strike the decisive blow, which is to level every thing. Like those mechanical powers, the greatest efficiency of which exists at the instant which precedes their entering into action, it has an immense force, just because it does not yet exert any; and in this state of stillness, but of attention, consists its true *momentum*.

If those who are entrusted with the active part of government, were to attempt the subversion of liberty, their ruin would be the result.

With regard to those who (whether from personal privileges, or by virtue of a commission from the people) are entrusted with the active part of government, as they, in the meanwhile, see themselves exposed to public view, and observed as from a distance by men free from the spirit of party, and who place in them but a conditional trust, they are afraid of exciting a commotion, which, though it might not prove the destruction of all power, yet would surely and immediately be the destruction of their own. And if we might suppose that, through an extraordinary conjunction of circumstances, they should resolve among themselves upon the sacrifice of those laws on which public liberty is founded, they would no sooner lift up their eyes towards that extensive assem-

bly, which views them with a watchful attention, than they would find their public virtue return upon them, and would make haste to resume that plan of conduct, out of the limits of which they can expect nothing but ruin and perdition. DE LOLME.

In short, as the body of the people cannot act without either subjecting themselves to some power, or effecting a general destruction, the only share they can have in a government, with advantage to themselves, is not to interfere, but to influence,—to be able to act, and not to act.

The body of the people should not interfere, but to influence, to be able to act, and not to act.

The power of the people is not when they strike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move; and Manlius included all in four words, when he said to the people of Rome,—*Ostendite bellum, pacem habebitis.*

CHAPTER XV.

Proofs drawn from Facts, of the Truth of the Principles laid down in the present Work.—1. *The peculiar Manner in which Revolutions have always been concluded in England.*

IT may not be sufficient to have proved by arguments the advantages of the English constitution; it will perhaps be asked, whether the effects correspond to the theory? To this question (which I confess is extremely proper) my answer is ready: it is the same which was once made, I believe, by a Lacedæmonian—*Come and see.*

If we peruse the English history, we shall be particularly struck with one circumstance to be observed in it, and which distinguishes most advantageously the English government from all other free governments;

Peculiarities attendant upon the revolutions in England.

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I mean the manner in which revolutions and public commotions have always been terminated in England.

If we read with some attention the history of other free states, we shall see that the public dissensions that have taken place in them have constantly been terminated by settlements in which the interests only of a *few* were really provided for, while the grievances of the *many* were hardly, if at all, attended to. In England the very reverse has happened: and we find revolutions always to have been terminated by extensive and accurate provisions for securing the general liberty.

Revolutions have terminated by extensive and accurate provisions for securing the general liberty.

The histories of the ancient Grecian commonwealths, and, above all, of the Roman republic, of which more complete accounts have been left us, afford striking proof of the former part of this observation.

What was, for instance, the consequence of that great revolution by which the kings were driven from Rome, and in which the senate and patricians acted as the advisers and leaders of the people? The consequence was, as we find in Dionysius of Halicarnassus, and Livy, that the senators immediately assumed all those powers lately so much complained of by themselves, which the kings had exercised. The execution of their future decrees were entrusted to two magistrates, taken from their own body, and entirely dependant on them, whom they called *consuls*, and who were made to bear about them all the ensigns of power which had formerly attended the kings. Only care was taken that the axes and *fasces*, the symbols of the power of life and death over the citizens, which the senate now claimed to itself, should not be carried before both consuls at once, but only before one at a time, for fear, says Livy, of doubling the terror of the people*.

* Omnia jura (*regum*), omnia insignia, primi consules tenuere; id modò

Nor was this all: the senators drew over to their party those men who had the most interest at that time among the people, and admitted them as members into their own body*; which indeed was a precaution they could not prudently avoid taking. But the interests of the great men in the republic being thus provided for, the revolution ended. The new senators, as well as the old, took care not to lessen, by making provisions for the liberty of the people, a power which was now become their own. Nay, they presently stretched this power beyond its former tone; and the punishments which the consuls inflicted, in a military manner, on a number of those who still adhered to the former mode of government, and even upon his own children, taught the people what they had to expect for the future, if they presumed to oppose the power of those whom they had thus unwarily made their masters.

The oppressive nature of the Roman laws respecting debtors

Among the oppressive laws or usages which the senate, after the expulsion of the kings, had permitted to continue, what were most complained of by the people, were those by which such citizens as could not pay their debts, with the interest (which at Rome was enormous), at the appointed time, became slaves to their creditors, and were delivered over to them, bound with cords; hence the word *nexi*, by which slaves of that kind were denominated. The cruelties exercised by creditors on those unfortunate men, whom the private calamities, caused by the frequent wars in which Rome was engaged, rendered very numerous, at last roused the body of the people: they abandoned both the city and their inhuman fellow-citizens, and retreated to the other side of the river *Anio*.

cautum est, ne, si ambo fasces haberent, duplicatus terror videretur.—Tit. Liv. lib. ii. § 1.

* These new senators were called *conscripti*; hence the name of *patres conscripti*, afterwards indiscriminately given to the whole senate.—Tit. Liv. ibid.

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But this second revolution, like the former, only procured the advancement of particular persons. A new office was created, called the tribuneship. Those whom the people had placed at their head when they left the city, were raised to it. Their duty, it was agreed, was, for the future, to protect the citizens: and they were invested with a certain number of prerogatives for that purpose. This institution, it must however be confessed, would have, in the issue, proved very beneficial to the people, at least for a long course of time, if certain precautions had been taken with respect to it, which would have much lessened the future personal importance of the new tribunes*: but these precautions the latter did not think proper to suggest; and in regard to those abuses themselves, which had at first given rise to the complaints of the people, no farther mention was made of them†.

Limitations on the authority of the consuls.

As the senate and patricians[1], in the early ages of the commonwealth, kept themselves closely united, the tribunes, for all their personal privileges, were not able, during the first times after their creation, to gain an admittance either to the consulship, or into the senate, and thereby to separate their condition any farther from that of the people. This situation of theirs, in which it was to be wished they might always have been kept, produced at first excellent effects, and caused their conduct to answer, in a great measure, the expectation of the people. The tribunes complained loudly of the exorbitancy of the powers possessed by the senate and consuls; and here we must observe that the power exercised by the latter over the lives of the

* Their number, which was only ten, ought to have been much greater; and they never ought to have accepted the power left to each of them, of stopping, by his single opposition, the proceedings of all the rest.

† Many other seditions were afterwards raised upon the same account.

[1] Vide ante, 641—645.

citizens, had never been yet subjected (which will probably surprise the reader,) to any known laws, though sixty years had already elapsed since the expulsion of the kings. The tribunes therefore insisted that laws should be made in that respect, which the consuls should thenceforward be bound to follow, and that they should no longer be left, in the exercise of their power over the lives of the citizens, to their own caprice and wantonness*.

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Equitable as these demands were, the senate and patricians opposed them with great warmth, and, either by naming dictators, or calling in the assistance of the priests, or other means, they defeated, for nine years together, all the endeavours of the tribunes. However, as the latter were at that time in earnest, the senate was at length obliged to comply; and the *Lex Terentilla* was passed, by which it was enacted, that a general code of laws should be made.

Lex Terentilla.

These beginnings seemed to promise great success to the cause of the people. But, unfortunately for them, the senate found means to have it agreed, that the office of tribune should be set aside during the whole time that the code should be framing. They, moreover, obtained that the ten men, called decemvirs, to whom the charge of composing this code was to be given, should be taken from the body of the patricians. The same causes, therefore, produced again the same effects; and the power of the senate and consul was left in the new code, or laws of the Twelve Tables[2], as undefined as before. As to the laws above mentioned, concerning debtors, which never had ceased to be bitterly complained of by the people, and in regard to

The Twelve Tables.

* Quod populus in se jus dederit, eo consulem usurum; non ipsos libidinem ac licentiam suam pro lege habituros.—Tit. Liv. lib. iii. § 9.

[2] Vide ante, 646, 647.

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which some satisfaction ought, in common justice, to have been given them, they were confirmed, and a new terror added to them from the manner in which they were expressed.

The decemvirs.

The true motive of the senate, when they thus trusted the framing of the new laws to a new kind of magistrates, called decemvirs[3], was, that, by suspending the ancient office of consul, they might have a fair pretence for suspending also the office of tribune, and thereby rid themselves of the people, during the time that the important business of framing the code should be carrying on: they even, in order the better to secure that point, placed the whole power of the republic in the hands of those new magistrates. But the senate and patricians experienced then, in their turn, the danger of entrusting men with an uncontrolled authority. As they themselves had formerly betrayed the trust which the people had placed in them, so did the decemvirs, on this occasion, likewise deceive them. They retained by their own private authority the unlimited power that had been conferred on them, and at last exercised it on the patricians as well as the plebeians. Both parties therefore united against them, and the decemvirs were expelled from the city.

Restoration of the republican dignities, and with them the office of tribune.

The former dignities of the republic were restored, and with them the office of tribune. Those from among the people who had been most instrumental in destroying the power of the decemvirs, were, as it was natural, raised to the tribuneship; and they entered upon their offices with a prodigious degree of popularity. The senate and the patricians were, at the same time, sunk extremely low in consequence of the long tyranny which had just expired; and those two circumstances united, afforded the tribunes but too easy an oppor-

[3] Vide ante, 645—647.

tunity of making the present revolution end as the former ones had done, and converting it to the advancement of their own power. They got new personal privileges to be added to those which they already possessed; and moreover procured a law to be enacted, by which it was ordained, that the resolutions taken by the *comitia tributa*[4] (an assembly in which the tribunes were admitted to propose new laws) should be binding upon the whole commonwealth;—by which they at once raised to themselves an *imperium in imperio*, and acquired, as Livy expresses it, a most active weapon*.

Public commotions always end in promoting the power of the few.

From that time great commotions arose in the republic, which, like all those before them, ended in promoting the power of a *few*[5]. Proposals for easing the people of their debts; for dividing with some equality amongst the citizens, the lands which were taken from the enemy; and for lowering the rate of the interest of money, were frequently made by the tribunes. And indeed all these were excellent regulations to propose; but, unfortunately for the people, the proposals of them were only pretences used by the tribunes for promoting schemes of a fatal, though somewhat remote, tendency to public liberty. Their real aims were at the consulship, the prætorship, the priesthood, and other offices of executive power, which they were intended to control, and not to share. To these views they constantly made the cause of the people subservient. I shall relate, among other instances, the manner in which they procured to themselves an admittance to the office of consul.

The tribunes aspire to those offices of executive power, which they were intended to control, and not to share.

Having, during several years, seized every oppor-

* *Acerrimum telum.*

[4] Vide ante, 643, 644.

[5] Ibid, 651—653.

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The tribunes excited seditions in order to overcome the opposition of the senate.

tunity of making speeches to the people on that subject, and even excited seditions in order to overcome the opposition of the senate, they at last availed themselves of the circumstance of an *interregnum*, (a time, during which there happened to be no other magistrates in the republic beside themselves,) and proposed to the tribes, whom they had assembled, to enact the three following laws:—the first, for settling the rate of interest of money; the second, for ordaining that no citizen should be possessed of more than five hundred acres of land; and the third for providing that one of the two consuls should be taken from the body of the plebeians. But on this occasion it evidently appeared, says Livy, which of the laws in agitation were most agreeable to the people, and which, to those who proposed them; for the tribes accepted the laws concerning the interest of money, and the lands; but as to that concerning the plebeian consulship, they rejected it; and both the former articles would from that moment have been settled, if the tribunes had not declared, that the tribes were called upon, either to accept, or reject, all their three proposals at once*. Great commotions ensued thereupon, for a whole year; but at last the tribunes, by their perseverance in insisting that the tribes should vote on their three *rogations* jointly, obtained their ends, and overcame both the opposition of the senate, and the reluctance of the people.

The tribunes made capable of exèrcising the executive power and public trust.

In the same manner did the tribunes get themselves made capable of filling all other places of executive power, and public trust, in the republic. But when

* Ab tribunis, velut per interregnum, concilio plebis habito, apparuit quæ ex promulgatis plebi, quæ latoribus, gratiora essent; nam de fœnore atque agro rogationes jubebant, de plebeio consulatu antiquabant (*antiquis stabant*); et perfecta utraque res esset, ni tribuni se in omnia simul consulere plebem dixissent.—Tit. Liv. lib. vi. § 39.

all their views of that kind were accomplished, the republic did not for all this enjoy more quiet, nor was the interest of the people better attended to, than before. New struggles then arose for actual admission to those places,—for procuring them to relatives or friends,—for governments of provinces, and commands of armies. A few tribunes, indeed, did at times apply themselves seriously, out of real virtue and love of their duty, to remedy the grievances of the people; but their fellow-tribunes, as we may see in history, and the whole body of those men upon whom the people had, at different times, bestowed consulships, ædileships, censorships, and other dignities without number, united together with the utmost vehemence against them; and the real patriots, such as Tiberius Gracchus, Caius Gracchus, and Fulvius, constantly perished in the attempt.

Those men upon whom the Roman people had bestowed dignities, united with the utmost vehemence against them.

I have been somewhat explicit on the effects produced by the different revolutions that happened in the Roman republic, because its history is much known to us, and we have, either in Dionysius of Halicarnassus, or in Livy, considerable monuments of the more ancient part of it. But the history of the Grecian commonwealths would also have supplied us with a number of facts to the same purpose. That revolution, for instance, by which the *Pisistratidæ* were driven out of Athens,—that by which the *four hundred*, and afterwards the *thirty*, were established,—as well as that by which the latter were in their turn expelled, —all ended in securing the power of a *few*. The republic of Syracuse, that of Corcyra, of which Thucydides has left us a pretty full account, and that of Florence, of which Machiavel has written the history, also present to us a series of public commotions ended by treaties, in which, as in the Roman republic, the grievances of the people, though ever so loudly com-

Republics of Syracuse, Corcyra, and Florence.

De Lolme.

plained of in the beginning by those who acted as their defenders, were, in the issue, most carelessly attended to, or even totally disregarded*.

The compacts for liberty made by the English, at the termination of national struggles, were such, as all orders of the people could essentially enjoy.

But, if we turn our eyes towards the English history, scenes of a quite different kind will offer to our view; and we shall find, on the contrary, that revolutions in England have always been terminated by making such provisions, and only such, as all orders of the people were really and indiscriminately to enjoy.

Most extraordinary facts, these! and which, from all the other circumstances that accompanied them, we see, all along, to have been owing to the impossibility (a point that has been so much insisted upon in former chapters) in which those who possessed the confidence of the people, were, of transferring to themselves any branch of the executive authority, and thus separating their own condition from that of the rest of the people.

Magna Charta.

Without mentioning the compacts which were made with the first kings of the Norman line[6], let us only cast our eyes on *Magna Charta*[7], which is still the foundation of English liberty. A number of circumstances, which have been described in the former part of this work, concurred at that time to strengthen the regal power to such a degree, that no men in the state could entertain a hope of succeeding in any other design than that of setting bounds to it. How great was the union which thence arose among all orders of the people!—what extent, what caution, do we see in the provisions made by the Great Charter! All the objects for which men naturally wish to live in a state

* The revolutions which formerly happened in France, all ended like those above mentioned. A similar remark may be extended to the history of Spain, Denmark, Sweden, Scotland, &c.

[6] Vide ante, 19—43.

[7] Ibid, 50—54, 67—69, 98, 99, 119.

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of society were settled in its various articles. The judicial authority was regulated. The person and property of the individual were secured. The safety of the merchant and stranger was provided for. The higher class of citizens gave up a number of oppressive privileges which they had long accustomed themselves to look upon as their undoubted rights*. Nay, the implements of tillage of the *bondman* or slave, were also secured to him: and for the first time, perhaps, in the annals of the world, a civil war was terminated by making stipulations in favour of those unfortunate men to whom the avarice and lust of dominion, inherent in human nature, continued, over the greatest part of the earth, to deny the common rights of mankind.

Henry III. Edward I., II., III. Richard II.

Under Henry the Third[8] great disturbances arose; and they were all terminated by solemn confirmations given to the Great Charter[9]. Under Edward I.[10], Edward II.[11], Edward III.[12], and Richard II.[13], those who were intrusted with the care of the interests of the people lost no opportunity that offered, of strengthening still farther that foundation of public liberty,—of taking all such precautions as might render the Great Charter still more effectual in the event. They had not ceased to be convinced that their cause was the same with that of all the rest of the people.

Henry IV.

Henry of Lancaster having laid claim to the crown, the commons received the law from the victorious party. They settled the crown upon Henry, by the name of Henry the Fourth[14]; and added, to the act of

* All possessors of land took the engagement to establish in behalf of their tenants and vassals (*erga suos*) the same liberties which they demanded from the king.

[8] Vide ante, 65—81.
[9] Ibid. 67—69.
[10] Ibid. 82—102.
[11] Ibid. 102—110.
[12] Ibid. 110—121.
[13] Ibid. 122—128.
[14] Ibid. 129—137.

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settlement, provisions which the reader may see in the second volume of the *Parliamentary History* of England. Struck with the wisdom of the conditions demanded by the commons, the authors of the book just mentioned observe (perhaps with some simplicity) that the commons of England *were no fools at that time.* They ought rather to have said—The commons of England were happy enough to form among themselves an assembly in which every one could propose what matters he pleased, and freely discuss them;—they had no possibility left of converting either these advantages, or in general the confidence which the people had placed in them, to any private views of their own: they, therefore, without loss of time, endeavoured to stipulate useful conditions with that power by which they saw themselves at every instant exposed to be dissolved and dispersed, and applied their industry to insure the safety of the whole people, as it was the only means they had of procuring their own.

The commons formed an assembly in which every one could propose what matters he pleased, and freely discuss them.

Contests between the Houses of York and Lancaster.

In the long contentions which took place between the houses of York and Lancaster, the commons remained spectators of disorders which in those times it was not in their power to prevent; they successively acknowledged the title of the victorious parties; but whether under Edward IV.[15], under Richard III.[16], or Henry VII.[17], by whom those quarrels were terminated, they continually availed themselves of the importance of the services which they were able to perform to the new-established sovereign, for obtaining effectual conditions in favour of the whole body of the people.

At the accession of James I.[18], which, as it placed a new family on the throne of England, may be consi-

[15] Vide ante, 150.
[16] Ibid. 150.
[17] Ibid. 151—158.
[18] Ibid. 312—366.

dered as a kind of revolution, no demands were made by the men who were at the head of the nation, but in favour of general liberty.

Charles I.

After the accession of Charles I.[19], discontents of a very serious nature began to take place: and they were terminated, in the first instance, by the act called the *Petition of Right*[20], which is still looked upon as a most precise and accurate delineation of the rights of the people*.

Petition of Right.

Charles II.

At the restoration of Charles II., the constitution being re-established upon its former principles, the former consequences produced by it began again to take place; and we see at that era, and indeed during the whole course of that reign, a continued series of precautions taken for securing the general liberty[21].

James II

Lastly, the great event which took place in the year 1689, affords a striking confirmation of the truth of the observation made in this chapter. At this era the political wonder again appeared—of a revolution terminated by a series of public acts, in which no interests but those of the people at large were considered and provided for[22]:—no clause, even the most indirect, was inserted, either to gratify the present ambition, or favour the future views, of those who were personally concerned in bringing those acts to a conclusion. Indeed, if any thing is capable of conveying to us an

A revolution terminated by a series of public acts, in which no interests but those of the people at large were considered and provided for.

* The disorders which took place in the latter part of the reign of that prince, seem, indeed, to contain a complete contradiction to the assertion which is the subject of the present chapter; but they, at the same time, are a no less convincing confirmation of the truth of the principles laid down in the course of this whole work. The above-mentioned disorders took rise from that day in which Charles I. gave up the power of dissolving his parliament,—that is, from the day in which the members of that assembly acquired an independent, personal, permanent authority, which they soon began to turn against the people who had raised them to it.

[19] Vide ante, 366—413.
[20] Ibid. 377.
[21] Ibid. 413—459.
[22] Ibid. 459—470.

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adequate idea of the soundness, as well as peculiarity, of the principles of which the English government is founded, it is the attentive perusal of the system of public compacts to which the Revolution of the year 1689 gave rise,—of the Bill of Rights, with all its different clauses, and of the several acts, which, till the accession of the House of Hanover, were made in order to strengthen it[23].

Bill of Rights.

Chapter XVI.

Second Difference.—The Manner after which the Laws for the Liberty of the Subject are executed in England.

The second difference I mean to speak of between the English government and that of other free states, concerns the important object of the execution of the laws. On this article, also, we shall find the advantage to lie on the side of the English government; and, if we make a comparison between the history of those states, and that of England, it will lead us to the following observation, viz., that though in other free states the laws concerning the liberty of the citizens were imperfect, yet the execution of them was still more defective. In England, on the contrary, not only the laws for the security of the subject are very extensive in their provisions, but the manner in which they are executed carries these advantages still farther; and English subjects enjoy no less liberty from the spirit, both of justness and mildness, by which all branches of the government are influenced, than from the accuracy of the laws themselves.

English subjects enjoy no less liberty from the justness and mildness of their government, than from the accuracy of the laws themselves.

[23] Vide ante, 470—487.

The Roman commonwealth will here again supply us with examples to prove the former part of the above assertion. When I said, in the foregoing chapter, that, in times of public commotion, no provisions were made for the body of the people, I meant no provisions that were likely to prove effectual in the event. When the people were roused to a certain degree, or when their concurrence was necessary to carry into effect certain resolutions, or measures, that were particularly interesting to the men in power, the latter could not, with any prudence, openly profess a contempt for the political wishes of the people; and some declarations expressed in general words, in favour of public liberty, were indeed added to the laws that were enacted on those occasions. But these declarations, and the principles which they tended to establish, were afterwards even openly disregarded in practice.

The enactments respecting liberty, were by the Roman governors openly disregarded in practice.

Thus, when the people were made to vote, about a year after the expulsion of the kings, that the regal government never should be again established in Rome, and that those who should endeavour to restore it, should be devoted to the gods, an article was added, which, in general terms, confirmed to the citizens the right they had before enjoyed under the king, of appealing to the people from the sentences of death passed upon them. No punishment (which will surprise the reader) was decreed against those who should violate this law; and indeed the consuls, as we may see in Dionysius of Halicarnassus and Livy, concerned themselves but little about the appeals of the citizens, and, in the more than military exercise of their functions, continued to sport with rights which they ought to have respected, however imperfectly and loosely they had been secured.

An article, to the same purport with the above, was

The lives of Roman citizens

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were subjected, on slight grounds, to be taken away.

afterwards also added to the laws of the Twelve Tables; but the decemvirs, to whom the execution of those laws was at first committed, behaved exactly in the same manner, and even worse than the consuls had done before them: and after they were expelled*, the magistrates who succeeded them, appear to have been as little tender of the lives of the citizens. I shall, out of many instances, select one, which will show upon what slight grounds the citizens were exposed to have their lives taken away.—Spurius Mælius being accused of endeavouring to make himself king, was summoned by the master of the horse to appear before the dictator, in order to clear himself of this somewhat extraordinary imputation. Spurius took refuge among the crowd; the master of the horse pursued him, and killed him on the spot. The people having thereupon expressed great indignation, the dictator had them called to his tribunal, and declared that Spurius had been lawfully put to death, even though he might be innocent of the crime laid to his charge, for having refused to appear before the dictator, when desired to do so by the master of the horse†.

The magistrates of the republic rendered the appeal to the people essentially useless.

About one hundred and forty years after the times we mention, the law concerning the appeal to the people was enacted for the third time. But we do not see that it was better observed in the sequel than it had been before: we find it frequently violated, after that period, by the different magistrates of the republic;

* At the time of the expulsion of the decemvirs, a law was also enacted, that no magistrate should be created from whom no appeal could be made to the people (*magistratus sine provocatione*, Tit. Liv. lib. iii. § 65); by which the people expressly meant to abolish the dictatorship: but this law was not better observed than the former ones had been.

† Tumultuantem deinde multitudinem, incertâ existimatione facti, ad concionem vocari jussit, et *Mælium jure cæsum* pronunciavit, *etiamsi regni crimine insons fuerit, qui vocatus a magistro equitum, ad dictatorem non venissel.* (Tit. Liv. lib. iv. § 15.)

and the senate itself, notwithstanding this same law, at times made formidable examples of the citizens. Of this we have an instance in the three hundred soldiers who had pillaged the town of Rhegium. The senate of its own authority ordered them all to be put to death. In vain did the tribune Flaccus remonstrate against so severe an exertion of public justice on Roman citizens: the senate, says Valerius Maximus, nevertheless persisted in its resolution*.

All these laws for securing the lives of the citizens had hitherto been enacted without any mention of a punishment against those who should violate them. At last the celebrated *Lex Porcia* was passed, which subjected to banishment those who should cause a Roman citizen to be scourged and put to death. From a number of instances posterior to this law, it appears that it was not better observed than those before it had been; Caius Gracchus, therefore, caused the *Lex Sempronia* to be enacted, by which a new sanction was given to it. But this second law did not secure his own life, and that of his friends, better than the *Lex Porcia* had done that of his brother, and those who had supported him; indeed, all the events which took place about those times rendered it manifest that the evil was such as was beyond the power of any laws to cure. I shall here mention a fact, which affords a remarkable instance of the wantonness with which the Roman magistrates had accustomed themselves to take away the lives of the citizens. A citizen, named Memmius,

Lex Porcia.

Lex Sempronia.

* Val. Max. lib. ii. c. 7. This author does not mention the precise number of those who were put to death on this occasion: he only says that they were executed fifty at a time, on different successive days; but other authors make the number of them amount to four thousand. Livy speaks of a whole legion,—*Legio Campana, quæ Rhegium occupaverat obsessa, deditione factâ, securi percussa est.* (Tit. Liv. lib. xv. *Epit.*)—I have here followed Polybius, who says that only three hundred were taken and brought to Rome.

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having put up for the consulship, and publicly canvassing for the same, in opposition to a man whom the tribune Saturninus supported, the latter caused him to be apprehended, and made him expire under blows in the public forum. The tribune even carried his insolence so far (as Cicero informs us) as to give to this act of cruelty, transacted in the presence of the whole people assembled, the outward form of a lawful act of public justice*.

Roman magistrates not only committed acts of injustice, but were guilty of avarice and private rapine.

Nor were the Roman magistrates satisfied with committing acts of injustice in their political capacity, and for the support of the power of that body of which they made a part. Avarice and private rapine were at last added to political ambition. The provinces were first oppressed and plundered. The calamity, in process of time, reached Italy itself, and the centre of the republic; till at last the *Lex Calpurnia de repetundis* was enacted to put a stop to it. By this law an action was given to the citizens and allies for the recovery of the money extorted from them by magistrates, or men in power: and the *Lex Junia* afterwards added the penalty of banishment to the obligation of making restitution.

Lex Calpurnia de repetundis.

Lex Junia.

But here another kind of disorder arose. The judges proved as corrupt, as the magistrates had been oppressive. They equally betrayed, in their own province, the cause of the republic with which they had

* The fatal form of words *(cruciatús carmina)* used by the Roman magistrates when they ordered a man to be put to death, resounded (says Tully, in his speech for *Rabirius*) in the assembly of the people, in which the censors had forbidden the common executioner even to appear, *I, lictor, colliga manus. Caput obnubito. Arbori infelici suspendito.*—Memmius being a considerable citizen, as we may conclude from his canvassing with success for the consulship, all the great men in the republic took the alarm at the atrocious action of the tribune; the senate, the next day, issued out its solemn mandate, or form of words, to the consuls, *to provide that the republic should receive no detriment;* and the tribune was killed in a pitched battle that was fought at the foot of the Capitol.

been intrusted; and rather chose to share in the plunder of the consuls, the prætors, and the proconsuls, than put the laws in force against them.

The levity and infamy of the Roman public judgments.

New expedients were therefore resorted to, in order to remedy this new evil. Laws were made for judging and punishing the judges themselves; and, above all, continual changes were made in the manner of composing their assemblies. But the malady lay too deep for common legal provisions to remedy. The guilty judges employed the same resources, in order to avoid conviction, as the guilty magistrates had done; and those continual changes, at which we are amazed, that were made in the constitution of the judiciary bodies*, instead of obviating the corruption of the judges, only transferred to other men the profit arising from becoming guilty of it. It became a general complaint, so early as the times of the Gracchi, that no man, who had money to give, could be brought to punishment†. Cicero says, that, in his time, the same opinion was universally received‡; and his speeches are full of his lamentations on what he calls the *levity* and the *infamy* of the public judgments.

Impunity of corrupt judges.

Nor was the impunity of corrupt judges the only

* The judges (over the assembly of whom the prætor usually presided) were taken from the body of the senate, till some years after the last Punic war; when the *Lex Sempronia*, proposed by Caius S. Gracchus, enacted that they should in future be taken from the equestrian order. The consul Cæpio procured afterwards a law to be enacted, by which the judges were to be taken from both orders, equally. The *Lex Servilia* soon after put the equestrian order again in possession of the *judgments;* and, after some years, the *Lex Livia* restored them entirely to the senate. The *Lex Plautia* enacted afterwards, that the judges should be taken from the three orders, the senatorian, equestrian, and plebeian. The *Lex Cornelia*, framed by the dictator Sylla, enacted again, that the judges should be entirely taken from the body of the senate. The *Lex Aurelia* ordered anew, that they should be taken from the three orders. Pompey made afterwards a change in their number (which he fixed at seventy-five), and in the manner of electing them. And lastly, Cæsar restored the judgments to the order of the senate.

† App. de Bell. Civ.

‡ Act. in Verr. i. § 1.

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evil under which the republic laboured. Commotions of the whole empire at last took place. The horrid vexations, and afterwards the acquittal, of Aquilius, proconsul of Syria, and of some others who had been guilty of the same crimes, drove the provinces of Asia to desperation: and then it was that the terrible war of Mithridates arose, which was ushered in by the death of eighty thousand Romans, massacred in one day, in various cities of Asia*.

The Roman laws and public judgments became the engines of oppression.

The laws and public judgments not only thus failed of the end for which they had been established: they even became, at length, new means of oppression added to those which already existed. Citizens possessed of wealth, persons obnoxious to particular bodies, or the few magistrates who attempted to stem the torrent of the general corruption, were accused and condemned; while Piso, of whom Cicero, in his speech against him, relates facts which make the reader shudder with horror, and Verres, who had been guilty of enormities of the same kind, escaped unpunished.

Hence a war arose, still more formidable than the former, and the dangers of which we wonder that Rome was able to surmount. The greatest part of the Italians revolted at once, exasperated by the tyranny of the public judgments; and we find in Cicero, who informs us of the cause of this revolt, which was called the *Social War*, a very expressive account both of the unfortunate condition of the republic, and of the perversion that had been made of the methods taken to remedy it. "A hundred and ten years have not yet elapsed (says he) since the law for the recovery of money extorted by magistrates was first propounded by the tribune Calpurnius Piso. A number of other laws to the same effect, continually more and more

The Social War.

* Appian.

severe, have followed: but so many persons have been accused, so many condemned, so formidable a war has been excited in Italy by the terror of the public judgments, and, when the laws and judgments have been suspended, such an oppression and plunder of our allies have prevailed, that we may truly say, it is not by our own strength, but by the weakness of others, that we continue to exist*."

I have entered into these particulars with regard to the Roman commonwealth, because the facts on which they are grounded are remarkable of themselves, and yet no just conclusion can be drawn from them, unless a series of them were presented to the reader. Nor are we to account for these facts by the luxury which prevailed in the latter ages of the republic, by the corruption of the manners of the citizens, their degeneracy, from their ancient principles, and such loose general phrases, which may perhaps be useful to express the manner itself in which the evil became manifested, but by no means set forth the causes of it.

The disorders in the Roman government, arose from its inherent imperfections.

The above disorders arose from the very nature of the government of the republic,—of a government in which the executive and supreme power being made to centre in the body of those in whom the people had once placed their confidence, there remained no other effectual power in the state that might render it necessary for them to keep within the bounds of justice and decency. And in the mean time, as the people, who were intended as a check over that body, continually gave a share in this executive authority to those whom they intrusted with the care of their interests, they increased the evils they complained of, as it were, at every attempt they made to remedy them; and instead of raising up opponents to those who were become the enemies of their liberty, as it

* See Cic. de Off. lib. ii. § 75.

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was their intention to do, they continually supplied them with new associates.

From this situation of affairs, flowed, as an unavoidable consequence, that continual desertion of the cause of the people, which, even in times of revolutions, when the passions of the people themselves were roused, and they were in a great degree united, manifested itself in so remarkable a manner. We may trace the symptoms of the great political defect here mentioned, in the earliest ages of the commonwealth, as well as in the last stage of its duration. In Rome, while small and poor, it rendered vain whatever rights or power the people possessed, and blasted all their endeavours to defend their liberty, in the same manner, as in the more splendid ages of the commonwealth, it rendered the most salutary regulations utterly fruitless, and even instrumental to the ambition and avarice of a few. The prodigious fortune of the republic, in short, did not create the disorder; it only gave full scope to it.

The English government, not affected with imperfections similar to those of Rome.

But if we turn our view towards the history of the English nation, we shall see how, from a government in which the above defects did not exist, different consequences have followed;—how cordially all ranks of men have always united together, to lay under proper restraints this executive power, which they knew could never be their own. In times of public revolutions, the greatest care, as we have before observed, was taken to ascertain the limits of that power; and after peace had been restored to the state, those who remained at the head of the nation continued to manifest an unwearied jealousy in maintaining those advantages which the united efforts of all had obtained.

By Magna Charta the executive power was not to touch the person of the subject.

Thus it was made one of the articles of Magna Charta, that the executive power should not touch the person of the subject, but in consequence of a judgment

passed upon him by his peers[1]; and so great was afterwards the general union in maintaining this law, that the *trial by jury*[2],—that admirable mode of proceeding, which so effectually secures the subject against all the attempts of power, even (which seemed so difficult to obtain) against such as might be made under the sanction of the judicial authority—hath been preserved to this day. It has even been preserved in all its original purity, though the same has been successively suffered to decay, and then to be lost, in the other countries of Europe, where it had been formerly known*.

Trial by jury secures the subject against all the attempts of power.

* The trial by jury was in use among the Normans long before they came over into England; but, even among them, it soon degenerated from its first institution; we see in Hale's History of the *Common Law* of England, that the unanimity among jurymen was not required in Normandy for making a good verdict; but, when jurymen dissented, some were taken out, and others added in their stead, till an unanimity was procured.—In Sweden, where, according to the opinion of the learned in that country, the *trial by jury* had its origin, only some forms of that institution are now preserved in the lower courts in the country, where sets of jurymen are established for life, and have a salary accordingly. And in Scotland, the vicinity of England has not been able to preserve to the trial by jury its genuine ancient form: the unanimity among jurymen is not required (as I have been told) to form a verdict; but the majority is decisive[3].

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[1] Vide ante, 53, 67—69. [2] Ibid. 785—799.

[3] An agreement of two-thirds of the jury (which in Scotland is composed of fifteen) in a verdict of conviction in criminal cases is sufficient. By 3 George IV. c. 85, in all criminal trials by jury in Scotland, (the crime of high treason, or misprision of treason, being excepted), the prosecutor, and each pannel respectively, when the jury of fifteen have been chosen, and before they have been sworn, can challenge five of the jurors, without being obliged to assign any reason; and this challenge disqualifies the person challenged, from serving as a juror on the trial in respect of which he was so chosen and challenged: But after each challenge made by any of the respective parties, it is incumbent upon the judge to choose another juror, so as again to complete the number of fifteen, before the party challenging is obliged to make any second or subsequent challenge; and the juror or jurors to be chosen to supply the place or places of the juror or jurors challenged, is equally liable to be challenged as the jurors originally chosen. This act also makes provision for summoning in certain cases an additional number of jurors on such trials.

Except in cases of revenue, the Scotch had not the benefit of trial by jury in civil actions until the year 1815; but this privilege has been secured to them by 11 George IV. and 1 William IV. c. 69.

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Nay, though this privilege of being tried by one's peers was at first a privilege of conquerors and masters, exclusively appropriated to those parts of nations which had originally invaded and reduced the rest by arms, it has in England been successively extended to every order of the people.

The property of every individual has been secured from the executive power.

And not only the person, but also the property of the individual, has been secured against all arbitrary attempts from the executive power; and the latter has been successively restrained from touching any part of the property of the subject, even under pretence of the necessities of the state, any otherwise than by the free grant of the representatives of the people. Nay, so true and persevering has been the zeal of these representatives, in asserting on that account the interests of the nation, from which they could not separate their own, that this privilege of taxing themselves, which was in the beginning grounded on a most precarious tenure, and only a mode of governing adopted by the sovereign for the sake of his own convenience, has become, in time, a settled right of the people, which the sovereign has found it necessary solemnly and repeatedly to acknowledge.

The representatives of the people have converted the right of taxation, into a regular and constitutional mean of influencing the executive.

Nay more, the representatives of the people have applied this right of *taxation* to a still nobler use than the mere preservation of property: they have, in process of time, succeeded in converting it into a regular and constitutional mean of influencing the motions of the executive power. By means of this right, they have gained the advantage of being constantly called to concur in the measures of the sovereign,—of having the greatest attention shown by him to their requests, as well as the highest regard paid to any engagements that he enters into with them. Thus has it become at last the peculiar happiness of English subjects, to whatever other people, either ancient or modern, we

compare them, to enjoy a share in the government of their country, by electing representatives, who, by reason of the peculiar circumstances in which they are placed, and of the extensive rights they possess, are both *willing* faithfully to serve those who have appointed them, and *able* to do so.

The representative power, able and willing to protect national rights.

And, indeed, the commons have not rested satisfied with establishing, once for all, the provisions for the liberty of the people which have been just mentioned; they have afterwards made the preservation of them the first object of their care*, and taken every opportunity of giving them new vigour and life.

Thus, under Charles I.[5], when attacks of a most alarming nature were made on the privilege of the people, to grant free supplies to the crown, the commons vindicated, without loss of time, that great right of the nation, which is the constitutional bulwark of all others, and hastened to oppugn, in the beginning, every precedent of a practice that must, in the end, have produced the ruin of public liberty.

Attempts by Charles I. to produce the ruin of public liberty.

They even extended their care to abuses of every kind. The judicial authority, for instance, which the executive power had imperceptibly assumed to itself, both with respect to the person and property of the individual, was abrogated by the act which abolished the Court of Star Chamber[6]: and the crown was thus brought back to its true constitutional office, viz., the countenancing, and supporting with its strength, the execution of the laws.

The duties of the crown are, to countenance and support with its strength, the execution of the laws.

* The first operation of the commons, at the beginning of a session, is to appoint four grand committees. One is a committee of religion, another of courts of justice, another of trade, and another of grievances; they are to be standing committees during the whole session[4].

[4] The order for the appointment of these committees was, on February 13, 1833, negatived without a division, and such committees have not since been appointed.

[5] Ibid. 363—413.

[6] Ibid. 151, 264, 382—385, 393.

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The subsequent endeavours of the legislature have carried to a still greater extent the above privileges of the people. They have, moreover, succeeded in restraining the crown from any attempt to seize and confine, even for the shortest time, the person of the subject, unless it be in the cases ascertained by the law, of which the judges of it are to decide.

The oppression of an obscure individual, gave rise to the Habeas Corpus Act.

Nor has this extensive unexampled freedom at the expense of the executive power been made, as we might be inclined to think, the exclusive appropriated privilege of the great and powerful. It is to be enjoyed alike by all ranks of subjects. Nay, it was the injury done to a common citizen that gave existence to the act which has completed the security of this interesting branch of public liberty. The *oppression of an obscure individual*, says Judge Blackstone, *gave rise to the famous Habeas Corpus Act.* Junius has quoted this observation of the judge; and the same is well worth repeating a third time, for the just idea it conveys of that readiness of all orders of men to unite in defence of common liberty, which is a characteristic circumstance in the English government*.

And this general union in favour of public liberty has not been confined to the framing of laws for its security; it has operated with no less vigour in bringing to punishment such as have ventured to infringe them; and the sovereign has contantly found it necessary to give up the violators of those laws, even when his own servants, to the justice of their country.

Corruption of the judges under Edward I.

Thus we find, so early as the reign of Edward I.[7],

* The individual here alluded to was one Francis Jenks, who, having made a motion at Guildhall, in the year 1676, to petition the king for a new parliament, was examined before the privy-council, and afterwards committed to the Gatehouse, where he was kept about two months, through the delays made by the several judges to whom he applied, in granting him a Habeas Corpus.—See the State Trials, vol. vii. anno 1676.

[7] Vide ante, 80, 81.

judges who were convicted of having committed exactions in the exercise of their offices, to have been condemned by a sentence of parliament*. From the immense fines which were laid upon them, and which, it seems, they were in a condition to pay, we may indeed conclude that, in those early ages of the constitution, the remedy was applied rather late to the disorder; but yet it was last applied. DE LOLME.

Under Richard II.[8], examples of the same kind were renewed. Michael de la Pole, Earl of Suffolk (who had been Lord Chancellor of the kingdom), the Duke of Ireland, and the Archbishop of York, having abused their power by carrying on designs that were subversive of public liberty, were declared guilty of high-treason[9]; and a number of judges, who, in their judicial capacity, had acted as their instruments, were involved in the same condemnation †. Richard II.

In the reign of Henry VIII.[10], Sir Richard Empson, Henry VIII.

* Sir Ralph de Hengham, Chief Justice of the King's Bench, was fined 7000 marks; Sir Thomas Wayland, Chief Justice of the Common Pleas, had his whole estate forfeited; and Sir Adam de Stratton, Chief Baron of the Exchequer, was fined 3400 marks.

† The most conspicuous among these judges were Sir Robert Belknap, and Sir Robert Tresilian, Chief Justice of the King's Bench. The latter had drawn up a string of questions calculated to confer a despotic authority on the crown, or rather on the ministers above named, who had found means to render themselves entire masters of the person of the king. These questions Sir Robert Tresilian proposed to the judges, who had been summoned for that purpose, and they gave their opinions in favour of them. One of these opinions of the judges, among others, tended to annihilate, at one stroke, all the rights of the commons, by taking from them that important privilege mentioned before, of starting and freely discussing whatever subjects of debate they think proper: the commons were to be restrained, under pain of being punished as traitors, from proceeding upon any articles besides those limited to them by the king. All those who had a share in the above declarations of the judges were attainted of high treason. Tresilian, and Brembre, who had been mayor of London, were hanged; the others were only banished, at the intercession of the bishops.—See the Parl. History of England, vol. i.

[8] Vide ante, 123. [9] Ibid. 161.
[10] Ibid. 159—170.

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and Edmund Dudley[11], who had been the promoters of the exactions committed under the preceding reign, fell victims to the zeal of the commons for vindicating the cause of the people. Under King James I., the Lord Chancellor Bacon[12], experienced that neither his high dignity, nor great personal qualifications, could screen him from having the severest censure passed upon him, for the corrupt practices of which he had suffered himself to become guilty. And in the reign of Charles I., the judges having attempted to imitate the example of the judges under Richard II., by delivering opinions subversive of the rights of the people, found the same spirit of watchfulness in the commons, as had proved the ruin of the former. Lord Finch, Keeper of the Great Seal, was obliged to fly beyond sea. The judges Davenport and Crawley, were imprisoned: and Judge Berkeley was seized while sitting upon the bench, as we are informed by Rushworth[13].

James I.

Charles I.

Charles II.

In the reign of Charles II., we find fresh instances of the vigilance of the commons. Sir William Scroggs, Lord Chief Justice of the King's Bench, Sir Francis North, Chief Justice of the Common Pleas, Sir Thomas Jones, one of the Judges of the King's Bench, and Sir Richard West, one of the Barons of the Exchequer, were impeached by the commons, for partialities shown by them in the administration of justice; and the Chief Justice Scroggs, against whom some positive charges were well proved, was removed from his employments.

The commons have always advocated the rights of the people.

The several examples offered here to the reader have been taken from different periods of the English history, in order to show that neither the influence, nor the dignity of the infractors of the laws, even when they have been the nearest servants of the crown, have

[11] Vide ante, 160. [12] Ibid. 347.
[2] Ibid. 387, 388, 394.

ever been able to check the zeal of the commons in asserting the rights of the people. Other examples might perhaps be related to the same purpose; though the whole number of those to be met with, will, upon inquiry, be found the smaller, in proportion as the danger of infringing the laws has always been indubitable.

The sovereign, for having personally violated the safety of the subject, received severe censure.

So much regularity has even (from all the circumstances above mentioned) been introduced into the operations of the executive power in England,—such an exact justice have the people been accustomed, as a consequence, to expect from that quarter, that even the sovereign, for his having once suffered himself personally to violate the safety of the subject, did not escape severe censure. The attack made, by order of Charles II., on the person of Sir John Coventry, filled the nation with astonishment; and this violent gratification of private passion, on the part of the sovereign, (a piece of self-indulgence with regard to inferiors, to which whole classes of individuals in certain countries almost think that they have a right,) excited a general ferment. "This event," says Bishop Burnet, "put the House of Commons in a furious uproar.—It gave great advantages to all those who opposed the court; and the names of the *court* and *country* party, which till now had seemed to be forgotten, were revived*."

The limitations on the executive power, greater in England than in any other government.

These are the limitations that have been set, in the English government, on the operations of the executive power[14]: limitations to which we find nothing comparable in any other free states, ancient or modern; and which are owing, as we have seen, to that very

* See Burnet's History, vol. i. anno 1669.—An act of parliament was made on this occasion, for giving a farther extent to the provisions before made for the personal security of the subject; which is still called the *Coventry* Act.

[14] Vide ante, 531—565, 575—629.

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circumstance which seemed, at first sight, to prevent the possibility of them,—I mean the greatness and unity of that power; the effect of which has been, in the event, to unite, upon the same object, the views and efforts of all orders of the people.

From this circumstance, that is, the *unity* and peculiar stability of the executive power in England, another most advantageous consequence has followed, that has been before noticed, and which it is not improper to mention again here, as this chapter is intended to confirm the principles laid down in the former ones;—I mean the unremitted continuance of the same general union among all ranks of men, and the spirit of mutual justice which thereby continues to be diffused through all orders of subjects.

Spirit of mutual justice everywhere diffused.

Though surrounded by the many boundaries that have just now been described, the crown, we must observe, has preserved its prerogative undivided: it still possesses its whole effective strength, and is only tied by its own engagements, and the consideration of what it owes to its dearest interests.

The great, or wealthy men in the nation, who, assisted by the body of the people, have succeeded in reducing the exercise of its authority within such well-defined limits, can have no expectation that it will continue to confine itself to them any longer than they themselves continue, by the justice of their own conduct, to deserve that support of the people, which alone can make them appear of consequence in the eye of the sovereign,—no probable hopes that the crown will continue to observe those laws by which their wealth, dignity, liberty, are protected, any longer than they themselves also continue to observe them.

Nay, more, all those claims of their rights which they continue to make against the crown, are encouragements which they give to the rest of the people

to assert their own rights against them. Their constant opposition to all arbitrary proceedings of that power, is a continual declaration they make against any acts of oppression which the superior advantages they enjoy might entice them to commit on their inferior fellow-subjects. Nor was that severe censure, for instance, which they concurred in passing on an unguarded violent action of their sovereign, only a restraint put upon the personal actions of future English kings; no, it was a much more extensive provision for the securing of public liberty;—it was a solemn engagement entered into by all the powerful men in the state to the whole body of the people, scrupulously to respect the person of the lowest among them.

And, indeed, the constant tenor of the conduct, even of the two houses of parliament, shows us that the above observations are not matters of mere speculation. From the earliest times we see the members of the House of Commons to have been very cautious not to assume any distinction that might alienate from them the affections of the rest of the people*. Whenever those privileges which were necessary to them for the discharge of their trust have proved burdensome to the

The commons have been careful not to assume any distinction which might alienate from them the affections of the people.

* In all cases of public offences, down to a simple breach of the peace, the members of the House of Commons have no privileges whatever above the rest of the people: they may be committed to prison by any justice of the peace; and are dealt with afterwards in the same manner as any other subjects. With regard to civil matters, their only privilege is to be free from arrests during the time of a session, and forty days before, and forty days after[15]: but they may be sued, by process against their goods, for any just debt during that time.

[15] Members of the House of Commons are privileged from arrest, not only during the actual sitting of parliament, but for a convenient time, sufficient to enable them to come from and return to any part of the kingdom, before the first meeting and after the final dissolution of it. And also for forty days after every prorogation, and before the next appointed meeting; which is now, in effect, as long as the parliament sits, it being seldom prorogued for more than fourscore days at a time.

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The commons have punished their members for corrupt conduct.

community, they have retrenched them. And those of their members who have applied either these privileges, or in general that influence which they derived from their situation, to any oppressive purposes, they themselves have endeavoured to bring to punishment.

Montpesson.

Thus, we see that, in the reign of James I., Sir Giles Montpesson, a member of the House of Commons, having been guilty of monopolies, and other acts of great oppression on the people, was not only expelled, but impeached and prosecuted with the greatest warmth by the House, and finally condemned by the lords to be publicly degraded from his rank of a knight, held for ever an infamous person, and imprisoned during life[16].

Sir John Benet.

In the same reign, Sir John Benet[17], who was also a member of the House of Commons, having been found to have been guilty of corrupt practices, in his capacity of judge of the *Prerogative* Court of Canterbury, (such as taking exorbitant fees, and the like,) was expelled the House, and prosecuted for those offences.

Henry Benson.

In the year 1641, Mr. Henry Benson, member for Knaresborough, having been detected in selling protections, experienced likewise the indignation of the House, and was expelled.

Speaker of the commons punished for taking money towards his private emolument.

In fine, in order, as it were, to make it completely notorious, that neither the condition of representative of the people, nor even any degree of influence in their House, could excuse any one of them from strictly observing the rules of justice, the commons did on one occasion pass the most severe censure they had power to inflict, upon their speaker himself, for having, in a single instance, attempted to convert the discharge of his duty, as speaker, into the means of private emolument. Sir John Trevor, Speaker of the House of Commons, having, in the sixth year of the reign of

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[16] Vide ante, 346, 347.

[17] Ibid. 347.

King William, received a thousand guineas from the city of London, "as a gratuity for the trouble he had taken with regard to the passing of the *Orphan Bill*," was voted guilty of a high crime and misdemeanor, and expelled the House. Even the inconsiderable sum of twenty guineas which Mr. Hungerford, another member, had been weak enough to accept on the same score, was looked upon as deserving the notice of the House; and he was likewise expelled* [18].

The lords do not permit their privileges to evade common justice.

If we turn our view towards the House of Lords, we shall find that they have also constantly taken care that their peculiar privileges should not prove impediments to the common justice which is due to the rest of the people†. They have constantly agreed to every just proposal that has been made to them on that subject by the commons: and, indeed, if we consider the numerous and oppressive privileges claimed by the *nobles* in most other countries, and the vehement spirit with which they are commonly asserted, we shall think it no small praise to the body of the nobility in England (and also to the nature of that government of which they make a part), that it has been by their free

* Other examples, of the attention of the House of Commons to the conduct of their members, might be produced, either before or after that which is mentioned here. The reader may, for instance, see the relation of their proceedings in the affair of the *South Sea Company* scheme; and a few years after, in that of the *Charitable Corporation*,—a fraudulent scheme, particularly oppressive to the poor, for which several members were expelled[19].

† In case of a public offence, or even a simple breach of the peace, a peer may be committed till he finds bail, by any justice of the peace: and peers are to be tried by the common course of law, for all offences under felony. With regard to civil matters, they are at all times free from *arrests*: but execution may be had against their effects, in the same manner as against those of other subjects.

[18] Vide ante, 476.

[19] The commons likewise exercised their powers of expulsion, in the cases of Joseph Hunt (May 23, 1810), Benjamin Walsh (March 5, 1812), Lord Viscount Cochrane and the Honourable Andrew Cochrane Johnstone (July 5, 1814).

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consent that their privileges have been confined to what they now are: that is to say, to no more, in general, than what is necessary to the accomplishment of the end and constitutional design of that House.

The lords have exercised their judicial authority with impartially.

In the exercise of their judicial authority with regard to civil matters, the lords have manifested a spirit of equity nowise inferior to that which they have shown in their legislative capacity. They have, in the discharge of that function (which of all others is so liable to create temptations), shown an incorruptness really superior to what any judicial assembly in any other nation can boast. Nor do I think that I run any risk of being contradicted, when I say, that the conduct of the House of Lords, in their civil judicial capacity, has constantly been such as has kept them above the reach of even suspicion or slander[20].

Even in the trial of their own members.

Even that privilege which they enjoy, of exclusively trying their own members, in case of any accusation that may affect their lives (a privilege which we might, at first sight, think repugnant to the idea of a regular government, and even alarming to the rest of the people), has constantly been rendered, by the lords, subservient to the purpose of doing justice to their fellow-subjects; and if we cast our eyes either on the collection of the *State Trials*, or on the History of England, we shall find very few examples, if any, of a peer, really guilty of the offence laid to his charge, that has derived any advantage from his not being tried by a jury of *commoners*.

Nor has this just and moderate conduct of the two Houses of Parliament, in the exercise of their powers (a moderation so unlike what has been related of the conduct of the powerful men in the Roman republic), been the only happy consequence of that salutary

[20] Vide ante, 111—113, 134—137, 140, 141, 446—451.

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jealousy which those two bodies entertain of the power of the crown. The same motive has also engaged them to exert their utmost endeavours to put the courts of justice under proper restraints; a point of the highest importance to public liberty.

The judges have been severely punished, when they have rendered themselves the instruments of the passions of the sovereign.

They have, from the earliest times, preferred complaints against the influence of the crown over these courts, and at last procured laws to be enacted by which such influence has been entirely prevented; all which measures, we must observe, were at the same time strong declarations that no subjects, however exalted their rank might be, were to think themselves exempt from submitting to the uniform course of the law, or hope to influence or overawe it. The severe examples which they have united to make on those judges who have rendered themselves the instruments of the passions of the sovereign, or of the designs of the ministers of the crown, are also awful warnings to the judges who have succeeded them, never to attempt to deviate in favour of any, the most powerful individuals, from that straight line of justice which the joint wisdom of the legislature has once marked out to them.

Impartiality in the distribution of public justice.

This singular situation of the English judges, relatively to the three constituent powers of the state (and also the formidable support which they are certain to receive from them as long as they continue to be the faithful ministers of justice,) has at last created such an impartiality in the distribution of public justice in England, has introduced into the courts of law the practice of such a thorough disregard to either the influence or wealth of the contending parties, and procured to every individual, both such an easy access to these courts, and such a certainty of redress, as are not to be paralleled in any other government. Philip de Comines, so long as three hundred years ago, com-

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mended, in strong terms, the exactness with which justice was done in England to all ranks of subjects; and the impartiality with which the same is administered in these days, will, with still more reason, excite the surprise of every stranger who has an opportunity of observing the customs of this country*.

Any violation of the laws, even by the first servants of the crown, is publicly redressed.

Indeed to such a degree of impartiality has the administration of public justice been brought in England, that it is saying nothing beyond the exact truth, to affirm that any violation of the laws, though perpetrated by men of the most extensive influence,—nay, though committed by the special direction of the very first servants of the crown,—will be publicly and completely redressed. And the very lowest of subjects will obtain such redress, if he has but spirit enough to stand forth, and appeal to the laws of his country[21]. Most extraordinary circumstances these! which those who know the difficulty of establishing just laws among mankind, and of providing afterwards for their due execution, only find credible because they are matters

* Soon after I came to England for the first time, (if the reader will give me leave to make mention of myself in this case,) an action was brought in a court of justice against a prince very nearly related to the crown; and a noble lord was also, much about that time, engaged in a lawsuit for the property of some valuable lead mines in Yorkshire. I could not but observe that, in both these cases, a decision was given against the two most powerful parties; though I wondered but little at this, because I had before heard much of the impartiality of the law proceedings in England, and was prepared to see instances of that kind. But what I was much surprised at was, that nobody appeared to be in the least so, even at the strictness with which the ordinary course of the law had, particularly in the former case, been adhered to,—and that those proceedings which I was disposed to consider as great instances of justice, to the production of which some circumstances peculiar to the times, at least some uncommon virtue or spirit on the part of the judges, must have more or less co-operated, were looked upon by all those whom I heard speak about it, as nothing more than the common and expected course of things. This circumstance became a strong inducement to me to inquire into the nature of a government by which such effects were produced.

[21] Vide ante, 916—919.

of fact, and can begin to account for, only when they look up to the constitution of the government itself; that is to say, when they consider the circumstances in which the executive power, or the crown, is placed in relation to the two bodies that concur with it to form the legislature,—the circumstances in which those two assemblies are placed in relation to the crown, and to each other,—and the situation in which all the three find themselves with respect to the whole body of the people*.

* The assertion above made, with respect to the impartiality with which justice is, in all cases, administered in England, not being of a nature to be proved by alleging single facts, I have entered into no particulars on that account. However, I will subjoin two cases, which, I think, cannot but appear remarkable to the reader.

The first is the case of the prosecution commenced in the year 1763, by some journeymen printers, against the king's messengers, for apprehending and imprisoning them for a short time, by virtue of a *general warrant* from the secretary of state; and that which was afterwards carried on by another private individual against one of the secretaries themselves. In these actions, all the ordinary forms of proceedings used in cases of actions between private subjects, were strictly adhered to: and both the secretary of state, and the messengers, were, in the end, condemned. Yet, which it is proper the reader should observe, from all the circumstances that accompanied this affair, it is difficult to propose a case in which ministers could, of themselves, be under greater temptations to exert an undue influence to hinder the ordinary course of justice. Nor were the acts for which those ministers were condemned, acts of evident oppression, which nobody could be found to justify. They had done nothing but follow a practice, of which they found several precedents, established in their offices: and their case, if I am well informed, was such that most individuals, under similar circumstances, would have thought themselves authorized to have acted as they had done.

The second case I propose to relate, affords a singular instance of the confidence with which all subjects in England claim what they think their just rights, and of the certainty with which the remedies of the law are in all cases open to them. The fact I mean, is the arrest executed in the reign of Queen Anne, in the year 1708, on the person of the Russian ambassador, by taking him out of his coach for the sum of fifty pounds. And the consequences that followed this fact are still more remarkable. The czar highly resented the affront, and demanded that the sheriff of Middlesex, and all others concerned in the arrest, should be punished with instant death. "But the queen" (to the amazement of that despotic court, says Judge Blackstone, from whom I borrow this fact) "directed the

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In fine, a very remarkable circumstance in the English government (and which alone evinces something peculiar and excellent in its nature), is that spirit of extreme mildness with which justice, in criminal cases, is administered in England; a point with regard to which England differs from all other countries in the world.

When we consider the punishments in use in the other states of Europe, we wonder how men can be brought to treat their fellow-creatures with so much cruelty; and the bare consideration of those punishments would sufficiently convince us (if we did not know the fact from other circumstances) that the men in those states who frame the laws, and preside over their execution, have little apprehension that either they, or their friends, will ever fall victims to those laws which they thus rashly establish.

The citizens who were at the head of the Roman republic assumed to themselves a great degree of cruelty.

In the Roman republic circumstances of the same nature with those just mentioned were also productive of the greatest defects in the kind of criminal justice which took place in it. That class of citizens who were at the head of the republic, and who knew how mutually to exempt each other from the operation of any too severe laws or practice, not only allowed themselves great liberties, as we have seen, in disposing of the lives of the inferior citizens, but had also introduced, into the exercise of the illegal powers they assumed to themselves in that respect, a great degree of cruelty*.

secretary of state to inform him that she could inflict no punishment upon any, the meanest of her subjects, unless warranted by the law of the land." —An act was afterwards passed to free from arrest the persons of foreign ministers, and such of their servants as they had delivered a list of to the secretary of state. A copy of this act, elegantly engrossed and illuminated, continues Judge Blackstone, was sent to Moscow, and an ambassador extraordinary commissioned to deliver it[22].

* The common manner in which the senate ordered citizens to be put to

[22] The statute alluded to is 7 Anne, c. 12.

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A spirit of great irregularity and cruelty prevailed among the Greeks, in the infliction of punishments.

Nor were things more happily conducted in the Grecian republics. From their democratical nature, and the frequent revolutions to which they were subject, we naturally expect to find that authority used with mildness, which those who enjoy it must have known to have been precarious; yet such were the effects of the violence attending those very revolutions, that a spirit both of great irregularity and cruelty had taken place among the Greeks, in the exercise of the power of inflicting punishments. The very harsh laws of *Draco* are well known, of which it was said that they were not written with ink, but with blood. The severe laws of the Twelve Tables among the Romans were in great part brought over from Greece[21]. And it was an opinion commonly received in Rome, that the cruelties practised by the magistrates on the citizens were only imitations of examples which the Greeks had given them*.

The punishment of torture adopted in Greece.

In fine, the use of torture, that method of administering justice, in which folly may be said to be added to cruelty, had been adopted by the Greeks, in consequence of the same causes which had concurred to produce the irregularity of their criminal justice. And the same practice continues, in these days, to prevail on the Continent of Europe, in consequence of that general arrangement of things which creates there such a carelessness about remedying the abuses of public authority.

death, was by throwing them headlong from the top of the Tarpeian rock. The consuls or other particular magistrates, sometimes caused citizens to expire upon a cross; or, which was a much more common case, ordered them to be beaten to death, with their heads fastened between the branches of a fork; which they called *cervicem furcæ inserere.*

* Cæsar expressly reproaches the Greeks with this fact in his speech in favour of the accomplices of Catiline, which Sallust has transmitted to us—*Eodem illo tempore, Græciæ morem imitati* (majores nostri) *verberibus animadvertebant in cives; de condemnatis summum supplicium sumebant.*

[23] Vide ante, 646, 647.

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England is freed from those abuses, which are most oppressive in other countries.

But the nature of that same government which has procured to the people of England all the advantages we have before described, has, with still more reason, freed them from the most oppressive abuses which prevail in other countries.

That wantonness in disposing of the dearest rights of mankind, those insults upon human nature, of which the frame of the governments established in other states unavoidably becomes more or less productive, are entirely banished from a nation which has the happiness of having its interest guarded by men who continue to be themselves exposed to the pressure of those laws which they concur in making, and of every tyrannic practice which they suffer to be introduced,—by men whom the advantages which they possess above the rest of the people render only more exposed to the abuses they are appointed to prevent, only more alive to the dangers against which it is their duty to defend the community*.

Punishment of torture strenuously opposed and defeated in England.

Hence we see that the use of torture has, from the earliest times, been utterly unknown in England[24]. And all attempts to introduce it, whatever might be the power of those who made them, or the circumstances in which they renewed their endeavours, have been strenuously opposed and defeated†.

From the same cause also arose that remarkable forbearance of the English laws to use any cruel

* Historians take notice that the commons, in the reign of Charles II., made haste to procure the abolition of the old statute, *De Hæretico comburendo* (for burning heretics), as soon as it became publicly known that the presumptive heir to the crown was a Roman Catholic. Perhaps they would not have been so diligent and earnest, if they had not been fully convinced that a member of the House of Commons, or his friends, might be brought to trial as easily as any other individuals among the people, so long as an express and written law could be produced against them.

† See the two notes in p. 783 of this work.

[24] Vide ante, 261, 262.

severity in the punishments which experience showed it was necessary for the preservation of society to establish; and the utmost vengeance of those laws, even against the most enormous offenders, never extends beyond the simple deprivation of life*.

No cruel and unusual punishments can be enforced.

Nay, so anxious has the English legislature been to establish mercy, even to convicted offenders, as a fundamental principle of the government of England, that they made it an express article of that great public compact which was framed at the important era of the Revolution, that "no cruel and unusual punishments" should be enforced†[25].—They even endeavoured, by adding a clause for that purpose to the oath which kings were thenceforward to take at their coronation, as it were to render it an everlasting obligation of English kings, to make justice to be "executed with mercy‡[26]."

Justice is executed with mercy.

* A very singular instance occurs in the history of the year 1605, of the care of the English legislature not to suffer precedents of cruel practices to be introduced. During the time that those concerned in the gunpowder-plot were under sentence of death, a motion was made in the House of Commons to petition the king, that the execution might be stayed, in order to consider of some extraordinary punishment to be inflicted upon them; but this motion was rejected. A proposal of the same kind was also made in the House of Lords, where it was dropped. (See the Parliamentary History of England, v. 5, anno 1605.)

† See the Bill of Rights, Art. x.—"Excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."

‡ Those same dispositions of the English legislature which have led them to take such precautions in favour even of convicted offenders, have still more engaged them to make provisions in favour of such persons as are only suspected and accused of having committed offences of any kind. Hence the zeal with which they have availed themselves of every important occasion,—such, for instance, as that of the Revolution,—to procure new confirmations to be given to the institution of the trial by jury, to the laws on imprisonments, and in general to that system of criminal jurisprudence of which a description has been given in the first part of this work.

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[25] Vide ante, 472.

[26] Ibid. 604.

Chapter XVII.

A more inward View of the English Government than has hitherto been offered to the Reader in the Course of this Work. —Very essential Differences between the English Monarchy, as a Monarchy, and all those with which we are acquainted.

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The liberty enjoyed by the English is caused by the impossibility of any body transferring to itself the executive.

The doctrine constantly maintained in this work, and which has, I think, been sufficiently supported by facts and comparisons drawn from the history of other countries, is, that the remarkable liberty enjoyed by the English nation is essentially owing to the impossibility under which their leaders, or in general all men of power among them, are placed, of invading and transferring to themselves any branch of the governing executive authority; which authority is exclusively vested, and firmly secured in the crown. Hence the anxious care with which those men continue to watch the exercise of that authority. Hence their perseverance in observing every kind of engagement which themselves may have entered into with the rest of the people.

But here a consideration of a most important kind presents itself: How comes the crown in England thus constantly to preserve to itself (as we see it does) the executive authority in the state, and moreover to preserve it so completely as to inspire the great men in the nation with that conduct so advantageous to public liberty, which has just been mentioned? These are effects which we do not find, upon examination, that the power of *crowns* has hitherto been able to produce in other countries.

In all states of a monarchical form, we indeed see that those men whom their rank and wealth, or their personal power of any kind, have raised above the rest

of the people, have formed combinations among themselves to oppose the power of the monarch. But their views, we must observe, in forming these combinations, were not by any means to set general and impartial limitations on the sovereign authority. They endeavoured to render themselves entirely independent of that authority; or even utterly to annihilate it, according to circumstances.

The manner in which the constitutions of Greece, Italy, and Rome, were destroyed.

Thus we see that in all the states of ancient Greece, the kings were at last destroyed and exterminated. The same event happened in Italy, where in remote times there existed for a while several kingdoms, as we learn both from the ancient historians and poets. And in Rome, we even know the manner and circumstances in which such a revolution was brought about.

In more modern times, we see the numerous monarchical sovereignties (which had been raised in Italy on the ruins of the Roman empire) successively destroyed by powerful factions; and events of much the same nature have at different times taken place in the kingdoms established in the other parts of Europe.

The nobles of Sweden, Denmark, and Poland, reduced their sovereign to a president over their assemblies.

In Sweden, Denmark, and Poland, for instance, we find the *nobles* reducing their sovereigns to the condition of simple presidents over their assemblies,—of mere ostensible heads of the government.

Disloyalty of the nobles of Germany, France, Scotland, Spain, and Italy.

In Germany and in France, countries where the monarchs, being possessed of considerable demesnes, were better able to maintain their independence than the princes just mentioned, the nobles waged war against them, sometimes singly and sometimes jointly; and events similar to these have successively happened in Scotland, Spain, and the modern kingdoms of Italy.

In fine, it has only been by means of standing armed forces that the sovereigns of most of the kingdoms we have mentioned have been able, in a course of time, to assert the prerogatives of the crown. And it is only

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by continuing to keep up such forces, that, like the eastern monarchs, and indeed like all the monarchs that ever existed, they continued to be able to support their authority.

How therefore can the crown of England, without the assistance of any armed force, maintain, as it does, its numerous prerogatives? How can it, under such circumstances, preserve to itself the whole executive power in the state? For here we must observe, the crown in England does not derive any support from what regular forces it has at its disposal; and if we doubted this fact, we need only look to the astonishing subordination in which the military is kept to the civil power, to become convinced that an English king is not indebted to his army for the preservation of his authority*.

The crown of England derives no support from the regular forces.

If we could suppose that the armies of the kings of Spain or of France, for instance, were, through some very extraordinary circumstance, all to vanish in one night, the power of those sovereigns, we must not doubt, would, in six months, be reduced to a mere shadow. They would immediately behold their prerogatives, however formidable they may be at present, invaded and dismembered†; and supposing that regular governments continued to exist, they would be reduced to have little more influence in them than the doges of Venice or of Genoa possess in the governments of those republics‡.

How, therefore,—to repeat the question once more, which is one of the most interesting that can occur in

The king of England can,

* Henry VIII., the most absolute prince, perhaps, who ever sat upon a throne, kept no standing army.

† As was the case in the several kingdoms into which the Spanish monarchy was formerly divided, and in no very remote times, in France itself.

‡ Or than the kings of Sweden were allowed to enjoy, before the last revolution in that country.

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without the assistance of an army, avoid those dangers to which other sovereigns are exposed.

politics,—how can the crown in England, without the assistance of any armed force, avoid those dangers to which all other sovereigns are exposed?

How can it, without any such force, accomplish even incomparably greater works than those sovereigns, with their powerful armies, are, we find, in a condition to perform?—How can it bear that universal effort (unknown in other monarchies), which, as we have seen, is continually and openly exerted against it? How can it even continue to resist this effort so powerfully as to preclude all individuals whatever from entertaining any views besides those of setting just and *general* limitations to the exercise of its authority? How can it enforce the laws upon all subjects, indiscriminately, without injury or danger to itself? How can it, in fine, impress the minds of all the great men in the state with so lasting a jealousy of its power, as to necessitate them, even in the exercise of their undoubted rights and privileges, to continue to court and deserve the affection of the rest of the people?

Those great men, I shall answer, who even in quiet times prove so formidable to other monarchs, are in England divided into two assemblies; and such, it is necessary to add, are the principles upon which this division is made, that from it result, as necessary consequences, the solidity and the indivisibility of the power of the crown.

The reader may perceive that I have led him, in the course of this work, much beyond the line within which writers on the subject of government have confined themselves; or rather, that I have followed a track entirely different from that which those writers have pursued. But as the observation just made, on the stability of the power of the crown in England, and the cause of it, is new in its kind, so do the principles from which its truth is to be demonstrated

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totally differ from what is commonly looked upon as the foundation of the science of politics. To lay those principles here before the reader, in a manner completely satisfactory to him, would lead us into philosophical discussions on what really constitutes the basis of governments and power amongst mankind, both extremely long, and in a great measure foreign to the subject of this book. I shall therefore content myself with proving the above observations by facts; which is more, after all, than political writers usually undertake to do with regard to their speculations.

The liberty which the English enjoy, is the result of the peculiar frame of their government.

As I chiefly propose to show that the extensive liberty the English enjoy is the result of the peculiar frame of their government, and occasionally to compare the same with the republican form, I even had at first intended to confine myself to that circumstance, which both constitutes the essential difference between those two forms of government, and is the immediate cause of English liberty,—I mean the having placed all the executive authority[1] in the state out of the hands of those in whom the people trust[2]. With regard to the remote cause of that same liberty, that is to say, the stability of the power of the crown, the singular solidity, without the assistance of any armed force, by which this executive authority is so secured, I should perhaps have been silent, had I not found it absolutely necessary to mention the fact in this place, in order to obviate the objections which the more reflecting part of readers might otherwise have made, both to several of the observations before offered to them, and to a few others which are soon to follow.

Besides, I shall confess here, I have been several times under apprehensions, in the course of this work, that the generality of readers, misled by the similarity of names, might put too extensive a construction upon

[1] Vide ante, 566—629. [2] Ibid. 531—565.

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what I said with regard to the usefulness of the power of the crown in England;—that they might accuse or suspect me, for instance, of attributing the superior advantages of the English mode of government over the republican form, merely to its approaching nearer to the nature of the monarchies established in the other parts of Europe, and of looking upon every kind of monarchy as preferable in itself to a republican government; an opinion which I do not by any means, or in any degree, entertain: I have too much affection, or (if you please) prepossession, in favour of that form of government under which I was born; and, as I am sensible of its defects, so do I know how to set a value upon the advantages by which it compensates for them.

The foundations of the English constitution are different from those on which the same power rests in other countries.

I therefore have, as it were, made haste to avail myself of the first opportunity of explaining my meaning on this subject,—of indicating that the power of the crown of England stands upon foundations entirely different from those on which the same power rests in other countries[3],—and of engaging the reader to observe (which for the present will suffice), that, as the English monarchy differs, in its nature and main foundations, from every other, so all that is said here of its advantages is peculiar and confined to it.

The Houses of Lords and Commons, have by turns defeated the attacks of each other upon its prerogative.

But to come to the proofs (derived from facts) of the solidity accruing to the power of the crown in England, from the *co-existence* of the two assemblies which concur to form the English parliament, I shall first point out to the reader several open acts of these two houses, by which they have by turns effectually defeated the attacks of each other upon its prerogative.

Charles II.

Without looking further back for examples than the reign of Charles II., we see that the House of Commons had, in that reign, begun to adopt the

[3] Vide ante, 305—320.

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The commons prevented from tacking money bills to other bills.

method of adding (or tacking, as it is commonly expressed) such bills as they wanted more particularly to have passed, to their money bills. This forcible use of their undoubted privilege of granting money[4], if it had been suffered to grow into common practice, would have totally destroyed the equilibrium that ought to subsist between them and the crown. But the lords took upon themselves the task of maintaining that equilibrium; they complained with great warmth of the several precedents that were made by the commons, of the practice we mention: they insisted that bills should be framed "*in the old and decent way of parliament;*" and at last made it a standing order of their house, to reject, upon the sight of them, all bills that are tacked to money bills.

The commons attempt to exclude from the crown, its presumptive heir.

Again, about the thirty-first year of the same reign, a strong party prevailed in the House of Commons; and their efforts were not entirely confined, if we may credit the historians of those times, to serving their constituents faithfully, and providing for the welfare of the state. Among other bills which they proposed in their house, they carried one to exclude from the crown the immediate heir to it[5]; an affair this, of a very high nature; and with regard to which it may well be questioned whether the legislative assemblies have a right to form a resolution, without the express and declared concurrence of the body of the people. But both the crown and the nation were delivered from the danger of establishing such a precedent, by the interposition of the lords, who threw out the bill on the first reading.

William III.

In the reign of King William III.[6], a few years after the Revolution, attacks were made upon the crown from another quarter. A strong party was formed in

[4] Vide ante, 97—100, 119, 135—137, 268, 575—629.
[5] Ibid. 445. [6] Ibid 486, 487.

the House of Lords; and, as we may see in Bishop Burnet's "History of his Own Times," they entertained very deep designs. One of their views, among others, was to abridge the royal prerogative of calling parliaments, and judging of the proper times of doing it*. They accordingly framed and carried in their house a bill for ascertaining the sitting of parliament every year: but the bill, after it had passed in their house, was rejected by the commons†.

The lords pass a bill for annual parliaments.

Again we find, that, a little after the accession of King George I., an attempt was made by a party in the House of Lords, to wrest from the crown a prerogative which is one of its finest flowers, and is, besides, the only check it has on the dangerous views which that house (which may stop both money bills and all other bills) might be brought to entertain: I mean the right of adding new members to it, and judging of the times when it may be necessary to do so. A bill was accordingly presented, and carried, in the House of Lords, for limiting the members of that house to a fixed number, beyond which it should not be increased; but after great pains taken to ensure the success of this bill, it was at last rejected by the commons.

George I.

Attempts to limit the prerogative of the crown in the creation of peers.

In fine, the several attempts which a majority in the House of Commons have in their turn made to restrain, farther than it now is, the influence of the crown arising from the distribution of preferments and other advantages, have been checked by the House of

* They, besides, proposed to have all money bills stopped in their house, till they had procured the right of taxing themselves, their own estates, and to have a committee of lords, and a certain number of the commons, appointed to confer together concerning the state of the nation: "which committee (says Bishop Burnet) would soon have grown to have been a council of state, that would have brought all affairs under their inspection, and never had been proposed but when the nation was ready to break into civil wars."—See Burnet's History, anno 1693.

† November 28, 1693.

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Place bills have always miscarried in the lords.

Lords, and all place bills have, from the beginning of this century, constantly miscarried in that house[7].

Nor have these two powerful assemblies only succeeded in thus warding off the open attacks of each other on the power of the crown. Their co-existence, and the principles upon which they are severally framed, have been productive of another effect much more extensive, though at first less attended to,—I mean the preventing even the making of such attacks; and in times, too, when the crown was of itself incapable of defending its authority; the views of each house destroying, upon these occasions, the opposite views of the other[8], like those positive and negative equal quantities (if I may be allowed the comparison), which destroy each other on the opposite sides of an equation.

The Houses of Lords and Commons resemble those positive and negative equal quantities, which destroy each other on the opposite sides of an equation.

Of this we have several remarkable examples: for instance, when the sovereign has been a minor. If we examine the history of other nations, especially before the invention of standing armies, we shall find that the event we mention never failed to be attended with open invasions of the royal authority, or even sometimes with complete and settled divisions on it. In England, on the contrary, whether we look at the reign of Richard II.[9], or that of Henry VI.[10], or of Edward VI.[11], we shall see that the royal authority was quietly exercised by the councils that were appointed to assist those princes; and when they came of age, it was delivered over to them undiminished.

Prerogatives of of the crown were undiminished during the minorities of Richard II., Henry VI., and Edward VI.

But nothing so remarkable can be alleged on this subject as the manner in which the two houses have acted upon those occasions, when, the crown being

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[7] Vide ante, 476, 477, 621—629; Stat. 6 Anne, c. 7; 1 George I. Stat. 2, c. 56; 15 George II. c. 22; 22 George III. c. 45.

[8] Ibid. 413—487.

[9] Ibid. 122—128.

[10] Ibid. 139—150.

[11] Ibid. 208—252.

without any present possessor, they had it in their power, both to settle it on what person they pleased, and to divide and distribute its effectual prerogatives, in what manner, and to what set of men, they might think proper. Circumstances like these we mention have never failed, in other kingdoms, to bring on a division of the effectual authority of the crown, or even of the state itself. In Sweden, for instance (to speak of a kingdom which has borne the greatest outward resemblance to that of England), when Queen Christina was put under a necessity of abdicating the crown, and it was transferred to the prince who stood next to her in the line of succession, the executive authority in the state was immediately divided, and either distributed among the nobles, or assigned to the senate, into which the nobles alone could be admitted; and the new king was only to be a president over it.

Constitution of Sweden bears the greatest outward resemblance to that of England.

After the death of Charles XII., who died without male heirs, the disposal of the crown (the power of which Charles XI. had found means to render again absolute) returned to the states, and was settled on the Princess Ulrica, and the prince her husband. But the senate, at the same time it thus settled the possession of the crown, again assumed to itself the effectual authority which had formerly belonged to it. The privilege of assembling the states was vested in that body. They also secured to themselves the power of making war and peace, and treaties with foreign powers,—the disposal of places,—the command of the army and of the fleet,—and the administration of the public revenue. Their number was to consist of sixteen members. The majority of votes was to be decisive upon every occasion. The only privilege of the new king was to have his vote reckoned for two: and if at any time he should refuse to attend their meet-

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ings, business was nevertheless to be done as effectually and definitively without him*.

The Revolution of 1689.

But in England, the Revolution of the year 1689[12], was terminated in a manner totally different. Those who at that interesting epoch had the guardianship of the crown,—those in whose hands it lay *vacant*,—did not manifest so much as a thought to split and parcel out its prerogative[13]. They tendered it to a single

* The senate had procured a seal to be made, to be affixed to their official resolutions, in case the king should refuse to lend his own. The reader will find more particulars concerning the former government of Sweden in the nineteenth chapter.

Regulations of a similar nature had been made in Denmark, and continued to subsist, with some variations, till the revolution which, in the seventeenth century, placed the whole power of the state in the hands of the crown without control. The different kingdoms into which Spain was formerly divided, were governed in much the same manner.

And in Scotland, that seat of anarchy and aristocratical feuds, the great offices in the state were not only taken from the crown, but they were moreover made hereditary in the principal families of the body of the nobles: such were the offices of high admiral, high steward, high constable, great chamberlain, and justice general; this last office implied powers analogous to those of the chancellor and the chief justice of the King's Bench, united.

The king's minority, or personal weakness, or, in general, the difficulties in which the state might be involved, were circumstances of which the Scotch leaders never failed to avail themselves, for invading the governing authority. A remarkable instance of the claims which they used to set forth on those occasions, occurs in a bill that was framed in the year 1703, for settling the succession to the crown, after the demise of the queen, under the title of *An Act for the Security of the Kingdom.*

The Scotch parliament was to sit by its own authority every year, on the first day of November, and adjourn itself as it should think proper.

The king was to give his assent to all laws agreed to, and offered by, the estates; or commission proper officers for doing the same.

A committee of one and thirty members, chosen by the parliament, were to be called the King's Council, and govern during the recess, being accountable to the parliament.

The king was not to make any foreign treaty without the consent of parliament.

All places and offices, both civil and military, and all pensions formerly given by the king, were ever after to be given by parliament. See Parliamentary Debates, A. 1703.

[12] Vide ante, 459—479. [13] Ibid. 470—479.

indivisible possessor, impelled, as it were, by some secret power operating upon them, without any salvo, without any article to establish the greatness of themselves or of their families. It is true, those prerogatives destructive of public liberty, which the late king had assumed, were retrenched from the crown[14]; and thus far the two Houses agreed. But as to any attempt to transfer to other hands any part of the authority of the crown, no proposal was even made about it. Those branches of prerogative which were taken from the kingly office were annihilated, and made to cease to exist in the state: and all the executive authority that was thought necessary to be continued in the government, was, as before, left undivided in the crown.

No attempt to transfer the executive power from the crown.

In the very same manner was the whole authority of the crown transferred afterwards to the princess who succeeded King William III., and who had no other claim to it but what was conferred on her by the parliament[15]. And in the same manner again it was settled, a long time beforehand, on the princes of Hanover who succeeded her*.

There is yet one more extraordinary fact, to which I desire the reader to give attention.—Notwithstanding

* It may not be improper to observe here, as a farther proof of the indivisibility of the power of the crown (which has been above said to result from the peculiar frame of the English government), that no part of the executive authority of the king is vested in his privy council, as it was in the senate of Sweden: the whole business centres in the sovereign; the votes of the members are not even counted; and, in fact, the constant style of the law is, the king *in* council, and not the king *and* council. A proviso is indeed sometimes added to some bills, that certain acts mentioned in them are to be transacted by the king in council; but this is only a precaution taken in the view that the most important affairs of a great nation may be transacted with proper solemnity, and to prevent, for instance, all objections that might, in process of time, be drawn from the uncertainty whether the king had assented, or not, to certain particular transactions. The king names the members of the privy council; or excludes them, by causing their names to be struck out of the book.

[14] Vide ante, 470—487.

[15] Ibid. 473, 474.

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all the revolutions we mention, although parliament hath sat every year since the beginning of this century, and though they have constantly enjoyed the most unlimited freedom, both as to the subjects and the manner of their deliberations, and numberless proposals have in consequence been made,—yet such has been the efficiency of each House, in destroying, preventing, or qualifying, the views of the other, that the crown has not been obliged during all that period to make use, even once, of its negative voice; and the last bill rejected by a king of England, was that rejected by King William III. in the year 1692, for triennial parliaments* [16].

The crown rarely exercises the prerogative of negation.

There occurs another instance yet more remarkable of this forbearing conduct of the parliament in regard to the crown, to whatever open or latent cause it may be owing, and how little their *esprit de corps* in reality leads them, amidst the apparent heat sometimes of their struggles, to invade its governing executive authority: I mean, the facility with which they have been prevailed upon to give up any essential branch of that authority, even after a conjunction of preceding circumstances had caused them to be actually in possession of it: a case this, however, that has not frequently happened in the English history. After the restoration of Charles II.[17], for instance, the parliament, of their own accord, passed an act (in the first year that followed that event), by which they annihilated, at one stroke, both the independent legislative authority, and all claims to such authority, which they had as-

The two Houses of Parliament do not possess an independent legislative authority.

* He assented a few years afterwards to that bill, when several amendments had been made in it.

[16] Vide ante, 486, 487. Elizabeth exercised her prerogative of negation to a great extent, thus,—at the close of one session, she gave her assent to twenty-four public bills, and nineteen private bills, and rejected forty-eight. —(Journ. 596).

[17] Ibid. 420 (Note 7).

sumed during the preceding disturbances: by the Stat. 13 Charles II. c. 1, it was forbidden, under the penalty of a *præmunire*, to affirm that either of the two Houses of Parliament, or both jointly, possess, without the concurrence of the king, the legislative authority. In the fourth year after the Restoration, another capital branch of the governing authority of the crown was also restored to it, without any manner of struggle:—by the Stat. 16 Charles II. c. 1[18], the act was repealed by which it had been enacted, that in case the king should neglect to call a parliament once at least in three years, the peers should issue the writs for an election: and that, should they neglect to issue the same, the constituents should of themselves assemble to elect a parliament.

Stat. 16 Charles II. c. 1, repealed.

It is here to be observed, that, in the same reign, the parliament passed the *Habeas Corpus* Act[19], as well as the other acts that prepared for the same, and, in general, showed a jealousy in watching over the liberty of the subject, superior perhaps to what has taken place at any other period of the English history. This is another striking confirmation of what has been remarked in a preceding chapter, concerning the manner in which public disturbances have been terminated in England. Here we find a series of parliaments to have been tenaciously and perseveringly jealous of those kinds of popular universal provisions, which great men in other states ever disdained seriously to think of, or give a place to, in those treaties by which internal peace was restored to the nation; and, at the same time, these parliaments cordially and sincerely gave up those high and splendid branches of governing authority, which the senates, or assemblies of great men who surrounded the monarchs, in other limited

The parliaments of England preserved national liberty, by rejecting the executive authority, and vesting it in a single person.

[18] Vide ante, 428.

[19] Ibid. 454, 455.

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Those persons who seem to have it in their power, to acquire the executive authority, are prevented from entertaining thoughts of doing so.

monarchies, never ceased anxiously to strive to assume to themselves,—and which the monarchs, after having lost them, never were able to recover but by military violence, aided by surprise, or through national commotions. All these are political singularities, certainly remarkable enough. It is a circumstance in no small degree conducive to the solidity of the executive authority of the English crown (which is the subject of this chapter), that those persons who seem to have it in their power to wrest the same from it, are even prevented from entertaining thoughts of doing so*.

As another proof of the peculiar solidity of the power of the crown, in England, may be mentioned

* I shall mention another instance of this real disinterestedness of the parliament in regard to the power of the crown;—nay, of the strong bent that prevails in that assembly to make the crown the general depository of the executive authority of the nation; I mean to speak of the manner in which they are accustomed to provide for the execution of such resolutions of an active kind as they may at times adopt: it is always by addressing the crown for that purpose, and desiring it to interfere with its own executive authority. Even in regard to the printing of their Journals, the crown is applied to by the commons, with a promise of making good to it the necessary expenses. Certainly, if there existed in that body any latent anxiety, any real ambition (I speak here of the general tenor of their conduct) to invest themselves with the executive authority in the state, they would not give up the providing by their own authority, at least, for the object just mentioned; it might give them a pretence for having a set of officers belonging to them, as well as a treasury of their own, and, in short, for establishing in their favour some sort of beginning or precedent; at the same time, that a wish on their part, to be the publishers of their own Journals, could not be decently opposed by the crown, nor would be likely to be disapproved by the public. To some readers the fact we are speaking of may appear trifling; to me it does not seem so: I confess I never see a paragraph in the newspapers, mentioning an address to the crown for borrowing its executive prerogative in regard to the inconsiderable object here alluded to, without pausing on the article. Certainly there must exist causes of a very peculiar nature, which produce, in an assembly possessed of so much weight, that remarkable freedom from any serious ambition to push their advantages farther—which inspire it with the great political forbearance we have mentioned, with so sincere an indifference in general, in regard to arrogating to themselves any branch of the executive authority of the crown: they really seem as if they did not know what to do with it after having acquired it, or of what kind of service it may be to them.

the facility, and safety to itself and to the state, with which it has at all times been able to deprive any particular subjects of their different offices, however overgrown and even dangerous their private power might seem to be. A very remarkable instance of this kind occurred when the great Duke of Marlborough was suddenly removed from all his employments: the following is the account given by Dean Swift, in his "History of the four last Years of the Reign of Queen Anne."

Disgrace of the Duke of Marlborough, under Anne.

"As the queen found herself under a necessity, either, on the one side, to sacrifice those friends, who had ventured their lives in rescuing her out of the power of some, whose former treatment she had little reason to be fond of,—to put an end to the progress she had made towards a peace, and dissolve her parliament; or, on the other side, by removing one person from so great a trust, to get clear of all her difficulties at once; her majesty determined upon the latter expedient, as the shorter and safer course; and during the recess at Christmas, sent the duke a letter, to tell him she had no farther occasion for his service.

The instability of greatness which is not founded on virtue.

"There has not, perhaps, in the present age been a clearer instance to show the instability of greatness which is not founded on virtue: and it may be an instruction to princes who are well in the hearts of their people, that the overgrown power of any particular person, although supported by exorbitant wealth, can, by a little resolution, be reduced in a moment, without any dangerous consequences. This lord, who was, beyond all comparison, the greatest subject in Christendom, found his power, credit, and influence, crumble away on a sudden; and except a few friends and followers, the rest dropped off in course," &c. (B. I. near the end.)

The ease with which such a man as the duke was

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suddenly removed, Dean Swift has explained by the necessary advantages of princes who possess the affection of their people, and the natural weakness of power which is not founded on virtue. However, these are very unsatisfactory explanations. The history of Europe, in former times, presents a continual series of examples to the contrary. We see in it numberless instances of princes incessantly engaged in resisting in the field the competition of the subjects invested with the eminent dignities of the realm, who were not by any means superior to them in point of virtue,—or, at other times, living in a continual state of vassalage under some powerful man whom they durst not resist, and whose *power*, *credit*, and *influence*, they would have found it far from possible to *reduce in a moment, or crumble on a sudden*, by the sending of a single letter, even though assisted *by a little resolution*, to use Dean Swift's expressions, and without any dangerous consequences.

Except under the English constitution, a discarded minister is the cause of more or less anxiety to the governing authority.

Nay, certain kings, such as Henry III. of France, in regard to the Duke of Guise, and James II. of Scotland, in regard to the two Earls of Douglas successively, had at last recourse to plot and assassination; and expedients of a similar sudden violent kind are the settled methods adopted by the eastern monarchs; nor is it very sure that they can always easily do otherwise*.

Even in the present monarchies of Europe, notwith-

* We might also mention here the case of the Emperor Ferdinand II. and the Duke of Walstein, which seems to have, at the time, made a great noise in the world. The Earls of Douglas were sometimes attended by a retinue of two thousand horse. (See Dr. Robertson's History of Scotland). The Duke of Guise was warned, some hours before his death, of the danger of trusting his person in the king's presence or house; he answered, *On n'oseroit*, They durst not.

If Mary, queen of Scots, had possessed a power analogous to that exerted by Queen Anne, she might perhaps have avoided being driven into those instances of ill conduct which were followed by such tragical consequences.

standing the awful force by which they are outwardly supported, a discarded minister is the cause of more or less anxiety to the governing authority; especially if, through the length of time he has been in office, he happens to have acquired a considerable degree of influence. He is generally sent and confined to one of his estates in the country, which the crown names to him: he is not allowed to appear at court, nor even in the metropolis; much less is he suffered to appeal to the people in loud complaints, to make public speeches to the great men in the state, and intrigue among them, and, in short, to vent his resentment by those bitter, and sometimes desperate methods, which, in the constitution of this country, prove in a great measure harmless.

The political effects of the dissolution of parliament.

But a dissolution of the parliament, that is, the dismission of the whole body of the great men in the nation, assembled in a legislative capacity, is a circumstance in the English government, in a much higher degree remarkable and deserving our notice than the depriving any single individual, however powerful, of his public employments. When we consider in what an easy and complete manner such a dissolution is effected in England, we must become convinced that the power of the crown bears upon foundations of very uncommon, though perhaps hidden, strength; especially if we attend to the several facts that take place in other countries.

In France, for example, we find the crown, notwithstanding the immense outward force by which it is surrounded, to use the utmost caution in its proceedings towards the parliament of Paris; an assembly only of a judiciary nature, without any legislative authority or avowed claim, and which, in short, is very far from having the same weight in the kingdom of France as the English parliament has in England.

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The king never repairs to that assembly, to signify his intentions, or hold a *lit de justice*, without the most overawing circumstance of military apparatus and preparation, constantly choosing to make his appearance among them rather as a general than as a king.

And when the late king*, having taken a serious alarm at the proceedings of this parliament, at length resolved upon their dismission, he fenced himself, as it were, with his army; and military messengers were sent with every circumstance of secresy and despatch, who, at an early part of the day, and at the same hour, surprised each member in his own house, causing them severally to retire to distant parts of the country, which were described to them, without allowing them time to consider, much less to meet, and hold any consultation.

The kingly office, has need of no other weapon, than the civil insignia of dignity.

But the person who is invested with the kingly office in England, has need of no other weapon, no other artillery, than the civil *insignia* of his dignity, to effect a dissolution of the parliament. He steps into the midst of them, telling them they are dissolved; and they are dissolved:—he tells them that they are no longer a parliament; and they are no longer so. Like the wand of Popilius†, a dissolution instantly puts a stop to their warmest debates and most violent proceedings. The peremptory words by which it is expressed have no sooner met their ears, than all their legislative faculties are benumbed; though they may still be sitting on the same benches, they look no longer on themselves as forming an assembly: they no longer consider each other in the light of associates or of colleagues. As if some strange kind of weapon, or a sudden magical effort, had been exerted in the

* Louis XV.

† A Roman ambassador, who stopped the army of Antiochus, king of Syria. (Livii Hist. l. xlv.)

midst of them, all the bonds of their union are cut off; and they hasten away, without having so much as the thought of continuing for a single minute the duration of their assembly*.

The civil wars of England, have rarely been occasioned, but by persons, who expressly laid claim to the crown.

To all these observations concerning the peculiar solidity of the authority of the crown in England, I shall add another that is supplied by the whole series of the English history; which is, that though bloody broils and disturbances have often taken place in England, and war been often made against the king, yet it has scarcely ever been done, but by persons who positively and expressly laid claim to the crown. Even while Cromwell contended with an armed force against Charles I., it was in the king's own name that he waged war against him[20].

The same objection might be expressed in a more general manner, and with strict truth, by saying, that

* Nor has London post-horses enough to drive them far and near into the country, when the declaration, by which the parliament is dissolved, also mentions the calling of a new one.

A dissolution, when proclaimed by a common crier assisted by a few beadles, is attended by the very same effects.

To the account of the expedient used by Louis XV. of France to effect the dismission of the parliament of Paris, we may add the manner in which the crown of Spain, more arbitrary perhaps than that of France, undertook some years ago to rid itself of the religious society of the Jesuits, whose political influence and intrigues had grown to give it umbrage. They were seized by an armed force at the same minute of the same day in every town or borough of that extensive monarchy, where they had residence, in order to their being hurried away to ships that were waiting to carry them into another country; the whole business being conducted with circumstances of secresy, of surprise, and of preparation, far superior to what is related of the most celebrated conspiracies mentioned in history.

The dissolution of the parliament which Charles II. had called at Oxford is an extremely curious event; a very lively account of it is found in Oldmixon's History of England.

If certain alterations, however imperceptible they may perhaps be at first to the public eye, ever take place, the period may come at which the crown will no longer have it in its power to dissolve the parliament; that is to say, a dissolution will no longer be followed by the same effects that it is at present.

[20] Vide ante, 412 (Note 75.)

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no war has been waged in England, against the governing authority, except upon national grounds; that is to say, either when the title to the crown has been doubtful, or when general complaints, either of a political or religious kind, have arisen from every part of the nation. As instances of such complaints, may be mentioned those that gave rise to the war against King John, which ended in the passing of the Great Charter[21]; the civil wars in the reign of Charles I.[22]; and the Revolution of the year 1689[23]. From the facts just mentioned it may also be observed as a conclusion, that the crown cannot depend on the great security we have been describing, any longer than it continues to fulfil its engagements to the nation, and to respect those laws which form the compact between it and the people. And the imminent dangers, or at least the alarms and perplexities, in which the kings of England have constantly involved themselves, whenever they have attempted to struggle against the general sense of the nation, manifestly show that all that has been above observed, concerning the security and the remarkable stability somehow annexed to their office, is to be understood, not of the capricious power of the man, but of the lawful authority of the head of the state*.

The crown cannot depend on security, if it does not fulfil its engagements to the country.

* One more observation may be made on the subject; which is, that when the kingly dignity has happened in England to be wrested from the possessor, through some revolution, it has been recovered, or struggled for, with more difficulty than in other countries: in all the other countries upon earth, a king *de jure* (by claim) possesses advantages in regard to the king in being, much superior to those of which the same circumstance may be productive in England. The power of the other sovereigns in the world is not so securely established as that of a English king; but then their character is more indelible: that is to say,—till their antagonists have succeeded in cutting off them and their families, they possess, in a high degree, a power to renew those claims and disturb the state. Those family pleas or claims of priority, and, in general, those arguments to which the bulk of mankind have agreed to allow so much weight, cease almost entirely to be of any effect in England, against the person actually invested with the kingly

[21] Vide ante, 50—58. [22] Ibid. 366—413. [23] Ibid. 468—478.

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THERE is certainly a very great degree of singularity in all the circumstances we have been describing here: those persons who are acquainted with the history of other countries cannot but remark with surprise that stability of the power of the English crown,—that mysterious solidity, that inward binding strength with which it is able to carry on with certainty its legal operations, amidst the clamorous struggle and uproar with which it is commonly surrounded, and without the medium of any armed threatening force. To give a demonstration of the manner in which all these things are brought to bear and operate, it is not, as I said before, my design to attempt here; the principles from which such demonstration is to be derived suppose an inquiry into the nature of man, and of human affairs, which rather belongs to philosophy (though to a branch hitherto unexplored) than to politics; at least such an inquiry certainly lies out of the sphere of the common science of politics*. However, I had a very material reason for introducing all the above-mentioned facts concerning the peculiar stability of the governing authority of England, inasmuch as they lead to an observation of a most important political nature; which is, that this stability allows several essential

Stability of the powers of the English crown, allows essential branches of English liberty to take place, which, without it, could not exist.

office, as soon as the constitutional parts and springs have begun to move, and, in short, as soon as the machine of the government has once begun to be in full play. An universal general ferment, similar to that which produced the former disturbances, is the only time of real danger.

The remarkable degree of internal national quiet, which, for near a century past, has followed the Revolution of the year 1689, is a strong proof of the truth of the observations above made; nor do I think that, all circumstances being considered, any other country can produce the like instance.

* It may, if the reader pleases, belong to the science of *metapolitics;* in the same sense as we say *metaphysics;* that is, the science of those things which lie beyond physical or substantial things. A few more words are bestowed upon the same subject in the advertisement, or preface, at the head of this work.

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branches of English liberty to take place, which, without it, could not exist. For there is a very essential consideration to be made in every science, though speculators are sometimes apt to lose sight of it, which is this,—in order that things may have existence, they must be possible; in order that political regulations of any kind may obtain their effect, they must imply no direct contradiction, either open or hidden, to the nature of things, or to the other circumstances of the government. In reasoning from this principle, we shall find that the stability of the governing executive authority in England, and the weight it gives to the whole machine of the state, have actually enabled the English nation, considered as a free nation, to enjoy several advantages which would really have been totally unattainable in the other states we have mentioned in former chapters, whatever degree of public virtue we might even suppose to have belonged to the men who acted in those states as the advisers of the people, or, in general, who were intrusted with the business of framing the laws.

Political regulations, to obtain their effect, must imply no direct contradiction to the nature of things, or to the other circumstances of government.

One of these advantages resulting from the solidity of the government, is the extraordinary personal freedom which all ranks of individuals in England enjoy at the expense of the governing authority. In the Roman commonwealth, for instance, we behold the senate invested with a number of powers totally destructive of the liberty of the citizens: and the continuance of these powers was, no doubt, in a great measure, owing to the treacherous remissness of those men to whom the people trusted for repressing them, or even to their determined resolution not to abridge those prerogatives. Yet, if we attentively consider the constant situation of affairs in that republic, we shall find, that, though we should suppose those persons to have been ever so truly attached to the cause

Personal freedom in England, superior to that of Rome and France.

of the people, it would not really have been possible for them to procure to the people an entire security. The right enjoyed by the senate, of suddenly naming a dictator with a power unrestrained by any law, or of investing the consuls with an authority of much the same kind, and the power it at times assumed of making formidable examples of arbitrary justice, were resources of which the republic could not, perhaps, with safety, have been totally deprived; and though these expedients frequently were used to destroy the just liberty of the people, yet they were also very often the means of preserving the commonwealth.

Nomination of a dictator.

Upon the same principle we should possibly find that the *ostracism*, that arbitrary method of banishing citizens, was a necessary resource, in the republic of Athens. A Venetian noble would perhaps also confess, that however terrible the state inquisition, established in his republic, may be even to the nobles themselves, yet it would not be prudent entirely to abolish it. And we do not know but a minister of state in France, though ever so virtuous and moderate a man, would say the same with regard to secret imprisonments, the *lettres de cachet*, and other arbitrary deviations from the settled course of law, which often take place in that kingdom, and in the other monarchies of Europe. No doubt, if he was the man we suppose, he would confess that the expedients mentioned have, in numberless instances, been basely prostituted to gratify the wantonness and private revenge of ministers, or of those who had any interest with them; but still perhaps he would continue to give it as his opinion, that the crown, notwithstanding its apparently immense strength, could not avoid recurring at times to expedients of this kind; much less could it publicly and absolutely renounce them for ever.

The ostracism, in the republic of Athens

Lettres de cachet.

It is therefore a most advantageous circumstance, in

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the English government, that its security renders all such expedients unnecessary, and that the representatives of the people have not only been constantly willing to promote the public liberty, but that the general situation of affairs has also enabled them to carry their precautions so far as they have done. And indeed, when we consider what prerogatives the crown, in England, has implicitly renounced;—that, in consequence of the independence conferred on the judges, and the method of *trial by jury*, it is deprived of all means of influencing the settled course of the law both in civil and criminal matters:—that it has renounced all power of seizing the property of individuals, and even of restraining in any manner whatsoever, and for the shortest time, the liberty of their persons:—we do not know which we ought most to admire; whether the public virtue of those who have deprived the supreme executive power of all those dangerous prerogatives, or the nature of that same power, which has enabled it to give them up without ruin to itself,—whether the happy frame of the English government, which makes those in whom the people trust, continue so faithful to the discharge of their duty, or the solidity of that same government, which can afford to leave to the people so extensive a degree of freedom*.

The executive in England, cannot alter the settled course of law in civil and criminal matters.

* At the times of the invasions of the Pretender, assisted by the forces of hostile nations, the *Habeas Corpus* Act was indeed suspended (which, by the by, may serve as one proof, that, in proportion as a government is in danger, it becomes necessary to abridge the liberty of the subject); but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals in consequence of the suspension of the act was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies which the circumstances of the times might raise, the deviation from the former course of the law was carried no farther than the single point we have mentioned. Persons detained by order of the government were to be dealt with in the same manner as those arrested at the suit of private individuals; the proceedings against them

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The liberty of the press does not exist in any European monarchy, as it does under the English constitution.

Again, the liberty of the press[1], that great advantage enjoyed by the English nation, does not exist in any of the other monarchies of Europe, however well established their power may at first seem to be; and it might even be demonstrated that it cannot exist in them. The most watchful eye, we see, is constantly kept, in those monarchies, upon every kind of publication; and a jealous attention is paid even to the loose and idle speeches of individuals. Much unnecessary trouble (we may be apt at first to think) is taken upon this subject; but yet if we consider how uniform is the conduct of all those governments, how constant and unremitted are their cares in those respects, we shall become convinced, without looking farther, that there must be some sort of necessity for their precautions.

In republican governments, the people are kept under the greatest restraints, by those who are at the head of the state.

In republican states, for reasons which are at bottom the same as in the before-mentioned governments, the people are also kept under the greatest restraints by those who are at the head of the state[2]. In the Roman commonwealth, for instance, the liberty of writing was curbed by the severest laws*: with regard to the freedom of speech, things were but little better, as we may conclude from several facts; and many instances may even be produced of the dread with which the private citizens, upon certain occasions, communicated their political opinions to the consuls, or to the senate.

In the Venetian republic, the press strictly watched.

In the Venetian republic, the press is most strictly

were to be carried on no otherwise than in a public place; they were to be tried by their peers, and have all the usual legal means of defence allowed to them; such as calling of witnesses, peremptory challenge of juries, &c.

* The law of the Twelve Tables had established the punishment of death against the author of a libel: nor was it by a *trial by jury* that they determined what was to be called a libel. SI QUIS CARMEN OCCENTASSIT, ACTITASSIT, CONDIDISSIT, QUOD ALTERI FLAGITIUM FAXIT, CAPITAL ESTO.

[1] Vide ante, 869—884.

[2] Ibid. 73—75, 413—417.

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watched; nay, to forbear to speak in any matter whatsoever of the conduct of the government is the fundamental maxim which they inculcate on the minds of the people throughout their dominions*.

The press affords every man a mean of laying his complaints before the public, from which redress is ultimately acquired against any act of oppression.

With respect therefore to this point, it may again be looked upon as a most advantageous circumstance in the English government, that those who have been at the head of the people have not only been constantly disposed to procure the public liberty, but also that they have found it possible for them to do so; and that the remarkable strength and steadiness of the government have admitted of that extensive freedom of speaking and writing which the people of England enjoy[3]. A most advantageous privilege this! which affording to every man a mean of laying his complaints before the public, procures him almost a certainty of redress against any act of oppression that he may have been exposed to; and which leaving, moreover, to

* Of this I have myself seen a proof somewhat singular, which I beg leave of the reader to relate. Being, in the year 1768, at Bergamo, the first town of the Venetian state, as you come into it from the state of Milan, about a hundred and twenty miles distant from Venice, I took a walk in the evening in the neighbourhood of the town; and wanting to know the names of several places which I saw at a distance, I stopped a young countryman to ask for information. Finding him to be a sensible young man, I entered into some farther conversation with him; and as he had himself a great inclination to see Venice, he asked me, whether I proposed to go there? I answered that I did: on which he immediately warned me, when I was at Venice, not to speak of the prince (*del principe*); an appellation assumed by the Venetian government, in order, as I suppose, to convey to the people a greater idea of their union among themselves. As I wanted to hear him talk farther on the subject, I pretended to be entirely ignorant in that respect, and asked for what reason I must not speak of the prince. But he (after the manner of the common people in Italy, who, when strongly affected by any thing, rather choose to express themselves by some vehement gesture than by words) ran the edge of his hand, with great quickness, along his neck, meaning thereby to express, that being strangled, or having one's throat cut, was the instant consequence of taking such liberty.

[3] The licentiousness of this freedom has been occasionally restrained, by Stat. 36 George III. c. 7 & 8; 60 George III. cc. 1, 2, 4, 6, 8, & 9; 3 William IV. c. 4.

every subject a right to give his opinion on all public matters, and, by thus influencing the sentiments of the nation, to influence those of the legislature itself (which is sooner or later obliged to pay a deference to them), procures to him a sort of legislative authority of a much more efficacious and beneficial nature than any formal right he might enjoy of voting by a mere *yea* or *nay*, upon general propositions suddenly offered to him, and which he could have neither a share in framing, nor any opportunity of objecting to and modiying.

It is the right of canvassing without fear the conduct of those who have the administration of government, which constitutes a free nation.

Such a privilege, by supporting in the people a continual sense of their security, and affording them undoubted proofs that the government, whatever may be its form, is ultimately designed to ensure the happiness of those who live under it, is both one of the greatest advantages of freedom, and its surest characteristic. The kind of security, as to their persons and possessions, which subjects, who are totally deprived of that privilege, enjoy at particular times under other governments, perhaps may entitle them to look upon themselves as the well-administered property of masters who rightly understand their own interests; but it is the right of canvassing without fear the conduct of those who are placed at their head, which constitutes a free nation*.

The unbounded freedom of debate, possessed by the English parliament, is also a consequence of the peculiar stability of the government. All sovereigns have agreed in their jealousy of assemblies of this kind, in their dread of the privileges of assemblies who attract

* If we consider the great advantages to public liberty which result from the institution of the trial by jury,[4], and from the liberty of the press[5], we shall find England to be in reality a more democratical state than any other we are acquainted with. The judicial power, and the censorial power, are vested in the people.

[4] Vide ante, 783—799.

[5] Ibid. 869—884.

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in so high a degree the attention of the rest of the people,—who in a course of time become connected by so many essential ties with the bulk of the nation, and acquire so much real influence by the essential share they must needs have in the management of public affairs, and by the eminent services, in short, which they are able to perform to the community*.

Single rulers have ever found it impracticable to place an unreserved trust in public assemblies.

Hence it has happened that monarchs, or single rulers, in all countries, have endeavoured to dispense with the assistance of assemblies like those we mention, notwithstanding the capital advantages they might have derived from their services towards the good government of the state; or, if the circumstances of the times have rendered it expedient for them to call such assemblies together, they have used the utmost endeavours in abridging those privileges and legislative claims which they soon found to prove so hostile to their security: in short, they have ever found it impracticable to place an unreserved trust in public meetings of this kind.

Administration of Cromwell.

We may here name Cromwell[6], as he was supported by a numerous army, and possessed more power than any foreign monarch who has not been secured by an armed force. Even after he had *purged*, by the agency of Colonel Pride[7] and two regiments, the parliament that was sitting when his power became settled, thereby thrusting out all his opponents, to the amount of about two hundred, he soon found his whole authority endangered by the proceedings of those who remained, and was under the necessity of turning them out in the

* And which they do actually perform, till they are able to throw off the restraints of impartiality and moderation,—a thing which, being men, they never fail to do when their influence is generally established, and proper opportunities offer. Sovereigns know these things, and dread them.

[6] Vide ante, 413—417.

[7] Ibid. 415, 416 (Note 5).

military manner with which every one is acquainted. Finding still a meeting of this kind highly expedient to legalize his military authority, he called together that assembly which was called *Barebones'* parliament. He had himself chosen the members of this parliament, to the number of about a hundred and twenty, and they had severally received the summons from him; yet, notwithstanding this circumstance, and the total want of personal weight in most of the members, he began in a very few months, and in the midst of his powerful victorious army, to feel a serious alarm at their proceedings; he soon heard them talk of their own divine commission, and of the authority they had received from the *Lord;* and, in short, finding he could not trust them, he employed the offices of a second colonel, to effect their dismission. Being now dignified with the legal appellation of *Protector*, he ventured to call a parliament elected by considerable parts of the people; but though the existence of this parliament was grounded, we might say grafted, upon his own, and though bands of soldiers were even posted in the avenues to keep out all such members as refused to take certain personal engagements to him, he made such haste in the issue, to rid himself of their presence, as to contrive a mean quibble or device to shorten the time of their sitting by ten or twelve days*. To a fourth assembly he again applied; but though the elections had been so managed as to procure him a formal tender of the crown during the first sitting, he put an end to the second with resentment and precipitation†.

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Cromwell feared the power of parliament.

* They were to have sitten five months; but Cromwell pretended that the months were to consist of only twenty-eight days; as this was the way of reckoning time used in paying the army and the fleet.

† The history of the conduct of the deliberating and debating assemblies we are alluding to, in regard to the monarchs, or single rulers of any deno-

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The Roman emperors distrusted the senate.

The example of the Roman emperors, whose power was outwardly so prodigious, may also be introduced here. They used to show the utmost jealousy in their conduct with respect to the Roman senate; and that assembly, which the prepossession of the people, who looked upon it as the ancient remains of the republic, had made it expedient to continue, were not suffered to assemble but under the drawn scimitars of the prætorian guards.

The kings of France have felt anxieties from the proceedings of their parliament.

Even the kings of France, though their authority is so unquestioned, so universally respected, as well as strongly supported, have felt frequent anxiety from the claims and proceedings of the parliament of Paris, —an assembly of much less weight than the English parliament. The alarm has been mentioned which Louis XV. at last expressed concerning their measures, as well as the expedient to which he resorted, to free himself from their presence. And when his successor thought proper to call again this parliament together,—a measure highly prudent in the beginning of his reign,—every jealous precaution was at the same time taken to abridge those privileges of deliberating and remonstrating, upon which any distant claim to, or struggle for, a share of the supreme authority, might be grounded.

It may be objected that the pride of kings or single rulers makes them averse to the existence of assemblies like those we mention, and despise the capital services which they might derive from them for the good government of their kingdoms. I grant it may in some measure be so. But if we inquire into the general situation of affairs in different states, and into the examples with which their history supplies us, we

mination, who summon them together, may be expressed in very few words. If the monarch is unarmed, they overrule him so as almost entirely to set him aside: if his power is of a military kind, they form connexions with the army.

shall also find that the pride of those kings agrees in the main with the interest and quiet of their subjects, and that their preventing the assemblies we speak of from meeting, or, when met, from assuming too large a share in the management of public affairs, is, in a great measure, matter of necessity.

The crown of England can give leave to assemble, and show the most unreserved trust in the parliament.

We may therefore reckon it as a very great advantage, that, in England, no such necessity exists. Such is the frame of the government, that the supreme executive authority can both give leave to assemble, and show the most unreserved trust, when assembled, to those two houses which concur together to form the legislature.

These two houses, we see, enjoy the most complete freedom in their debates, whether the subject be *grievances*, or regulations concerning government matters of any kind; no restriction whatever is laid upon them; they may start any subject they please. The crown is not to take any notice of their deliberations: its wishes, or even its name, are not to be introduced in the debates. And, in short, what makes the freedom of deliberating, exercised by the two houses, really unlimited, is the privilege, or sovereignty we may say, enjoyed by each within its own walls, in consequence of which, nothing done or said in parliament is to be questioned in any place out of parliament. Nor will it be pretended by those persons who are acquainted with the English history, that these privileges of parliament we mention are nominal privileges, only privileges upon paper, which the crown has disregarded whenever it has thought proper, and to the violations of which the parliament have used very tamely to submit. That these remarkable advantages,—this total freedom from any compulsion or even fear, and, in short, this unlimited liberty of debate, so strictly claimed by the parliament, and so scrupulously allowed

Unlimited freedom of speech.

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by the crown[8],—should be exercised year after year, during a long course of time, without producing the least relaxation in the execution of the laws, the smallest degree of anarchy,—are certainly very singular political phenomena.

The executive authority operates to the advantage of the people in a twofold manner.

It may be said, that the remarkable solidity of the governing executive authority, in England, operates to the advantage of the people with respect to the objects we mention, in a twofold manner. In the first place, it so far takes from the great men in the nation all serious ambition to invade this authority, that their debates do not produce such anarchical and more or less bloody struggles as have very frequently disturbed other countries. In the second place, it inspires those great men with that salutary jealousy of the same authority which leads them to frame such effectual provisions for laying it under proper restraints. On which I shall observe, by way of a short digression, that this distinguished *stability* of the executive authority of the English crown affords an explanation of the peculiar manner in which public commotions have constantly been terminated in England, compared with the manner in which the same events have been concluded in other kingdoms. When I mentioned, in a former chapter, this peculiarity in the English government, I mean the accuracy, impartiality, and universality of the provisions by which peace, after internal disturbances, has been restored to the nation, I confined my comparisons to instances drawn from republican governments, purposely postponing to say anything of governments of a monarchical form, till I had introduced the very essential observation contained in this chapter, which is, that the power of *crowns*, in other monarchies, has not been able, by itself, to pro-

The power of the crown, in other monarchies, has

[8] Vide ante, 328, 472, 531—565.

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not been able, by itself, to produce the same effects as it has in England.

duce the same effects it has in England,—that is, has not been able to inspire the great men in the state with anything like that salutary jealousy we mention, nor of course to induce them to unite in a real common cause with the rest of the people. In other monarchies*, those men who, during the continuance of the public disturbances, were at the head of the people, finding it in their power in the issue, to parcel out, more or less, the supreme governing authority (or even the state itself), and to transfer the same to themselves, constantly did so, in the same manner, and for the very same reasons, as it happened in the ancient commonwealths; those monarchical governments being in reality, so far as that, of a republican nature: and the governing authority was left, at the conclusion, in the same undefined extent it had before†. But, in England, the great men in the nation finding themselves in a situation essentially different, lost no time in pursuits like those in which the great men of other countries used to indulge themselves on the occasion we mention. Every member of the legislature plainly perceived, from the general aspect of affairs, and his feelings, that the supreme executive authority in the state must in the issue fall somewhere undivided, and continue so; and being moreover sensible, that neither personal advantages of any kind, nor the power of any faction, but the law alone, could afterwards be an effectual restraint upon its motions, they had no thought or aim left, except to frame with care those laws on which their own liberty was to continue to depend,

In all national conventions, the people of England perceived that the executive must be undivided.

* I mean before the introduction of those numerous standing armies which are now kept by all the crowns of Europe: since that epoch, which is of no very ancient date, no treaty has been entered into by those crowns with any subjects.

† As a remarkable instance of such a treaty, may be mentioned that by which the war *for the public good* was terminated in France.

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and to restrain a power which they judged it so impracticable to transfer to themselves or their party, or to render themselves independent of. These observations I thought necessary to be added to those in the fifteenth chapter, to which I now refer the reader.

Nor has the great freedom of canvassing political subjects we have described, been limited to the members of the legislature, or confined to the walls of Westminster; that is, to the exclusive spot on which the two Houses meet: the like privilege is allowed to the other orders of the people: and a full scope is given to that spirit of party, and a complete security ensured to those numerous and irregular meetings, which, especially when directed to matters of government, create so much uneasiness in the sovereigns of other countries. Individuals even may, in such meetings, take an active part for procuring the success of those public steps which they wish to see pursued; they may frame petitions to be delivered to the crown, or to both Houses, either to procure the repeal of measures already entered upon by government, or to prevent the passing of such as are under consideration, or to obtain the enacting of new regulations of any kind; they may severally subscribe their names to such petitions: the law sets no restriction on their numbers; nor has it, we may say, taken any precaution to prevent even the abuse that might be made of such freedom[9].

Public assemblies for the redress of grievances.

The press is available for the purposes of advertising the time and place, as well as the intent, of such meetings.

That mighty political engine, the press, is also at their service; they may avail themselves of it to advertise the time and place, as well as the intent, of the meetings, and moreover to set off and inculcate the advantages of those notions which they wish to see adopted.

[9] Vide ante, 472.

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Such meetings may be repeated; and every individual may deliver what opinion he pleases on the proposed subjects, though ever so directly opposite to the views or avowed designs of the government. The member of the legislature may, if he chooses, have admittance among them, and again enforce those topics which have not obtained the success he expected, in that House to which he belongs. The disappointed statesman, the minister turned out, also find the door open to them: they may bring in the whole weight of their influence and of their connexions: they may exert every nerve to enlist the assembly in the number of their supporters; they are bidden to do their worst: they fly through the country from one place of meeting to another: the clamour increases: the constitution, one may think, is going to be shaken to its very foundations:—but these mighty struggles, by some means or other, always find a proportionate degree of reaction; new difficulties, and at last insuperable impediments, grow up in the way of those who would take advantage of the general ferment to raise themselves on the wreck of the governing authority: a secret force exerts itself, which gradually brings things back to a state of moderation and calm: and that sea so stormy, to appearance so deeply agitated, constantly stops at certain limits which it seems as if it wanted the power to pass.

Freedom of public discussio

Impartiality in the administration of justice.

The impartiality with which justice is dealt to all orders of men in England[10], is also in great measure owing to the peculiar stability of the government: the very remarkable, high degree, to which this impartiality is carried, is one of those things, which, being impossible in other countries, is possible under the government of this country. In the ancient commonwealths,

[10] Vide ante, 281, 394, 477, 629—638.

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from the instances that have been introduced in a former place, and from others that might be quoted, it is evident that no redress was to be obtained, for the acts of injustice or oppression committed by the men possessed of influence or wealth, upon the inferior citizens. In the monarchies of Europe, in former times, abuses of a like kind prevailed to a most enormous degree. In our days, notwithstanding the great degrees of strength acquired by the different governments, it is matter of the utmost difficulty for subjects of the inferior classes to obtain the remedies of the law against certain individuals: in some countries it is impossible, let the abuse be ever so flagrant; an open attempt to pursue such remedies being moreover attended with danger. Even in those monarchies of Europe in which the government is supported both by real strength, and by civil institutions of a very advantageous nature, great differences prevail between individuals in regard to the facility of obtaining the remedies of the law: and to seek for redress, is at best, in many cases, so arduous and precarious an attempt, as to take from injured individuals all thoughts of encountering the difficulty. Nor are these abuses we mention, in the former or present governments of Europe, to be attributed only to the want of resolution in the heads of those governments. In some countries, the sovereign, by an open design to suppress these abuses, would have endangered at once his whole authority: and in others, he would find obstructions multiply so in his way as to compel him, perhaps very quickly, to drop the undertaking. How can a monarch, alone, make a persevering stand against the avowed expectations of all the great men by whom he is surrounded, and against the loud claims of powerful classes of individuals? In a commonwealth, what can the senate do when they find that their refusing to protect

Difficulties exist under some governments, for subjects of the inferior classes to obtain legal remedies against certain individuals.

a powerful offender of their own class, or to indulge some great citizen with the impunity of his friends, is likely to be productive of serious divisions among themselves, or perhaps of disturbances among the people?

If we cast our eyes on the strict and universal impartiality with which justice is administered in England, we shall soon become convinced that some inward essential difference exists between the English government and those of other countries, and that its power is founded on causes of a distinct nature. Individuals of the most exalted rank do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law. The complaint of the meanest subject, if preferred and supported in the usual way, immediately meets with a serious regard. The oppressor, of the most extensive influence, though in the midst of a train of retainers, nay, though in the fullest flight of his career and pride, and surrounded by thousands of applauders and partisans, is stopped short at the sight of the legal paper which is delivered into his hands; and a tipstaff is sufficient to bring him away, and produce him before the bench.

In England, individuals of the most exalted rank cannot prevent the operation of the law.

Such is the *greatness*, and such is the uninterrupted *prevalence* of the law*; such is, in short, the continuity of omnipotence, of resistless superiority, it exhibits, that the extent of its effects at length ceases to be a subject of observation to the public.

Nor are great or wealthy men to seek for redress or satisfaction of any kind, by any other means than such as are open to all; even the sovereign has bound himself to resort to no other; and experience has shown that he may without danger trust the protection of his

The king can only seek redress by the laws.

* *Lex magna est, et prævalebit.*

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person, and of the places of his residence, to the slow and litigious assistance of the law*.

Another very great advantage attending the remarkable stability of the English government, is, that the same is effected without the assistance of an armed standing force: the constant expedient this of all other governments[11]. On this occasion I shall introduce a passage of Doctor Adam Smith†, in a work published since the present chapter was first written, in which passage an opinion certainly erroneous is contained; the mistakes of persons of his very great abilities deserve attention. This gentleman, struck with the necessity of a sufficient power of reaction, of a sufficient strength, on the side of government, to resist the agitations attendant on liberty, has looked round, and judged that the English government derived the singular stability it manifests from the standing force it has at its disposal[12]: the following are his expressions: "To a sovereign who feels himself supported, not only by the natural aristocracy of the country, but by a well-regulated standing army, the rudest, the most groundless, and the most licentious remonstrances can give little disturbance. He can safely pardon or neglect them, and his consciousness of his superiority naturally disposes him to do so. *That degree of liberty which approaches to licentiousness, can be tolerated only in countries where the sovereign is secured by a well-regulated standing army*‡."

The English government does not derive its stability from the standing force it has at its disposal.

* I remember soon after my first coming to this country, I took notice of the boards set up from place to place behind the enclosure of Richmond Park—"Whoever trespasses upon this ground will be *prosecuted*."

† An *Inquiry into the Nature and Causes of the Wealth of Nations*.—Book v. Chap. i.

‡ The author's design, in the whole passage, is to show that standing armies, under proper restrictions, cannot be hurtful to public liberty: and may, in some cases, be useful to it, by freeing the sovereign from any troublesome jealousy in regard to this liberty.

[11] Vide ante, 486, 487.

[12] Ibid. 466—468, 531—629.

The above positions are grounded on the notion, that an army places in the hands of the sovereign a united irresistible strength, a strength liable to no accidents, difficulties, or exceptions; a supposition this, which is not conformable to experience. If a sovereign was endued with a kind of extraordinary power attending on his person, at once to lay under water whole legions of insurgents, or to repulse and sweep them away by flashes and shocks of the electrical fluid, then, indeed, he might use the great forbearance above described:—though it is not, perhaps, very likely he would put up with the *rude* and *groundless* remonstrances of his subjects, and with their *licentious* freedom, yet he might, with safety, do or not do so, at his own choice. But an army is not that simple weapon which is here supposed. It is formed of officers and soldiers who feel the same passions with the rest of the people,—the same disposition to promote their own interest and importance, when they find out their strength, and proper opportunities offer. What will, therefore, be the resource of the sovereign, if into that army, on the assistance of which he relies, the same party spirit creeps, by which his other subjects are actuated? Where will he take refuge, if the same political caprices, abetted by the serious ambition of a few leading men,—the same restlessness, and at last perhaps the same disaffection,—begin to pervade the smaller kingdom of the army, by which the main kingdom or nation is agitated?

The army generally composed of those, who have the same passions with the rest of the people.

The prevention of dangers like those just mentioned constitutes the most essential part of the precautions and state-craft of rulers, in those governments which are secured by standing armed forces. Mixing the troops formed of natives with foreign auxiliaries, dispersing them in numerous bodies over the country, and continually shifting their quarters, are among the methods

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that are used; which it does not belong to our subject to enumerate, any more than the extraordinary expedients employed by the eastern monarchs for the same purposes. But one caution, very essential to be mentioned here, and which the governments we allude to never fail to take before every other, is to retrench from their unarmed subjects a freedom, which, transmitted to the soldiery, would be attended with such fatal consequences; hindering such bad examples from being communicated to those in whose hands their power and life are trusted, is what every notion of self-preservation suggests to them; every weapon is accordingly exerted to suppress the rising and spreading of so awful a contagion.

Where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together, must be extended over the whole nation.

In general, it may be laid down as a maxim, that, where the sovereign looks to his army for the security of his person and authority, the same military laws by which this army is kept together, must be extended over the whole nation; not in regard to military duties and exercises, but certainly in regard to all that relates to the respect due to the sovereign and to his orders. The martial law, concerning these tender points, must be universal. The jealous regulations concerning mutiny and contempt of orders cannot be severely enforced on that part of the nation which secures the subjection of the rest, and enforced, too, through the whole scale of military subordination, from the soldier to the officer, up to the very head of the military system,—while the more numerous and inferior part of the people are left to enjoy an unrestrained freedom:—that secret disposition which prompts mankind to resist and counteract their superiors cannot be surrounded by such formidable checks on one side, and be left to be indulged to a degree of licentiousness and wantonness on the other.

In a country where an army is kept, capable of

commanding the obedience of the nation, this army will both imitate the licentiousness above mentioned, and check it in the people. Every officer and soldier, in such a country, claim a superiority in regard to other individuals; and, in proportion as their assistance is relied upon by the government, expect a greater or less degree of submission from the rest of the people*.

The same author concludes his above quoted observations concerning the security of the power of an armed sovereign, by immediately adding: "It is in such countries only that it is unnecessary that the sovereign should be trusted with any discretionary power for suppressing even the wantonness of this

* In the beginning of the passage which is here examined, the author says:—"Where the sovereign is himself the general, and the principal nobility and gentry of the country are the chief officers of the army,—where the military force is placed under the command of those who have the greatest interest in the support of the civil authority, because they have the greatest share of that authority,—a standing army can never be dangerous to liberty. On the contrary, it may, in some cases, be favourable to liberty," &c. In a country so circumstanced, a standing army can never be dangerous to liberty: no, not the liberty of those principal nobility and gentry, especially if they have wit enough to form combinations among themselves against the sovereign. Such a union as is here mentioned, of the civil and military powers, in the aristocratical body of the nation, leaves both the sovereign and the people without resource. If the former kings of Scotland had adopted the expedient of a standing army, and had trusted this army, thus defrayed by them, to those noblemen and gentlemen who had rendered themselves hereditary admirals, hereditary high-stewards, hereditary high-constables, hereditary great chamberlains, hereditary justices-general, hereditary sheriffs of counties, &c., they would have ill repaired the disorders under which the government of their country laboured; they would only have supplied these nobles with fresh weapons against each other, against the sovereign, and against the people.

If those members of the British parliament, who sometimes make the whole nation resound with the clamour of their dissensions, had an army under their command which they might engage in the support of their pretensions, the rest of the people would not be the better for it. Happily the swords are secured, and force is removed from their debates.

The author whom we are quoting has deemed a government to be a more simple machine, and an army a more simple instrument, than they in reality are. Like many other persons of great abilities, while struck with a certain peculiar consideration, he has overlooked others no less important,

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licentious liberty." The idea here expressed coinciding with those already discussed, I shall say nothing farther on the subject. My reason for introducing the above expressions, has been, that they lead me to take notice of a remarkable circumstance in the English government. From the expression, *it is unnecessary that the sovereign should be trusted with any discretionary power*, the author appears to think that a sovereign at the head of an army, and whose power is secured by this army, usually waits to set himself in motion, till he has received leave for that purpose; that is, till he has been trusted with a power for so doing. This notion in the author we quote, is borrowed from the steady and thoroughly legal government of this country; but the like law-doctrine, or principle, obtains under no other government. In all monarchies (and it is the same in republics), the executive power in the state is supposed to possess, originally and by itself, all manner of lawful authority: every one of its exertions is deemed to be legal: and they do not cease to be so, till they are stopped by some express and positive regulation. The sovereign, and also the civil magistrate till so stopped by some positive law, may come upon the subject when they choose: they may question any of his actions; they may construe them into unlawful acts; and inflict a penalty, as they please: in these respects they may be thought to abuse, but not to exceed, their power. The authority of the government, in short, is supposed to be unlimited so far as there are no visible boundaries set up against it; within which boundaries lies whatever degree of liberty the subject may possess.

In all monarchies the executive power in the state is supposed to possess originally, and by itself, all manner of lawful authority.

In England, the very reverse obtains. It is not the authority of the government, it is the liberty of the subject which is supposed to be unbounded. All the actions of an individual are supposed to be lawful, till

In England it is not the authority of the government, it is the liberty of the subject, which is supposed to be unbounded.

that law is pointed out which makes them to be otherwise. The *onus probandi* is here transferred from the subject to the prince. The subject is not at any time to show the ground of his conduct. When the sovereign or magistrate think proper to exert themselves, it is their business to find out and produce the law in their own favour, and the prohibition against the subject*.

When the magistrate exerts himself, he is bound to produce the law under which he acts.

This kind of law principle, owing to the general spirit by which all parts of the government are influenced, is even carried so far that any quibble, or trifling circumstance, by which an offender may be enabled to step aside and escape, though ever so narrowly, the reach of the law, will screen him from punishment, let

* I shall take the liberty to mention another fact respecting myself, as it may serve to elucidate the above observations, or at least my manner of expressing them. I remember, when I was beginning to pay attention to the operations of the English government, I was under a prepossession of quite a contrary nature to that of the gentleman whose opinions have been discussed: I used to take it for granted that every article of liberty the subject enjoys in this country was grounded upon some positive law by which this liberty was ensured to him. In regard to the freedom of the press, I had no doubt that it was so, and that there existed some particular law, or rather series of laws or legislative paragraphs, by which this freedom was defined and carefully secured: and as the liberty of writing happened at that time to be carried very far, and to excite a great deal of attention (the noise about the Middlesex election had not yet subsided), I particularly wished to see those laws I supposed, not doubting that there must be something remarkable in the wording of them. I looked into those law books which I could meet with; such as Jacob's and Cunningham's "Law Dictionaries," Wood's "Institutes," and Judge Blackstone's "Commentaries." I also found means to have a sight of Comyn's "Digest of the Laws of England," and I was again disappointed; this author, though the work consists of five folio volumes, had not had, any more than the authors just mentioned, room to spare for the interesting law I was in search of. At length it occurred to me, that this liberty of the press was grounded upon its not being prohibited; that this want of prohibition was the sole, and at the same time solid, foundation of it. This led me, when I afterwards thought of writing upon the government of this country, to give that definition of the freedom of the press which is contained in pp. 869—884, 957—967; adding to it the important consideration, that all actions respecting publications are to be decided by a jury.

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the immorality or intrinsic guilt of his conduct be ever so openly admitted*.

Such a narrow circumscription of the exertions of the government is very extraordinary: it does not exist in any country but this; nor could it. The situation of other governments is such, that they cannot thus allow themselves to be shut out of the unbounded space unoccupied by any law, in order to have their motions confined to that spot which express and previously-declared provisions have chalked out. The power of these governments being constantly attended with more or less precariousness, there must be a degree of *discretion* answerable to it†.

The foundation of the doctrine which makes the power of the government subordinate to the laws, was laid before the Great Charter passed.

The foundation of that law principle, or doctrine, which confines the exertion of the power of the government to such cases only as are expressed by a law in being[13], was laid when the Great Charter was passed: this restriction was implied in one of those general impartial articles which the barons united with the people to obtain from the sovereign. The crown, at that time, derived from its foreign dominions that stability and inward strength (in regard to the

* A number of instances, some even of a ludicrous kind, might be quoted in support of the above observation. Even a trifling flaw in the mere words of an indictment is enough to make it void.

I do not remember the name of that political author, who, having published a treasonable writing for which he escaped punishment, used afterwards to answer to his friends, when they reproached him with his rashness, *I knew I was writing within an inch of the gallows.* The law being both ascertained and strictly adhered to, he had been enabled to bring his words and positions so nicely within compass.

† It might perhaps also be proved, that the great lenity used in England in the administration of criminal justice, both in regard to the mildness, and to the frequent remission of punishments, is essentially connected with the same circumstance of the *stability* of the government. Experience indicates that it is needless to use any great degree of harshness and severity in regard to offenders; and the supreme governing authority is under no necessity of showing the subordinate magistracies any bad example in that respect.

[13] Vide ante, 8, 9.

English nation), which are now in a secret hidden manner annexed to the civil branch of its office, and which, though operating by different means, continue to maintain that kind of confederacy against it, and union between the different orders of the people. By the article in *Magna Charta* here alluded to, the sovereign bound himself neither to *go*, nor *send*, upon the subject, otherwise than by the trial of peers, and the law of the land[14]. This article was, however, afterwards disregarded in practice, in consequence of the lawful efficiency which the king claimed for his *proclamations*, and especially by the institution of the court of *Star Chamber*[15], which grounded its proceedings not only upon these proclamations, but also upon the particular rules it chose to frame within itself. By the abolition of this court (and also of the court of High Commission) in the reign of Charles I.[16], the above provision of the Great Charter was put in actual force; and it has appeared by the event, that the very extraordinary restriction upon the governing authority we are alluding to, and its execution, are no more than what the intrinsic situation of things, and the strength of the constitution, can bear*.

Limitations on the executive in Magna Charta.

The law-doctrine we have above described, and its

* The court of Star Chamber was like a court of equity in regard to criminal matters; it took upon itself to decide, upon those cases of offence upon which the usual courts of law, when uninfluenced by the crown, refused to decide, either on account of the silence of the laws in being, or of the particular rules they had established within themselves; which is exactly the office of the court of Chancery (and of the Exchequer) in regard to matters of property. The great usefulness of courts of this kind has caused the courts of equity, in regard to civil matters, to be supported and continued; but experience has shown, that no essential inconvenience can arise from the subject being indulged with the very great freedom he has acquired by the total abolition of all arbitrary or provisional courts in regard to criminal matters.

[14] Vide ante, 53, 67—69. [15] Ibid. 151, 155, 264, 382—385. [16] Ibid. 393.

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being strictly regarded by the high-governing authority, I take to be the most characteristic circumstance in the English government, and the most pointed proof that can be given of the true freedom which is the consequence of its frame. The practice of the executive authority thus to square its motions upon such laws, and such only as are ascertained and declared beforehand, cannot be the result of that kind of stability which the crown might derive from being supported by an armed force, or, as the above-mentioned author has expressed it, from the sovereign being the general of an army; such a rule of acting is even contradictory to the office of a general: the operations of a general eminently depend for their success, on their being sudden, unforeseen, attended by surprise.

The executive never acts, but under such laws as are ascertained.

In general, the stability of the power of the English crown cannot be the result of that kind of strength which arises from an armed force: the kind of strength which is conferred by such a weapon as an army, is too uncertain, too complicated, too liable to accidents: in a word, it falls infinitely short of the degree of steadiness necessary to counterbalance, and at last quiet, those extensive agitations in the people which sometimes seem to threaten the destruction of order and government. An army, if its support be well directed, may be useful to prevent this restlessness in the people from beginning to exist: but it cannot keep it within bounds, when it has once taken place.

The crown of England never resorted to military force, for its support.

If, from general arguments and considerations, we pass to particular facts, we shall actually find that the crown, in England, does not rely for its support, nor ever has relied, upon the army of which it has the command. From the earliest times,—that is, long before the invention of standing armies among European princes,—the kings of England possessed an authority certainly as full and extensive as that which

they now enjoy. After the weight they derived from their possessions beyond sea had been lost, a certain arrangement of things began to be formed at home, which supplied them with a strength of another kind, though not less solid; and they began to derive from the civil branch of their regal office that secure power which no other monarchs had ever possessed, except through the assistance of legions and prætorian guards, of armies of Janissaries, or of Strelitzes.

Authority of the House of Tudor not maintained by an army.

The princes of the House of Tudor[17], to speak of a very remarkable period in the English history, though they had no other visible present force than inconsiderable retinues of servants, were able to exert a power equal to that of the most absolute monarchs that ever reigned, equal to that of a Domitian or a Commodus, an Amurath or a Bajazet: nay, it even was superior, if we consider the steadiness and outward show of legality with which it was attended throughout.

The House of Stuart, although only supported by the civil authority of their office, offered great opposition to the restless spirit of the nation.

The stand which the kings of the House of Stuart[18] were able to make, though unarmed, and only supported by the civil authority of their office, during a long course of years, against the restless spirit which began to actuate the nation, and the vehement political and religious notions that broke out in their time, is still more remarkable than even the exorbitant power of the princes of the House of Tudor, during whose reign prepossessions of quite a contrary nature were universal.

James I.

The struggle opened with the reign of James I.[19]; yet he peaceably weathered the beginning storm, and transmitted his authority undiminished to his son.

Charles I.

Charles I., indeed, was at last crushed under the ruins of the constitution: but if we consider that, after making the important national concessions contained

[17] Vide ante, 151—311. [18] Ibid. 312—479.
[19] Ibid. 312—366.

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in the *Petition of Right*[20], he was able, single and unarmed, to maintain his ground without loss or real danger, during the space of eleven years (that is, till the year 1640), we shall be inclined to think that, had he been better advised, he might have avoided the misfortunes that at length befell him.

Events in the reign of James II. afford a proof of the solidity annexed to the authority of the English crown.

Even the events of the reign of James II.[21] afford a proof of that solidity which is annexed to the authority of the English crown. Although the whole nation, not excepting the army, were in a manner unanimous against him, he was able to reign four years, standing single against all, without meeting with any open resistance. Nor was such justifiable and necessary resistance easily brought about at length*. Though it is not to be doubted that the dethroning of James II. would have been effected in the issue, and perhaps in a very tragical manner; yet, if it had not been for the assistance of the Prince of Orange, the event would certainly have been postponed for a few years. That authority on which James relied with so much confidence, was not annihilated at the time it was, otherwise than by a ready and considerable armed force being brought against it from the other side of the sea, —like a solid fortress, which, though, without any visible outworks, requires, in order to be compelled to surrender, to be battered with cannon.

* Mr. Hume is rather too anxious in his wish to exculpate James II. He begins the conclusive character he gives of him, with representing him as a prince *whom we may safely pronounce more unfortunate than criminal.* If we consider the solemn engagements entered into, not by his predecessors only, but by himself, which this prince endeavoured to break, how cool and deliberate was his attack on the liberties and religion of the people, how unprovoked the attempt, and, in short, how totally destitute he was of any plea of self-defence or necessity, a plea to which most of the princes who have been at variance with their subjects have had a more or less distant claim, we shall look upon him as being perhaps the most guilty monarch that ever existed.

[20] Vide ante, 377.

[21] Ibid, 459—470.

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The manner in which the country has been governed since the Revolution of 1689.

If we look into the manner in which this country has been governed since the Revolution, we shall evidently see that it has not been by means of the army that the crown has been able to preserve and exert its authority. It is not by means of their soldiers that the kings of Great Britain prevent the manner in which elections are carried on, from being hurtful to them; for these soldiers must move from the places of election one day before such elections are begun, and not return till one day after they are finished. It is not by means of their military force that they prevent the several kinds of civil magistracies in the kingdom from invading and lessening their prerogative; for this military force is not to act till called for by these latter, and under their direction. It is not by means of their army that they lead the two branches of the legislature into that respect to their regal authority which we have before described; since each of these two branches, severally, is possessed of an annual power of disbanding this army*.

The military power subordinate to the civil.

There is another circumstance, which, abstractedly from all others, makes it evident that the executive authority of the crown is not supported by the army: I mean the very singular subjection in which the military is kept in regard to the civil power in this country.

In a country where the governing authority in the state is supported by the army, the military profession, who, in regard to the other professions, have on their side the advantage of present force, being now more-

* The generality of the people have from early times been so little accustomed to see any display of force used to influence the debates of the parliament, that the attempt made by Charles I. to seize the *five members*, attended by a retinue of about two hundred servants, was the actual spark that set in a blaze the heap of combustibles which the preceding contests had accumulated. The parliament, from that fact, took a pretence to make military preparations in their turn; and then the civil war began.

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over countenanced by the law, immediately acquire, or rather assume, a general ascendancy; and the sovereign, far from wishing to discourage their claims, feels an inward happiness in seeing that instrument on which he rests his authority, additionally strengthened by the respect of the people, and receiving a kind of legal sanction from the general outward consent.

And not only the military profession at large, but the individuals belonging to it, also claim personally a pre-eminence: chief commanders, officers, soldiers, or Janissaries, all claim, in their own spheres, some sort of exclusive privilege: and these privileges, whether of an honorary, or of a more substantial kind, are violently asserted, and rendered grievous to the rest of the community, in proportion as the assistance of the military force is more evidently necessary to, and more frequently employed by, the government. These things cannot be otherwise.

Military courts under a constant subordination to the ordinary courts of law.

Now, if we look into the facts that take place in England, we shall find that a quite different order prevails from what is above described. All courts of a military kind are under a constant subordination to the ordinary courts of law. Officers who have abused their private power, though only in regard to their own soldiers, may be called to account before a court of common law, and compelled to make proper satisfaction. Even any flagrant abuse of authority committed by members of courts-martial, when sitting to judge their own people, and determine upon cases entirely of a military kind, makes them liable to the animadversion of the civil judge*.

* A great number of instances might be adduced to prove the above-mentioned subjection of the military to the civil power. I shall introduce one which is particularly remarkable: I met with it in the periodical publications of the year 1746.

A lieutenant of marines, whose name was *Frye*, had been charged, while in the West Indies, with contempt of orders, for having refused, when

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All offences committed by persons of the military profession in regard to other classes of the people, are alone determinable by the civil judge.

To the above facts concerning the pre-eminence of the civil over the military power at large, it is needless to add that all offences committed by persons of the military profession, in regard to individuals belonging to the other classes of the people, are to be determined

ordered by the captain, to assist another lieutenant in carrying another officer prisoner on board the ship: the two lieutenants wished to have the order given in writing. For this, Lieutenant Frye was tried at Jamaica by a court-martial, and sentenced to fifteen years' imprisonment, besides being declared incapable of serving the king. He was brought home: and his case (after being laid before the privy-council) appearing in a justifiable light, he was released. Some time after, he brought an action against Sir Chaloner Ogle, who had been president of the above court-martial, and had a verdict in his favour for one thousand pounds' damages, as it was also proved that he had been kept fourteen months in the most severe confinement before he was brought to his trial. The judge moreover informed him, that he was at liberty to bring his action against any of the members of the said court-martial he could meet with. The following part of the affair is still more remarkable.

Upon application made by Lieutenant Frye, Sir John Willes, Lord Chief Justice of the Common Pleas, issued his writ against Admiral Mayne and Captain Rentone, two of the persons who had composed the above court-martial, who happened to be at that time in England, and were members of the court-martial that was then sitting at Deptford, to determine on the affair between Admirals Matthews and Lestock, of which Admiral Mayne was also president; and they were arrested immediately after the breaking-up of the court. The other members resented highly what they thought an insult; they met twice on the subject, and came to certain *resolutions*, which the judge-advocate was directed to deliver to the Board of Admiralty, in order to their being laid before the king. In these resolutions they demanded "satisfaction for the high insult on their president, from all persons, how high soever in office, who have set on foot this arrest, or in any degree advised or promoted it:"—moreover complaining, that, by the said arrest, "the order, discipline, and government of his majesty's armies by sea were dissolved, and the statute 13 Car. II. made null and void."

The altercations on that account lasted some months. At length the court-martial thought it necessary to submit; and they sent to Lord Chief Justice Willes a letter signed by the seventeen officers, admirals, and commanders, who composed it, in which they acknowledged that "*the resolutions of the 16th and 21st of May, were unjust and unwarrantable, and to ask pardon of his lordship, and the whole court of Common Pleas, for the indignity offered to him and the court.*"

This letter Judge Willes read in the open court, and directed the same to be registered in the *Remembrance* Office, as a "memorial *to the present and future ages, that whoever set themselves above the law, will, in the end, find themselves mistaken.*" The letter from the court-martial, and Judge Willes's acceptation, were inserted in the next Gazette, 15th November, 1746.

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upon by the civil judge. Any use they may make of their force, unless expressly authorized and directed by the civil magistrate, let the occasion be what it may, makes them liable to be convicted of murder for any life that may have been lost. To allege the duties or customs of their profession, in extenuation of any offence, is a plea which the judge will not so much as understand. Whenever claimed by the civil power, they must be delivered up immediately. Nor can it, in general, be said that the countenance shown to the military profession by the ruling power in the state has constantly been such as to inspire the bulk of the people with a disposition tamely to bear their acts of oppression, or to raise in magistrates and juries any degree of prepossession sufficient to lead them always to determine with partiality in their favour*.

If any of the military are claimed by the civil power, they must be delivered up immediately.

The subjection of the military to the civil power, carried to that extent it is in England, is another characteristic and distinctive circumstance in the English government.

It is sufficiently evident that a king does not look to his army for his support, who takes so little pains to bribe and unite it to his interest.

The English army cannot procure to the sovereign any permanent strength.

In general, if we consider all the different circumstances in the English government, we shall find that the army cannot procure to the sovereign any permanent strength [22], any strength upon which he can rely, and

* The reader may see, in the publications of the year 1770, the clamour that was raised on account of a general in the army (Gen. Gansell) having availed himself of the vicinity of his soldiers to prevent certain sheriff's officers from executing an arrest upon his person, at Whitehall. It however appeared that the general had done nothing more than put forth a few of his men, in order to perplex and astonish the sheriff's officers; and in the mean time he took an opportunity for himself to slip out of the way. The violent clamour we mention was no doubt owing to the party spirit of the time; but it nevertheless shows what the notions of the bulk of the people were on the subject.

[22] Vide ante, 472, 486, 487, 575—629.

from it expect the success of any future and distant measures[23].

Notoriety of parliamentary debates, induces all individuals, soldiers as well as others, to pay some attention to political subjects.

The public notoriety of the debates in parliament induces all individuals, soldiers as well as others, to pay some attention to political subjects; and the liberty of speaking, printing, and intriguing, being extended to every order of the nation by whom they are surrounded, makes them liable to imbibe every notion that may be directly contrary to the views of that power which maintains them.

The case would be still worse if the sovereign should engage in a contest with a very numerous part of the nation. The general concern would increase in proportion to the vehemence of the parliamentary debates: individuals, in all the different classes of the public, would try their eloquence on the same subjects; and this eloquence would be in great measure exerted, during such interesting times, in making converts of the soldiery: these evils the sovereign could not obviate, nor even know, till it should be in every respect too late. A prince, engaged in the contest we suppose, would scarcely have completed his first preparations,—his project would scarcely be half ripe for execution,—before his army would be taken from him. And the more powerful this army might be, the more adequate, seemingly, from its numbers, to the task it is intended for, the more open it would be to the danger we mention.

James II. was deserted by his army.

Of this, James II.[24] made a very remarkable experiment. He had augmented his army to the number of thirty thousand. But when the day came in which their support was to have been useful to him, some deserted to the enemy; others threw down their arms; and those who continued to stand together, showed

[23] Vide ante, 486, 487.

[24] Ibid. 466.

more inclination to be spectators of, than agents in, the contest. In short, he gave all over for lost, without making any trial of their assistance*.

Authority of the crown in England, rests upon foundations peculiar to itself.

From all the facts before mentioned, it is evident that the power of the crown, in England, rests upon foundations quite peculiar to itself, and that its security and strength are obtained by means totally different from those by which the same advantages are so incompletely procured, and so dearly paid for, in other countries.

* The army made loud rejoicings on the day of the *acquittal of the bishops*, even in the presence of the king, who had purposely repaired to Hounslow Heath on that day. He had not been able to bring a single regiment to declare an approbation of his measures in regard to the test and penal statutes. The celebrated ballad *Lero lero lillibulero*, which is reported to have had such an influence on the minds of the people at that time, and of which Bishop Burnet says, "*Never perhaps so slight a thing had so great an effect*," originated in the army: "*the whole army, and at last people both in city and country, were perpetually singing it.*"

To a king of England, engaged in a project against public liberty, a numerous army, ready formed before-hand, must, in the present situation of things, prove a very great impediment; he cannot give his attention to the proper management of it: the less so, as his measures for that purpose must often be contradictory to those he is to pursue with the rest of the people.

If a king of England, wishing to set aside the present constitution, and to assimilate his power to that of the other sovereigns of Europe, should do me the honour to consult me as to the means of obtaining success, I would recommend to him, as his first preparatory step, and before his real project is even suspected, to disband his army, keeping only a strong guard, not exceeding twelve hundred men. This done, he might, by means of the weight and advantages of his place, set himself about undermining such constitutional laws as he dislikes; using as much temper as he can, that he may have the more time to proceed. And when at length things should be brought to a crisis, then I would advise him to form another army, out of those friends or class of the people whom the turn and incidents of the preceding contests would have linked and riveted to his interest; with this army he might now take his chance: the rest would depend on his generalship, and even in a great measure on his bare reputation in that respect.

In offering my advice to the king of England, I would, however, conclude with observing to him, that his situation is as advantageous to the full as that of any king upon earth, and, upon the whole, that all the advantages which can arise from the success of his plan cannot make it worth his while to undertake it.

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It is without the assistance of an armed force that the crown, in England, is able to manifest that dauntless independence on particular individuals, or whole classes of them, with which it discharges its legal functions and duties. Without the assistance of an armed force, it is able to counterbalance the extensive and unrestrained freedom of the people, and to exert that resisting strength which constantly keeps increasing in a superior proportion to the force by which it is opposed,—that ballasting power by which, in the midst of boisterous winds and gales, it recovers and rights again the vessel of the state*.

The essential power of the king, is derived from the civil branch of his office.

It is from the civil branch of its office the crown derives that strength by which it subdues even the military power, and keeps it in a state of subjection to the laws, unexampled in any other country. It is from a happy arrangement of things it derives that uninterrupted steadiness, that invisible solidity, which procure to the subject both so certain a protection, and so extensive a freedom. It is from the nation it receives the force with which it governs the nation. Its resources are official energy, and not compulsion,—free action, and not fear;—and it continues to reign through the political *drama*,—the struggle of the voluntary passions of those who pay obedience to it†.

* There are many circumstances in the English government, which those persons who wish for speculative meliorations, such as parliamentary reform, or other changes of a like kind, do not perhaps think of taking into consideration. If so, they are, in their proceedings, in danger of meddling with a number of strings, the existence of which they do not suspect. While they only mean reformation and improvement, they are in danger of removing the *talisman* on which the existence of the fabric depends; or, like the daughter of King *Nisus*, of cutting off the fatal hair with which the fate of the city is connected.

† Many persons, satisfied with seeing the elevation and upper parts of a building, think it immaterial to give a look under ground and notice the foundation. Those readers, therefore, who choose, may consider the long chapter that has just been concluded, as a kind of foreign digression, or parenthesis, in the course of the work.

Chapter XVIII.

How far the Examples of Nations who have lost their Liberty are applicable to England.

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Every government (those writers observe, who have treated on these subjects) containing within itself the efficient cause of its ruin, a cause which is essentially connected with those very circumstances that had produced its prosperity; the advantages attending the English government cannot, therefore, according to these writers, exempt it from that latent defect which is secretly working its ruin; and M. de Montesquieu, giving his opinion both of the cause and the effect, says, that the English constitution will lose its liberty, will perish: "Have not Rome, Lacedæmon, and Carthage, perished? It will perish when the legislative power shall have become more corrupt than the executive[1]."

The English constitution will be destroyed, when its legislative power shall have become more corrupt than the executive.

Though I do by no means pretend that any human establishment can escape the fate to which we see everything in nature is subject, nor am so far prejudiced by the sense I entertain of the great advantages of the English government as to reckon among them that of eternity,—I will, however, observe in general, that as it differs by its structure and resources from all those with which history makes us acquainted, so it cannot be said to be liable to the same dangers. To judge of one from the other, is to judge by analogy where no analogy is to be found: and my respect for the author I have quoted will not preclude me from saying that his opinion has not the same weight with me on this occasion that it has on many others.

[1] Vide ante, 166—168.

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Having neglected, as indeed all systematic writers upon politics have done, to inquire attentively into the real foundations of power and of government among mankind, the principles he lays down are not always so clear, or even so just, as we might have expected from a man of so acute a genius. When he speaks of England, for instance, his observations are much too general: and though he had frequent opportunities of conversing with men who had been personally concerned in the public affairs of this country, and he had been himself an eyewitness of the operations of the English government, yet, when he attempts to describe it, he rather tells us what he conjectured than what he saw.

The examples he quotes, and the causes of dissolution which he assigns, particularly confirm this observation. The government of Rome, to speak of the one which having gradually, and as it were of itself, fallen to ruin, may afford matter for exact reasoning, had no relation to that of England. The Roman people were not, in the later ages of the commonwealth, a people of citizens but of conquerors. Rome was not a state, but the head of a state. By the immensity of its conquests, it came in time to be in a manner only an accessory part of its own empire. Its power became so great, that, after having conferred it, it was at length no longer able to resume it: and from that moment it became itself subjected to it, for the same reason that the provinces were so.

The power of Rome became so great, that, after having conferred it, it was at length no longer able to resume it.

The fall of Rome, therefore, was an event peculiar to its situation; and the change of manners which accelerated this fall, had also an effect which it could not have had but in that same situation. Men who had drawn to themselves all the riches of the world, could no longer be content with the supper of Fabricius, or with the cottage of Cincinnatus. The people who

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were masters of all the corn of Sicily and Africa, were no longer obliged to plunder their neighbours. All possible enemies, besides, being exterminated, Rome, whose power was military, ceased to be an army; and that was the era of her corruption: if, indeed, we ought to give that name to what was the inevitable consequence of the nature of things.

Rome destined to lose her liberty when she lost her empire.

In a word, Rome was destined to lose her liberty when she lost her empire; and she was destined to lose her empire, whenever she should begin to enjoy it.

But England forms a society founded upon principles entirely different. Here, all liberty and power are not accumulated as it were in one point, so as to leave, everywhere else, only slavery and misery, consequently only seeds of division and secret animosity. From one end of the island to the other, the same laws take place, and the same interests prevail: the whole nation, besides, equally concurs in the framing of the government; no one part, therefore, has cause to fear that the other parts will suddenly supply the necessary forces to destroy its liberty: and the whole have, of course, no occasion for those ferocious kinds of virtue which are indispensably necessary to those who, from the situation to which they have brought themselves, are continually exposed to dangers, and, after having invaded everything, must abstain from everything.

Situation of the people of England, essentially differs from that of the people of Rome.

The situation of the people of England, therefore, essentially differs from that of the people of Rome. The form of the English government does not differ less from that of the Roman republic: and the great advantages it has over the latter, for preserving the liberty of the people from ruin, have been described at length in the course of this work.

Thus, for instance, the ruin of the Roman republic was principally brought about by the exorbitant power to which several of its citizens were successfully

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In the latter times of the Roman commonwealth, the dominions of the republic were divided among a few citizens.

enabled to rise. In the latter times of the commonwealth, those citizens went so far as to divide among themselves the dominions of the republic in much the same manner as they might have done lands of their own. And to them others in a short time succeeded, who not only did the same, but even proceeded to such a degree of tyrannical insolence, as to make cessions to each other, by express and formal compacts, of the lives of thousands of their fellow-citizens. But the great and constant authority and weight of the crown, in England, prevent, in their very beginning (as we have seen), all misfortunes of this kind: and the reader may recollect what has been said before on that subject.

At last the ruin of the republic, as every one knows, was completed. One of those powerful citizens to whom we alluded, in process of time, found means to exterminate all his competitors; he immediately assumed the whole power of the state, and erected an arbitrary monarchy. But such a sudden and violent establishment of the monarchical power, and all the fatal consequences that would result from such an event, are calamities which cannot take place in England. That kind of power has here existed for ages: it is circumscribed by fixed laws, and established upon regular and well-known foundations.

Parliament can always influence and direct the executive.

Nor is there any great danger that this power may, by means of those legal prerogatives it already possesses, suddenly assume others, and at last openly make itself absolute. The important privilege of granting to the crown its necessary supplies, we have before observed, is vested in the nation: and how extensive soever the prerogatives of a king of England may be, it constantly lies in the power of his people either to grant or deny him the means of exercising them[2].

[2] Vide ante, 99, 119, 472, 473, 486, 487, 531—565, 575—629.

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Privilege of granting supplies, constitutes the great difference between the constitution of England, and those of other nations.

This right, possessed by the people of England, constitutes the great difference between them and all the other nations that live under monarchical governments. It likewise gives them a great advantage over such as are formed into republican states, and confers on them a mean of influencing the conduct of the government, not only more effectual, but also (which is more in point to the subject of this chapter) incomparably more lasting and secure than those reserved to the people, in the states we mention.

In those states, the political rights which usually fall to the share of the people, are those of voting in general assemblies, either when laws are to be enacted, or magistrates to be elected. But as the advantages arising from these general rights of giving votes are never very clearly ascertained by the generality of the people, so neither are the consequences attending particular forms or modes of giving these votes generally and completely understood. They accordingly never entertain any strong and constant preference for one method rather than another; and hence it always proves too easy a thing in republican states, either by insidious proposals made at particular times to the people, or by well-contrived precedents, or other means, first to reduce their political privileges to mere ceremonies and forms, and at last, entirely to abolish them.

In republican states, the political privileges of the people, are early reduced to mere ceremonies and forms.

Thus, in the Roman republic, the mode which was constantly in use for about one hundred and fifty years, of dividing the citizens into *centuriæ*[3], when they gave their votes, reduced the right of the greater part of them, during that time, to little more than a shadow. After the mode of dividing them by tribes had been introduced by the tribunes, the bulk of the citizens indeed were not, when it was used, under so great a

[3] Vide ante, 642.

disadvantage as before; but yet the great privileges exercised by the magistrates in all the public assemblies, the power they assumed of moving the citizens out of one tribe into another, and a number of other circumstances, continued to render the rights of the citizens more and more inefficient: and in fact we do not find that when those rights were entirely taken from them, they expressed any very great degree of discontent.

Legislative powers of the people of Sweden.

In Sweden (the former government of which partook much of the republican form) the right allotted to the people in the government was that of sending deputies to the general states of the kingdom, who were to give their votes on the resolutions that were to be taken in that assembly. But the privilege of the people of sending such deputies was, in the first place, greatly diminished by some essential disadvantages under which these deputies were placed with respect to the body, or *order*, of the nobles. The same privilege of the people was farther lessened by their deputies being deprived of the right of freely laying their different proposals before the states, for their assent or dissent; and by vesting the exclusive right of framing such proposals in a private assembly, which was called the *secret committee*. Again, the right allowed to the order of the nobles, of having a number of members in this secret committee, double to that of all the other orders taken together, rendered the rights of the people still more ineffectual. At the last revolution, the rights we mention were in a manner taken from the people; and they do not seem to have made any great efforts to preserve them*.

* I might have produced examples of a number of republican states, in which the people have been brought, at one time or other, to submit to the loss of their political privileges. In the Venetian republic, for instance, the right, long vested exclusively in a certain number of families,—of enacting laws, and electing the doge and other magistrates,—was originally enjoyed by the whole people.

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Political rights of the English, are inseparably connected with the right of property.

But the situation of affairs in England is totally different from that which we have just described. The political rights of the people are inseparably connected with the right of property—with a right which it is as difficult to invalidate by artifice, as it is dangerous to attack by force, and which we see that the most arbitrary kings, in the full career of their power, have never offered to violate without the greatest precautions. A king of England who would enslave his people, must begin with doing, for his first act, what all other kings reserve for the last; and he cannot attempt to deprive his subjects of their political privileges, without declaring war against the whole nation at the same time, and attacking every individual at once in his most permanent and his best-understood interest.

The mean possessed by the people of England, of influencing the conduct of the government, is not only in a manner secure against any danger of being taken from them: it is moreover attended with another advantage of the greatest importance; which is that of conferring naturally, and as it were necessarily, on those to whom they intrust the care of their interests, the great privilege we have before described, of debating among themselves whatever questions they deem conducive to the good of their constituents, and of framing whatever questions they think proper, and in what terms they choose[4].

Right of propounding legislation, as enjoyed by the English, different from that of other states.

This privilege of starting new subjects of deliberation, and, in short, of *propounding* in the business of legislation, which, in England, is allotted to the representatives of the people, forms another capital difference between the English constitution, and the government of other free states, whether limited monarchies or commonwealths, and prevents that which, in those states, proves a most effectual mean of subverting the laws favourable to public liberty,—namely,

[4] Vide ante, 136, 137, 351, 352, 472, 530—565, 827—861.

the undermining of these laws by the precedents and artful practices of those who are invested with the executive power in the government.

In the states we mention, the *active* share, or the business of *propounding*, in legislation, being ever allotted to those persons who are invested with the executive authority, they not only possess a general power, by means of insidious and well-timed proposals made to the people, of getting those laws repealed which set bounds to their authority; but when they do not choose openly to discover their wishes in that respect, or perhaps are even afraid of failing in the attempt, they have another resource, which, though slower in its operation, is no less effectual in the issue. They neglect to execute those laws which they dislike, or deny the benefit of them to the separate straggling individuals who claim it, and, in short, introduce practices that are directly repugnant to them. These practices in a course of time become respectable *usages*, and at length obtain the force of *laws*.

In some states, the active share, or the business of propounding, in legislation, is allotted to those persons who are invested with the executive authority.

The people, even where they are allowed a share in legislation, being ever *passive* in the exercise of it, have no opportunities of framing new provisions by which to remove the spurious practices or regulations, and declare what the law in reality is. The only resource of the citizens, in such a state of things, is either to be perpetually cavilling, or openly to oppose: and, always exerting themselves either too soon or too late, they cannot come forth to defend their liberty, without incurring the charge, either of disaffection, or of rebellion.

The people, even where they are allowed a share in legislation, being ever *passive* in the exercise of it, cannot declare what the law in reality is.

And while the whole class of politicians, who are constantly alluding to the usual forms of limited governments, agree in deciding that freedom, when once lost, cannot be recovered*, it happens that the

* "Ye free nations, remember this maxim: Freedom may be acquired, but it cannot be recovered." (Rousseau's Social Contract, c. viii.)

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maxim *principiis obsta*, which they look upon as the safeguard of liberty, and which they accordingly never cease to recommend, besides its requiring a degree of watchfulness incompatible with the situation of the people, is in a manner impracticable[5].

Redress of grievances, is the constitutional office of the representatives of the people.

But the operation of preferring grievances, which in other governments is the constant forerunner of public commotions, and that of framing new law-remedies, which is so jealously secured to the ruling powers of the state, are, in England, the constitutional and appropriated offices of the representatives of the people.

How long soever the people may have remained in a state of supineness, as to their most valuable interests, whatever may have been the neglect and even the errors of their representatives, the instant the latter come either to see these errors, or to have a sense of their duty, they proceed, by means of the privilege we mention, to abolish those abuses of practices which, during the preceding years, had taken place of the laws. To how low soever a state public liberty may happen to be reduced, they take it where they find it, lead it back through the same path, and to the same point, from which it had been compelled to retreat; and the ruling power, whatever its usurpations may have been,—how far soever it may have overflowed its banks,—is ever brought back to its old limits.

Frequent confirmations of Magna Charta.

To the exertions of the privilege we mention, were owing the frequent confirmations and elucidations of the Great Charter that took place in different reigns[6]. By means of the same privilege the act was repealed, without public commotion, which had enacted that the king's proclamation should have the force of law: by this act public liberty seemed to be irretrievably lost: and the parliament which passed it, seemed to have

[5] Vide ante, 827—834. [6] Ibid. 116.

done what the Danish nation did about a century afterwards. The same privilege procured the peaceable abolition of the Court of Star Chamber[7],—a court which, though in itself illegal, had grown to be so respected through the length of time it had been suffered to exist, that it seemed to have for ever fixed and riveted the unlawful authority it conferred on the crown. By the same means was set aside the power which the privy council had assumed of imprisoning the subject without admitting to bail, or even mentioning any cause. This power was, in the first instance, declared illegal by the *Petition of Right*[8]; and the attempts of both the crown and the judges to invalidate this declaration, by introducing or maintaining practices that were derogatory to it, were as often obviated, in a peaceable manner, by fresh declarations, and, in the end, by the celebrated *Habeas Corpus* act* [9].

The different parts of the English government mutually assist and support each other.

I shall take this opportunity of observing, in general, how the different parts of the English government mutually assist and support each other. It is because the whole executive authority of the state is vested in the crown, that the people may without danger delegate the care of their liberty to representatives:—it is

* The case of general warrants may also be mentioned as an instance. The issuing of such warrants, with the name of the person to be arrested left blank, was a practice that had been followed by the secretaries of state for above sixty years. In a government differently constituted, that is, in a government in which the magistrates, or executive power, should have been possessed of the *key* of legislation, it is difficult to say how the contest might have been terminated; these magistrates would have been but indifferently inclined to frame and bring forth a declaration which would abridge their assumed authority. In the republic of Geneva, the magistracy, instead of rescinding the judgment against M. Rousseau, of which the citizens complained, chose rather openly to avow the maxim, that standing *uses* were valid derogations from the written law, and ought to supersede it. This rendered the clamour more violent than before.

[7] Vide ante, 151, 155, 264, 382—385, 393.
[8] Ibid. 377.
[9] Ibid. 454, 455.

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It is because the people share in the government through their representatives, that they are enabled to possess the advantages arising from proposing new laws.

because they share in the government only through these representatives, that they are enabled to possess the great advantage arising from framing and proposing new laws: but for this purpose it is again absolutely necessary that a correspondent prerogative of the *crown*, that is to say, a *veto* of extraordinary power, should exist in the state.

It is, on the other hand, because the balance of the people is placed in the right of granting to the crown its necessary supplies, that the latter may, without danger, be intrusted with the great authority we mention: and that the right, for instance, which is vested in it, of judging of the proper time for calling and dissolving parliaments (a right absolutely necessary to its preservation)* may exist without producing, *ipso facto*, the ruin of public liberty. The most singular government upon earth, and which has carried farthest the liberty of the individual, was in danger of total destruction, when Bartholomew Columbus was on his passage to England, to teach Henry VII. the way to Mexico and Peru.

All the political passions of mankind, are satisfied and provided for, in the English government.

As a conclusion of this subject (which might open a field for speculation without end) I shall take notice of an advantage peculiar to the English government, and which, more than any other we could mention, must contribute to its duration. All the political passions of mankind, if we attend to it, are satisfied and provided for in the English government; and whether we look at the monarchical, the aristocratical, or the democratical part of it, we find all those powers already settled in it in a regular manner, which have an unavoidable tendency to arise, at one time or other, in all human societies.

* As affairs are situated in England, the dissolution of a parliament on the part of the crown is no more than an appeal either to the people themselves, or to another parliament. [Vide ante, 531—629, 835—861.]

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If we could for an instant suppose that the English form of government, instead of having been the effect of a concurrence of fortunate circumstances, had been established from a settled plan by a man who had discovered, before-hand and by reasoning, all those advantages resulting from it which we now perceive from experience, and had undertaken to point them out to other men capable of judging of what he said to them, the following is, most likely, the manner in which he would have expressed himself.

Nothing is more chimerical than a state either of total equality or total liberty.

"Nothing is more chimerical (he might have said) than a state either of total equality, or total liberty, amongst mankind. In all societies of men, some power will necessarily arise. This power, after gradually becoming confined to a smaller number of persons, will, by a like necessity, at last fall into the hands of a single leader; and these two effects (of which you may see constant examples in history) arising from the ambition of one part of mankind, and from the various affections and passions of the other, are absolutely unavoidable.

"Let us, therefore, admit this evil at once, since it is impossible to avoid it. Let us, of ourselves, establish a chief among us, since we must, some time or other, submit to one; we shall, by this step, effectually prevent the conflicts that would arise among the competitors for that situation. But let us, above all, avoid plurality; lest one of the chiefs, after successively raising himself on the ruin of his rivals, should, in the end, establish despotism, and that through a train of incidents the most pernicious to the nation.

The sovereign should possess authority to protect the whole community.

"Let us even give him every thing we can confer without endangering our security. Let us call him our sovereign; let us make him consider the state as being his own patrimony; let us grant him, in short, such personal privileges as none of us can ever hope to rival him in; and we shall find that those things which

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we were at first inclined to consider as a great evil, will be in reality a source of advantage to the community. We shall be the better able to set bounds to that power which we shall have thus ascertained and fixed in one place. We shall thus render more interested the man whom we shall have put in possession of so many advantages, in the faithful discharge of his duty; and we shall procure, for each of us, a powerful protector at home, and for the whole community, a defender against foreign enemies, superior to all possible temptation of betraying his country.

A class of men arise in every state, who, without having any actual share in the public power, yet partake of its lustre.

"You may also have observed (he might continue) that in all states there naturally arise around the person or persons who are invested with the public power, a class of men, who, without having any actual share in that power, yet partake of its lustre,—who, pretending to be distinguished from the rest of the community, do from that very circumstance become distinguished from it; and this distinction, though only matter of opinion, and at first thus surreptitiously obtained, yet may become in time the source of very grievous effects.

"Let us therefore regulate this evil, which we cannot entirely prevent. Let us establish this class of men, who would otherwise grow up among us without our knowledge, and gradually acquire the most pernicious privileges. Let us grant them distinctions that are visible and clearly ascertained: their nature will thus be the better understood, and they will of course be much less likely to become dangerous. By the same means also, we shall preclude all other persons from the hopes of usurping them. As to pretend to distinctions can thenceforward be no longer a title to obtain them, every one who shall not be expressly included in their number must continue to confess himself one of the people; and, just as we said before, 'Let us choose ourselves one master that we may not

have fifty,' we may now say, 'Let us establish three hundred lords, that we may not have ten thousand nobles.'

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"Besides, our pride will better reconcile itself to a superiority which it will no longer think of disputing. Nay, as they will themselves see that we are before-hand in acknowledging it, they will think themselves under no necessity of being insolent to furnish us a proof of it. Secure as to their privileges, all violent measures on their part for maintaining, and at last perhaps extending them, will be prevented: they will never combine with any degree of vehemence, but when they really have cause to think themselves in danger; and by having made them indisputably great men, we shall have a chance of often seeing them behave like modest and virtuous citizens.

"In fine, by being united in a regular assembly, they will form an intermediate body in the state, that is to say, a very useful part of the government.

A great body of men cannot act, without being, though they are not aware of it, the instruments of the designs of a small number of persons.

"It is also necessary (our reasoning lawgiver might add) that we, the people, should have an influence upon government: it is necessary for our own security; it is no less necessary for the security of the government itself. But experience must have taught you, at the same time, that a great body of men cannot act, without being, though they are not aware of it, the instruments of the designs of a small number of persons; and that the power of the people is never any thing but the power of a few leaders, who (though it may be impossible to tell when or how) have found means to secure to themselves the direction of its exercise.

"Let us, therefore, be also before-hand with this other inconvenience. Let us effect openly what would, otherwise, take place in secret. Let us intrust our power, before it be taken from us by address. Those whom we shall have expressly made the depositories of

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it, being freed from any anxious care about supporting themselves, will have no object but to render it useful. They will stand in awe of us the more, because they well know that they have not imposed upon us; and instead of a small number of leaders, who would imagine they derive their whole importance from their own dexterity, we shall have express and acknowledged representatives, who will be accountable to us for the evils of the state.

Advantages of a concentration of power.

"But above all, by forming our government with a small number of persons, we shall prevent any disorder that may take place in it from ever becoming dangerously extensive. Nay more, we shall render it capable of such inestimable combinations and resources, as would be utterly impossible in the government of all, which never can be any thing but uproar and confusion.

"In short, by expressly divesting ourselves of a power, of which we should, at best, have only an apparent enjoyment, we shall be entitled to make conditions for ourselves: we will insist that our liberty be augmented; we will, above all, reserve to ourselves the right of watching and censuring that administration which will have been established by our own consent. We shall the better see its faults, because we shall be only spectators of it: we shall correct them the better, because we shall not have personally concurred in its operations*."

The English constitution secures not only the liberty, but the general satisfaction of those who are subject to it.

The English constitution being founded upon such principles as those we have just described, no true comparison can be made between it and the govern-

* He might have added,—"As we will not seek to counteract nature, but rather to follow it, we shall be able to procure ourselves a mild legislation. Let us not be without cause afraid of the power of one man; we shall have no need either of a Tarpeian rock, or of a council of *ten*. Having expressly allowed to the people a liberty to inquire into the conduct of government, and to endeavour to correct it, we shall need neither state prisons, nor secret informers."

ment of any other state; and since it evidently secures, not only the liberty, but the general satisfaction, in all respects, of those who are subject to it, in a much greater degree than any other government ever did, this consideration alone affords sufficient ground to conclude, without looking farther, that it is also more likely to be preserved from ruin.

The English constitution has maintained its principles against all civil commotions.

And indeed we may observe the remarkable manner in which it has been maintained in the midst of such general commotions as seemed to lead to its unavoidable destruction. It rose again, we see, after the wars between Henry III.[10] and his barons,—after the usurpation of Henry IV.[11],—and after the long and bloody contentions between the houses of York and Lancaster[12]. Nay, though totally destroyed in appearance after the fall of Charles I.[13], and though the greatest efforts had been made to establish another form of government in its stead, yet no sooner was Charles II.[14] called over, than the constitution was re-established upon all its ancient foundations[15].

Henry III.

Henry IV.

Houses of York and Lancaster.

Charles I.

Charles II.

However, as what has not happened at one time may happen at another, future revolutions (events which no form of government can totally prevent) may perhaps end in a different manner from that in which past ones have terminated. New combinations may possibly take place among the then ruling powers of the state, of such a nature as to prevent the constitution, when peace shall be restored to the nation, from settling again upon its ancient and genuine foundations: and it would certainly be a very bold assertion to affirm, that both the outward form, and the true spirit of the English government, would again be preserved from destruction, if the same dangers to which

[10] Vide ante, 69, 79.
[11] Ibid. 129—137.
[12] Ibid. 129—150.
[13] Ibid. 391—417.
[14] Ibid. 417.
[15] Ibid. 413—459.

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they have in former times been exposed should again happen to take place.

The English government will be no more, when the crown becomes independent of supplies, or when the representative power assumes the executive.

Nay, such fatal changes as those we mention may be introduced even in quiet times, or, at least, by means in appearance peaceable and constitutional. Advantages, for instance, may be taken by particular factions, either of the feeble capacity, or of the misconduct of some future king. Temporary prepossessions of the people may be so artfully managed as to make them concur in doing what will prove afterwards the ruin of their own liberty. Plans of apparent improvement in the constitution, forwarded by men who, though with good intentions, shall proceed without a due knowledge of the true principles and foundations of government, may produce effects quite contrary to those which were intended, and in reality pave the way to its ruin*. The crown, on the other hand, may, by the acquisition of foreign dominions,

* Instead of looking for the principles of politics in their true sources, that is to say, in the nature of the affections of mankind, and of those sacred ties by which they are united in a state of society, men have treated that science in the same manner as they did natural philosophy in the time of Aristotle, continually recurring to occult causes and principles, from which no useful consequence could be drawn. Thus, in order to ground particular assertions, they have much used the word constitution in a personal sense, *the constitution loves, the constitution forbids*, and the like. At other times they have had recourse to *luxury*, in order to explain certain events; and, at others, to a still more occult cause, which they have called *corruption;* and abundance of comparisons drawn from the human body have been also used for the same purposes: continued instances of such defective arguments and considerations occur in the works of *M. de Montesquieu*, though a man of so much genius, and from whose writings so much information is nevertheless to be derived. Nor is it only the obscurity of the writings of politicians, and the impossibility of applying their speculative doctrines to practical uses, which prove that some peculiar and uncommon difficulties lie in the way of the investigation of political truths; but the remarkable perplexity which men in general, even the ablest, labour under, when they attempt to descant and argue upon abstract questions in politics, also justifies this observation, and proves that the true first principles of this science, whatever they are, lie deep both in the human feelings and understanding.

acquire a fatal independency on the people: and if, without entering into any farther particulars on this subject, I were required to point out the principal events which would, if they were ever to happen, prove immediately the ruin of the English government, I would say,—the English government will be no more, either when the crown shall become independent on the nation for its supplies, or when the representatives of the people shall begin to share in the executive authority*.

CHAPTER XIX.

A few additional Thoughts on the Attempts that at particular Times may be made to abridge the Power of the Crown, and some of the Dangers by which such Attempts may be attended.

THE power of the crown is supported by deeper and more numerous roots than the generality of people are aware of, as has been observed in a former chapter; and there is no cause to fear that the wresting any capital branch of its prerogative may be effected, in common peaceable times, by the mere theoretical speculations of politicians. However, it is not equally impracticable that some event of the kind we mention may be brought about through a conjunction of several circumstances. Advantage may, in the first place, be taken of the minority, and even of the inexperience or the errors of the person invested with the kingly authority. Of this a remarkable instance happened in

Undue advantage may be taken of the minority or inexperience of the sovereign.

* And if at any time dangerous changes were to take place in the English constitution, the pernicious tendency of which the people were not able at first to discover, restrictions on the liberty of the press, and on the power of juries, will give them the first information.

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the reign of George I., while that bill, by which the order of peers was in future to be limited to a certain number, was under consideration in the House of Commons, to whom it had been sent by the Lords. So unacquainted was the king at that time with his own interest, and with the constitution of the English government, that, having been persuaded by the party who wished success to the bill, that the commons only objected to it from an opinion of its being disagreeable to him, he was prevailed upon to send a message to them, to let them know that such an opinion was ill-grounded, and that, should the bill pass in their house, it would meet with his assent. Considering the prodigious importance of the consequences of such a bill, the fact is certainly very remarkable.

To popular discontents of long continuance in regard to certain particular abuses of influence or authority.

With those personal disadvantages under which the sovereign may lie for defending his authority, other causes of difficulty may concur,—such as popular discontents of long continuance in regard to certain particular abuses of influence or authority. The generality of the public, bent, at that time, both upon remedying the abuses complained of, and preventing the like from taking place in future, will perhaps wish to see that branch of the prerogative which gave rise to them taken from the crown: a general disposition to applaud such a measure, if effected, will be manifested from all quarters; and at the same time men may not be aware, that the only material consequence that may arise from depriving the crown of that branch of power which has caused the public complaints, will perhaps be the having transferred that branch of power from its former seat to another, and having intrusted it to new hands, which will be still more likely to abuse it than those in which it was formerly lodged.

Power under any form of government must exist and be intrusted somewhere.

In general, it may be laid down as a maxim, that power under any form of government must exist, and

be intrusted somewhere. If the constitution does not admit of a king, the governing authority is lodged in the hands of magistrates. If the government, at the same time that it is a limited one, bears a monarchical form, those portions of power that are retrenched from the king's prerogative will most probably continue to subsist, and be vested in a senate or assembly of great men, under some other name of the like kind.

Thus, in the kingdom of Sweden, which, having been a limited monarchy, may supply examples very applicable to the government of this country, we find that the power of convoking the general states (or parliament) of that kingdom had been taken from the crown; but at the same time we also find that the Swedish senators had invested themselves with that essential branch of power which the crown had lost: I mean here the government of Sweden as it stood before the last revolution.

The power of the Swedish king to confer offices and employments had been also very much abridged. But what was wanting to the power of the king, the senate enjoyed: it had the nomination of three persons for every vacant office, out of whom the king was to choose one.

The king had but a limited power in regard to pardoning offenders; but the senate likewise possessed what was wanting to that branch of his prerogative, and it appointed two persons, without the consent of whom the king could not remit the punishment of any offence.

The king of England has an exclusive power in regard to foreign affairs, war, peace, treaties;—in all that relates to military affairs, he has the disposal of the existing army, of the fleet, &c.[1] The king of Sweden had no such extensive powers; but they

The king of England has an exclusive power in relation to foreign affairs, war, peace, treaties, &c.

[1] Vide ante, 566—574.

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nevertheless existed: everything relating to the above-mentioned objects was transacted in the assembly of the senate; the majority decided; the king was obliged to submit to it; and his only privilege consisted in his vote being accounted two *.

If we pursue farther our inquiry on the subject, we shall find that the king of Sweden could not raise whom he pleased to the office of senator, as the king of England can in regard to the office of member of the privy council[2]; but the Swedish states, in the assembly of whom the nobility enjoyed most capital advantages, possessed a share of the power we mention, in conjunction with the king; and in cases of vacancies in the senate, they elected three persons, out of whom the king was to return one.

The king of England can always deprive his ministers of their employments.

The king of England may, at all times, deprive the ministers of their employments[3]. The king of Sweden could remove no man from his office; but the states enjoyed the power that had been denied to the king; and they might deprive of their places both the senators, and those persons in general who had share in the administration.

* The Swedish senate was fully composed of sixteen members. In regard to affairs of smaller moment they formed themselves into two divisions, in either of these, when they did sit, the presence of seven members was required for the effectual transacting of business: in affairs of importance, the assembly was formed of the whole senate; and the presence of ten members was required to give force to the resolutions. When the king could not or would not take his seat, the senate proceeded nevertheless, and the majority continued to be equally decisive.

As the royal seal was necessary for putting in execution the resolutions of the senate, King Adolphus Frederic tried, by refusing to lend the same, to procure that power which he had not by his suffrage, and to stop the proceedings of the senate. Great debates in consequence of that pretension arose, and continued for a while; but at last, in the year 1756, the king was over-ruled by the senate, who ordered a seal to be made, that was named the *king's seal*, which they affixed to their official resolutions, when the king refused to lend his own.

[2] Vide ante, 475, 476.

[3] Ibid. 946—948.

The king of England has the power of dissolving, or keeping assembled, his parliament[4]. The king of Sweden had not that power; but the states might of themselves prolong their duration as they thought proper.

Those who think that the prerogative of a king cannot be too much abridged, and that power loses all its influence on the dispositions and views of those who possess it, according to the kind of name used to express the offices by which it is conferred, may be satisfied, no doubt, to behold those branches of power that were taken from a king distributed to several bodies, and shared by the representatives of the people; but those who think that power, when parcelled and diffused, is never so well repressed and regulated as when it is confined to a sole indivisible seat, which keeps the nation united and awake,—those who know, that, names by no means altering the intrinsic nature of things, the representatives of the people, as soon as they are invested with independent authority, become, *ipso facto*, its masters,—those persons, I say, will not think it a very happy regulation in the former constitution of Sweden to have deprived the king of prerogatives formerly attached to his office, in order to vest the same either in a senate, or in the deputies of the people, and thus to have intrusted with a share in the exercise of the public power those very men whose constitutional office should have been to watch and restrain it.

Power is never so well repressed and regulated, as when it is confined to a sole indivisible seat.

From the indivisibility of the governing authority in England, a community of interest takes place among all orders of men; and hence arises, as a necessary consequence, the liberty enjoyed by all ranks of subjects. This observation has been insisted upon at length in the course of the present work. The shortest

From the indivisibility of the governing authority in England, a community of interest takes place among all orders of men.

[4] Vide ante, 531—565, 950—951.

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* Such regulations as may essentially affect, through their consequences, the equipoise of a government, may be brought about, even though the promoters themselves of those regulations are not aware of their tendency. When the bill passed in the seventeenth century, by which it was enacted that the crown should give up its prerogative of dissolving the parliament then sitting, the generality of people had no thought of the calamitous consequences that were to follow: very far from it. The king himself certainly felt no very great apprehension on that account, else he would not have given his assent; and the commons themselves, it appears, had very faint notions of the capital changes which the bill would speedily effect in their political situation.

When the crown of Sweden was, in the first instance, stripped of all the different prerogatives we have mentioned, it does not appear that those measures were effected by sudden open provisions for that purpose: it is very probable that the way had been paved for them by indirect regulations formerly made, the whole tendency of which scarcely any one perhaps could foresee at the time they were framed.

When the bill was in agitation, for limiting the House of Peers to a certain number, its great constitutional consequences were scarcely attended to by anybody. The king himself certainly saw no harm in it, since he sent an open message to promote the passing of it: a measure which was not, perhaps, strictly regular. The bill was, it appears, generally approved out of doors. Its fate was for a long time doubtful in the House of Commons; nor did they acquire any favour with the bulk of the people by finally rejecting it: and Judge Blackstone, as I find in his Commentaries, does not seem to have thought much of the bill, and its being rejected, as he only observes that the commons "wished to keep the door of the House of Lords as open as possible." Yet, no bill of greater constitutional importance was ever agitated in parliament; since the consequences of its being passed would have been the freeing the House of Lords, both in their judicial and legislative capacities, from all constitutional check whatever, either from the crown or nation. Nay, it is not to be doubted, that they would have acquired, in time, the right of electing their own members: though it would be useless to point out here by what series of intermediate events the measure might have been brought about. Whether there

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The care of English legislators always kept pace with the exigencies of their situation.

But experience does not by any means allow us to entertain so pleasing an opinion. The perusal of the history of this country will show us, that the care of its legislators, for the welfare of the subject, always kept pace with the exigencies of their own situation. When, through the minority, or easy temper of the reigning prince, or other circumstances, the dread of a superior power began to be overlooked, the public cause was immediately deserted in a greater or less degree, and pursuit after private influence and lucrative offices took the place of patriotism. When, in the reign of Charles I., the authority of the crown was for a while annihilated, those very men, who till then had talked of nothing but Magna Charta and liberty, instantly endeavoured openly to trample both under foot.

Since the time we mention, the former constitution of the government having been restored, the great outlines of public liberty have indeed been warmly and seriously defended; but if any partial unjust laws or regulations have been made, especially since the Revolution of the year 1689,—if any abuses injurious to particular classes of individuals have been suffered to continue, it will certainly be found, upon inquiry, that those laws and those abuses were of such a complexion, that from them, the members of the legislature well knew, neither they nor their friends would ever be likely to suffer.

Consequential evils, if bodies or classes of individuals were to acquire a personal independent share in the executive.

If, through the unforeseen operation of some new regulation made to restrain the royal prerogative, or

existed any actual project of this kind among the first framers of the bill, does not appear; but a certain number of the members of the house we mention would have thought of it soon enough, if the bill in question had been enacted into a law; and they would certainly have met with success, had they been contented to wait, and had they taken time. Other equally important changes in the substance, and perhaps the outward form, of the government would have followed.

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through some sudden public revolution, any particular bodies or classes of individuals were ever to acquire a personal independent share in the exercise of the governing authority, we should behold the public virtue and patriotism of the legislators and great men immediately cease with its cause, and aristocracy, as it were, watchful of the opportunity, burst out at once, and spread itself over the kingdom.

The men who are now the ministers, would set themselves above the law.

The men who are now the ministers, but then the partners of the crown, would instantly set themselves above the reach of the law, and soon after ensure the same privilege to their several supporters or dependants.

Personal and independent power becoming the only kind of security of which men would now show themselves ambitious, the *Habeas Corpus* Act, and in general all those laws which subjects of every rank regard with veneration, and to which they look up for protection and safety, would be spoken of with contempt, and mentioned as remedies fit only for peasants and cits:—it even would not be long before they would be set aside, as obstructing the wise and salutary steps of the senate.

The pretensions of an equality of right in all subjects, to property and personal safety, would be despised.

The pretensions of an equality of right in all subjects, of whatever rank and order, to their property and to personal safety, would soon be looked upon as an old-fashioned doctrine, which the judge himself would ridicule from the bench. And the liberty of the press, now so universally and warmly vindicated, would, without loss of time, be cried down and suppressed, as only serving to keep up the insolence and pride of a refractory people.

And let us not believe, that the mistaken people, whose representatives we now behold making such a firm stand against the *indivisible* power of the crown, would, amidst the general devastation of everything

they hold dear, easily find men equally disposed to repress the encroaching, while *attainable*, power of a senate and body of nobles.

The time would be no more when the people, upon whatever men they should fix their choice, would be sure to find them ready sincerely to join in the support of every important branch of public liberty.

Wherever the people applied for servants, they would only meet with betrayers.

Present or expected personal power, and independence on the laws, being now the consequence of the trust of the people,—wherever they should apply for servants, they would only meet with betrayers. Corrupting, as it were, everything they should touch, they could confer no favour upon an individual but to destroy his public virtue; and (to repeat the words used in a former chapter) "their raising a man would only be immediataly inspiring him with views directly opposite to their own, and sending him to increase the number of their enemies."

Caution requisite in laying new restraints on the governing authority.

All these considerations strongly point out the very great caution which is necessary to be used in the difficult business of laying new restraints on the governing authority. Let, therefore, the less informed part of the people, whose zeal requires to be kept up by visible objects, look (if they choose) upon the crown as the only seat of the evils they are exposed to; mistaken notions on their part are less dangerous than political indifference; and they are more easily directed than roused;—but, at the same time, let the more enlightened part of the nation constantly remember, that the constitution only subsists by virtue of a proper equilibrium,—by a discriminating line being drawn between power and liberty.

The constitution only exists by a discriminating line being drawn between power and liberty.

Made wise by the examples of several other nations, by those which the history of this very country affords, let the people, in the heat of their struggles in the defence of liberty, always take heed, only to reach,

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never to overshoot the mark,—only to repress, never to transfer and diffuse power.

Whenever the prospect of personal power and independence from the governing authority is offered to the view of the members of the legislature, civil liberty will be destroyed.

Amidst the alarms that may at particular times arise from the really awful authority of the crown, let it, on one hand, be remembered, that even the power of the Tudors was opposed and subdued,—and, on the other, let it be looked upon as a fundamental maxim, that, whenever the prospect of personal power and independence on the governing authority shall offer to the view of the members of the legislature, or, in general, of those men to whom the people must trust, even hope itself is destroyed. The Hollander, in the midst of a storm, though trusting to the experienced strength of the mounds that protect him, shudders, no doubt, at the sight of the foaming element that surrounds him; but they all gave themselves over for lost, when they thought the worm had penetrated into their dykes*.

Chapter XX.

A few additional Observations on the Right of Taxation, which is lodged in the Hands of the Representatives of the People. What kind of Danger this Right may be exposed to.

The generality of men, or at least of politicians, seem to consider the right of taxing themselves, enjoyed by the English nation, as being no more than the means of securing their property against the attempts of the crown; while they overlook the nobler and more extensive efficiency of that privilege.

The right to grant subsidies to the crown, possessed

* Such new forms as may prove destructive of the real substance of a government may be unwarily adopted, in the same manner as the superstitious notions and practices described in my work, entitled *Memorials of Human Superstition*, may be introduced into a religion, so as entirely to subvert the true spirit of it.

by the people of England, is the safeguard of all their other liberties, religious and civil[1]; it is a regular mean conferred on them by the constitution, of influencing the motion of the executive power; and it forms the tie by which the latter is bound to them. In short, this privilege is a sure pledge in their hands, that their sovereign, who can dismiss their representatives at his pleasure, will never entertain thoughts of ruling without the assistance of these.

Evils from the crown being independent of parliament in pecuniary resources.

If, through unforeseen events, the crown could attain to be independent on the people in regard to its supplies, such is the extent of its prerogative, that, from that moment, all the means the people possess to vindicate their liberty would be annihilated. They would have no resource left,—except, indeed, that uncertain and calamitous one, of an appeal to the sword; which is no more, after all, than what the most enslaved nations enjoy.

Let us suppose, for instance, that abuses of power should be committed, which, either by their immediate operation, or by the precedent they might establish, should undermine the liberty of the subject. The people, it will be said, would then have their remedy in the legislative power possessed by their representatives. The latter would, at the first opportunity, interfere, and frame such bills as would prevent the like abuses for the future. But here we must observe, that the assent of the sovereign is necessary to make those bills become laws: and if, as we have just now supposed, he had no need of the support of the commons, how could they obtain his assent to laws thus purposely framed to abridge his authority?

The liberty of the subject might be invaded with impunity.

Again, let us suppose that, instead of contenting itself with making slow advances to despotism, the

[1] Vide ante, 97—100, 119—121, 126, 127, 135—137, 325—330, 385—388, 472, 531—565, 575—609, 835—861.

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executive power, or its minister, should at once openly invade the liberty of the subject. Obnoxious men, printers, for instance, or political writers, might be persecuted by military violence, or, to do things with more security, with the forms of law. Then, it will be said, the representatives of the people would impeach the persons concerned in those measures. Though unable to reach a king who personally *can do no wrong*[2], they at least would attack those men who were the immediate instruments of his tyrannical proceedings, and endeavour, by bringing them to condign punishment, to deter future judges or ministers from imitating their conduct. All this I grant; and I will even add, that, circumstanced as the representatives of the people now are, and having to do with a sovereign who can enjoy no dignity without their assistance, it is most likely that their endeavours in the pursuit of such laudable objects would prove successful. But if, on the contrary, the king, as we have supposed, stood in no need of their assistance, and moreover knew that he should never want it, it is impossible to think that he would then suffer himself to remain a tame spectator of their proceedings. The impeachments thus brought by them would immediately prove the signal of their dismission; and the king would make haste, by dissolving them, both to revenge what would then be called the insolence of the commons, and to secure his ministers.

If the crown could govern without the assistance of the commons, it would dismiss them for ever.

But even those are vain suppositions: the evil would reach much farther; and we may be assured that, if ever the crown should be in a condition to govern without the assistance of the representatives of the people, it would dismiss them for ever, and thus rid itself of an assembly which, continuing to be a clog on his power, would no longer be of any service

[2] Vide ante, 573—574.

to it. This Charles I. attempted to do when he found his parliaments refractory, and the kings of France really have done, with respect to the general estates of their kingdom.

The king of England would be absolute were it not for the right of taxation.

Indeed if we consider the extent of the prerogative of the king of England, and especially the circumstance of his completely uniting in himself all the executive and active powers of the state[3], we shall find that it is no exaggeration to say that he has power sufficient to be as arbitrary as the kings of France, were it not for the right of taxation, which, in England, is possessed by the people; and the only constitutional difference between the French and English nations is, that the former can neither confer benefits on their sovereign, nor obstruct his measures; while the latter, how extensive soever the prerogative of their king may be, can deny him the means of exerting it.

Right of granting subsidies to the crown, can only be effectual when it is exercised by one assembly alone.

But here a most important observation is to be made; and I entreat the reader's attention to the subject. This right of granting subsidies to the crown can only be effectual when it is exercised by one assembly alone. When several distinct assemblies have it equally in their power to supply the wants of the prince, the case becomes totally altered. The competition which so easily takes place between those different bodies, and even the bare consciousness which each entertains of its inability to obstruct the measures of the sovereign, render it impossible for them to make any effectual constitutional use of their privilege. "Those different parliaments or estates (to repeat the observation introduced in the former part of this work) having no means of recommending themselves to their sovereign, but their superior readiness in complying with his demands, vie with each other in granting what it would not only be fruitless but even dangerous to

[3] Vide ante, 566—574, 862—867.

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refuse. And the king, in the mean time, soon comes to demand as a tribute, a gift which he is confident to obtain." In short, it may be laid down as a maxim, that when a sovereign is made to depend, in regard to his supplies, upon more assemblies than one, he, in fact, depends on none. And indeed the king of France is not independent of his people for his necessary supplies, any otherwise than by drawing the same from several different assemblies of their representatives; the latter have in appearance a right to refuse all his demands: and as the English call the grants they make to their kings, aids or subsidies, the estates of the French provinces call theirs *dons gratuits*, or free gifts.

When a sovereign is made to depend, in regard to his supplies, on more assemblies, than one, he, in fact, depends upon none.

What is it, therefore, that constitutes the difference between the political situation of the French and English nations, since their rights thus seem outwardly to be the same? The difference lies in this, that there has never been in England more than one assembly that could supply the wants of the sovereign. This has always kept him in a state, not of a seeming, but of a real dependance on the representatives of the people for his necessary supplies; and how low soever the liberty of the subject may, at particular times, have sunk, they have always found themselves possessed of the most effectual means of restoring it, whenever they thought proper so to do. Under Henry VIII., for instance, we find the despotism of the crown to have been carried to an astonishing height: it was even enacted that the proclamations of the king should have the force of law[4]: a thing which, even in France, never was so expressly declared: yet no sooner did the nation recover from its long state of supineness, than the exorbitant power of the crown was reduced within its constitutional bounds[5].

The sovereigns of England have always been kept in a state of real dependance on the representatives of the people for necessary supplies.

[4] Vide ante, 163—168.

[5] Ibid. 451, 452, 470—487.

To no other cause than the disadvantage of their situation, are we to ascribe the low condition in which the deputies of the people in the assembly called the general estates of France, were always forced to remain.

Surrounded as they were by the particular estates of those provinces into which the kingdom had been formerly divided, they never were able to stipulate conditions with their sovereign: and instead of making their right of granting subsidies to the crown serve to gain them in the end a share in the legislation, they ever remained confined to the unassuming privilege of "humble supplication and remonstrance*."

Those estates, however, as all the great lords in France were admitted into them, began at length to appear dangerous; and as the king could in the mean

* An idea of the manner in which the business of granting supplies to the crown was conducted by the states of the province of Bretagne in the reign of Louis XIV, may be formed from several lively strokes to be met with in the Letters of Madame de Sevigné, whose estate lay in that province, and who had often assisted at the holding of those states. The granting of supplies was not, it seems, looked upon as any serious kind of business. The whole time the states were sitting, was a continued scene of festivity and entertainment; the canvassing of the demands of the crown was chiefly carried on at the table of the nobleman who had been deputed from court to hold the states; and the different points were usually decided by a kind of acclamation. In a certain assembly of those states, the duke of Chaulnes, the lord deputy, had a present of fifty thousand crowns made to him, as well as a considerable one for his duchess, besides obtaining the demand of the court: and the lady we quote here, commenting somewhat jocularly on these grants, says, *Ce n'est pas que nous soyons riches: mais nous sommes honnêtes, nous avons du courage, et entre midi et une heure nous ne savons rien refuser à nos amis.* "It is not that we are rich; but we are civil, we are full of courage, and between twelve and one o'clock we are unable to deny anything to our friends."

The different provinces of France, it may be observed, are liable to pay several taxes besides those imposed on them by their own states. Dean Tucker, in one of his tracts, in which he has thought proper to quote this work, has added to the above instance of the French provinces, that of the states of the Austrian Netherlands, which is very conclusive. And examples to the same purpose might be supplied by all those kingdoms of Europe in which provincial states are holden.

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time do without their assistance, they were set aside. But several of the particular states of the provinces are preserved to this day*; some, which for temporary reasons had been abolished, have been restored: nay, so manageable have popular assemblies been found by the crown, when it has to do with many, that the kind of government we mention is that which it has been found most convenient to assign to Corsica: and Corsica has been made *un pays d'états.*

Evils from the crown of England rendering itself independent from the commons for its supplies.

That the crown in England should, on a sudden, render itself independent on the commons for its supplies,—that is, should on a sudden successfully assume to itself a right to lay taxes on the subject, by its own authority,—is not certainly an event likely to take place, nor indeed is it one that should, at the present time, raise any kind of political apprehension. But it is not equally impracticable that the right of the representatives of the people might become invalidated, by being divided in the manner that has been just described.

National calamities might suggest methods for raising supplies.

Such a division of the right of the people might be effected in various ways. National calamities, for instance, unfortunate foreign wars attended with loss of public credit, might suggest methods for raising the necessary supplies, different from those which have hitherto been used. Dividing the kingdom into a certain number of parts, which should severally vote subsidies to the crown, or even distinct assessments to be made by the different counties into which England is now divided, might, in the circumstances we suppose, be looked upon as advisable expedients; and these being once introduced, might be continued.

Another division of the right of the people much more likely to take place than those just mentioned,

* The year 1784.

Rights of the people might be invaded from acquisitions of foreign dominions.

might be such as might arise from acquisitions of foreign dominions, the inhabitants of which should in time claim and obtain a right to treat directly with the crown, and grant supplies to it, without the interference of the British legislature.

Should any colonies acquire the right we mention, —should, for instance, the American colonies have acquired, as they claimed it,—it is not to be doubted that the consequences which have resulted from a division like that we mention in most of the kingdoms of Europe, would also have taken place in the British dominions, and that the spirit of competition, above described, would in time have manifested itself between the different colonies. This desire of ingratiating themselves with the crown, by means of the privilege of granting supplies to it, was even openly confessed by an agent of the American provinces*, when, on his being examined by the House of Commons, in the year 1766, he said, "*The granting aids to the crown is the only means the Americans have of recommending themselves to their sovereign.*" And the events that have of late years taken place in America, render it evident that the colonies would not have scrupled going any lengths to obtain favourable conditions at the expense of Britain and the British legislature.

That a similar spirit of competition might be raised in Ireland, is also sufficiently plain from certain late events. And should the American colonies have obtained their demands,—and at the same time should Ireland and America have increased in wealth to a certain degree,—the time might have come at which the crown might have governed England with the supplies of Ireland and America,—Ireland with the supplies of England and of the American colonies,—

* Dr. Franklin.

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and the American colonies with the money of each other, and of England and Ireland.

Foreign supplies might counterbalance the importance of the commons.

To this it may be objected, that the supplies granted by the colonies, even though joined with those of Ireland, never could have risen to such a height as to have counterbalanced the importance of the English commons. I answer, in the first place, that there would have been no necessity that the aids granted by Ireland and America should have risen to an equality with those granted by the British parliament: it would have been sufficient to produce the effects we mention, that they had only borne a certain proportion to the latter, so far as to have conferred on the crown a certain degree of independence, and at the same time have raised in the English commons a correspondent sense of self-diffidence in the exercise of their undoubted privilege of granting, or rather *refusing*, subsidies to the crown. Here it must be remembered, that the right of granting or refusing supplies to the crown is the only ultimate forcible privilege possessed by the British parliament[6]: by the constitution it has no other, as has been observed in the beginning of this chapter. This circumstance ought to be combined with the exclusive possession of the executive powers lodged in the crown,—with its prerogative of dissenting from the bills framed by parliament, and even of dissolving it*.

Right of granting or refusing supplies to the crown, is the only ultimate forcible privilege possessed by the British parliament.

* Being with Doctor Franklin at his house in Craven-street, some months before he went back to America, I mentioned to him a few of the remarks contained in this chapter, and, in general, that the claim of the American colonies directly clashed with one of the vital principles of the English constitution. The observation, I remember, struck him very much: it led him afterwards to speak to me of the examination he had undergone in the House of Commons; and he concluded with lending me that volume of the collection of "Parliamentary Debates," in which an account of it is contained. Finding the constitutional tendency of the

[6] Vide ante, 135—137, 288, 472, 473, 486, 535, 950, 951.

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Those who were the advocates of American independence, were the most sanguine of the future wealth and greatness of that country.

I shall mention, in the second place, a remarkable fact in regard to this subject (which may serve to show that politicians are not always consistent, or even sagacious in their arguments); which is, that the same persons who were the most strenuous advocates for granting to the American colonies their demands, were likewise the most sanguine in their predictions of the future wealth and greatness of America; and at the same time also used to make frequent complaints of the undue influence which the crown derives from the scanty supplies granted to it by the kingdom of Ireland *.

Had the American colonies fully obtained their demands, both the essence of the present English government, and the condition of the English people, would certainly have been altered thereby: nor would such a change have been inconsiderable, but in proportion as the colonies should have remained in a state of national poverty†.

claim of the Americans to be a subject not very generally understood, I added a few paragraphs concerning it in the English edition I some time after gave of this work; and on publishing a third edition of the same, I thought it might not be amiss to write something more compact on the subject, and accordingly added the present new chapter, into which I transferred the few additional paragraphs I mention, leaving in the place where they stood (page 520), only the general observations on the right of granting subsidies, which were formerly in the French work. Several of the ideas, and even expressions, contained in this chapter, made their appearance in the "Public Advertiser," about the time I was preparing the first edition: I sent them myself to that newspaper, under the signature of "Advena."

* For instance, the complaints made in regard to the pensions on the Irish establishment.

† When I observe that no man who wished for the preservation of the form and spirit of the English constitution ought to have desired that the claim of the American colonies might be granted to them, I mean not to say that the American colonies should have given up their claim. The wisdom of ministers, in regard to American affairs, ought to have been constantly employed in making the colonies useful to this country, and at the same time in hiding their subjection from them (a caution, which is, after all, more or less used in every government upon earth); it ought to have been exerted in preventing the opposite interests of Britain and of America from being brought to an issue,—to any such clashing dilemma as

Chapter XXI.

Conclusion.—A few Words on the Nature of the Divisions that take place in England.

De Lolme. I shall conclude this work with a few observations on the total freedom from violence with which the political disputes and contentions in England are conducted and terminated, in order both to give a farther proof of the soundness of the principles on which the

would render disobedience on the one hand, and the resort to force on the other, almost unavoidable. The generality of the people fancy that ministers use a great depth of thought and much forecast in their operations; whereas the truth is, that ministers, in all countries, never think but of providing for present, immediate contingencies; in doing which they constantly follow the open track before them. This method does very well for the common course of human affairs, and even is the safest; but whenever cases and circumstances of a new and unknown nature occur, sad blunders and uproar are the consequences. The celebrated Count Oxenstiern, chancellor of Sweden, one day when his son was expressing to him his diffidence of his own abilities, and the dread with which he thought of ever engaging in the management of public affairs, made the following Latin answer to him; *Nescis, mi fili, quam parvâ cum sapientiâ regitur mundus.* "You do not know, my son, with what little wisdom the world is governed."

Matters having come to an eruption, it was no longer to be expected they could be composed by the palliative offers sent at different times from this country to America. When the earl of Carlisle solicited to be at the head of the solemn commission that sailed for the purpose we mention, he did not certainly show modesty equal to that of the son of Chancellor Oxenstiern. It has been said, in that stage of the contest, the Americans could not think that the proposals thus sent to them were seriously meant: however, this cannot have been the principal cause of the miscarriage of the commission. The fact is, that after the Americans had been induced to open their eyes on their political situation, and rendered sensible of the local advantages of their country, it became in a manner impossible to strike with them any bargain at which either nation would afterwards have cause to rejoice, or even to make any bargain at all. It would be needless to say anything more, in this place, on the subject of the American contest.

The motto of one of the English nobility should have been that of ministers, in their regulations for rendering the colonies useful to the mother-country,—*Faire sans dire.*

English government is founded, and to confute in general the opinion of foreign writers or politicians, who, misled by the apparent heat with which these disputes are sometimes carried on, and the clamour to which they give occasion, look upon England as a perpetual scene of civil broils and dissensions.

The courtesy which is observed by the several branches of parliament towards each other.

In fact, if we consider, in the first place, the constant tenour of the conduct of the parliament, we shall see that whatever different views the several branches that compose it may at times pursue, and whatever use they may accordingly make of their privileges, they never go, in regard to each other, beyond the terms of decency, or even of that general good understanding which ought to prevail among them.

Thus the king, though he preserves the style of his dignity, never addresses the two Houses but in terms of regard and affection; and if at any time he chooses to refuse their bills, he only says that he will consider of them *(le roy s'avisera)*; which is certainly a gentler expression than the word *veto*[1].

The two Houses, on their part, though very jealous, each within their own walls, of the freedom of speech, are, on the other hand, careful that this liberty shall never break out into unguarded expressions with regard to the person of the king. It is even a constant rule amongst them never to mention him, when they mean to blame the administration; and those things which they may choose to censure, even in the speeches made by the king in person, and which are apparently his own acts, are never considered but as the deeds of his ministers, or, in general, of those who have advised him.

Mode in which bills are rejected.

The two Houses are also equally attentive to prevent every step that may be inconsistent with that respect which they owe to one another. The examples of their differences with each other are very rare, and

[1] Vide ante, 536, 537.

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have been, for the most part, mere misunderstandings. Nay, in order to prevent all subject of altercation, the custom is, that, when one House refuses to assent to a bill presented by the other, no formal declaration is made of such refusal; and that House whose bill is rejected, learns its fate only from hearing no more of it, or by what the members may be told as private persons.

In each House, the members take care, even in the heat of debate, never to go beyond certain bounds in their manner of speaking of each other: if they were to offend in that respect, they would certainly incur the censure of the House. And, as reason has taught mankind to refrain, in their wars, from all injuries to each other that have no tendency to promote the main object of their contentions, so a kind of law of nations (if I may so express myself) has been introduced among the persons who form the parliament, and take a part in the debates: they have discovered that they may very well be of opposite parties, and yet not hate and persecute one another. Coming fresh from debates carried on even with considerable warmth, they meet without reluctance in the ordinary intercourse of life; and, suspending all hostilities, they hold every place out of parliament to be neutral ground.

The generality of the people preserve themselves more free from party spirit than their representatives.

In regard to the generality of the people, as they never are called upon to come to a final decision with respect to any public measures, or expressly to concur in supporting them, they preserve themselves still more free from party spirit than their representatives themselves sometimes are. Considering, as we have observed, the affairs of government as only matter of speculation, they never have occasion to engage in any vehement contests among themselves on that account; much less do they think of taking an active and violent part in the differences of particular factions, or the

quarrels of private individuals. And those family feuds, those party animosities, those victories and consequent outrages of factions alternately successful; in short, all those inconveniences which in so many other states have constantly been the attendants of liberty, and which authors tell us we must submit to, as the price of it, are things in a very great measure unknown in England.

But are not the English perpetually making complaints against the administration? and do they not speak and write as if they were continually exposed to grievances of every kind?

Dissatisfactions, in a free society, will be openly manifested by complaints.

Undoubtedly, I shall answer, in a society of beings subject to error, dissatisfactions will necessarily arise from some quarter or other; and, in a free society, they will be openly manifested by complaints. Besides, as every man in England is permitted to give his opinion upon all subjects, and as, to watch over the administration, and complain of grievances, is the proper duty of the representatives of the people, complaints must necessarily be heard in such a government, and even more frequently, and upon more subjects, than in any other.

But those complaints, it should be remembered, are not, in England, the cries of oppression forced at last to break its silence. They do not suppose hearts deeply wounded. Nay, I will go farther,—they do not even suppose very determinate sentiments; and they are often nothing more than the first vent which men give to their new and yet unsettled conceptions.

The agitation of the popular mind, animates all parts of the state, and is to be considered as the beneficial vicissitudes of the seasons.

The agitation of the popular mind, therefore, is not in England what it would be in other states; it is not the symptom of a profound and general discontent, and the forerunner of violent commotions. Foreseen, regulated, even hoped for by the constitution, this agitation animates all parts of the state, and is to be

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considered only as the beneficial vicissitude of the seasons. The governing power, being dependant on the nation, is often thwarted; but, so long as it continues to deserve the affection of the people, it can never be endangered. Like a vigorous tree which stretches its branches far and wide, the slightest breath can put in motion; but it acquires and exerts at every moment a new degree of force, and resists the winds, by the strength and elasticity of its fibres, and the depth of its roots.

Political changes never occasion the shortest interruption of the power of the laws.

In a word, whatever revolutions may at times happen among the persons who conduct the public affairs in England, they never occasion the shortest interruption of the power of the laws, or the smallest diminution of the security of individuals. A man who should have incurred the enmity of the most powerful men in the state—what do I say?—though he had, like another *Vatinius*, drawn upon himself the united detestation of all parties,—might, under the protection of the laws, and by keeping within the bounds required by them, continue to set both his enemies and the whole nation at defiance.

The limits prescribed to this book do not admit of entering into any farther particulars on the subject we are treating here; but if we were to pursue this inquiry, and investigate the influence which the English government has on the manners and customs of the people, perhaps we should find that, instead of inspiring them with any disposition to disorder or anarchy, it produces in them a quite contrary effect. As they see the highest powers in the state constantly submit to the laws, and they receive, themselves, such a certain protection from those laws whenever they appeal to them, it is impossible but they must insensibly contract a deep-rooted reverence for them, which can at no time cease to have some influence on their actions. And,

If the highest powers in the state, are subservient to the laws, a spirit of justice and order is thereby inculcated in the lower classes.

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in fact, we see that even the lower classes of the people, in England, notwithstanding the apparent excesses into which they are sometimes hurried, possess a spirit of justice and order superior to what is to be observed in the same rank of men in other countries. The extraordinary indulgence which is shown to accused persons of every degree, is not attended with any of those pernicious consequences which we might at first be apt to fear from it. And it is, perhaps, to the nature of the English constitution itself (however remote the cause may seem) and to the spirit of justice which it continually and insensibly diffuses through all orders of the people, that we are to ascribe the singular advantage possessed by the English nation, of employing an incomparably milder mode of administering justice in criminal matters than any other nation[2], and at the same time of affording, perhaps, fewer instances of violence or cruelty.

Another consequence which we might observe here, as flowing also from the principles of the English government, is the moderate behaviour of those who are invested with any branch of public authority. If we look at the conduct of public officers, from the minister of state, or the judge, down to the lowest officer of justice, we find a spirit of forbearance and lenity prevailing in England, among the persons in power, which cannot but create surprise in those who have visited other countries.

Attention of the legislature in providing for the interests and welfare of the people.

Two circumstances more I shall mention here, as peculiar to England; namely, the constant attention of the legislature in providing for the interests and welfare of the people, and the indulgence shown by them to their very prejudices; advantages these, which are, no doubt, the consequence of the general spirit

[2] Vide post, Note (1), 1033.

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that animates the whole English government, but are also particularly owing to the circumstance peculiar to it, of having lodged the active part of legislation in the hands of the representatives of the nation, and committed the care of alleviating the grievances of the people to persons who either feel them, or see them nearly, and whose surest path to advancement and fame is to be active in finding remedies for them.

Constant tendency of the government to correct abuses and improve the laws.

I mean not, however, to affirm, that the English government is free from abuses, or that all possible good laws are enacted, but that there is a constant tendency in it, both to correct the one, and improve the other. And that all the laws which are in being are strictly executed, whenever appealed to, is what I look upon as the characteristic and undisputed advantage of the English constitution,—a constitution the more likely to produce all the effects we have mentioned, and to procure in general the happiness of the people, since it has taken mankind as they are, and has not endeavoured to prevent every thing, but to regulate every thing: I shall add, the more difficult to discover, because its form is complicated, while its principles are natural and simple. Hence it is that the politicians of antiquity, sensible of the inconveniences of the governments they had opportunities of knowing, wished for the establishment of such a government, without much hope of ever seeing it realized*: even Tacitus, an excellent judge of political subjects, considered it as a project entirely chimerical†. Nor was it because he had not thought of it, had not reflected on it, that he was of this opinion: he had

* "Statuo esse optime constitutam rempublicam quæ ex tribus generibus illis, regali, optimo, et populari, modice confusa."—Cic. Frag.

† "Cunctas nationes et urbes, populus, priores, aut singuli, regunt. Delecta ex his et constituta reipublicæ forma, laudari facilius quam evenire; vel si evenit, haud diuturna esse potest."—Tac. Ann. lib. iv.

sought for such a government, had had a glimpse of it, and yet continued to pronounce it impracticable.

Let us not, therefore, ascribe to the confined views of man, to his imperfect sagacity, the discovery of this important secret. The world might have grown old, generations might have succeeded generations, still seeking it in vain. It has been by a fortunate conjunction of circumstances,—I shall add, by the assistance of a favourable situation, that Liberty has at last been able to erect herself a temple.

English liberty has been acquired by a fortunate conjunction of circumstances.

Invoked by every nation, but of too delicate a nature, as it should seem, to subsist in societies formed of such imperfect beings as mankind, she showed, and merely showed herself, to the ingenious nations of antiquity who inhabited the south of Europe. They were constantly mistaken in the form of the worship they paid to her. As they continually aimed at extending dominion and conquest over other nations, they were no less mistaken in the spirit of that worship; and though they continued for ages to pay their devotions to this divinity, she still continued, with regard to them, to be the *unknown* goddess.

Excluded, since that time, from those places to which she had seemed to give a preference, driven to the extremity of the Western World, banished even out of the Continent, she has taken refuge in the Atlantic Ocean. There it is, that, freed from the dangers of external disturbance, and assisted by a happy prearrangement of things, she has been able to display the form that suited her; and she has found six centuries to have been necessary for the completion of her work.

Being sheltered, as it were, within a citadel, she there reigns over a nation which is the better entitled to her favours, as it endeavours to extend her empire, and carries with it, to every part of its dominions, the blessings of industry and equality. Fenced in on every

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side (to use the expression of Chamberlayne) with a wide and deep ditch, the sea,—guarded with strong out-works, its ships of war,—and defended by the courage of her seamen,—she preserves that mysterious essence, that sacred fire so difficult to be kindled, and which, if it were once extinguished, would, perhaps, never be lighted again. When the world shall have been again laid waste by conquerors, she will still continue to show mankind, not only the principle that ought to unite them, but, what is of no less importance, the form under which they ought to be united. And the philosopher, when he considers the constant fate of civil societies amongst men, and observes the numerous and powerful causes which seem, as it were, unavoidably to conduct them all to a state of political slavery, will take comfort in seeing that Liberty has at length disclosed her nature and genuine principles, and secured to herself an asylum against despotism on the one hand, and popular licentiousness on the other.

Liberty has secured to herself an asylum against despotism on the one hand, and popular licentiousness on the other.

NOTES.

(1.) DE LOLME having frequently adverted to the lenient spirit of the "English Criminal Law," it has been deemed expedient to settle an analysis of criminal offences, and the statutes under which they are punishable; likewise to give, from the returns which have been made to the Home Office, and prepared by Mr. Redgrave, an analysis of crimes that were committed in 1837; of the sentences passed; those who were acquitted or not prosecuted; number of offenders tried before the different courts; ages of the criminals; result of the proceedings against offenders, aged twelve years and under, with reference to their respective ages; result of the proceedings against the offenders, aged twelve years and under, with reference to their offences; and the degrees of instruction which the prisoners had received.

	Statutes by which the offence is defined and made punishable.
OFFENCES PUNISHABLE WITH DEATH.	
High treason.	25 Edw. III. St. 5, c. 2. 1 Anne, St. 2, c. 17. 6 Anne, c. 7, s. 1. 7 Anne, c. 21, s. 8. 36 Geo. III. c. 7. 54 Geo. III. c. 146. 57 Geo. III. c. 6[1].
Wilfully setting on fire, or aiding in the same, any of her majesty's vessels of war; or any timber in the arsenals for building ships; or victualling stores, or other munition of war.	12 Geo. III. c. 24.
Persons tumultuously destroying any dissenting church or chapel; any buildings or machinery for trade, manufacture, or otherwise.	7 & 8 Geo. IV. c. 30, s. 8[2].
Convicted of murder, or of being an accessory before the fact to murder.	9 Geo. IV. c. 31, s. 3[3].
An unnatural offence, committed either with mankind or with any animal.	9 Geo. IV. c. 31, s. 15.
Rape.	9 Geo. IV. c. 31, s. 16.
Unlawfully and carnally knowing and abusing any girl under the age of ten years.	9 Geo. IV. c. 31, s. 17.

[1] Vide etiam 2 & 3 William IV. c. 123, 11 George IV. & 1 William IV. c. 66; annual Mutiny Acts, and obsolete statutes respecting the Popish religion.

[2] Vide etiam 7 & 8 George IV. c. 30, as to principals and accessories.

[3] Vide etiam 9 George IV. c. 31, s. 2; 2 & 3 William IV. c. 75; 4 & 5 William IV. c. 26.

NOTES.

1 Vic. c. 85, s. 2[4]. Administering any poison; or inflicting bodily injury, with intent to commit murder.

1 Vic. c. 87, s. 2. Robbing any person, and, immediately after such robbery, wounding such person.

1 Vic. c. 86, s. 2. Burglariously entering any dwelling house, and assaulting any person therein with intent to murder.

1 Vic. c. 89, s. 2. Wilfully setting fire to any dwelling house, any person being therein.

1 Vic. c. 88, s. 2. Assaulting, with intent to murder, any person on board of, or belonging to any vessel, with intent to commit, or during, or immediately before, or immediately after the committing, the crime of piracy in respect of such vessel.

1 Vic. c. 89, s. 4. Setting fire to or destroying any vessel, either with intent to murder any person, or whereby the life of any person shall be endangered.

1 Vic. c. 89, s. 5. Exhibiting any false light or signal with intent to bring any vessel into danger; or doing anything tending to the immediate loss of any vessel in distress.

FELONIES NOT CAPITAL.

Transportation for life, and, previously to transportation, imprisonment, with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.

5 Geo. IV. c. 84, s. 22. 4 & 5 Will. IV. c. 67[1]. Any offender who shall be sentenced or ordered to be transported or banished, or who shall agree to transport himself under Stat. 5 George IV. c. 84, and being at large within his majesty's dominions previous to the expiration of his punishment.

Transportation beyond the seas for life, or for any term not less than fifteen years, or imprisonment with or without hard labour in the common gaol or house of correction for any term not exceeding three years, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time,

[4] Vide etiam 1 Victoria, cc. 86, 87.
[1] Vide etiam 6 George IV. c. 85; 4 George IV. c. 81.

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and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Piracy.

28 Hen. VIII. c. 15.
11 & 12 Will. III. c. 7.
4 Geo. I. c. 11, s. 7.
8 Geo. I. c. 24.
18 Geo. II. c. 30.
1 Vic. c. 88, ss. 3 & 5[2].

Any persons, to the number of twelve or more, unlawfully assembled to the disturbance of the public peace, after being required by one or more magistrates, in the form prescribed by 1 George I. Stat. 2, c. 5, peaceably to disperse.

1 Geo. I. St. 2, c. 5, s. 1.
1 Vic. c. 91, ss. 1, 2.

Wilfully obstructing any person from making the proclamation directed by 1 George I. Stat. 2, c. 5, whereby such proclamation could not be made.

1 Geo. I. St. 2, c. 5, s. 5.
1 Vic. c. 91, ss. 1, 2.

Setting at liberty, or rescuing, or attempting to rescue, any person out of prison, who shall be committed for, or found guilty of, murder; or rescuing, or attempting to rescue, any person convicted of murder going to execution, or during execution.

25 Geo. II. c. 37, s. 9.
1 Vic. c. 91, ss. 1, 2.

Maliciously endeavouring to seduce persons from serving in his majesty's forces by sea or land, or inciting such persons to commit acts of mutiny.

37 Geo. III. c. 70, s. 1.
37 Geo. III. c. 40, s. 1. (I.)
1 Vic. c. 91, ss. 1, 2.

Administering, or causing to be administered, any oath or engagement binding any person to commit treason, murder, or any felony punishable with death.

52 Geo. III. c. 104, s. 1.
1 Vic. c. 91, ss. 1, 2.

Any convict ordered to be confined in the general Penitentiary at Millbank breaking prison or escaping during the term of his confinement.

59 Geo. III. c. 136, s. 17.
1 Vic. c. 91, ss. 1, 2.

Any person wilfully shipping, embarking, receiving, detaining, or confining, or assisting in shipping, &c., on board any ship, vessel, or boat, any person or persons for the purpose of his, her, or their being carried away, &c., as a slave or slaves, or being imported or brought as a slave or slaves into any island, &c., or of being sold, &c., as a slave or slaves.

5 Geo. IV. c. 113, s. 9.
1 Vic. c. 91, ss. 1, 2.

Any persons armed with offensive weapons to the number of three or more, and being assembled in order to be aiding and assisting in the illegal landing, running,

3 & 4 Will. IV. c. 53, s. 53.
1 Vic. c. 91, ss. 1, 2.

[2] Vide etiam 5 George IV. c. 113.

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or carrying away of any prohibited goods, or in rescuing the same from authorized officers.

3 & 4 Will. IV. c. 53, s. 59.
1 Vic. c. 91, ss. 1, 2.

Maliciously shooting at any vessel or boat belonging to his majesty's navy, or in the service of the revenue, or shooting at or wounding any officer of the army, navy, or marines, employed for the prevention of smuggling, or any officer of customs or excise, or their assistants.

1 Vic. c. 85, ss. 3, 8.

Attempting to administer any poison, or shooting, or attempting to discharge loaded fire-arms at any person, or attempting to drown, suffocate, or strangle any person with intent to commit the crime of murder, although no bodily injury shall have been effected.

1 Vic. c. 85, ss. 4, 8.

Maliciously attempting to maim, disfigure, or disable any person, or with intent to resist or prevent the lawful apprehension or detainer of any person.

1 Vic. c. 85, ss. 5, 8.

Maliciously sending, or causing to be received by any person, any explosive substance, or other dangerous or noxious thing, or casting any corrosive fluid on any person.

1 Vic. c. 85, ss. 6, 8.

Procuring the miscarriage of any woman, by administering to her, or causing to be taken by her, any poison or other noxious thing, or unlawfully using any instrument or other means, with the like intent.

1 Vic. c. 87, ss. 3, 10.

Being armed with any offensive weapon, and robbing or assaulting with intent to rob any person.

1 Vic. c. 87, ss. 4, 10[8].

Accusing, or threatening to accuse, any person of an unnatural offence, or of making any promise or threat to any person to induce such person to commit or permit such crime, with an intent to extort gain.

1 Vic. c. 89, ss. 3, 12.

Setting fire to any church or other property, with intent to injure or defraud any person.

1 Vic. c. 89, ss. 6, 12.

Setting fire to, or destroying, any vessel or freight, with intent to prejudice any owner or part owner, or under-writer.

1 Vic. c. 89, ss. 7, 12.

Forcibly preventing any person saving his life from any vessel in distress, wrecked, stranded, or cast on shore.

1 Vic. c. 89, ss. 9, 12.

Setting fire to any mine of coal or cannel coal.

1 Vic. c. 89, ss. 10, 12.

Setting fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood.

[8] Vide etiam 1 Victoria, c. 86; 7 & 8 George IV. c. 29.

NOTES.

Transportation beyond the seas for life, or for any term not less than ten years, or imprisonment with or without hard labour in the common gaol or house of correction for any term not exceeding three years, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall deem meet.

Being convicted of the crime of burglary. 1 Vic. c. 86, ss. 3, 7[4].

Transportation beyond the seas for life, or for any term not less than seven years, as the court shall adjudge, and previously to transportation to be liable to imprisonment, with or without hard labour, in the common gaol or house of correction, or to be confined in the Penitentiary for any term not exceeding four years, or to be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years nor less than one year.

Breaking and entering a dwelling house, and stealing therein any chattel, money, or valuable security, to any value whatever, and every principal in the second degree and accessory before the fact. 7 & 8 Geo. IV. c. 29, s. 12. 3 & 4 Will. IV. c. 44.

Transportation beyond the seas for life, or for any term not less than seven years, as the court shall adjudge.

Personating, or falsely assuming, the name or character, or procuring any other person to personate, &c., any officer, non-commissioned officer, soldier, or other 2 Will. IV. c. 53, s. 49.

[4] By 1 Victoria, c. 86, s. 4, it is enacted, that so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine o'clock in the evening of each day, and to conclude at six o'clock in the morning of the next succeeding day. By 7 & 8 George IV. c. 29, s. 11, (unrepealed by 1 Victoria, c. 86,) it is declared, that it shall be deemed burglary to enter the dwelling-house of another with intent to commit felony, or, being in such dwelling house, shall commit any felony, and, in either case, break out of the said dwelling-house in the night-time.

NOTES.

person entitled, or supposed to be entitled, to any prize money, grant, bounty money, share, or other allowance of money, due or payable, or supposed to be due or payable, for, or on account of, any service performed, or supposed to have been performed, by any officer, &c., who shall have really served, or be supposed to have served, in his majesty's army, or in any other military service.

Transportation for life, or for such term of years as the court shall adjudge.

52 Geo. III. c. 104, s. 1[5].

Taking any oath, or making any engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, not being compelled thereto.

Transportation for life, or for such term of fourteen or seven years as the court shall adjudge.

52 Geo. III. c. 156, s. 1.

Aiding or assisting any alien enemy of his majesty, being a prisoner of war in his majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in his majesty's dominions, or any part thereof, on his parole, to escape from such prison, &c., or from his majesty's dominions, if at large upon parole.

52 Geo. III. c. 156, s. 3.

Any person or persons owing allegiance to his majesty, after such prisoner, as aforesaid, hath quitted the coast of any part of his majesty's dominions in such his escape as aforesaid, knowingly and wilfully upon the high seas aiding or assisting such prisoner in his escape to or towards any other dominions or place.

Transportation for life, or for such term, not less than seven years, as the court shall adjudge, or imprisonment only, or imprisonment and hard labour in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.

4 Geo. IV. c. 53.
7 & 8 Geo. IV. c. 27.

Stealing or embezzling his majesty's ammunition, sails, cordage, or naval and military stores.

[5] Vide etiam Stat. 39 George III. c. 79; 57 George III. c. 19.

NOTES.

Sending or delivering any letter or writing, threatening to murder any of his majesty's subjects, or to burn or destroy their property, or aiding in the commission of such offences, or forcibly rescuing any person in custody for the same.

4 Geo. IV. c. 54, s. 3.
7 & 8 Geo. IV. c. 27.

Being declared a bankrupt, and not surrendering to the commissioners before three o'clock upon the forty-second day after notice thereof in writing, to be left at the usual place of abode of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the commission, and of the meetings of the commissioners, surrender himself to them, and sign or subscribe such surrender, and submit to be examined before them, from time to time, upon oath, or, being a Quaker, upon solemn affirmation; or if such bankrupt, upon such examination, shall not discover all his real or personal estate, and how and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto (except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of trade, or laid out in the ordinary expense of his family); or, if upon such examination, he shall not deliver up to the commissioners all such part of such estate, and all books, papers, and writings relating thereunto, as be in his possession, custody, or power (except the necessary wearing apparel of himself, his wife, and children); or shall remove, conceal, or embezzle any part of such estate to the value of ten pounds or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors.

6 Geo. IV. c. 16, s. 112.
1 & 2 Will. IV. c. 56.

Transportation beyond the seas for life, or for any term not less than seven years, or imprisonment for any term not exceeding four, nor less than two years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

NOTES.

10 Anne, c. 19, s. 97.
12 Anne, St. 2, c. 9.
3 Geo. I. c. 7.
6 Geo. I. c. 4.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Counterfeiting or forging any stamp or seal provided, or to be provided, renewed, or altered, by the commissioners for managing the duties upon silks printed, stained, painted, or dyed in Great Britain.

6 Geo. I. c. 4, s. 56.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[6].

Forging or counterfeiting the common seal of the governor and company of merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery; or forging, counterfeiting, or altering any bond or obligation under the common seal of the said company.

6 Geo. I. c. 11, s. 50.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[7].

Forging, counterfeiting, or altering, or wilfully tendering or alienating any receipt under the hand or hands of one or more of the officers of the governor and company of merchants of Great Britain trading to the South Seas, &c., issued for subscriptions under 6 George I., &c.

6 Geo. I. c. 18, s. 13.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting the common seal of either of the corporations for the assurance of ships and merchandize at sea, erected and established pursuant to 6 George I. c. 18; or forging, or counterfeiting, or altering any policy, bond, or obligation, under the common seal of either of the same corporations, or wilfully disposing, or offering to dispose of the same.

4 Geo. II. c. 18, s. 1.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[8].

Forging or counterfeiting, or assisting in the false making, &c., of "Mediterranean pass or passes," or altering or erasing any authentic "pass," or uttering or publishing such "passes."

4 Geo. III. c. 37, s. 15.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting the common seal of the English Linen Company, or forging, counterfeiting, or altering any deed, bill, bond, or obligation, under the common seal of such corporation, or wilfully disposing, or offering to dispose of the same.

4 Geo. III. c. 37, s. 26.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1 26.
1 Vic. c. 90, s. 5.

Forging, or counterfeiting any stamp, mark, or seal, to resemble any stamp, &c., provided or used in pursuance of 4 George III. c. 37, or wilfully selling or exposing goods with such counterfeit marks.

[6] Vide etiam 6 George I. c. 11, s. 50; 2 & 3 William IV. c. 123; 3 & 4 William IV. c. 44; 1 Victoria, c. 84, ss. 2, 3.
[7] 1 Victoria, c. 84, ss. 2, 3.
[8] 52 George III. c. 143, s. 7; 4 George III. c. 37.

NOTES.

Forging or counterfeiting, or causing or procuring to be forged, &c., the name or hand-writing of the treasurer of the ordnance, or his deputies, to any writing for obtaining money from the Bank of England, on account of the ordnance, &c.

46 Geo. III. c. 45, s. 9.
11 Geo. IV. & 1 Will. IV. c. 66, s. 4.
2 & 3 Will. IV. c. 123.
3 & 4 Will. IV. c. 44.
1 Vic. c. 84, ss. 2, 3[9].

Forging or counterfeiting, or causing or procuring to be forged, the name or hand-writing of the receiver-general of the stamp duties, or of either of the commissioners of stamps, to any writing for obtaining money from the Bank of England on account of the receiver-general of the stamp duties, or wilfully uttering and publishing the same.

46 Geo. III. c. 76, s. 9.
11 Geo. IV & 1 Will. IV. c. 66, s. 4.
2 & 3 Will. IV. c. 123.
3 & 4 Will. IV. c. 44.
1 Vic. c. 84, ss. 2, 3.

Forging or counterfeiting any writing, purporting to be made by any authorized person, touching the redemption or sale of the land tax, or of any part thereof, or wilfully uttering the same.

52 Geo. III. c. 143, s. 6.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[10].

Forging or counterfeiting, &c., any debenture, or any certificate for the payment or return of any money, &c., in any case in which such debenture, &c., is by any act or acts of parliament relating to the duties of customs or excise required to be given, or wilfully uttering or publishing the same.

52 Geo. III. c. 143, s. 10.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[11].

Forging or counterfeiting, &c., any stamp or die, &c., which shall have been made in pursuance of 55 George III. c. 184, or in pursuance of any former act or acts relating to any stamp duty or duties, upon any vellum, parchment, or paper, &c., with intent to defraud her majesty of the duties, or wilfully selling or exposing the same to sale.

55 Geo. III. c. 184, s. 7.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5[12].

Forging or counterfeiting, &c., any mark, stamp, or die, which shall have been provided under 55 George III. c. 185, upon any gold or silver plate, with intent to evade the duties, or being wilfully possessed of plate with such counterfeit marks.

55 Geo. III. c. 185, s. 7.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

[9] Vide etiam 5 & 6 William IV. c. 20; 4 & 5 William IV. c. 60.
[10] 42 George III. c. 116.
[11] Vide etiam 41 George III. c. 91, s. 5; 1 Victoria, c. 84, ss. 2, 3; 3 & 4 William IV. c. 50, s. 3; 6 George IV. c. 105, s. 297.
[12] Vide etiam 4 & 5 William IV. c. 60; 6 & 7 William IV. c. 76.

NOTES.

57 Geo. III. c. 34, s. 63.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5 [13].

Forging, counterfeiting, &c., any certificate of the commissioners for the execution of 57 George III. c. 34, or wilfully delivering any such forged certificate to the auditor of the receipts of his majesty's exchequer in Great Britain, or to the vice-treasurer of Ireland, or to the commissioners for the execution of the said act, &c., or wilfully uttering such forged certificate.

1 Geo. IV. c. 35, s. 27.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting, &c., the name or handwriting of any accountant-general of the Court of Exchequer, or lord chief or barons of that court; or of the clerk of the reports; or of any of the cashiers of the governor and company of the Bank of England; or of any officer of any other body politic or corporate, or company, whom it may concern, to any certificate, report, entry, indorsement, transfer, declaration of trust, note, direction, authority, or any instrument or writing whatsoever, for or in order to the receiving or obtaining any money or effects of any of the suitors of the Court of Exchequer, or wilfully uttering and publishing the same.

3 Geo. IV. c. 86, s. 54.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting, or altering any certificate of the commissioners for the execution of 3 George IV. c. 86, or wilfully delivering such forged certificate to the auditor of the receipt of his majesty's exchequer; or wilfully uttering the same.

3 Geo. IV. c. 113, s. 23.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging, counterfeiting, or altering, &c., any certificate under 3 George IV. c. 113, or any appointments under such act, or wilfully uttering or delivering the same.

3 Geo. IV. c. 113, s. 23.
11 Geo. IV. & 1 Will. IV. c. 66, s. 4.
2 & 3 Will. IV. c. 123.
3 & 4 Will. IV. c. 44.
1 Vic. c. 84, ss. 2 & 3.

Forging, counterfeiting, or altering any orders for any payment to be made under 3 George IV. c. 113, or wilfully uttering or delivering the same.

5 Geo. IV. c. 53, s. 22.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. 90, s. 5.

Forging or counterfeiting any certificate, or duplicate certificate, required by 5 George IV. c. 53, or altering any number, figure, or word therein, or wilfully publishing the same.

[13] 1 George IV. cc. 60, 81; 3 George IV. c. 86; 5 George IV. c. 36; 7 George IV. c. 30.

NOTES.

Forging, counterfeiting, interlining, erasing, or altering, or procuring to be forged, &c., any certificate directed to be granted by any order of his majesty touching quarantine, or wilfully uttering or publishing the same.

6 Geo. IV. c. 78, s. 25.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting, &c., the name or hand-writing of any receiver-general of excise, or of any excise comptroller of the cash, or of any persons duly authorized to any writing whatsoever, for or in order to the receiving or obtaining any of the money, bills, notes, drafts, checks, or orders for the payment of money in the Bank of England on account of such receiver-general, or wilfully uttering or publishing the same.

7 & 8 Geo. IV. c. 53, s. 56.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting, or causing or procuring to be forged or counterfeited, any type, die, seal, stamp, mark, plate, or device, or any part of any type, &c., which shall be used under the authority of the commissioners of stamps under 9 George IV. c. 18, upon any playing card or dice, or upon any label, thread, or paper, &c.

9 Geo. IV. c. 18, s. 35.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 1, 26.
4 & 5 Will. IV. c. 60.
1 Vic. c. 90, s. 5.

Forging, or offering, uttering, disposing of, or putting off, knowing the same to be forged, any ticket, pay list, extract from any ships' books, or any certificate whatever, authorized by 11 George IV. and 1 William IV. c. 20, or any inspector's or other cheque, or any letter of attorney, assignment, power or authority, in order to obtain, or to enable any other person to receive, any wages, pay, half-pay, prize-money, bounty-money, or other allowance of money due, or supposed to be due, in respect of the service of any commission, warrant, or petty officer or seaman, or any commissioned or non-commissioned officer of marines, or marine, or any other person, performed or supposed to be performed in the royal navy; or forging or offering, uttering, disposing of, or putting off, any purser's or other certificate to a bill of exchange, or any approval of any such bill respectively required by the said act; or forging or offering, or uttering, or putting off, knowing the same to be forged, any receipt for wages payable under allotment or otherwise, in respect of the services of any person on board any of his majesty's ships; or forging the name or hand-writing of any officer of the royal navy or royal marines to any

11 Geo. IV. & 1 Will. IV. c. 20, s. 83.
2 Will. IV. c. 40, s. 35.
1 Vic. c. 90, s. 5.

NOTES.

receipt for half-pay or arrears of half-pay, or the name or hand-writing of any widow to any receipt for any pension or arrears of pension, or the name or hand-writing of any person to any receipt for an allowance from the compassionate fund of the navy; or offering, uttering, or disposing of, or putting off any forged receipt for half-pay or arrears of half-pay, or for any widow's pension or arrears of such pension, or for any allowance from the compassionate fund, knowing any such receipt to be forged, with intent in any of the said cases to defraud any person whomsoever.

11 Geo. IV. & 1 Will. IV. c. 20, s. 84.
1 Vic. c. 90, s. 5.

Falsely personating any commission, warrant, or petty officer or seaman, or commission or non-commissioned officer of marines, or marine, or the wife, widow, or relation, executor, administrator, or creditor of any such officer, seaman, or marine, or any person entitled to any allowance from the compassionate fund of the navy, in order to receive any wages, pay, half-pay, prize-money, bounty-money, pension, or any part thereof, gratuity, or other allowance, for money due or payable, or supposed to be due or payable, to any such officer, seaman, or marine, or to the wife or widow, relation, executor, administrator, or creditor, of any such deceased officer, seaman, or marine, or any allowance to any person from the said compassionate fund, with intent to defraud any person whomsoever.

11 Geo. IV. & 1 Will. IV. c. 20, s. 85.
1 Vic. c. 90, s. 5.

Taking a false oath in order to obtain probate of any will or letters of administration of the effects of any deceased commission, warrant or petty officer, or seaman, or commission or non-commissioned officer of marines, or marine; or fraudulently receiving or demanding any wages, pay, prize-money, bounty-money, pension, or any part thereof, or any allowance of money whatever, payable or supposed to be payable in respect of the services of any such officer, seaman, or marine, or from the compassionate fund of the navy, or any pension to the widow of an officer, upon or by virtue of any probate of a will, or letters of administration, knowing such will to be forged, or such probate or letters of administration to have been obtained by means of a false oath, with intent in any of the said cases, to defraud any person whomsoever.

NOTES.

Forging, or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or an endorsement or an assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of England trading to the East Indies, commonly called an East India bond, or any note or bill of exchange of the governor and company of the Bank of England, commonly called a bank note, or bank bill of exchange, or a bank post bill, or any endorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, or any bill of exchange, or any promissory note for the payment of money, or any endorsement on or assignment of any bill of exchange, or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent in any of the cases aforesaid, to defraud any person whomsoever.

11 Geo. IV. & 1 Will. IV. c. 66, s. 3.
2 & 3 Will. IV. c. 123.
3 & 4 Will. IV. c. 44.
1 Vic. c. 84, ss. 2, 3.

Wilfully making any false entry in, or wilfully altering any word or figure in, any of the books of account kept by the governor and company of the Bank of England, or by the governor and company of merchants of Great Britain, trading to the South Seas and other parts of America, and for encouraging the fishery, commonly called the South Sea Company; in which books the accounts of the owners of any stock, annuities, or other public funds which now are, or hereafter may be, transferable at the Bank of England, or at the South Sea House, shall be entered and kept.

11 Geo. IV. & 1 Will. IV. c. 66, s. 5.
2 & 3 Will. IV. c. 123.
3 & 4 Will. IV. c. 44.
1 Vic. c. 84, ss. 2, 3.

Forging or altering, or uttering, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament, or wilfully forging or altering, or uttering any power of attorney, or other authority to transfer any share or interest of or in any such stock,

11 Geo. IV. & 1 Will. IV. c. 66, s. 6.
2 & 3 Will. IV. c. 123.
3 & 4 William IV. c. 44.
1 Vic. c. 84, ss. 2, 3.

[14] Vide etiam 48 George III. c. 1.

NOTES.

annuity, public fund, or capital stock, or wilfully receiving any dividend payable in respect of any such share or interest, or demanding or endeavouring to have any such share or interest transferred, or to receive any dividend payable in respect thereof, &c.

11 Geo. IV. & 1 Will. IV. c. 66, s. 7.
1 Vic. c. 90, s. 5[15].

Falsely personating any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament; or any owner of any dividend payable in respect of any such share or interest as aforesaid, and thereby endeavouring to transfer any share or interest belonging to any such owner, or thereby endeavouring to receive any money due to any such owner, as if such offender were the true and lawful owner.

11 Geo. IV. & 1 Will. IV. c. 66, s. 10.
1 Vic. c. 90, s. 5.

Forging or altering, or offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court-roll, or copy of any court-roll, relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security, for payment of money, or any warrant, order, or request, for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person whomsoever.

11 Geo. IV. & 1 Will. IV. c. 66, s. 11.
1 Vic. c. 90, s. 5.

Acknowledging any recognizance or bail, before any court, judge, or other person lawfully authorized to take the same, in the name of any other person not privy or consenting to the same, whether such recognizance or bail in either case, be or not be filed; or in the name of any other person not privy or consenting to the same, acknowledging any fine, recovery, cognovit actionem, or judgment, or any deed to be enrolled.

11 Geo. IV. & 1 Will. IV. c. 66, s. 20.
1 Vic. c. 90, s. 5.

Inserting, or causing or permitting to be inserted in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar,

[15] 3 & 4 William IV. c. 74.

NOTES.

curate, or officiating minister of any parish, district parish, or chapelry in England, any false entry of any matter relating to any baptism, marriage, or burial; or forging or altering in any such register any entry of any matter relating to any baptism, marriage, or burial, or uttering any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered; or uttering any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered; or uttering any copy of such entry, knowing such entry to be false, forged, or altered; or wilfully destroying, defacing, or injuring, or causing or permitting to be destroyed, &c., any such register or any part thereof; or forging any licence of marriage, or altering, or uttering, knowing the same to be forged or altered.

Forging, counterfeiting, or altering, or procuring to be forged, &c., any declaration, warrant, order, or other instrument, or any affidavit or affirmation required to be made by 2 & 3 William IV. c. 59, or by the commissioners for the reduction of the national debt, or the name of any person to any transfer or receipt of annuities, &c., or order for the payment of money, &c., or personating any nominee, &c., or uttering or delivering any forged register, or copy of register, of any birth, baptism, or marriage, with intent to defraud.

2 & 3 Will. IV. c. 59, s. 19.
1 Vic. c. 84, ss. 1, 3.

Forging or altering, or offering, uttering, or disposing of, knowing the same to be forged or altered, any will, codicil, or testamentary writing, with intent to defraud any body corporate or person whatsoever; or forging, or altering or uttering, knowing the same to be forged or altered, any power of attorney, or other authority, to transfer any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the Bank of England or South Sea House, or at the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or procuring, aiding, or assisting in the commission of such offences.

2 & 3 Will. IV. c. 123, s. 2.
1 Vic. c. 84. ss. 1, 3.

NOTES.

2 & 3 Will. IV. c. 125, s. 65.
1 Vic. c. 84, ss. 1, 3 [16].

Forging, counterfeiting, or altering, or procuring to be forged, &c., any certificate of the commissioners appointed by 2 & 3 William IV. c. 125, or any receipt given by the cashiers of the Bank of England, or wilfully delivering to the auditor of the receipt of his majesty's exchequer, or wilfully uttering any such forged receipt.

3 & 4 Will. IV. c. 51, s. 27.
1 Vic. c. 84, ss. 2, 3.

Forging or counterfeiting, or causing or procuring to be forged, &c., the name or hand-writing of any receiver-general of the customs, or of any comptroller-general of the customs, any writing for obtaining money from the Bank of England on account of the receiver-general of the customs, or wilfully uttering or publishing the same.

5 & 6 Will. IV. c. 45, s. 12.
1 Vic. c. 84, ss. 1, 3.

Forging or counterfeiting, or causing or procuring to be forged, &c., any receipt of the whole or part of the contributions towards the sum of fifteen millions (part of the sum of twenty millions authorized to be raised by 3 & 4 William IV. c. 73), or any certificate or other instrument to be issued by the commissioners for the reduction of the national debt.

Transportation beyond the seas for life, or for any term not less than seven years, or imprisonment for any term not exceeding four years, nor less than two, at the discretion of the court.

3 & 4 Will. IV. c. 97, s. 12 [17].

Without lawful excuse having in possession any false, forged, or counterfeit die, plate, or other instrument, resembling or intended to resemble any stamp used under the direction of the commissioners of stamps for the purpose of expressing or denoting any stamp duty whatever; or any vellum, parchment, or paper, having thereon the impression of any such false die, &c.; or knowingly using, uttering, selling, or exposing to sale, any such forged stamps.

Transportation beyond the seas for life, or for any term not less than seven years, or imprisonment for any term not exceeding four years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of

[16] Vide etiam 5 & 6 William IV. c. 51.
[17] Vide etiam 4 & 5 William IV. c. 60.

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such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Knowingly sending or delivering any letter or writing, demanding of any person, with menaces, or without any reasonable or probable cause, any chattel, money, or valuable security; or accusing, or threatening to accuse, or knowingly sending or delivering any letter or writing, accusing, or threatening to accuse, any person of any crime punishable by law with death, transportation, or pillory, or with any assault to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, with a view or intent to extort or gain from such person, any chattel, money, or valuable security.

7 & 8 Geo. IV. c. 29, ss. 4, 8.
1 Vic. c. 90, s. 5.

Corruptly taking any money or reward, directly or indirectly, under pretence or on account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, or converted (unless the person so taking such money, &c., as aforesaid, cause the offender to be apprehended and brought to trial for the same).

7 & 8 Geo. IV. c. 29, ss. 4, 58.
1 Vic. c. 90, s. 5.

Unlawfully cutting, breaking, or destroying, or damaging with intent to destroy, or render useless, any goods, or articles of silk, woollen, &c., being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture, &c., or by force entering into any house, building, &c. with intent to commit any of such offences.

7 & 8 Geo. IV. c. 30, ss. 3, 27.
1 Vic. c. 90, s. 5[18].

Maliciously breaking down or cutting down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or unlawfully and maliciously throwing down, levelling, or otherwise

7 & 8 Geo. IV. c. 30, ss. 12, 27.
1 Vic. c. 90, s. 5.

[18] 7 & 8 George IV. c. 29.

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destroying any lock, sluice, floodgate, or other work, on any navigable river or canal.

7 & 8 Geo. IV. c. 30, ss. 13, 27.
1 Vic. c. 90, s. 5.

Maliciously pulling down or in any wise destroying any public bridge, or doing any injury with intent, and so as thereby to render such bridge, or any part thereof, dangerous or impassable.

Transportation beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

2 Will. IV. c. 34, ss. 3, 19.
1 Vic. c. 90, s. 5.

Making or counterfeiting any coin, resembling, or apparently intended to resemble, or pass for, the king's current gold or silver coin.

2 Will. IV. c. 34, ss. 4, 19.
1 Vic. c. 90, s. 5.

Gilding or silvering, or with any wash or materials capable of producing the colour of gold or silver, washing, colouring, or casing over any coin whatever, resembling, or apparently intended to resemble, or pass for, any of the king's current gold or silver coin, &c.

2 Will. IV. c. 34, ss. 6, 19.
1 Vic. c. 90, s. 5.

Buying, selling, receiving, paying, or putting off, or offering to buy, &c., any false or counterfeit coin resembling, or apparently intended to resemble, or pass for, any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for; or importing into the United Kingdom from beyond the seas any false or counterfeit coin resembling, &c., any of the king's current gold or silver coin, knowing the same to be false or counterfeit.

2 Will. IV. c. 34, ss. 7, 19.
1 Vic. c. 90, s. 5.

Being convicted of tendering, uttering, or putting off, any false or counterfeit coin resembling, &c., any of the king's current gold or silver coin, knowing the same to be false, &c.; or of doing so, and at the time of doing so, being possessed, besides the false or counterfeit coin so tendered, &c., of one or more piece or pieces of false, &c., coin, resembling, &c., any of the king's current gold or silver coin; or of, either on the day of such tendering

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&c., or within the space of ten days then next ensuing, tendering, &c., any more or other false, &c., coin, resembling any of the king's current gold or silver coin, knowing the same to be false or counterfeit; or being convicted of having in one's custody or possession three or more pieces of false, &c., coin, resembling, &c., any of the king's current gold or silver coin, knowing the same to be false, &c. and with intent to utter or put off the same;—and afterwards again committing any of the said misdemeanors, or crimes and offences, and being convicted thereof.

Making or mending, or beginning or proceeding to make or mend; or buying or selling, or knowingly and without lawful excuse having in one's custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or, without lawful authority, making or mending, &c., or, without lawful excuse, having in one's custody, &c., any edger, edging-tool, collar, instrument, or engine, adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, knowing the same to be so adapted and intended as aforesaid; or, without lawful authority, making or mending, &c., or, without lawful excuse, having in one's custody or possession, any press for coinage, or any cutting-engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, knowing such press to be a press for coinage, or knowing such engine to have been used for, or in order to, the counterfeiting of any of the king's current gold or silver coin.

2 Will. IV. c. 34, ss. 10, 19.
1 Vic. c. 90, s. 5.

Conveying out of his majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging-tool, collar, instrument, press, or engine, used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals.

2 Will. IV. c. 34, ss. 11, 19.
1 Vic. c. 90, s. 5.

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1 Vic. c. 36, ss. 26, 41, 42.
1 Vic. c. 90, s. 5[19].

Any person employed under the post-office stealing, or for any purpose whatever embezzling, secreting, or destroying a post letter, containing any chattel or money whatsoever, or any valuable security.

1 Vic. c. 36, ss. 27, 41, 42.
1 Vic. c. 90, s. 5.

Stealing from or out of a post letter any chattel or money, or valuable security.

1 Vic. c. 36, ss. 28, 41, 42.
1 Vic. c. 90, s. 5.

Stealing a post letter-bag, or a post letter from a post letter-bag, or stealing a post letter from a post-office, or from an officer of the post-office, or from a mail, or stopping a mail with intent to rob or search the same.

1 Vic. c. 36, ss. 30, 41, 42.
1 Vic. c. 90, s. 5.

Receiving any post letter or post letter-bag, or any chattel or money or valuable security, the stealing or taking, or embezzling, or secreting whereof, shall amount to a felony under the Post-office Act, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent, or to have been intended to be sent, by the post.

1 Vic. c. 36, ss. 33, 41, 42.
1 Vic. c. 90, s. 5.

Forging or counterfeiting the name or handwriting of the receiver-general for the time being of the general post-office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the obtaining of money from the Bank of England or Ireland, on account of the receiver-general of the post-office.

Transportation for life, for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any time not exceeding four years.

9 Geo. IV. c. 31, s. 19[20].

Where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive, or next of kin, to any one having such interest, taking away or detaining, from motives of lucre, such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; or counselling, aiding, or abetting therein.

[19] Vide etiam 1 Victoria, c. 36, s. 47; 7 & 8 George IV. c. 29.
[20] 9 George IV. c. 31, s. 31.

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Transportation beyond the seas for life, or for any term not less than seven years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years, or the offender to pay such fine as the court shall award.

Manslaughter. 9 Geo. IV. c. 31, s. 9[21].

Transportation for life, or for any term of years not less than seven, or to be imprisoned for any term not exceeding three years, with or without hard labour, and for any period of solitary confinement during such imprisonment, not exceeding one month at a time, or three months in the space of one year, at the discretion of the court or judge, by or before whom the offender may be tried.

Breaking and entering any church or chapel, and stealing therein any chattel; or, having stolen any chattel in any church or chapel, breaking out of the same. 7 & 8 Geo. IV. c. 29, s. 10. 5 & 6 Will. IV. c. 81. 6 & 7 Will. IV. c. 4. 1 Vic. c. 90, s. 5.

Transportation for any term not exceeding fifteen nor less than ten years, or imprisonment, with or without hard labour, in the common gaol or house of correction for any term not exceeding three years, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

Stealing any property in any dwelling house, and by any menace or threat, putting any one, being therein, in bodily fear. 1 Vic. c. 86, ss. 5, 7.

Robbing any person, or stealing any property from the person of another. 1 Vic. c. 87, ss. 5, 10.

Plundering or stealing any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel. 1 Vic. c. 87, ss. 8, 10.

[21] 1 Hale, 347.

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1 Vic. c. 89, ss. 8, 12.

Maliciously destroying any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel.

7 & 8 Geo. IV. c. 29, s. 12.
2 & 3 Will. IV. c. 62.
3 & 4 Will. IV. c. 44.
1 Vic. c. 90, ss. 1, 3[22].

Stealing in a dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more; or counselling, aiding, or abetting the commission thereof.

7 & 8 Geo. IV. c. 29, s. 25.
2 & 3 Will. IV. c. 62.
3 & 4 Will. IV. c. 44.
1 Vic. c. 90, ss. 1, 3.

Stealing any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or wilfully killing any of such cattle, with intent to steal the carcase or skin, or any part of the cattle so killed; or counselling, aiding, or abetting the commission thereof.

7 & 8 Geo. IV. c. 29, ss. 4, 14.
1 Vic. c. 90, ss. 2, 3[23].

Breaking and entering any building, and stealing therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being a part thereof.

7 & 8 Geo. IV. c. 29. ss. 4, 15.
1 Vic. c. 90, ss. 2, 3.

Breaking and entering any shop, warehouse, or counting-house, and stealing therein any chattel, money, or valuable security.

7 & 8 Geo. IV. c. 29, ss. 4, 16.
1 Vic. c. 90, ss. 2, 3.

Stealing, to the value of 10*s.* any goods or articles of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, or progress of manufacture, in any building, field, or other place.

7 & 8 Geo. IV. c. 29, ss. 4, 17.
1 Vic. c. 90, ss. 2, 3.

Stealing any goods or merchandize in any vessel, barge, or boat, of any description whatever, in any port of entry, or discharge, or upon any navigable river, or canal, or in any creek belonging to, or communicating with, any such port, river, or canal, or stealing any goods or merchandize from any dock, wharf, or quay, adjacent to any such port, river, canal, or creek.

7 & 8 Geo. IV. c. 30, ss. 16, 27.
1 Vic. c. 90, ss. 2, 3.

Unlawfully and maliciously killing, maiming, or wounding any cattle.

7 & 8 Geo. IV. c. 30, ss. 18, 27.
1 Vic. c. 90, ss. 2, 3.

Unlawfully and maliciously cutting or otherwise destroying any hop-binds growing on poles in any plantation of hops.

[22] 7 & 8 George IV. c. 29, s. 5.
[23] Vide etiam 15 George II. c. 27.

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Transportation beyond the seas for the term of fourteen years.

Casting or causing the forging, counterfeiting, or causing or procuring to be cast, &c., any mark or stamp used for the marking or stamping gold or silver plate in pursuance of any act or acts of parliament in force at the time of passing the 13 George III. c. 59, by the company of goldsmiths in London, or by the wardens or assayers at York, Exeter, Bristol, Chester, Norwich, Newcastle-upon-Tyne, or by any maker or worker of gold or silver plate, or any or either of them; or selling, exchanging, or exposing to sale, or exporting out of this kingdom, any wrought plate of gold or silver, or any vessel of such base metal as aforesaid, with any such forged or counterfeit mark, or wilfully being possessed of the same.

12 Geo. II. c. 26. 31 Geo. II. c. 32, s. 15 13 Geo. III. c. 59, s. 2[24].

Buying or receiving any part of any cargo or loading of goods, stores, &c., belonging to any ship or vessel on the river Thames, knowing the same to be stolen or unlawfully come by; or privately buying or receiving any such goods, &c., by suffering any door, window, or shutter to be left open or unfastened between sun setting and sun rising for that purpose; or buying or receiving the same, or any of them, at any time, in any clandestine manner.

2 Geo. II. c. 28, s. 12.

Solemnizing matrimony in any other place than a church, or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of Canterbury; or solemnizing matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or falsely pretending to be in holy orders, and solemnizing matrimony according to the rites of the Church of England.

4 Geo. IV. c. 76, s. 21.

Purchasing or receiving from any other person, or having in one's custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged.

11 Geo. IV. & 1 Will. IV. c. 66, s. 12.

[24] 28 Edward I. St. 3, c. 20.

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11 Geo. IV. & 1 Will. IV. c. 66, s. 13.

Without the authority of the governor and company of the Bank of England, making or using, or, without lawful excuse, knowingly have in one's custody or possession, any frame, mould, or instrument, for the making of paper with the words "Bank of England" visible in the substance of the paper; or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of the paper, &c.

11 Geo. IV. & 1 Will. IV. c. 66, s. 15.

Engraving, or in anywise making upon any plate, wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note, or blank bill of exchange, purporting to belong to the Bank of England, without the authority of the governor and company of the same; or using such plate, &c., without such authority; or wilfully having the same in one's custody or possession.

11 Geo. IV. & 1 Will. IV. c. 66, s. 16.

Engraving, or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the Bank of England; or using any such plate, &c., for the making upon any paper or other material the impression of any word, &c.; or knowingly having in one's custody or possession any such plate, &c.; or knowingly offering, uttering, disposing of, or putting off any paper or other material upon which there shall be an impression of any such matter; or wilfully having in one's custody or possession any paper or other material upon which there shall be an impression of any such matter.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or imprisonment for any term not exceeding three nor less than one year, with or without hard labour, in any common gaol or house of correction, and to be kept in solitary confinement for any portion or

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portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Forging or counterfeiting any memorial or certificate mentioned and directed by Stat. 2 & 3 Anne, c. 4, for public registering deeds, conveyances, and wills.

2 & 3 Anne, c. 4, s. 19.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 23, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting any entry of the acknowledgment of any bargainer in any bargain and sale of any property, &c., in the West Riding of the county of York, or any memorial, &c., directed by 5 Anne, c. 18.

5 Anne, c. 18, s. 8.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 23, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting any entry of acknowledgment of any bargainer in any bargain or sale of any property, &c., within the East Riding of the county of York, or Kingston-upon-Hull, as directed by 6 Anne, c. 35.

6 Anne, c. 35, s. 26.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 23, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting any entry of acknowledgment of any memorial, &c., directed by 7 Anne, c. 20, for registering deeds in the county of Middlesex.

7 Anne, c. 20, s. 15.
11 Geo. IV. & 1 Will. IV. c. 66, ss. 23, 26.
1 Vic. c. 90, s. 5.

Forging or counterfeiting any entry of acknowledgment, or of any bargainer in any bargain and sale of property, &c., within the North Riding of the county of York, as directed by 8 George II. c. 6.

8 Geo. II. c. 6, s. 31.
11 Geo. IV. & 1 Will. IV. c. 66. ss. 23, 26.
1 Vic. c. 90, s. 5.

Subscribing any false petition or application to the treasurer of his majesty's navy, or to the paymaster of royal marines, falsely representing oneself therein to be the widow, executor, nearest, or one of the nearest, of kindred of any deceased commission or warrant officer of the navy, or commission officer of marines, or of any petty officer or seaman, non-commissioned officer of marines, or uttering or publishing any such petition or application knowing the same to be false, in order to procure, or to enable any other person to procure, a certificate from the inspector of seamen's wills, or from the paymaster of royal marines, as provided by 11 George IV. & 1 William IV. c. 20, thereby to obtain payment of any wages, pay, half-pay, or pension, or any allowance from the compassionate fund of the navy, or payment of

11 Geo. IV. & 1 Will. IV. c. 20, s. 86.
2 Will. IV. c. 40.
1 Vic. c. 90, s. 5.

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any wages, prize money, or allowances payable in respect of the services of any officer, seaman, or marine in the royal navy, &c.

11 Geo. IV. & 1 Will. IV. c. 20, s. 87.
1 Vic. c. 90, s. 5.

Forging or uttering, offering or exhibiting, any paper or writing purporting to be an extract from any register of marriage, baptism, or burial, or any certificate of marriage, &c., in order to sustain any claim to any wages, prize money, or other moneys due or payable in respect of the services of any officer, seaman, or marine in his majesty's navy.

11 Geo. IV. & 1 Will. IV. c. 66, ss. 17, 26.
1 Vic. c. 90, s. 5.

Making or using any frame, mould, or instrument, for the manufacture of paper, with the name or firm of any person or persons, body corporate or company, carrying on the business of bankers (other than and except the Bank of England), appearing visible in the substance of the paper, without the authority of such body corporate.

11 Geo. IV. & 1 Will. IV. c. 66, ss. 18, 26.
1 Vic. c. 90, s. 5.

Engraving any words resembling any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such persons without their authority; or without their authority having in one's possession any plate, &c., or without their authority wilfully offering, uttering, disposing of, or putting off, or possessed of, any paper upon which any part of such counterfeit bill, &c., shall be made or printed.

11 Geo. IV. & 1 Will. IV. c. 66, ss. 19, 26.
1 Vic. c. 90, s. 5.

Engraving, or in anywise making upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, &c., in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, &c., of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of his majesty, without the authority of such foreign prince, &c.; or, without such authority, using, or without lawful excuse, knowingly having in his custody or possession any plate, &c., upon which any such foreign bill, &c., or any part

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thereof, shall be engraved or made, or, without such authority, knowingly offering, uttering, disposing of, or putting off, or, without lawful excuse, knowingly having in one's custody or possession any paper upon which any part of such foreign bill, &c., shall be made or printed.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or imprisonment for any term not exceeding three nor less than one year, at the discretion of the court.

Subscribing, transmitting, uttering, or publishing any false petition or application to the inspector of seamen's wills, knowing the same to be false, in order to obtain, or to enable any other person to obtain, any check or certificate, in lieu of probate or letters of administration, in cases of claims where the deceased's assets shall not exceed 32*l.* and 20*l.* respectively. 2 Will. IV. c. 40, s. 33.

Transportation beyond the seas for any term not exceeding fourteen years, nor less than seven years, or imprisonment for any term not exceeding three years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Any clerk or servant stealing any chattel, money, or valuable security, belonging to, or in the possession or power of, his master. 7 & 8 Geo. IV. c. 29, ss. 4, 46. 1 Vic. c. 90, s. 5.

Any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, by virtue of such employment receiving or taking into his possession any chattel, money, or valuable security, for or in the name, or on the account of, his master, and fraudulently embezzling the same or any part thereof. 7 & 8 Geo. IV. c. 29, ss. 4, 47. 1 Vic. c. 90, s. 5.

Receiving any chattel, money, valuable security, or 7 & 8 Geo. IV. c. 29, ss. 4, 54.

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1 Vic. c. 90, s. 5.

other property whatsoever, the stealing or taking whereof shall amount to a felony, either at common law, or by virtue of 7 & 8 George IV. c. 29, knowing the same to have been feloniously stolen or taken.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or imprisonment for any term not exceeding three years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

2 Will. IV. c. 34, ss. 5, 19.
1 Vic. c. 90, s. 5.

Impairing, diminishing, or lightening any of the king's current gold or silver coin, with intent to make the coin so impaired, &c., pass for the king's current gold or silver coin.

1 Vic. c. 36, ss. 29, 41, 42.
1 Vic. c. 90, s. 5.

Stealing or unlawfully taking away a post-letter bag sent by a post-office packet, or stealing or unlawfully taking a letter out of any such bag, or unlawfully opening any such bag.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or imprisonment, with or without hard labour, as to the court shall seem meet, for any term not exceeding three years.

2 Will. IV. c. 4, s. 1.

Any person employed in the public service of his majesty, and intrusted by virtue of such employment with the receipt, custody, management, or control, of any chattel, money, or valuable security, embezzling the same, or any part thereof, or in any manner fraudulently applying or disposing of the same or any part thereof to his own use or benefit, or for any purpose whatsoever, except for the public service.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, in the common

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gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Where a person having been convicted of any offence against 2 William IV. c. 34, shall afterwards be indicted for any offence against such act committed subsequent to such conviction, and, any clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or the deputy of such clerk or officer, shall certify or utter as true any false copy of any indictment or conviction for any offence against such act, knowing the same to be false; or if any person other than such clerk, officer, or deputy, shall sign or certify any copy of any such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit.

2 Will. IV. c. 34, ss. 9, 19.
1 Vic. c. 90, s. 5.

Transportation beyond the seas for a term not exceeding fourteen years, or confinement with hard labour for a term not exceeding five nor less than three years, at the discretion of the court.

Dealing or trading in, purchasing, selling, bartering, or transferring, or contracting for the dealing in, &c., (except in such special cases as are permitted or otherwise provided for, by 5 George IV. c. 113, an act to amend and consolidate the laws relating to the abolition of the slave trade,) of slaves, or persons intended to be dealt with as slaves;

5 Geo. IV. c. 113, s. 10.

Or otherwise than as aforesaid, carrying away or removing, or contracting for the carrying away, &c., of slaves or other persons as or in order to their being dealt with as slaves;

Or importing or bringing, or contracting for the importing, &c., into any one place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves;

Or otherwise than as aforesaid, shipping, trans-shipping, embarking, receiving, detaining, or confining on

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board, or contracting for the shipping, &c., on board of any ship, vessel, or boat, slaves or other persons for the purpose of their being carried away or removed, or imported or brought into any place whatsoever, as or in order to their being dealt with as slaves;

Or fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight, or on hire, or contracting for the fitting out, &c., of any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which are by the said act declared unlawful;

Or lending or advancing, or becoming security for the loan or advance, or contracting for the landing, &c., of money, goods, or effects, employed or to be employed in accomplishing any of the objects, &c., or knowingly and wilfully becoming guarantee or security, or contracting for the becoming guarantee, &c., for agents employed or to be employed in accomplishing any of the objects, &c., or in any other manner engaging or contracting to engage, directly or indirectly, therein, as a partner, agent, or otherwise;

Or shipping, trans-shipping, lading, receiving, or putting on board, or contracting for the shipping, &c., on board of any vessel, &c., money, goods, or effects, to be employed in the accomplishing, &c., or taking the charge or command, or navigating, or embarking on board, or contracting for the taking the charge, &c., of any ship, &c., as captain, master, mate, surgeon, or supercargo, knowing that such vessel, &c., is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge, &c., or contract so to do as aforesaid, intended to be employed in accomplishing, &c.;

Or insuring, or contracting for the insuring, of any slaves, or any property or other subject-matter engaged or employed in accomplishing, &c.;

Or forging or counterfeiting any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation, &c., or any receipt (such receipts being required by the said act), or any part of such certificate, &c., as aforesaid;

Or uttering or publishing the same, knowing it to be

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forged, &c., with intent to defraud his majesty, his heirs, or successors, or any other person or persons whatsoever, or any body politic or corporate.

Transportation beyond the seas for the term of fourteen years, or, in mitigation or commutation of such punishment, to be publicly whipped, fined, and imprisoned, or all, or any one or more of them, as the court in its discretion shall think fit.

Destroying, beating out, taking out, cutting out, defacing, obliterating, or erasing wholly or in part, any of the marks mentioned in 9 & 10 William III. c. 41, (an act for the better preventing the embezzlement of his majesty's stores of war, and preventing cheats, frauds, and abuses in paying seamen's wages,) and in 39 & 40 George III. c. 89, (an act for the better preventing the embezzlement of his majesty's naval, ordnance, and victualling stores,) or any other mark whatever denoting the property of his majesty, his heirs, or successors, in or to any warlike or naval, ordnance, or victualling stores, or causing, procuring, employing, or directing any other person or persons so to do for the purpose of concealing his majesty's property in such stores.

9 & 10 Will. III. c. 41.
39 & 40 Geo. III. c. 89, s. 4.
56 Geo. III. c. 138.

Transportation for seven years.

Any number of persons not less than three, within the hamlet of Wapping, Stepney, or any other place, within the limits of the weekly bills of mortality, of the cities of London and Westminster, wherein persons shall unlawfully assemble and associate, for the sheltering themselves from their debts, of which complaint shall have been made by a presentment of the grand jury, at a general or quarter sessions of the proper county, wilfully opposing any person from serving any writ, or any rule, or order of any court of law or equity, or other legal process whatsoever.

11 Geo. I. c. 22, s. 1.

Wilfully opposing any officers of justice or their assistants in the execution of any writ, or of any legal process, execution, or extent, within the hamlet of Wapping, Stepney, and places adjacent, wherein persons shall unlawfully assemble, for the sheltering of them-

11 Geo. I. c. 22, s. 2.

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selves from their debts, of which complaint shall have been made by a presentment of the grand jury, at a general or quarter sessions of the proper county; or making rescous of any prisoner taken upon any such process, &c., within the places aforesaid; or knowingly concealing any prisoner so taken, or any person who rescued any such prisoner, or anywise wilfully assisting in resisting any such officer or officers, or in rescuing any such prisoner.

16 Geo. II. c. 31, s. 3.

Assisting any prisoner to attempt to make his or her escape from the custody of any constable, &c., who shall then have the lawful charge of such prisoner in order to carry him or her to gaol by virtue of a warrant of commitment for treason or any felony expressed in such warrant, or assisting any felon to attempt to make his escape from on board any boat or vessel carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns, or agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation.

25 Geo. II. c. 37, ss. 9, 10.
2 & 3 Will. IV. c. 75.

After execution had of a person convicted of murder, by force rescuing or attempting to rescue the body of such offender out of the custody of the sheriff or his officers, during the conveyance of such body to any of the places directed by 25 George II. c. 37.

32 Geo. II. c. 28, s. 17.
33 Geo. III. c. 5.
39 Geo. III. c. 50.

Prisoners charged in execution for any debt or damages not exceeding the sum of 100*l.* [enlarged to 300*l.* by 33 George III. c. 5], besides costs of suit, neglecting or refusing to deliver in and subscribe a just and true account of his or her whole estate and effects, as directed by 32 George II. c. 28, without offering or making appear some just excuse for every such neglect or refusal; or refusing to assign or convey his or her estate and effects according to the order of the court, &c.

2 Geo. III. c. 28, s. 13.

Cutting, damaging, or spoiling any cordage, cable, buoys, buoy rope, headfast, or other fast, fixed to any anchor or moorings belonging to any vessel at anchor or moorings in the River Thames, or any rope used for the purpose of mooring or rafting masts or timber; or aiding or assisting therein, with an intent to steal the same.

2 Geo. III. c. 28, s. 19.

Obstructing any person acting in the execution of any of the powers granted by 2 George III. c. 28 (an act to

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prevent the committing of thefts and frauds by persons navigating bum boats and other boats upon the river Thames); or acting in the assistance of any person so obstructing.

Forging, casting, or counterfeiting, or causing to be forged, &c., the stamp directed to be used by 38 George III. c. 69 (an act for allowing gold wares to be manufactured at a standard lower than is now allowed by law), for the marking or stamping of gold plate by the company of goldsmiths in London or Edinburgh, or the Birmingham or Sheffield company, or by the wardens or assayers at York, Exeter, Bristol, Chester, Norwich, or Newcastle-upon-Tyne, &c., transposing, or causing to be transposed, any stamp, &c., from one piece of wrought plate to another, or to any vessel of silver, brass, or other metal, &c., any stamp used by either of the said companies, &c., or selling, exchanging, or exposing to sale, or exporting out of the kingdom any wrought plate of gold, or any vessel of silver, &c., with any such forged mark, &c., wilfully knowing the same to be forged, or wilfully having or being possessed of any such counterfeit stamp, &c.

38 Geo. III. c. 69, s. 7[25].

Forging, or counterfeiting, or causing to be forged, &c., or assisting in the forging, &c., of the name or handwriting of any underwriter, on any policy of insurance, to any declaration of any return of the premium on such policy or any part thereof; or fraudulently altering, or causing to be altered, or assisting in altering, any such declaration after the same shall have been signed by any underwriter; or uttering, or making use of any such declaration, knowing the same to have been fraudulently altered, &c., for the purpose of obtaining any allowance, with intent to defraud his majesty [the 54 George III. c. 133, is extended to contracts of insurance by 54 George III. c. 144.]

54 Geo. III. c. 133, s. 10[26].

Being armed with a gun, pistol, sword, or pike, or in a violent manner with staves or stones rescuing any offender arrested, or seizing any goods or chattels seized under 6 George IV. c. 80 (an act to repeal the duties payable in respect of spirits distilled in England, &c.), or

6 Geo. IV. c. 80, s. 143.

[25] Vide etiam 12 George II. c. 26; 31 George II. c. 32; 13 George III. c. 59.

[26] Vide etiam 54 George III. c. 144.

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preventing such arrest of seizure, or assaulting, beating, or wounding any officer or officers, or other person or persons acting in his or their aid or assistance, or any person or persons who shall have given or be about to give any information against, or shall have discovered or given evidence against, or be about to discover or give evidence against, or shall seize or bring to justice any person or persons offending against such act, or who shall have seized, or be about to seize or examine any goods or chattels forfeited under such act; or forcibly opposing the execution of any of the powers given by that act, or being so armed, or with such violence as aforesaid offering or theatening so to do, or aiding or abetting the commission of any such offences.

3 & 4 Will. IV. c. 53, s. 60.

Being found in company with more than four other persons with any goods liable to forfeiture under 3 & 4 William IV. c. 53 (an act for the prevention of smuggling), or any other act relating to the revenue of customs or excise, or in company with one other person, within five miles of the sea coast or any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way.

1 Vic. c. 36, s. 34.

Forging or counterfeiting the handwriting of any person in the superscription of a post letter, or altering or changing upon a post letter the superscription thereof, or writing or sending by the post, or causing to be written or sent by the post, a letter, the superscription whereof, in whole or in part, shall be forged or counterfeited or altered, knowing the same to be forged, &c., with intent in either of those cases, to avoid the payment of the duty of postage.

Transportation for any term not exceeding seven years.

26 Geo. III. c. 106, s. 26.

Forging or counterfeiting the seal of the British Society for extending the Fisheries and improving the sea coasts of the kingdom, or any deed or writing under the common seal, or demanding any money in pursuance of any such forged or counterfeited deed or writing, either from the society or any members or servants thereof, knowing such writing to be forged, with intent to defraud the said society or any other persons whomsoever.

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Administering or causing to be administered, or aiding, assisting, or being present at and consenting to, the administering or taking in any manner or form whatsoever, of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy formed for any such purpose, or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose, or not to inform or give evidence against any associate, confederate, or other person, or not to reveal or discover any unlawful combination or confederacy, or not to reveal or discover any illegal act done or to be done, or not reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, or taking any such oath or engagement, not being compelled thereto. 37 Geo. III. c. 123, s. 1[27].

Any pilot, hoveller, boatman, or other person in any small vessel, conveying any anchor or cable which may have been weighed, swept for, or taken possession of by them, or which they may have purchased of other persons, knowing them to have been weighed, &c., without being reported as is mentioned in 1 & 2 George IV. c. 75 (an act to continue and amend certain acts for preventing frauds and dilapidations committed on merchants, shipowners, and underwriters, by boatmen and others; and also for remedying certain defects relative to the adjustment of salvage in England, under an act made in the twelfth year of Queen Anne), to any foreign port, harbour, creek, or bay, and there selling and disposing of the same. 1 & 2 Geo. IV. c. 75, s. 15.

Transportation for the term of seven years, or imprisonment at the discretion of the court, for any period not less than two years.

Making, causing, or procuring to be made, or aiding 2 Will. IV. c. 16, s. 3.

[27] Vide etiam 39 George III. c. 79; 57 George III. c. 19.

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in the same, or knowingly having in one's custody, not being authorised by the commissioners of excise, and without lawful excuse, any mould or frame, or other instrument, or any paper whatever, having therein or thereon the words "Excise Office," or any other words, figures, marks, or devices, peculiar to and appearing in the substance of the paper used by such commissioners for permits, or with any or part of such words, &c., intended to imitate or pass for the same, &c.

Transportation for seven years, or imprisonment for any term, not exceeding four years, as the court shall direct.

2 & 3 Will. IV. c. 106, s. 3.

Forging or counterfeiting, or causing or procuring to be falsely made, &c., or willingly acting or assisting in the false making, &c., of any authority or certificate, or bill of exchange, mentioned in 2 & 3 William IV. c. 106 (an act to enable the officers in his majesty's army and their representatives, and the widows of officers and persons on the compassionate list, and also civil officers on retired and superannuation allowances, payable by the paymaster-general of his majesty's forces, to draw for and receive their half-pay and allowances), or uttering as true any such false, &c., authority or certificate, or bill of exchange, knowing the same to be false, &c., with intent to defraud any person or persons, body or bodies politic or corporate.

Transportation beyond the seas for the term of seven years, or imprisonment with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and the offender to be kept in solitary confinement for any portion of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court shall seem meet.

1 Vic. c. 36, ss. 26, 42.
1 Vic. c. 90, s. 5.

Any person employed under the Post Office, stealing, or for any purpose whatever embezzling, secreting, or destroying a post letter.

Transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding

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two, nor less than one year, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement, for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Forging the name or handwriting of any person, as or purporting to be a witness, attesting the execution of any power of attorney, or other authority to transfer any share or interest of or in any stock, annuity, or public fund which now is or hereafter may be transferable at the Bank of England, or at the South Sea House, or of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament, or to receive any dividend payable in respect of any such share or interest, or uttering any such power of attorney or other authority; with the name or hand-writing of any person forged thereon as an attesting witness, knowing the same to be forged.

11 Geo. IV. & 1 Will. IV. c. 66, ss. 8, 26. 1 Vic. c. 90, s. 5.

Any clerk, officer, or servant of, or other person employed or intrusted by, the governor and company of the Bank of England, or the governor and company of merchants commonly called the South Sea Company, knowingly making out or delivering any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out, is or are entitled to, with intent to defraud any person whatsoever.

11 Geo. IV. & 1 Will. IV. c. 66, ss. 9, 26. 1 Vic. c. 90, s. 5.

Inserting, or causing or permitting to be inserted, in any copy of any register of baptisms, marriages, and burials, directed by law to be transmitted to the registrars of the diocese, within which any parish, district parish, or chapelry in England, where the ceremonies of baptism, marriage, and burial, can lawfully be performed, may be situated, any false entry of any matter relating to any baptism, marriage, or burial; or forging, or altering, or uttering, knowing the same to be forged or altered, any copy of any register, so directed to be transmitted as aforesaid; or knowingly and wilfully signing or verifying any copy of any register so directed to be transmitted as

11 Geo. IV. & 1 Will. IV. c. 66, ss. 22, 26. 1 Vic. c. 90, s. 5.

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aforesaid, which copy shall be false in any part thereof, knowing the same to be false.

Transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet; and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

12 Car. II. c. 22, s. 4.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

Counterfeiting, or causing to be counterfeited any of the seals used by the corporation or congregation of the Dutch Bay Hall in Colchester, or not being the officer thereunto by the said corporation appointed, and in the place by them thereunto appointed, affixing any such seal or seals to any Colchester Bays, whether counterfeited or not (for the third offence).

9 Geo. I. c. 28, s. 1.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

Within the place commonly called Suffolk-place or the Mint, in the parish of St. George, in the county of Surrey, or within any of the limits thereof, obstructing any person serving or executing any writ, rule, or order of any court of law or equity, or justice of the peace, or assaulting or abusing the officer executing the same, whereby he shall have received damage or bodily hurt.

9 Geo. I. c. 28, s. 2.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

Resisting any officer of justice or their assistants in the execution of any legal writ within the place called Suffolk-place or the Mint, or within any the limits or pretended limits thereof; or making rescous of any prisoner taken upon any such writ, &c., or concealing any prisoner so taken, or any persons who rescued such prisoner, or anyways assisting in resisting any such officer, or in rescuing such prisoners; or presuming to exercise any unlawful jurisdiction, or making or executing, &c., any pretended ordinance for supporting any pretended privilege within the place called Suffolk-place or the Mint, or any the limits or pretended limits thereof,

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contrary to law, or for opposing and hindering the due execution of any legal or equitable process.

Forging or counterfeiting, or procuring to be forged or counterfeited, or wilfully acting or assisting in the forging, &c., the name or hand of the registrar of the High Court of Admiralty and High Court of Appeals for Prizes, or his deputy, or any of the cashiers of the governor and company of the Bank of England, to any certificate, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing whatsoever, for, or in order to the receiving or obtaining any of the money or effects of any of the suitors of the said courts, or either of them; or forging, &c., or procuring to be forged, &c., or willingly acting or assisting in forging, &c., any certificate, &c. made by such registrar or his deputy, or any of the cashiers of the governor and company of the Bank of England; or uttering or publishing any such, knowing the same to be forged, &c., with intent to defraud any person whatsoever.

53 Geo. III. c. 151, s. 12.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5[28].

Any person having the custody of any convict ordered to be confined within the Penitentiary at Millbank, or being employed by the person having such custody as a keeper, under-keeper, turnkey, assistant, or guard, voluntarily permitting such convict to escape; or any person whatsoever, by supplying arms, tools, or instruments of disguise, or otherwise in any manner aiding and assisting to any such convict in any escape, or in any attempt to make an escape, though no escape be actually made, or attempting to rescue any such convict, or aiding and assisting in any such attempt, though no rescue be actually made.

56 Geo. III. c. 63, s. 44.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

Any persons who shall have preserved or taken possession of any merchandize or marine stores, whether belonging to his majesty or any British subjects, or foreigners, from any ship or vessel stranded, deserted by her crew, or wrecked, within the jurisdiction of the Cinque Ports, and selling, disposing of, or otherwise making away with the same, or in any manner concealing, de-

1 & 2 Geo. IV. c. 76, s. 8.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

[28] Vide etiam 11 George IV. & 1 William IV. c. 66; 2 & 3 William IV. c. 123; 3 & 4 William IV. c. 123; and 3 & 4 William IV. c. 44; 1 Victoria, c. 84, s. 2 & 3.

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facing, taking out, or obliterating the marks or numbers thereon, or altering the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identity of such articles by the owner or owners thereof.

5 Geo. IV. c. 52, s. 22.
7 & 8 Geo. IV. c. 28, ss. 8, 9.
1 Vic. c. 90, s. 5.

Casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark or stamp used for marking gold or silver plate in pursuance of 5 George IV. c. 52, (an act [local and personal] for repealing so much of an act of the thirteenth year of the reign of his late majesty King George III., intituled An Act for appointing wardens and assay masters for assaying wrought plate in the towns of Sheffield and Birmingham, as relates to the town of Birmingham, and within twenty miles thereof; and for granting further and more effectual powers for assaying and marking gold and silver plate wrought or made within the said town of Birmingham, and within thirty miles thereof, and for other purposes relating thereto), or by any maker or worker of gold or silver plate, or any or either of them; or casting, &c., or causing or procuring to be cast, &c., any mark, stamp, or impression, in imitation of or to resemble any mark, &c., made with any mark or stamp used as aforesaid by the "guardians of the standard of wrought plate in Birmingham," or by any maker or worker of gold or silver plate, or any or either of them, &c.; or selling, exchanging, or exposing to sale, or exporting out of this kingdom any gold wrought plate or silver wrought plate, or any vessel of base metal with any such forged or counterfeited mark, &c., thereon, or any mark, &c., which hath been or shall be transposed or removed from any other piece of gold or silver plate, knowing such mark, &c. to be forged, &c., as aforesaid; or wilfully or knowingly having or being possessed of any mark or stamp which hath been or shall be forged or counterfeited in imitation of, or to resemble any mark or stamp used as aforesaid by the said company, or by any maker or worker of gold or silver plate, or any or either of them.

7 & 8 Geo. IV. c. 28, ss. 8, 9.
10 Geo. IV. c. 50, s. 124.

Forging, or counterfeiting, or acting or assisting in forging, &c., the name or handwriting of the commissioners for the time being of his majesty's woods, forests, land revenues, works, and buildings, or of any or either

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of them, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining any of the money in the hands or custody of the governor and company of the Bank of England, or of the Bank of Ireland, or of any private banker, on account of the said commissioners, or forging, &c., or causing or procuring to be forged, &c., or wilfully acting or assisting in the forging, &c., any draft, &c., in form of a draft made by the said commissioners, or any or either of them; or uttering or publishing any such, knowing the same to be forged, &c., with an intent to defraud the governor and company of the Bank of England, or of the Bank of Ireland, or any private banker, or any body corporate, or any person or persons whomsoever.

2 & 3 Will. IV. c. 1, s. 1.
1 Vic. c. 90, s. 5[29].

Wilfully (except in the case of a marriage between two of the society of friends, called Quakers, according to the usages of the said society, or between two persons professing the Jewish religion, according to the usages of the Jews) solemnizing any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate required by the 6 & 7 William IV. c. 85 (an act for marriages in England);

7 & 8 Geo. IV. c. 28, ss. 8, 9.
6 & 7 Will. IV. c. 85, s. 39.
1 Vic. c. 90, s. 5.

Or, in any such registered building or office, knowingly and wilfully solemnizing any marriage in the absence of a registrar of the district in which such registered building or office is situated;

Or solemnizing any marriage in England (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar, as directed by the said act; or, if the marriage is by licence, within seven days after such entry, or after three calendar months after such entry.

Any superintendent registrar issuing any certificate for marriage, after the expiration of three calendar months after the notice shall have been entered by him, as mentioned in 6 & 7 William IV. c. 85, or any certificate for marriage by licence, before the expiration of seven

7 & 8 Geo. IV. c. 28, ss. 8, 9.
6 & 7 Will. IV. c. 85, s. 40.
1 Vic. c. 90, s. 5.

[29] Vide etiam 6 & 7 William IV. c. 85,

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days after the entry of the notice, or any certificate for marriage without licence before the expiration of twenty-one days after the entry of the notice, or any certificate, the issue of which shall have been forbidden, as in such statute mentioned, by any person authorized to forbid the issue of the registrar's certificate, or knowingly and wilfully registering any marriage in such act declared to be null and void;

Or, any registrar issuing any licence for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar, as in such statute mentioned, or knowingly and wilfully solemnizing in his office any marriage in the said act declared to be null and void.

7 & 8 Geo. IV. c. 29, ss. 8, 9.
6 & 7 Will. IV. c. 85, s. 40.
1 Vic. c. 22, s. 3.
1 Vic. c. 90, s. 5[30].

Any superintendent registrar issuing any licence for marriage, after the expiration of three calendar months after the notice shall have been entered by the registrar, as provided by 6 & 7 William IV. c. 85; or solemnizing or permitting to be solemnized in his office any marriage in the 6 & 7 William IV. c. 86 (an act for registering births, deaths, and marriages, in England), declared to be null and void.

7 & 8 Geo. IV. c. 28, ss. 8, 9.
6 & 7 Will. IV. c. 86, s. 43.
1 Vic. c. 90, s. 5.

Wilfully destroying, or injuring, or causing to be destroyed or injured, any register book (to be provided in pursuance of the 6 & 7 William IV. c. 86, an act for registering births, deaths, and marriages in England), or any part or certified copy of any part thereof; or falsely making or counterfeiting, or causing to be falsely made, &c., any part of any such register book or certified copy thereof; or wilfully inserting or causing to be inserted in any register book or certified copy thereof, any false entry of any birth, death, or marriage, or wilfully giving any false certificate, or certifying any writing to be a copy or extract of any registrar book, knowing the same register to be false in any part thereof, or forging or counterfeiting the seal of the register office.

7 & 8 Geo. IV. c. 29, ss. 3, 4.
1 Vic. c. 90, s. 5[31].

Simple larceny.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 26.
1 Vic. c. 90, s. 5.

Coursing, hunting, snaring, or carrying away, or killing, or wounding, or attempting to kill or wound,

[30] Vide etiam 6 & 7 William IV. c. 86.
[31] Vide etiam 11 George III. c. 14, s. 26; 11 George III. c. 43, s. 52.

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any deer kept, or being in the enclosed part of any forest, chase, or purlieu, or in any enclosed land wherein deer shall be usually kept.

Having been previously convicted of unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing or wounding, or attempting to kill or wound any deer kept, or being in the inclosed or uninclosed part of any forest, chase, purlieu, or land, offending a second time, by committing any of the offences hereinbefore last enumerated, whether such second offence be of the same description as the first or not.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 26.
1 Vic. c. 90, s. 5.

Having entered into any forest, chase, or purlieu (whether enclosed or not), or into any enclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, unlawfully beating or wounding any person intrusted with the care of the deer, or any of his assistants in the execution of any of the powers given by the 7 & 8 George IV. c. 29 (an act for consolidating the laws in England relative to larceny and other offences connected therewith).

7 & 8 Geo. IV. c. 29, ss. 3, 4, 29.
1 Vic. c. 90, s. 5.

Stealing any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out and known as such.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 36.
1 Vic. c. 90, s. 5.

Stealing, or severing with intent to steal, the ore of any metal, or lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof, respectively.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 37.
1 Vic. c. 90, s. 5.

Stealing, or cutting, breaking, rooting up, or otherwise destroying or damaging, with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 1*l.*);

7 & 8 Geo. IV. c. 29, ss. 3, 4, 38.
1 Vic. c. 90, s. 5.

Or stealing, &c., any tree, &c., respectively growing elsewhere than in any of the situations hereinbefore mentioned (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of 5*l.*);

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7 & 8 Geo. IV. c. 29, ss. 3, 4, 39. 1 Vic. c. 90, s. 5.

Or stealing, &c., any tree, &c., wheresoever the same may be respectively growing (the stealing of such article or articles, or the injury done, being to the amount of 1*s.* at the least), in case the offender shall have been twice previously convicted.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 42. 1 Vic. c. 90, s. 5.

Stealing, or destroying, or damaging, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, having been previously convicted of any of the said offences.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 44. 1 Vic. c. 90, s. 5.

Stealing or ripping, cutting or breaking, with intent to steal, any glass or woodwork belonging to any buildings whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal, or other material, respectively fixed in or to any building whatsoever, or anything made of metal, fixed in any land, being private property, or for a fence to any dwelling house, garden, or area, or in any square, street, or other place dedicated to public use or ornament.

7 & 8 Geo. IV. c. 29, ss. 3, 4, 45. 1 Vic. c. 90, s. 5.

Any person stealing any chattel or fixture, let to be used by him or her, in or within any house, or lodging (whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband).

7 & 8 Geo. IV. c. 30, ss. 4, 27. 1 Vic. c. 90, s. 5.

Cutting, breaking, or destroying, or damaging, with intent to destroy or render useless, any threshing machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except in the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework, knitted piece, stocking, hose, or lace).

7 & 8 Geo. IV. c. 30, ss. 6, 27. 1 Vic. c. 90, s. 5.

Causing any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof; or with the like intent wilfully and maliciously pulling down, filling up, or obstructing any airway, waterway, drain, pit, level, or shaft, of or belonging to any mine.

7 & 8 Geo. IV. c. 30, ss. 7, 27. 1 Vic. c. 90, s. 5.

Pulling down, or destroying, or damaging, with intent to destroy or render useless, any steam engine, or other engine for sinking, draining, or working any mine, or

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any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine, whether such building, &c., be completed or in an unfinished state.

Damaging otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless. 7 & 8 Geo. IV. c. 30, ss. 10, 27. 1 Vic. c. 90, s. 5.

Cutting off, drawing up, or removing any piles, chalk, or other materials fixed in the ground, and used for securing any sea-bank, or sea-wall, or the bank or wall of any river, canal, or marsh; or unlawfully and maliciously opening or drawing up any flood-gate, or doing any other injury or mischief to any navigable river, or canal, with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof. 7 & 8 Geo. IV. c. 30, ss. 12, 27. 1 Vic. c. 90, s. 5.

Setting fire to any crop, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern, wheresoever the same may be growing. 7 & 8 Geo. IV. c. 30, ss. 17, 27. 1 Vic. c. 90, s. 5.

Cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground, adjoining or belonging to any dwelling house (in case the amount of the injury done shall exceed the sum of 1*l.*) 7 & 8 Geo. IV. c. 30, ss. 19, 27. 1 Vic. c. 90, s. 5.

Cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned (in case the amount of the injury done shall exceed the sum of 5*l.*) 7 & 8 Geo. IV. c. 30, ss. 19, 27. 1 Vic. c. 90, s. 5.

Having been twice convicted of maliciously cutting, breaking, barking, rooting up, or otherwise destroying or damaging the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1*s.* at least, and again committing any of the said offences. 7 & 8 Geo. IV. c. 30, ss. 20, 27. 1 Vic. c. 90, s. 5.

Having been convicted of maliciously destroying, or damaging, with intent to destroy, any plant, root, fruit, 7 & 8 Geo. IV. c. 30, ss. 21, 27. 1 Vic. c. 90, s. 5.

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or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, and afterwards committing any of the said offences.

Transportation beyond the seas for the term of seven years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and, if a male, the offender to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

9 Geo. IV. c. 31, s. 21. Either by force or fraud, maliciously leading or taking away, or decoying, or enticing away, or detaining any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with the intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or with any such intent receiving or harbouring any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained, as hereinbefore-mentioned; or counselling, aiding or abetting therein.

Transportation beyond the seas for the term of seven years, or imprisonment, with or without hard labour, in the common gaol, or house of correction, for any term not exceeding two years.

9 Geo. IV. c. 31, s. 22. Any person being married marrying any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere; or any person counselling, aiding, or abetting such offender[82].

Transportation for any term not exceeding seven years, or imprisonment for any number of years, at the discretion of the court.

[82] This offence does not include the case of a person marrying a second time, whose husband or wife shall have been absent, and not known to be living, for the then seven preceding years; or who shall have been divorced from the first marriage; or whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction; nor to any second marriage contracted out of England, by any other than a subject of his majesty. s. 22.

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Wilfully cutting away, casting adrift, removing, altering, defacing, sinking, or destroying, or doing, or committing any act with intent and design, to cut away, &c., or in any other way injure or conceal any buoy, buoy-rope or mark, belonging to any vessel, or which may be attached to any anchor or cable belonging to any vessel, whether in distress or otherwise. 1 & 2 Geo. IV. c. 75, s. 11.

Transportation beyond the seas for any term not exceeding seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Making or counterfeiting any coin resembling, or intended to resemble or pass for any of the king's current copper coin; or knowingly, and without lawful authority, making or mending, or beginning or proceeding to make or mend, or buying or selling, or knowingly, and without lawful excuse, having in one's custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the king's current copper coin; or buying or selling, receiving, paying or putting off, or offering to buy, &c., any false or counterfeit coin, &c., resembling, &c., any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports, or was coined or counterfeited for. 2 Will. IV. c. 34, s. 12. 1 Vic. c. 90, s. 5.

Transportation beyond the seas for any time not exceeding seven years, or fine, imprisonment, and such corporal punishment, by public or private whipping, as the court shall direct.

Any person or persons keeping or using any slaughtering house or place, and slaughtering any "horse, mare, or gelding, foal or filly, ass or mule, or any bull, cow, heifer, ox, calf, sheep, hog, goat, or other cattle, for any other purpose than for butchers' meat, or flaying any 26 Geo. III. c. 71, s. 8[33].

[33] Vide etiam 5 & 6 William IV. c. 59, ss. 7, 8.

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horse, mare, gelding," &c., brought dead to such slaughtering house, or other place, without taking out a licence, or without giving the notice required by 26 George III. c. 71, (an act for regulating houses and other places kept for the purpose of slaughtering horses,) or slaughtering, killing or flaying the same at any time or times, other than and except within the hours in such statute limited, or not delaying to slaughter or kill the same according to the direction of the inspector authorized to prohibit the same.

Imprisonment for life and forfeiture of all goods and chattels, real and personal.

5 Eliz. c. 15, s. 3.

Having been convicted of publishing fantastical prophesies upon arms, &c., to the intent to make insurrection, &c., as is mentioned in 5 Elizabeth, c. 15, s. 2, offending a second time.

Confinement in the Penitentiary at Millbank, for any term not exceeding five, nor less than one year.

56 Geo. III. c. 63, s. 44[34].

Rescuing any convict who shall be ordered to be confined within the penitentiary at Millbank, either during the time of his or her conveyance to the said penitentiary, or whilst such convict shall be in the custody of the person or persons under whose care and charge he or she shall be so confined: or aiding or assisting in any such rescue.

Imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet.

1 Vic. c. 87, ss. 6, 10.

Assaulting any person with intent to rob, (save and

[34] Vide etiam 59 George III. c. 136; 1 Edward II. Stat. 2; 7 & 8 Geo. IV. c. 33.

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except in the cases where a greater punishment is provided by 1 Victoria, c. 87.)

With menaces or by force, demanding any property of any person with intent to steal the same. 1 Vic. c. 87, ss. 7, 10.

LIST OF MISDEMEANORS.

Transportation for life.

After being sentenced and ordered to be banished, under the provisions of 10 George IV. c. 7, (an act for the relief of his majesty's Roman Catholic subjects,) being at large within any part of the United Kingdom, without some lawful excuse, after the end of three calendar months from the time such sentence and order hath been pronounced. 10 Geo. IV. c. 7, s. 36.

Banishment from the United Kingdom for life.

Jesuit or member of any religious order, community, or society of the Church of Rome, bound by monastic or religious vows, coming into this realm. 10 Geo. IV. c. 7, s. 29.

Or having obtained the secretary of state's license to remain therein, under the provisions of 10 George IV. c. 7, (an act for the relief of his majesty's Roman Catholic subjects,) not departing from the United Kingdom within twenty days after the expiration mentioned in such license, or if such license shall have been revoked, then within twenty days after notice of such revocation shall have been given to him. 10 Geo. IV. c. 7, s. 31.

Within any part of the United Kingdom, being admitted or becoming a Jesuit, or brother, or member of any religious order, community, or society of the Church of Rome. 10 Geo. IV. c. 7, s. 34.

Transportation for the term of fourteen years.

Casting, forging, or counterfeiting, or causing or procuring to be cast, &c., any mark or stamp, used for making plate, in pursuance of 13 George III. c. 52, (an act for appointing wardens and assay masters for assaying wrought plate in the towns of Sheffield and Birmingham,) or by any maker or worker of silver plate, or any or either of them, or any mark, stamp or impression in imitation of or to resemble any mark, &c., 13 Geo. III. c. 52, s. 14. 5 Geo. IV. c. 52, s. 1. [local and personal.]

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made with any mark or stamp used as aforesaid, by the Sheffield Company, or by any maker or worker of silver plate, or any or either of them, &c., or transposing, or causing to be removed from one piece of wrought plate to another, or to any plated vessel, any impression made with any stamp used by the said company, &c., or selling, exchanging, or exposing to sale, or exporting, any silver, wrought plate, &c., with such forged impressions, &c., or wilfully being possessed of any mark or stamp which hath been counterfeited in imitation of, or to resemble, any mark or stamp used as aforesaid by the said company, &c.

Transportation beyond the seas for a term of fourteen years, or, in mitigation or commutation[1] *of such punishment, to be publicly whipped, fined, or imprisoned, or all or any one or more of them, as the court in its discretion shall think fit.*

9 & 10 Will. III. c. 41.
9 Geo. I. c. 8.
39 & 40 Geo. III. c. 89, ss. 1, 7.
56 Geo. III. c. 138, s. 2.

Any person not being a contractor, or employed as in 9 & 10 William III. c. 41 (an act for the better preventing the embezzlement of his majesty's stores of war, and preventing cheats, frauds, and abuses in paying seamen's wages,) is mentioned, willingly or knowingly selling or delivering, or causing or procuring to be sold, &c., to any person or persons whomsoever, or willingly or knowingly receiving, or having in his, her, or their custody, possession, or keeping, any stores of war, or naval, ordnance, or victualling stores, or any goods whatsoever, marked as in 9 & 10 William III. c. 8 (an act for continuing some laws and reviving others therein mentioned, for exempting apothecaries from serving parish and ward offices, and upon juries, and relating to jurors, and to the payment of seamen's wages, and the preservation of naval stores and stores of war, &c.) are expressed, or any canvas marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called bunting, wrought with one or more streaks of raised tape (such stores of war, &c., or any of them, being in a raw or unconverted state, or being new, or not more than one-third worn):

[1] In the case of a second offence, the fourteen years' transportation is absolute. Vide etiam 7 & 8 George IV. c. 29; 54 George III. c. 60.

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or concealing such stores or goods, or any of them, marked as aforesaid; unless such person or persons shall, upon his or their trial, produce a certificate under the hands of three or more of his majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods as he or they shall then be indicted for, and the occasion or reason of such stores or goods coming to his, her, or their hands or possession.

Being guilty of a second offence, contrary to the acts of 9 & 10 William III. c. 41, and 39 & 40 George III. c. 89, which would not otherwise, as the first offence, subject a person to transportation.

9 & 10 Will. III. c. 41. 39 & 40 Geo. III. c. 89, ss. 5, 7. 56 Geo. III. c. 138, s. 2.

Transportation beyond the seas for any term not exceeding fourteen, nor less than seven years, or fine and imprisonment, with or without hard labour, in the common gaol or house of correction, or both, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court, in its discretion, seem meet.

Any money, or security for the payment of money, being intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose specified in such direction, and such banker, &c., in violation of good faith, and contrary to the purpose so specified, in anywise converting to his own use or benefit such money, security, or proceeds, or any part thereof respectively.

7 & 8 Geo. IV. c. 29, ss. 4, 49. 1 Vic. c. 90, s. 5.

Any chattel, or valuable security, or any power of attorney, for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, being intrusted to any banker, &c., for safe custody, or for any special purpose, without any authority to sell, negociate, transfer, or pledge, and such banker, &c., in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of

7 & 8 Geo. IV. c. 29, ss. 4, 49. 1 Vic. c. 90, s. 5.

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attorney shall have been intrusted to him, selling, &c., or in any manner converting to his own use or benefit, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof.

Transportation beyond the seas for any term not exceeding fourteen nor less than seven years, or imprisonment and to be kept to hard labour, for any term not exceeding three years.

9 Geo. IV. c. 69, s. 9.

Entering or being in any land, whether open or inclosed, by night, to the number of three or more together, for the purpose of taking or destroying game or rabbits, and any of such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon.

Transportation beyond the seas for the term of seven years, or fine or imprisonment, with or without hard labour, in the common gaol or house of correction, or both, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

7 & 8 Geo. IV. c. 29, ss. 4, 21.
1 Vic. c. 90, s. 5.

Stealing, or for any fraudulent purpose taking from its place of deposit for the time being, or from any person having the lawful custody thereof, or unlawfully and maliciously obliterating, injuring, or destroying any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever, of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court.

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Either during the life of the testator or testatrix, or after his or her death, stealing, or for any fraudulent purpose destroying or concealing any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate or to both. — 7 & 8 Geo. IV. c. 29, ss. 4, 22. 1 Vic. c. 90, s. 5.

Stealing any paper or parchment, written or printed, or partly written or partly printed, being evidence of the title of, or of any part of, the title to any real estate. — 7 & 8 Geo. IV. c. 29, ss. 4, 23. 1 Vic. c. 90, s. 5.

By any false pretence, obtaining from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same. — 7 & 8 Geo. IV. c. 29, ss. 4, 53. 1 Vic. c. 90, s. 5.

Transportation for the term of seven years, or fine and imprisonment, at the discretion of the court.

Counterfeiting or forging, or causing or procuring to be counterfeited, &c., or assisting in counterfeiting, &c., any permit, or any part of any permit, or counterfeiting any impression, stamp, or mark, figure or device, provided or appointed by the commissioners of excise to be put on such permit, or uttering, giving, or making use of any permit, with any such counterfeited impressions, &c., knowing the same to be counterfeited; or knowingly and willingly accepting or receiving any counterfeited, &c., permit, or any permit with any such counterfeited impression, &c., thereon, knowing the same to be counterfeited. — 2 Will. IV. c. 16, s. 4.

The like punishment as for a misdemeanor at common law, or transportation for seven years, at the discretion of the court.

With intent to defraud and injure the true owner or owners thereof, or any person interested therein, purchasing or receiving any anchors, cables, or goods, or merchandize, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions contained in 1 & 2 George IV. c. 75, (an act to continue and amend certain acts for preventing frauds and dilapidations committed on mer- — 1 & 2 Geo. IV. c. 75, s. 12[a].

[a] Vide etiam 7 & 8 George IV. c. 29, ss. 54, 55.

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chants, &c. &c.,) with regard to such articles, shall not have been previously complied with.

Transportation beyond the seas for the term of seven years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

9 Geo. IV. c. 31, s. 24.

Assaulting and striking, or wounding any magistrate, officer, or other person whatsoever, lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water.

Fine of £40, [and, besides the said punishment, the court or judge before whom the offender shall be convicted, may order him to be sent to some house of correction within the same county, for a term not exceeding seven years, there to be kept to hard labour, during all the said time, or otherwise to be transported beyond the seas for a term not exceeding seven years, as the court shall think most proper;] [and further, the court (if it shall think fit,) may award and order sentence of imprisonment, with hard labour, for any term not exceeding the term for which such court may imprison as aforesaid, either in addition to, or in lieu of, the before-mentioned punishments;] and no person, being convicted of this misdemeanor, can thenceforth be received as a witness in any court of record, unless the judgment given against him be reversed.

5 Eliz. c. 9, ss. 3, 4, 5.
29 Eliz. c. 5.
21 Jac. I. c. 28, s. 8.
2 Geo. II. c. 25, s. 2.
3 Geo. IV. c. 114.
1 Vic. c. 23[3].

Procuring any witness or witnesses, by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever, depending in suit and variance, by any writ, action, bill, complaint, or information, in anywise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the king's courts of chancery, or courts of record, or in any leet, view of frank pledge, or

[3] Vide etiam 12 George I. c. 29, s. 4; 21 George II. c. 3.

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law-day, ancient demesne court, hundred court, court baron, or in the court or courts of the stannary in the counties of Devon and Cornwall; or unlawfully and corruptly procuring or suborning any witness or witnesses, which shall be sworn to testify *in perpetuam rei memoriam.*

Fine of £20, and imprisonment for six months, [and, besides the said punishments, the court or judge before whom the offender shall be convicted, may order him to be sent to some house of correction within the same county, for a term mot exceeding seven years, there to be kept to hard labour during all the said time, or, otherwise, to be transported beyond the seas for a term not exceeding seven years, as the court shall think most proper;] [and further, the court (if it shall think fit,) may award and order sentence of imprisonment, with hard labour, for any term not exceeding the term for which such court may imprison as aforesaid, either in addition to, or in lieu of, the before-mentioned punishments;] and no person being convicted of this misdemeanor, can thenceforth be received as a witness in any court of record, unless the judgment given against him be reversed.

Any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly committing any manner of wilful perjury, by his or their deposition in any of the king's courts of chancery, or courts of record, or in any leet, view of frank pledge, or law-day, ancient demesne court, hundred court, court baron, or in any court or courts of the stannary in the counties of Devon and Cornwall, or being examined *ad perpetuam rei memoriam.*

5 Eliz. c. 9, ss. 6, 7.
29 Eliz. c. 5.
21 Jac. I. c. 28, s. 8.
2 Geo. II. c. 25, s. 2.
3 Geo. IV. c. 114.
1 Vic. c. 23.

Any petty officer or seaman, non-commissioned officer of marines, or marine, obtaining or attempting to obtain his pay, or any part thereof, upon or by means of any false or forged certificate, purporting to be a certificate of service in, or discharge from, any of his majesty's ships, or from any hospital or sick quarters.

11 Geo. IV. c. 20, s. 89.
1 Vic. c. 23.

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2 Will. IV. c. 40, s. 32.
1 Vic. c. 23.

Forging or falsely making any certificate to be given under the authority of 2 William IV. c. 40, (an act to amend the laws relating to the business of the civil departments of the navy, and to make other regulations for more effectually carrying on the duties of the said departments,) by the commissioners for executing the office of lord high admiral, or any of them, or by any superintendent, of the purchase or sale of any naval or victualling stores; or uttering or publishing any false or altered certificate of any such purchase or sale, knowing the same to be false.

6 & 7 Will. IV. c. 85, s. 38.
1 Vic. c. 23.

Making any false declaration, or signing any false notice or certificate, required by 6 & 7 William IV. c. 85, (an act for marriages in England,) for the purpose of procuring any marriage.

Or forbidding the issue of any superintendent-registrar's certificate, by falsely representing oneself to be a person whose consent to such marriage is required by law, knowing such representation to be false.

6 & 7 Will. IV. c. 86, s. 41.
1 Vic. c. 23.

Making, or causing to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars required by 6 & 7 William IV. c. 86, (an act for registering births, deaths, and marriages in England,) to be known and registered.

Transportation for seven years, or imprisonment in any house of correction or common gaol, and to be kept to hard labour, for any term not exceeding three years, at the discretion of the court.

3 & 4 Will. IV. c. 53, s. 61.

By force or violence assaulting, resisting, opposing, molesting, hindering, or obstructing, any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs, or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or their office or duty.

Transportation beyond the seas for the term of seven years, or imprisonment for any term not exceeding two years, with or without hard labour, in the

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common gaol or house of correction, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet; and the offender, if a male, to be once, twice, or thrice publicly or privately whipped, (if the court shall so think fit,) in addition to such imprisonment.

Receiving any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by 7 & 8 George IV. c. 29 knowing the same to have been unlawfully stolen, &c. — 7 & 8 Geo. IV. c. 29, ss. 4, 55. 1 Vic. c. 90, s. 5.

Maliciously breaking down or otherwise destroying the drain of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or unlawfully and maliciously putting any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein; or unlawfully and maliciously breaking down or otherwise destroying the dam of any mill-pond. — 7 & 8 Geo. IV. c. 30, ss. 15, 27. 1 Vic. c. 90, s. 5.

Transportation beyond the seas for seven years, or imprisonment, and to be kept to hard labour, in the common gaol or house of correction, for any term not exceeding two years, at the discretion of the court.

Being convicted a third time of unlawfully taking or destroying, by night, any game or rabbits, in any land, whether open or inclosed, or by night unlawfully entering or being in any land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game. — 9 Geo. IV. c. 69, s. 1.

Being found upon any land committing any such offence as aforesaid, and assaulting or offering any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards — 9 Geo. IV. c. 69, s. 2.

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any person authorized to seize and apprehend such person so found.

Transportation for any term not exceeding seven years, or imprisonment not exceeding two years, at the discretion of the court.

37 Geo. III. c. 123.
39 Geo. III. c. 79, s. 8.
52 Geo. III. c. 104.
57 Geo. III. c. 19.

Being guilty of any unlawful combination and confederacy.

60 Geo. III. & 1 Geo. IV. c. 1, s. 1.

Being present at or attending any meeting or assembly for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements or evolutions, such meeting or assembly being without any lawful authority from his majesty, or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing; or training or drilling any other person or persons to the use of arms, &c. or aiding or assisting therein.

Imprisonment for Life.

5 & 6 Edw. VI. c. 1, s. 6.

Willingly and wittingly hearing and being present at any other manner or form of common prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in the book, intituled, "The Book of Common Prayer and Administration of Sacraments, and other rites and ceremonies in the Church of England," than is mentioned and set forth in such book, or that is contrary to the form of sundry provisions and exceptions contained in 2 & 3 Edward VI. c. 1, (an act for uniformity of service and administration of sacraments throughout the realm,) and being thereof lawfully convicted, having previously been twice convicted of the same.

1 Eliz. c. 2, ss. 4, 6[4].

Any manner of parson, vicar, or other whatsoever minister that ought or should sing or say common prayer, mentioned in the book of common prayer, authorized by Stat. 5 and 6 Edward VI. intituled, "An Act for the

[4] Vide etiam 2 & 3 Edward VI. c. 1.

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Uniformity of Common Prayer and administration of the Sacraments," refusing to use the said common prayers or to minister the sacraments in such cathedral or parish church, or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book; or wilfully or obstinately (standing in the same) using any other rite, ceremony, order, form, or manner of celebrating of the Lord's supper openly or privily, or mattens, even song, administration of the sacraments, or other open prayers, than is mentioned and set forth in the said book; or preaching, declaring, or speaking anything in the derogation or depraving of the said book, or any thing therein contained, or of any part thereof, and being lawfully convicted thereof, having been previously twice convicted of any offence concerning the premises.

Any person, not having any spiritual promotion, after his first conviction eftsoons offending in anything concerning the premises, and being thereof lawfully convicted. 1 Eliz. c. 2, s. 8 [5].

In any interludes, plays, songs, rhymes, or by other open words, declaring or speaking anything in the derogation, depraving, or despising of the book of common prayer, or of anything therein contained, or any part thereof; or by open fact, deed, or by open threatenings, compelling, or causing, or otherwise procuring or maintaining any parson, vicar, or other minister, in any cathedral or parish church, or in chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner and form than is mentioned in the said book; or by any of the said means unlawfully interrupting or letting any parson, vicar, or other minister, in any cathedral or parish church, chapel, or any other place, to sing or say common and open prayer, or to minister the sacraments, or any of them, in such manner and form as is mentioned in such book, and being thereof lawfully convicted of any offence concerning any of the last recited offences. 1 Eliz. c. 2, ss. 9, 11.

The Common Law Punishment.

Distraining a man by his beasts that gain his land, or by his sheep, for the king's debt, or the debt of any other 51 Hen. III. st. 4. 28 Edw. I. st. 3, c. 12.

[5] 2 & 3 Edward VI. c. 1.

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man, or for any other cause, whilst another distress can be found, or chattels sufficient whereof the debt may be levied, or that is sufficient for the demand (except impounding of beasts that a man findeth in his ground *damage faisant*, after the use of the custom of the realm).

13 Edw. I. St. 2, c. 6.

Keeping fairs or market in churchyards.

5 & 6 Edw. VI. c. 16.
49 Geo. III. c. 126, s. 3.
6 Geo. IV. c. 105, s. 10.

Selling or bargaining for the sale of, or receiving, having, or taking any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or by any way, device, or means, contracting or agreeing to receive or have any money, &c., or making or entering into any promise, &c., to give or pay any money, &c., or by any way, means, or device, contracting or agreeing to give or pay any money, &c., directly or indirectly, for any office, commission, place, or employment, specified or described in 5 & 6 Edward VI. c. 16, (an act against buying and selling of offices,) and 49 George III. c. 126, (an act for the further prevention of the sale and brokerage of offices,) or within the true intent and meaning of the said acts, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons to any such appointment, nomination, or resignation; or wilfully and knowingly aiding, abetting, or assisting such person therein.

5 & 6 Edw. VI. c. 16
49 Geo. III. c. 126, s. 4.
6 Geo. IV. c. 105, s. 10.

Receiving, having, or taking any money, fee, reward, or profit, directly or indirectly, or taking any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contracting, or agreeing to receive or have any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or pretended to be made, or under any pretence of making, or causing, or procuring to be made, any interest, &c., in or about, or in anywise touching, concerning, or relating to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment, as aforesaid, or under any pretence for using or having used any interest, &c., in or about any such nomination, &c., or for

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the obtaining, or having obtained, the consent or consents, or voice or voices of any person or persons, as aforesaid, to such nomination, &c.; or giving, or causing, or procuring to be given or paid, any money, &c., or making, or causing, or procuring to be made any promise, &c., or by any way, &c., contracting or agreeing, or giving, or paying, or causing, or procuring to be given or paid, any money, &c. for any petition, &c., that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, &c., as aforesaid, or for the obtaining, or having obtained the consent, &c., of any person or persons as aforesaid, to any such nomination, &c., or for or in expectation of gain, fee, &c., soliciting, recommending, or negotiating in any manner for any person or persons in any matter that shall in anywise touch, concern, or relate to any such nomination, &c., or for the obtaining, directly or indirectly, the consent, &c., of any person or persons to any such nomination, &c.; or wilfully and knowingly aiding, abetting, or assisting therein.

Opening or keeping any house, room, office, or place for the soliciting, transacting, or negotiating, in any manner whatever, any business relating to vacancies in, or the sale or purchase of, or appointment, nomination, or deputation to, or resignation, transfer, or exchange of any offices, commissions, places, or employments whatever, in or under any public department; or wilfully and knowingly aiding, abetting, or assisting therein.

5 & 6 Edw. VI. c. 16. 49 Geo. III. c. 126, s. 5. 6 Geo. IV. c. 105, s. 10.

Wilfully and fraudulently declaring any matter or thing which shall be false or untrue in any declaration required by 50 George III. c. 105, (an act to regulate the manner of making surcharges of the duties of assessed taxes, &c.)

50 Geo. III. c. 105, s. 9.

Any clerk of assize, clerk of the peace, clerk of the court, or their deputies or other officers, exacting fees from prisoners, against whom (being charged with or indicted for any felony, or as an accessory thereto, or with or for any misdemeanor, before any court holding criminal jurisdiction in England,) no bill of indictment shall be found by the grand jury, or who on his, her, or their trial shall be acquitted, or who shall be discharged by proclamation, for want of prosecution, for or in respect of his, her, or their discharge.

55 Geo. III. c. 50, s. 9.

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4 Geo. IV. c. 24, s. 72.

In case of any embezzlement, waste, spoil, or destruction being made of, or in, any goods, or merchandize which shall be warehoused in warehouses under the authority of 4 George IV. c. 24, (an act to make more effectual provision for permitting goods imported to be secured in warehouses, or other places, without payment of duty on the first entry thereof,) by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be guilty of a misdemeanor.

7 Geo. IV. c. 16, s. 25.

Obtaining, or endeavouring to obtain for self, or any other person, from the commissioners of the Royal Hospital at Chelsea, by the sending or production of any false certificate, or any altered certificate or discharge, instructions, or other document, knowing the same to have been fraudulently altered, or by making any false representation, obtaining, or endeavouring to obtain, any pension, or increase of pension, or other allowance of money, or any enrolment, or other privilege or advantage.

7 & 8 Geo. IV. c. 18, s. 1.

Setting or placing, or causing to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with intent that the same, or whereby the same may destroy or inflict grievous bodily harm upon a trespasser, or other person coming in contact therewith.

9 Geo. IV. c. 21, ss. 1, 2, 3, 4, 6.

The master of any ship carrying passengers on any voyage, from any port or place in the United Kingdom, or in the islands of Guernsey, Jersey, Alderney, or Sark, or in the Isle of Man, to or for any port or place in his majesty's possessions on the continent or islands of North America, which shall carry any number of passengers exceeding by more than one person in fifty the proportion (viz., three persons for every four tons of the registered burden of such ship, the master and crew being included in and forming part of such prescribed number,) authorized and allowed by 9 George IV. c. 21 (an act to regulate the carriage of passengers in merchants' vessels from the United Kingdom to the continent and islands of North America); or where, having on board the whole number of passengers, shall carry the cargo, provisions, water, or sea stores, between decks; or which shall clear out, or put to sea, not having on board water, and good

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and wholesome provisions, for the use and consumption of the said passengers, to the amount, or in the proportion following (that is to say): a supply of pure water, to the amount of fifty gallons for every person on board such ship, the master and crew included, such water being carried in sweet casks, and a supply of bread and biscuit, oatmeal, or bread stuffs, to the amount of fifty pounds' weight at the least for every passenger on board such ship; or which shall be cleared out from any port or place in the United Kingdom, before the master thereof shall have delivered to the collector or other principal officer of his majesty's customs at such port or place, a list in writing, specifying as accurately as may be the names, ages, and professions or occupations of all and every the passengers on board such ship, with the name of the port or place at which he, the said master, hath contracted to land each of the said passengers, or if any such list shall be wilfully false, shall be deemed guilty of a misdemeanor.

Jesuit or member of any religious order, community, or society of the Church of Rome, bound by monastic or religious vows, within any part of the United Kingdom, admitting any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or aiding or consenting thereto, or administering, or causing to be administered, or aiding or assisting in the administering or taking, any oath, vow, or engagement, purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, &c. 10 Geo. IV. c. 7, s. 33.

Churchwarden, rate-collector, overseer, or other parish officer, refusing to call meetings according to the provisions of 1 & 2 William IV. c. 60, (an act for the better regulation of vestries, &c.,) or refusing or neglecting to make and give the declarations and notices directed to be made and given by that act, or to receive the vote of any rate-payer as therein mentioned, or in any manner whatsoever altering, falsifying, concealing, or suppressing any vote or votes as therein mentioned. 1 & 2 Will. IV. c. 60, s. 11.

Making a false answer to any of the questions directed by 2 & 3 William IV. c. 45 (an act to amend the representation of the people in England and Wales,) to 2 & 3 Will. IV. c. 45, s. 53.

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be put by the returning officer or his bailiff at elections of members to serve in parliament, if required on behalf of any candidate, to any voter at the time of tendering his vote.

2 & 3 Will. IV. c. 107, s. 17. 5 & 6 Will. IV. c. 22.

With intention to deceive, not giving a full and complete plan of the whole of the house to be licensed under 2 & 3 William IV. c. 107, (an act for regulating for three years, and from thence until the end of the next session of parliament, the care and treatment of insane persons in England,) or notice of any and all such additions and alterations as shall from time to time have been made in any such house.

2 & 3 Will. IV. c. 107, s. 22. 5 & 6 Will. IV. c. 22.

Keeping a house for the reception of two or more insane persons, not duly licensed according to 2 & 3 William IV. c. 107.

2 & 3 Will. IV. c. 107, s. 27. 5 & 6 Will. IV. c. 22.

Receiving any insane person, or persons represented or alleged to be insane, to be taken care of or confined in any house licensed under 2 & 3 William IV. c. 107, without such order and medical certificate as in such act is mentioned, and without making, within three clear days after the reception of such patient, a minute or entry in writing in a book to be kept for that purpose, according to the form in such act mentioned, of the true name of the patient, and also the Christian and surname, occupation, and place of abode, of the person by whom such patient shall be brought.

2 & 3 Will. IV. c. 107, s. 28. 5 & 6 Will. IV. c. 22.

Physician, surgeon, or apothecary, who is wholly or partly, or whose father, son, brother, or partner, is wholly or partly proprietor, or regular professional attendant, at any licensed house, signing a certificate of admission of a patient to any such house.

2 & 3 Will. IV. c. 107, s. 28. 5 & 6 Will. IV. c. 22.

Knowingly and with intention to deceive, signing any medical certificate upon which any order shall be given for the confinement of any person (not a parish pauper) in a licensed house, untruly setting forth any of the particulars required by 2 & 3 William IV. c. 107.

2 & 3 Will. IV. c. 107, s. 29. 5 & 6 Will. IV. c. 22.

Wilfully receiving any parish pauper, represented or alleged to be insane, into any licensed house, without the order and medical certificate mentioned in 2 & 3 William IV. c. 107.

2 & 3 Will. IV. c. 107, s. 30. 5 & 6 Will. IV. c. 22.

The proprietor or resident superintendent of any licensed house, neglecting, within the time mentioned in 2 & 3 William IV. c. 107, to transmit a copy

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of such order and medical certificate, with a notice according to the form mentioned in 2 & 3 William IV. c. 107, to the clerk of the metropolitan commissioners in lunacy; or, within the jurisdiction of the visitors, to transmit a duplicate copy thereof to the clerk of the peace.

The proprietor or resident superintendent of any such house, knowingly and wilfully neglecting, on the removal therefrom, or death of any patient confined therein, to transmit a written notice thereof (in the form and within the time mentioned in 2 & 3 William IV. c. 107,) to the clerk of the metropolitan commissioners or the clerk of the peace.

2 & 3 Will. IV. c. 107, s. 31.
5 & 6 Will. IV. c. 22.

The proprietor or resident superintendent of any licensed mad-house fraudulently concealing or attempting to conceal any part of such house or premises, or any person detained therein as insane, from the metropolitan commissioners or visitors, or from any medical or other person authorized under the provisions of 2 & 3 William IV. c. 107, to visit and inspect any such house and the patients confined therein.

2 & 3 Will. IV. c. 107, s. 40.
5 & 6 Will. IV. c. 22.

Receiving to board or lodge in any house not licensed under 2 & 3 William IV. c. 107, or taking the care or charge of any insane person, without having the like order and medical certificates as are required on the admission of an insane person (not being a parish-pauper patient) into a licensed house, (unless the person so receiving or taking care, &c., be a guardian or relative, who does not derive any profit from the charge, or a committee appointed by the lord chancellor, or other, the person or persons for the time being intrusted by the king's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic, or of unsound mind).

2 & 3 Will. IV. c. 107, s. 46.
5 & 6 Will. IV. c. 22.

Receiving to board or lodge in any house not licensed under 2 & 3 William IV. c. 107, or taking the care or charge of any insane person in any such house, (unless the person so doing be a guardian, &c., as aforesaid,) and omitting within twelve calendar months after, if such insane person shall not previously have returned to his or her own, or usual place of abode, to transmit to

2 & 3 Will. IV. c. 107, s. 47.
5 & 6 Will. IV. c. 22.

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the clerk of the metropolitan commissioners a copy of such order, and medical certificates, sealed and indorsed "private return," &c., or on the 1st day of January in every succeeding year, or within seven clear days after, to transmit to such clerk a certificate signed by two physicians, surgeons, or apothecaries, describing the then actual state of mind of such insane person, and to be indorsed "private return."

3 & 4 Will. IV. c. 64, s. 7.
5 & 6 Will. IV. c. 22.

The proprietor and resident superintendent of any house licensed for the reception of insane persons, knowingly and wilfully neglecting to transmit any notice, copy of order, medical certificate or statement, by 3 & 4 William IV. c. 64, (an act to amend an act of 2 & 3 William IV., for regulating the care and treatment of insane persons in England,) required to be transmitted.

4 & 5 Will. IV. c. 35, s. 8.

Requiring or compelling any apprentice or person of any description to ascend a chimney-flue for the purpose of extinguishing fire therein.

4 & 5 Will. IV. c. 76, s. 13.

Wilfully refusing to attend in obedience to summons of any poor-law commissioner or assistant-commissioner, or to give evidence, or wilfully altering, suppressing, concealing, destroying, or refusing to produce any books, contracts, agreements, accounts, and writings, or copies of the same, which may be so required to be produced before such commissioners or assistant-commissioners.

5 & 6 Will. IV. c. 24, s. 3.

Forging or counterfeiting any certificate of service in his majesty's navy, or any instrument purporting to be a protection from such service; or fraudulently uttering or publishing any forged certificate of such service, or any forged instrument, purporting, &c., knowing the same to be forged; or fraudulently altering any certificate or protection which shall have been duly granted or issued.

Or forging or fraudulently altering any extract from a baptismal register; or knowingly uttering any false or fraudulently altered extract from a baptismal register, or any false affidavit, certificate, or other document, in order to obtain from the Admiralty office a protection from his majesty's naval office for oneself or any other person;

Or being in possession of a protection, lending, selling, or disposing thereof to any other person, in order fradulently to enable such other person to make an unlawful use of the same; or producing, uttering, or making use

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of as a protection for oneself any protection which shall have been made out or issued for any other individual.

In any case where a declaration is substituted for an oath, under the authority of 5 & 6 William IV. c. 62, (an act to repeal an act of the present session of parliament, intituled, "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various departments of the State, and to substitute Declarations in lieu thereof, and for the more entire suppression of Voluntary and Extrajudicial Oaths and Affidavits," and to make other provisions for the abolition of unnecessary oaths,) or by virtue of any power or authority thereby given, or in case where a declaration is directed and authorized to be made and subscribed under the authority of that act, or by virtue of any power thereby given, wilfully and corruptly making and subscribing any such declaration, knowing the same to be untrue in any material particular.

5 & 6 Will. IV. c. 62, s. 21.

Making and subscribing any declaration authorized by 6 & 7 William IV. c. 5, (an act for carrying into further execution two acts of his present majesty, relating to the compensation for slaves upon the abolition of slavery, and for facilitating the distribution and payment of such compensation,) to be taken and received by the comptroller-general, or assistant comptroller-general, or other officer appointed by and acting under the commissioners for the reduction of the national debt, or the accountant-general of the court of Chancery, or the accountant-general of the court of Exchequer, in case they shall deem it necessary, and require that some evidence should be given of the identity of the party named in any letter of attorney, or as to the truth of any matter contained in, or necessary for, the explanation of such letter of attorney, knowing the same declaration to be untrue in any material particular.

6 & 7 Will. IV. c. 5, s. 8.

Executing any renewed lease of any house, land, &c., under the provisions of 6 & 7 William IV. c. 20, (an act for imposing certain restrictions on the renewal of leases by ecclesiastical persons,) or any counterpart thereof, knowing the recital or statement required by the said act to be contained in such lease, (and which

6 & 7 Will. IV. c. 20, s. 3.

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recital, in the case of a lease for lives, is to set forth the names of the several persons named as *cestuique vie* in the then last preceding lease of the same premises, and to state which of such persons, if any, is or are then dead, or for whose life that of some other person has been exchanged by virtue of the proviso thereinafter contained, and in case of a lease for years it is to set forth for what term of years the last preceding lease of the same premises was granted, and how much of such term has then expired, and how much remains to come and unexpired, and every such rental or statement, so far as it relates to the validity of the lease so to be granted as aforesaid, is to be deemed and taken to be conclusive evidence of the truth of the matter so recited or stated,) or any part thereof, to be false; or wilfully introducing, causing to be introduced, or aiding or assisting in introducing any such recital or statement into any such lease, knowing the same or any part thereof to be false.

6 & 7 Will. IV. c. 71, s. 93.

Wilfully refusing to attend in obedience to any lawful summons of any commissioner or assistant-commissioner for carrying into effect 6 & 7 William IV. c. 71, (an act for the commutation of tithes in England and Wales,) or to give evidence; or altering, withholding, destroying, or refusing to produce any book, deed, contract, agreement, account, or writing, terrier, map, plan, or survey, or any copy of the same which may be lawfully required to be produced before the said commissioner or assistant-commissioner.

6 & 7 Will. IV. c. 76, s. 6.

Signing and making any declaration (required by 6 & 7 William IV. c. 76, an act to reduce the duties on newspapers, &c.,) to be delivered to the commissioners of stamps and taxes, &c., before any person shall print or publish, or cause to be printed, &c., any newspaper in which shall be inserted or set forth the name, addition, or place of abode of any person as a proprietor, publisher, printer, or conductor of the actual printing of any newspaper to which such declaration shall relate, who shall not be a proprietor, printer, or publisher thereof, or from which shall be omitted the name, addition, or place of abode of any proprietor, publisher, printer, or conductor of the actual printing of such newspaper, contrary to the true meaning of such act, or in which any matter or thing

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by such act required to be set forth, shall be set forth otherwise than according to the truth, or from which any matter or thing required by such act, to be truly set forth shall be entirely omitted.

Fine and imprisonment, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Wilfully in the night-time taking or killing any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or coneys (whether the same be inclosed or not). — 7 & 8 Geo. IV. c. 29, ss. 4, 30. 1 Vic. c. 90, s. 5.

Wilfully taking or destroying any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having the right of fishery therein. — 7 & 8 Geo. IV. c. 29, ss. 4, 34. 1 Vic. c. 90, s. 5.

Maliciously throwing down, levelling, or otherwise destroying, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up, or erected to prevent passengers passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing-engine erected for the better collection, ascertainment, or security of any such toll. — 7 & 8 Geo. IV. c. 30, ss. 14, 27. 1 Vic. c. 90, s. 5.

Fraudulently retaining, or wilfully secreting or keeping, or detaining, or, being required to deliver up by an officer of the post-office, neglecting or refusing to deliver up a post-letter which ought to have been delivered to any other person, or a post-letter-bag or post-letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person. — 1 Vic. c. 36, ss. 31, 42. 1 Vic. c. 90, s. 5.

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Fine and imprisonment, and such corporal punishment by public or private whipping as the court shall direct.

26 Geo. III. c. 71, s. 9. Keeping or using any slaughtering-house or place, throwing into any lime-pit or lime-pits, or otherwise immersing in lime or any preparation thereof, or rubbing therewith or with any other corrosive matter, or destroying or burying, the hide or hides, skin or skins, of any horse, mare, gelding, colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog, goat, or other cattle, by him, her, or them slaughtered, killed, or flayed.

26 Geo. III. c. 71, s. 9. Being guilty of any offence against 26 George III. c. 71, (an act for regulating houses and other public places kept for the purpose of slaughtering-houses,) for which no punishment or penalty is expressly provided or declared.

Fine, imprisonment, or other corporal punishment, as the court shall think fit to award.

53 Geo. III. c. 141, s. 8. Either in person, by letter, agent, or otherwise howsoever, procuring, engaging, soliciting, or asking any person being under the age of twenty-one years, to grant or attempt to grant any annuity or rent-charge, or to execute any bond, deed, or other instrument for securing the same; or advancing, or procuring, or treating for any money to be advanced to any person under the age of twenty-one years, upon consideration of any annuity or rent charge to be secured or granted by such infant after he or she shall have attained his or her age of twenty-one years; or inducing, soliciting, or procuring any infant, upon any treaty or transaction for money advanced or to be advanced, to make oath or to give his or her word of honour or solemn promise, that he or she shall not plead infancy or make other defence against the demand of any such annuity or rent-charge, or the repayment of the money advanced to him or her when under age, or that when he or she comes of age, he or she will confirm or ratify, or in any way substantiate such annuity or rent-charge.

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Imprisonment and fine and ransom to the king.

Any persons being sufficient to travel in the county where routs, assemblies, or riots against the law be, not being assistant to the justices, commissioners, sheriff, or under-sheriff of the same county, when they shall be reasonably warned to ride with the said justices, commissioners, and sheriff, or under-sheriff, in aid to resist such riots, routs, and assemblies. 2 Hen. V. St. 1, c. 8[6].

Depraving, despising, or contemning the sacrament of the Lord's Supper, in contempt thereof, by any contemptuous words, or by any words of depraving, despising, or reviling; or advisedly in any otherwise contemning, despising, or reviling the said most blessed sacrament, contrary to the effects and declaration set forth in 1 Edward VI. c. 1 (an act against such as shall unreverently speak against the Sacrament of the Altar, of the receiving thereof under both kinds). 1 Edw. VI. c. 1, s. 1. 1 Eliz. c. 1, s. 14[7].

Imprisonment and ransom at the king's will.

Making entry into any lands and tenements, with strong hand, or with multitude of people, and not in peaceable and easy manner. 5 Rich. II. St. 1, c. 7. 15 Rich. II. c. 2[8].

Imprisonment and fine at the king's will.

Where a man, a dog, or a cat, escape quick out of the ship (in which case such ship or barge, or any thing within them, is not to be adjudged wreck), and not delivering the goods into the hands of such as are of the crown where the goods were found, so that if any sue for those goods, and after prove that they were his, or perished in his keeping, within a year and a day, they shall be restored to him without delay; or otherwise doing contrary to 3 Edward I. c. 4 (an act declaring what shall be adjudged wreck and what not). 3 Edw. I. c. 4.

Any of the clergy presuming to attempt, allege, claim, or put in use any constitutions or ordinances, provincial 25 Hen. VIII. c. 19, s. 1. 1 Eliz. c. 1, s. 6.

[6] Vide etiam Co. Litt. 127 (a). Dyer, 232, pl. 5.

[7] Vide etiam 1 James I. c. 25, s. 48.

[8] 4 Henry IV. c. 8; 8 Henry VI. c. 9; 31 Elizabeth, c. 11; 21 James I. c. 15.

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or synodal, or any other canons; or enacting, promulgating, or executing any such canons, constitutions, or ordinances provincial, by whatsoever name or names they may be called in their convocations, unless the same clergy may have the king's most royal assent and licence to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal.

Imprisonment, as best shall seem to the king or to his council, or imprisonment with hard labour, for any term not exceeding the term for which the court may now imprison, either in lieu of, or in addition to the first-named punishment.

17 Rich. II. c. 8.
2 Hen. V. St. 1, c. 8.
3 Geo. IV. c. 114[9].

Rioters being attainted of petty riots.

Fine and imprisonment at the discretion of the court, and offender upon conviction to be incapable of holding or enjoying any office under the crown.

7 & 8 Geo. IV. c. 53, s. 44.

Collector, receiver, or other person intrusted with the collection, receipt, custody, or management of any part of the revenue of excise, neglecting or omitting to keep and render such separate and distinct accounts, and in such manner and form as shall from time to time be directed by the commissioners of excise, of all duties, penalties, and sums of money collected, had, or received by him, or intrusted to his care or custody, and all balances of money in his hands, or under his control and management, or knowingly rendering, or furnishing false accounts of, or relating to, any duty, &c., collected, &c., or to be collected, &c., or intrusted, &c., or of any balance of money, &c.

Fine and imprisonment.

15 Rich. II. c. 2.

Not being attendant upon justices of the peace to go and assist the same justices to arrest any that hold any lands or tenements, or other possessions whatsoever, forcibly, after forcible entry made.

[9] Vide etiam 13 Henry IV. c. 7; 1 George I. St. 2. c. 5.

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Any officer, collector, or receiver, intrusted with the receipt, custody, or management of any part of the public revenues, knowingly furnishing false statements or returns of the sums of money collected by him or intrusted to his care, or of the balances of money in his hands or under his control. — 50 Geo. III. c. 59, s. 2.

Any person concerned in the transmitting or delivery of writs for the election of members to serve in parliament, wilfully neglecting or delaying to deliver or transmit any such writ, or accepting any fee, or doing any other matter or thing in violation of 53 George III. c. 89 (an act for the more regular conveyance of writs for the election of members to serve in parliament). — 53 Geo. III. c. 89, s. 6.

Any gaoler exacting from any prisoner any fee or gratuity, for or on account of the entrance, commitment, or discharge of such prisoner, or detaining any prisoner in custody for non-payment of any fee or gratuity. — 55 Geo. III. c. 50, s. 13.

Forfeiture, fine, not exceeding £200, and costs of suit, and also by such further fine, and by whipping and imprisonment, or any or either of them, in such manner and for such space of time as to the judge or justices before whom the offender shall be convicted shall seem meet.

Having in one's custody any timber, thick stuff, or plank, marked with the broad arrow, by stamp, brand, or otherwise, or concealing any timber, &c., so marked. — 9 & 10 Will. III. c. 41. 9 Geo. I. c. 8. 17 Geo. II. c. 40. 39 & 40 Geo. III. c. 89, s. 2. 56 Geo. III. c. 138, s. 2.

Making, having in custody, possession, or keeping, or concealing (not being a contractor with his majesty's principal officers or commissioners of the navy, ordnance, or victuallers for his majesty's use, or employed by such contractor for that purpose), any stores of war, or naval stores whatsoever, with the marks usually used to and marked upon his majesty's said warlike and naval or ordnance stores, that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from — 9 & 10 Will. III. c. 41. 17 Geo. II. c. 40. 39 & 40 Geo. III. c. 89, s. 2. 56 Geo. III. c. 138, s. 2 [10].

[10] 54 Geo. III. c. 60.

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three inches downwards, with a twine in lieu of a white thread laid to the contrary way as aforesaid, or any canvas wrought or unwrought with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise.

39 & 40 Geo. III. c. 89, s. 2.
56 Geo. III. c. 138, s. 2.

Being possessed (not being a contractor, or employed as aforesaid) of any of his majesty's stores, called canvas, marked with a blue streak in a serpentine form, or bewper, otherwise called bunting, wrought with one or more streaks of raised tape (such canvas or bewper, otherwise called bunting, not being charged to be new, or not more than one-third worn).

Fine not exceeding £500, or imprisonment for any term not exceeding two years, or both, at the discretion of the court.

9 Geo. IV. c. 83, s. 34.

In any manner contriving, aiding, abetting, or assisting in the escape or intended escape from any part of New South Wales or Van Diemen's Land, or the dependencies thereof, of any person or persons there being under or by virtue of any judgment or sentence of transportation, for any term not then expired, or of any judgment or sentence pronounced in any court of competent jurisdiction in the said colony or its dependencies.

Imprisonment with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

9 Geo. IV. c. 31, s. 17.

Unlawfully and carnally knowing and abusing any girl, being above the age of ten years and under the age of twelve years.

Imprisonment for such term as the court shall award.

9 Geo. IV. c. 31, s. 30.

Any master of a merchant vessel, during his being abroad, forcing any man on shore; or wilfully leaving him behind in any of his majesty's colonies, or elsewhere; or refusing to bring home with him again all such of the men whom he carried out with him, as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage.

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Fine or imprisonment, or both, such imprisonment to be with or without hard labour in the common gaol or house of correction, and the offender to be kept in solitary confinement for any portion of such imprisonment not exceeding one month at a time, or three months in the space of one year, as to the court shall seem meet.

Any person employed by or under the post-office, contrary to his duty, opening or procuring or suffering to be opened, a post-letter, or wilfully detaining or delaying a post-letter. 1 Vic. c. 36, ss. 25, 42. 1 Vic. c. 90, s. 5.

Any person employed in the post-office, stealing, or, for any purpose, embezzling, secreting, or destroying, or wilfully detaining or delaying in course of conveyance or delivery thereof by the post, any printed votes, or proceedings in parliament, or any printed newspaper, or any other printed paper whatever, sent by the post without covers, or in covers open at the sides. 1 Vic. c. 36, ss. 32, 42. 1 Vic. c. 90, s. 5.

Fine and imprisonment, or both, such imprisonment to be in the common gaol or house of correction, and either with or without hard labour, as the court shall think fit.

Forging or counterfeiting, or causing or procuring to be forged, counterfeited, or resembled, the stamp-office plate by 1 & 2 William IV. c. 22 (an act to amend the laws relating to hackney-carriages, &c.), directed to be provided for the purpose of being fixed upon every hackney-carriage; or wilfully fixing or placing, or causing or permitting, or suffering to be fixed or placed upon any hackney-carriage or other carriage, any such forged or counterfeited plate; or selling or exposing to sale, or uttering any such forged or counterfeited plate, or knowingly and without lawful excuse having or being possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited, or knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence. 1 & 2 Will. IV. c. 22, s. 25.

In applying for or procuring, or attempting to procure, any licence, under any of the provisions of 1 & 2 William IV. c. 22, to use or employ any false or fictitious 1 & 2 Will. IV. c. 22, s. 33.

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name or place of abode, or other false or fictitious description of any person or supposed person; or shall wilfully or knowingly insert, or cause to be inserted, in any requisition for any such licence, or in any such licence, any false or fictitious name or place of abode, or other false or fictitious description of any person or supposed person; or shall wilfully or knowingly insert, or cause to be inserted, in any such requisition or licence, the name of any person as being a proprietor or part proprietor of any hackney-carriage, who shall not, at the time of the application for such licence, be so.

2 & 3 Will. IV. c. 120, s. 10.

On application for, or in procuring, or attempting to procure, any licence under 2 & 3 William IV. c. 120, (an act to repeal the duties under the management of the commissioners of stamps on stage-carriages, and on horses let for hire, in Great Britain, and to grant other duties in lieu thereof; and also to consolidate and amend the laws relating thereto), for, or in respect of any stage-carriage, and using or employing any false or fictitious name or place of abode, or other false, &c., description of any person, or supposed person; or inserting, or causing to be inserted, in any requisition for any such licence, any false, &c., name, &c., or other false, &c., description of any person, &c., as being the proprietor, or part proprietor of the stage-carriage, for in respect of which such licence shall be applied for or procured; or wilfully and knowingly inserting, or causing to be inserted in any such requisition, or in any such licence as aforesaid, the name of any person as being a proprietor, or part proprietor, of such carriage, who shall not, at the time of the application for such licence, be, in fact, a proprietor, &c., of such carriage.

2 & 3 Will. IV. c. 120, s. 32.

Forging, or counterfeiting, or causing or procuring to be forged, counterfeited, or resembled, any numbered plate directed to be provided, or which shall have been provided, made or used, in pursuance of 2 & 3 William IV. c. 120, or of any former act relating to the duties payable in respect of stage-carriages; or wilfully fixing or placing, or causing, or permitting, or suffering to be fixed or placed, upon any stage-carriage, or other carriage, any such forged or counterfeited plate; or selling, or exchanging, or exposing to sale, or uttering

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any such forged or counterfeited plate; or knowingly, and without lawful excuse, having or being possessed of any such forged or counterfeited plate, knowing such plate to be forged or counterfeited; or knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence as aforesaid.

Fine and imprisonment, or both, as to the court shall seem meet.

Counterfeiting, or causing to be counterfeited, any of the seals used by the corporation or congregation of the Dutch-Bay-Hall, in Colchester; or, not being the officer thereunto by the said corporation appointed, and in the place thereunto by them appointed, affixing any such seal or seals to any Colchester Bays, whether counterfeited or not, for the second offence. 12 Car. II. c. 22, s. 4. 56 Geo. III. c. 138, s. 2.

Opposing or resisting the sheriffs of London and Middlesex, head-bailiff of the liberty of the duchy of Lancaster, high-sheriff of the county of Surrey, or bailiff of the liberty of the borough of Southwark, for the time being, or their respective deputy or deputies, officer or officers, or either or any of them, or any who shall be aiding or assisting to them, or any of them, in the execution of any legal process, execution, or extent taken out by any person having any debt or debts, sum or sums of money, due or owing to him, from any person residing within the Whitefriars, Savoy, Salisbury-Court, Ram-Alley, Mitre-Court, Fuller's-Rents, Baldwin's-Gardens, Montague-Close, or the Minories, Mint, Clink, or Deadman's-Place. 8 & 9 Will. III. c. 27, s. 15. 56 Geo. III. c. 138, s. 2.

Asking, demanding, accepting, or receiving, directly, or indirectly, any sum or sums of money, or any kind of gratuity, or reward, for the soliciting or procuring the loan, and for the brokerage of any money that shall be actually and *bonâ fide* advanced and paid as and for the price or consideration of any annuity or rent charge, granted for one or more life or lives, or for any term of years or greater estate, determinable on one or more life or lives, over and above the sum of 10*s.* for every 100*l.* so actually and *bonâ fide* advanced and paid. 53 Geo. III. c. 141, s. 9.

Any person having the custody of any convict ordered to be confined within the Penitentiary, at Millbank, or 56 Geo. III. c. 63, s. 44.

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being employed by the person having such custody, as a keeper, under-keeper, turnkey, assistant, or guard, negligently permitting any such convict to escape.

59 Geo. III. c. 69, s. 2.

Any natural born subject of his majesty, his heirs, or successors, without the leave or licence of his majesty, his heirs, or successors, for that purpose first had and obtained, under the sign-manual of his majesty, his heirs or successors, or signified by order in council, or by proclamation of his majesty, his heirs, or successors, taking or accepting, or agreeing to take, &c., any military commission, or otherwise entering into the military service, as a commissioned or non-commissioned officer, or entering himself to enlist, or agreeing to enlist or enter himself to serve as a soldier, or to be employed by serving in any warlike or military operation in the service of, or for or under or in aid of, any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, &c., either as an officer or soldier, or in any other military capacity.

Or accepting, or agreeing to take or accept, any commission, warrant, or appointment as an officer, or enlisting or entering himself to serve as a sailor or marine, or to be employed or engaged, or serving in and on board any ship or vessel, used or fitted out, or equipped, or intended to be used, for any warlike purpose in the service of or for or under, or in aid of any foreign power, prince, &c.

Or engaging, contracting, or agreeing to go or going to any foreign state, country, &c., or to any place beyond the seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea, or in the service of or for, or under or in aid of any person or persons exercising, or assuming to exercise the powers of government in or over any foreign country, &c., either as an officer or soldier, or in any other military capacity, or as any officer, or sailor, or marine, in any such ship, or vessel, as aforesaid, although no enlisting money, or pay, or reward shall have been, or shall be, in any or either of the cases aforesaid, actually paid to or received by him, or by any person to or for his use or benefit.

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Or any person whatever, within the United Kingdom of Great Britain and Ireland, or in any part of his majesty's dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to his majesty, hiring, retaining, engaging, or procuring, or attempting or endeavouring to hire, &c., any person or persons whatever to enlist or to serve, or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, for or under, or in aid of any foreign prince, &c.; or to go to, or agree to go, or embark from any part of his majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed, as aforesaid, whether any enlisting money, pay or reward, shall have been, or shall be, actually given or received or not.

Any person within any part of the United Kingdom, or in any part of his majesty's dominions beyond the seas, without the leave and licence of his majesty for that purpose had and obtained as aforesaid, equipping, furnishing, fitting out, or arming, or attempting, or endeavouring to equip, &c., or procuring to be equipped, &c., or knowingly aiding, assisting, or being concerned in the equipping, &c., of any such ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, &c., as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects or citizens of any prince, &c., or against the persons exercising or assuming to exercise the powers of government in any colony, &c., or against the inhabitants of any foreign colony, &c., with whom his majesty shall not then be at war; 59 Geo. III. c. 69, s. 7.

Or issuing or delivering any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid.

Any person in any part of the United Kingdom, or of his majesty's dominions beyond the seas, without the leave and licence of his majesty, as aforesaid, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increasing or augmenting, or procuring 59 Geo. III. c. 69, s. 8.

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to be increased, &c., or knowingly being concerned in increasing, &c., the warlike force of any ship or vessel of war, or cruiser, or other armed vessel, which at the time of her arrival in any part of the United Kingdom, or any of his majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign prince, &c.

9 Geo. IV. c. 31, s. 20. Taking, or causing to be taken, any unmarried girl, being under the age of sixteen years, out of the possession, and against the will of her father or mother, or of any other person having the lawful care or charge of her.

9 Geo. IV. c. 31, s. 23. Arresting any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of the persons so arresting, be going to perform the same, or returning from the performance thereof.

2 Will. IV. c. 16, s. 15. Officer of excise delivering out, or suffering to be delivered out, any paper, prepared or provided, or appointed by the commissioners of excise to be used for permits in blank, or before such permit shall be filled up and issued agreeably to, and in conformity with a request note, or knowingly giving or granting any permit to any person not entitled to receive the same, or knowingly giving or granting any false or untrue permit, or making any false or untrue entry in the counterpart of any permit given or granted by him, or knowingly or willingly receiving or taking any goods or commodities into the stock of any person or persons, brought in with any false, or untrue, or fraudulent permit, or knowingly or willingly granting any permit for the removal of any goods or commodities out of, or from the stock of any person or persons who shall have received or retained such goods or commodities, or any of them, under, or by virtue or pretext of any false, untrue, forged, or fraudulent permit, or knowingly or willingly giving any false credit in the stock, so as to enable such person or persons falsely and fraudulently to obtain a permit or permits; or knowingly or willingly suffering the same to be done directly or indirectly.

5 & 6 Will. IV. c. 19, s. 40. Master of a ship belonging to any subject of the United Kingdom, forcing on shore, and leaving behind, or otherwise wilfully and wrongfully leaving behind on shore, or at sea, in any place, in or out of his majesty's dominions, any person belonging to his crew, before the return to, or arrival of such ship in the United Kingdom, or before

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the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not.

Imprisonment for three years, and fine at the king's pleasure.

Champerty (as well those who shall be attainted thereof as those who consent thereunto).

3 Edw. I. c. 25.
13 Edw. I. St. 1, c. 49.
28 Edw. I. St. 3, c. 11.
33 Edw. I. St. 2.
——— St. 3.
4 Edw. III. c. 11.
20 Edw. III. c. 4.
——— c. 5.
7 Rich. II. c. 15.
32 Hen. VIII. c. 9.

Maintenance (as well those who shall be attainted thereof, as those consenting thereunto).

3 Edw. I. c. 28.
——— c. 33.
33 Edw. I. St. 3.
1 Edw. III. St. 2, c. 14.
4 Edw. III. c. 11.
20 Edw. III. c. 4.
——— c. 5.
1 Rich. II. c. 4.
7 Rich. II. c. 15.
32 Hen. VIII. c. 9.

Great Forfeiture.

By force of arms, or by malice or menacing, disturbing any, to make free election.

3 Edw. I. c. 5.

To be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them, or any of them.

Any person having been educated in, or at any time having made profession of, the Christian religion within this realm, asserting, or maintaining by writing, printing, teaching, or advised speaking, there are more gods than one, or denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of Divine authority.

9 & 10 Will. III. c. 32, s. 1.
53 Geo. III. c. 160, s. 2.

Imprisonment for the space of three years, without bail or mainprise, and the offender to be disabled to sue, pro-

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secute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever, within this realm.

9 & 10 Will. III. c. 32, s. 1.
53 Geo. III, c. 160, s. 2.

Any person being a second time lawfully convicted of all or any of the crime or crimes lastly hereinbefore mentioned.

Imprisonment and hard labour, for any period of time not exceeding three years.

7 Geo. IV. c. 57, s. 70.
2 Will. IV. c. 44.

Prisoner for debt, with intent to defraud his or her creditors or creditor, wilfully and fraudulently omitting in his or her schedule, sworn to as directed by 7 George IV. c. 57, (an act to amend and consolidate the laws for the relief of insolvent debtors in England,) any effects or property whatsoever, or retaining or excepting out of such schedule, as wearing apparel, bedding, working tools, and implements, or other necessaries, property of greater value than 20*l.*, or aiding or assisting him to do the same.

Imprisonment for any term not exceeding three years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

2 Will. IV. c. 34, s. 8.
1 Vic. c. 90, s. 5.

Being possessed of three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same.

Imprisonment with hard labour, for any term not exceeding three years, either in addition to, or in lieu of, any other punishment, or penalty which may by law be inflicted or imposed upon the offender, as the court shall think fit.

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With force or violence assaulting or resisting (being armed with any offensive weapon whatever) any officer of the excise, or any person employed in the revenue of the excise, or any acting in the aid or assistance of such officer or person so employed, who, in the execution of his office or duty, shall search for, take, or seize, or shall endeavour, or offer to search for, &c., any goods or commodities forfeited under, or by virtue of, any act or acts of parliament relating to the revenue of excise or customs, or who shall search for, &c., any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods, &c., or who shall arrest, or endeavour, &c., to arrest any person carrying, removing, or concealing the same, or employed or concerned therein, and liable to such arrest. 7 & 8 Geo. IV. c. 53, ss. 40, 43.

Fine and imprisonment, with or without hard labour, not exceeding two years, and sureties, if required, to keep the peace.

Assaulting, with intent to commit felony; or assaulting any peace-officer or revenue-officer, in the due execution of his duty, or any person acting in aid of such officer; or assaulting any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he may be liable by law to be apprehended or detained; or committing any assault in pursuance of any conspiracy to raise the rate of wages. 9 Geo. IV. c. 31, s. 25.

Assaulting, or resisting any constable appointed by virtue of 1 & 2 William IV. c. 41, (an act for amending the laws relative to the appointment of special constables, &c.,) whilst in the execution of his office, or promoting, or encouraging any other person so to do. 9 Geo. IV. c. 31, 25. 1 & 2 Will. IV. c. 41, s. 11.

Fine and imprisonment, not exceeding two years, at the discretion of the court.

Attending or being present at any meeting or assembly for the purpose of being, or at any meeting or assembly being, trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, such meeting or assembly being without any lawful authority 60 Geo. III. & 1 Geo. IV. c. 1, s. 1.

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of his majesty, or the lieutenant, or two justices of the peace of any county, or riding, or of any stewartry, by commission or otherwise, for so doing.

Imprisonment for two years.

4 Hen. VII. c. 20.

The defendant or defendants in any action popular, pleading any manner of recovery of action popular, in bar of the said action, when the said recovery was had by covin, or else that he or they before that time barred the plaintiff or plaintiffs, having been barred in the said action popular by covin.

Imprisonment in the common gaol or house of correction for any time not exceeding two years, nor less than six calendar months, in the discretion of the court.

39 & 40 Geo. III. c. 60, s. 14. [local and personal]

Certifying or declaring any matter or thing which shall be false or untrue, in any certificate or declaration which the committee for the time being of the corporation of the president, vice-presidents, treasurer and guardians of the asylum for the reception of orphan girls, the settlements of whose parents cannot be found, or any three or more of them present at their weekly or other meetings, shall or may require to be made and subscribed previous to and for the purpose of the admission of any orphan girl into the said asylum, according to the rules of the said charity.

Imprisonment for any term not exceeding two years, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

2 Will. IV. c. 34, s. 7. 1 Vic. c. 90, s. 5.

Tendering, uttering, or putting off any false or counterfeit coin, resembling or apparently intended to resemble, or pass for, any of the king's current gold or silver coin, knowing the same to be false, &c., and at the time of such tendering, &c., having in his possession, besides the false, &c., coin so tendered, &c., one or more piece or pieces of false, &c., coin resembling, &c., any of the king's current gold or silver coin, or either on the day of

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such tendering, &c., any more or other false or counterfeit coin resembling any of the king's current gold or silver coin, knowing the same to be false or counterfeit.

Soliciting or endeavouring to procure any other person to commit a felony or misdemeanor punishable by the post-office acts. 1 Vic. c. 36, ss. 36, 42. 1 Vic. c. 90, s. 5.

Imprisonment, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years.

Any woman being delivered of a child, by secret burying or otherwise disposing of the dead body of the said child, endeavouring to conceal the birth thereof. 9 Geo. IV. c. 31, s. 14.

Imprisonment for a term not exceeding two years.

Entering and embarking on board, or contracting for the entering, &c., (except in such special cases as are expressly permitted by 5 George IV. c. 113, an act to amend and consolidate the laws for the abolition of the slave trade,) of any ship, vessel, or boat, as petty officer, seaman, marine, or servant, or in any other capacity, knowing that such ship, &c., is actually employed, or is in the same voyage or upon the same occasion, in respect of which they shall so enter or embark on board, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects which are by the said act declared unlawful. 5 Geo. IV. c. 113 s. 11.

Imprisonment for the space of one whole year, without bail or mainprise, and the offender to be obliged to give sureties for good behaviour in such sum, and for such time, as the court shall judge proper according to the circumstances of the offence, and, in such case, to be further imprisoned until such sureties be given.

Pretending to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration, or undertaking to tell fortunes, or pretending from skill or knowledge in any occult or crafty science to discover where or in what 9 Geo. II. c. 5, s. 4. 56 Geo. III. c. 138, s. 2.

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manner any goods or chattels supposed to have been stolen or lost may be found.

Imprisonment for one year, and grievous fine to the king.

13 Edw. I. St. 1, c. 12.
1 Rich. II. c. 13.

By malice procuring any indictment against the judges of holy church, for having cognizance in cases of tithes, or other things which of right ought, and of old times were wont, to pertain to the spiritual court, or against any other persons thereof meddling according to the law.

Grievous amercement.

52 Hen. III. c. 4.

Taking great and unreasonable distresses.

52 Hen. III. c. 23[11].

Fermors, during their terms, making waste or exile of house, woods, and men, or of anything belonging to the tenements that they have to farm, without special licence had by writing of covenant, making mention that they may do it.

3 Edw. I. c. 35.

Great men or their bailiffs, or others (except the king's officers), at the complaint of any, or by their own authority, attaching others passing through their jurisdiction with their goods, and compelling them to answer afore them upon contracts, covenants, and trespasses, done out of their power, and out of their jurisdiction, where indeed they hold nothing of them, nor within the franchise where their power is.

Fine of £10 and imprisonment for one year.

5 Eliz. c. 15, s. 2.

Advisedly and directly advancing, publishing, and setting forth by writing, printing, signing, or any other open speech or deed, to any person or persons, any fond, fantastical, or false prophesy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, insurrection, dissention, loss of life, or other disturbance within this realm, and other of the queen's dominions.

[11] Vide etiam 6 Edward I. St. 1, c. 5; 13 Edward I. St. 1, cc. 36, 37.

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One year's imprisonment, and fine and ransom at the king's pleasure.

Any spiritual person, by the occasion of the fulminations of any interdictions, censures, inhibitions, excommunications, appeals, suspensions, summons, or other foreign citations for the causes mentioned in 24 Henry VIII. c. 12 (an act for the restraint of appeals), or for any of them, refusing to minister or cause to be ministered the sacraments, sacramentals, and other divine services, as Catholic and Christian men owen to do.

24 Hen. VIII. c. 12, s. 3.
1 Eliz. c. 1, s. 4.

Amercement and otherwise, according as of old times hath been used to be done within the realm of England in the like case.

Any person having the summons of parliament, (be he archbishop, bishop, duke, earl, baron, banneret, knight of the shire, citizen of city, burgess of borough, or other singular person or commonalty,) absenting himself, and coming not at the said summons (except he may reasonably and honestly excuse himself to our lord the king).

5 Rich. II. St. 2, c. 4.

Imprisonment for a year and a day, and, if the trespass require greater punishment, at the king's pleasure.

Any serjeant, pleader, or other, doing any manner of deceit or collusion in the king's court, or to beguile the court or the party.

3 Edw. I. c. 29.

Imprisonment for one year at the least, or imprisonment with hard labour, for any term not exceeding one year, either in lieu of, or in addition to, the first-named punishment.

Rioters being attainted of great and heinous riots.

17 Rich. II. c. 8.
2 Hen. V. St. 1, c. 8.
3 Geo. IV. c. 114[12].

Imprisonment for the space of one whole year.

Willingly and wittingly hearing and being present at any other manner or form of common prayer, of administration of the sacraments, of making of ministers in the churches, or of any other rites contained in the Book of

5 & 6 Edw. VI. c. 1, s. 6.

[12] 13 Henry IV. c. 7; 1 George I. St. 2, c. 5.

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Common Prayer, than is meant and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in 2 & 3 Edward VI. c. 1 (an act for uniformity of service and administration of sacraments throughout the realm), and being thereof lawfully convicted (for the second offence).

1 Eliz. c. 2, s. 5[13].

Any manner of parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer mentioned in the said Book of Common Prayer, or that ought or should minister the sacraments, committing any of the offences mentioned in 1 Elizabeth, c. 2, s. 4, (previously enumerated at pages 1090, 1091) and being thereof lawfully convicted—(for the second offence).

1 Eliz. c. 2, s. 7.

Any person not being beneficed, nor having any spiritual promotion, offending and being lawfully convicted concerning any of the premises—(for the first offence).

Imprisonment with hard labour in the common gaol or house of correction, for any term not exceeding twelve nor less than six calendar months.

33 Geo. III. c. 67, s. 1.
41 Geo. III. (U. K.) c. 19, s. 4.

Any seamen, keelmen, casters, ship-carpenters, or other persons, riotously assembled together, to the number of three or more, unlawfully and with force preventing, hindering, or obstructing the loading, or unloading, or the sailing, or navigating, of any ship, keel, or other vessel, or unlawfully and with force, boarding any ship, &c., with intent to prevent, &c., the loading, &c., of such ship, &c.

Forfeiture of all the offender's goods and chattels, as well real as personal, and if he shall not have or be worth of his proper goods and chattels to the value of £20, at the time of his conviction or attainder, then, over and besides the forfeiture of his goods and chattels, imprisonment for the space of one whole year, without bail or mainprise.

1 Eliz. c. 1, ss. 27, 28.

By writing, printing, teaching, preaching, express words, deed, or act, advisedly, maliciously, and directly affirming, holding, standing with, setting forth, maintaining, or defending the authority, pre-eminence, power,

[13] Vide etiam 2 & 3 Edward VI. c. 1.

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or jurisdiction spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate whatsoever, heretofore claimed, used, or usurped within this realm, or any dominion or country being within or under the power, dominion, or obeysance of her highness; or advisedly, maliciously, and directly putting in use, or executing any thing for the extolling, advancement, setting forth, maintenance, or defence of any such pretended or usurped jurisdiction, power, pre-eminence, and authority, or any part thereof; or abetting, aiding, procuring, or counselling therein—(for the first offence).

Imprisonment for any term not exceeding one year, with or without hard labour, in the common gaol or house of correction, and to be kept in solitary confinement for any portion or portions of such imprisonment, not exceeding one month at a time, or three months in the space of one year, as to the court in its discretion shall seem meet.

Tendering, uttering, or putting off, any false or counterfeit coin, resembling, or apparently intended to resemble, or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit.

2 Will. IV. c. 34, ss. 12, 19.
1 Vic. c. 90, s. 5.

Tendering, uttering, or putting off, any false or counterfeit coin, resembling, &c., any of the king's current copper coin, knowing the same to be false or counterfeit, or having in his custody or possession three or more pieces of false or counterfeit coin, resembling, &c., any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same.

2 Will. IV. c. 34, ss. 12, 19.
1 Vic. c. 90, s. 5.

Fine of £100, or, at the discretion of the court, commitment to the common gaol or house of correction, there to be kept to hard labour for any term not exceeding one year.

After sunset and before sunrise between the 21st of September and the 1st of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time in the year, making, or causing to be made, or aiding or assisting in making,

3 & 4 Will. IV. c. 53, s. 53.

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any signal in or on board, or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board of any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to notice any such signal.

Forfeiture of five times the value of all moneys above ten pounds, won by gaming, at one sitting, and the offender to be deemed infamous.

9 Anne, c. 14, s. 5 [14]. By any fraud or shift, cousenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, tables, tennis, bowls, or other game or games whatsoever, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, winning, obtaining, or acquiring, to oneself or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever; or at any one time or sitting, winning of any one or more person or persons whatsoever, above the sum or value of 10*l.*

Penalty of £500. and removal from office, and rendered incapable for ever after of holding any office in same court, or otherwise serving his majesty, his heirs, or successors.

1 & 2 Will. IV. c. 56, s. 58. Judge, commissioner, registrar, deputy registrar, clerk, messenger, assignee, or any other officer or person whatsoever, fraudulently and wilfully demanding or taking, or appointing or allowing any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, emolument, gratuity, sum of money, or anything of value whatsoever, for anything done or pretended to be done under 1 & 2 William IV. c. 56, (an act to establish a court in bankruptcy,) or any other act relating to bankruptcy, or

[14] Vide etiam 56 George III. c. 138.

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under colour of doing anything under that act, or any other such acts, other than is allowed by that act and any other such act as aforesaid.

Master in ordinary of the high court of Chancery, or any person holding any office, situation, or employment, in any office of the said court, or under any of the judges or officers thereof, wilfully taking, demanding, receiving, or accepting, or appointing or allowing any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him or for any other person by him named, any fee, gift, gratuity, or emolument, or anything of value, other than what is allowed and directed to be taken by him, for anything done or pretended to be done relating to his office, situation, or employment, or under colour of doing anything relating to his office, &c.

3 & 4 Will. IV. c. 94, s. 41.

Forfeiture of four hundred marks, or, if the offender do not pay the same within six weeks after his conviction, twelve months' imprisonment instead.

Committing any of the offences mentioned in 1 Elizabeth, c. 2, s. 9, (an act for the uniformity of common prayer and service in the church, and administration of the sacraments, previously enumerated at pp. 1090, 1091), and being thereof lawfully convicted (for the second offence).

1 Eliz. c. 2, ss. 10, 13[15].

Forfeiture of one hundred marks, or, if the offender do not pay the same within six weeks after his conviction, six months' imprisonment instead.

Committing any of the offences mentioned in the 1 Elizabeth, c. 2, s. 9, (and which have been stated at pp. 1090, 1091,) and being thereof lawfully convicted (for the first offence).

1 Eliz. c. 2. ss. 9, 12[16].

Imprisonment for six months.

Willingly hearing and being present at any other manner or form of common prayer, of administration of

5 & 6 Edw. VI. c. 1, s. 6[17].

[15] Vide etiam 2 & 3 Edward VI. c. 1.
[16] Ibid.
[17] Ibid.

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the sacraments, of making of ministers in the churches, or of any other rites contained in the Book of Common Prayer than is mentioned and set forth in the said book, or that is contrary to the form of sundry provisions and exceptions contained in 2 & 3 Edward VI, c. 1, (an act for uniformity of service and administration of sacraments throughout the realm,) and being thereof lawfully convicted (for the first offence).

1 Eliz. c. 2, s. 4[18].

Any manner of parson, vicar, or other whatsoever minister, that ought or should sing or say common prayer, mentioned in the said Book of Common Prayer, or that ought or should minister the sacraments, committing any of the offences mentioned in 1 Elizabeth, c. 2, s. 4, and being thereof lawfully convicted (for the first offence).

8 Eliz. c. 2, s. 4.

By any way or mean maliciously, or for vexation and trouble, causing or procuring any other person or persons to be arrested or attached to answer in the court of the Marshalsea, or in any court within the city of London, or in any city, borough, town corporate, or other place or places where any liberty or privilege is used to hold plea in any action or actions personal, at the suit or in the name of any person or persons, where indeed there is no such person or persons known, or without the assent, consent, or agreement of such person or persons, at whose suit or in whose name such arrest or attachment is so had and procured.

Fine not exceeding £20, or imprisonment not exceeding three calendar months, or both, and the offender to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at a time, in the common gaol or house of correction, as to the court in its discretion shall seem meet.

7 & 8 Geo. IV. c. 29 ss. 4, 36.
1 Vic. c. 90, s. 5.

Using any drudge, or any net, instrument, or engine whatsoever, within the limits of any oyster-fishery, being the property of any other person, and sufficiently marked out and known as such, for the purpose of taking oysters

[18] Vide etiam 2 & 3 Edward VI. c. 1.

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or oyster-brood, although none shall be actually taken; or with any net, instrument, or engine, dragging upon the ground or soil of any such fishery.

Imprisonment for a term not exceeding three months, or fine not exceeding £50, at the discretion of the court.

Offending against the provisions of the act for regulating schools of anatomy. 2 & 3 Will. IV. c. 75, s. 18.

Fine not less than £20, and imprisonment, with or without hard labour, as may be awarded against him by the court.

Neglecting or disobeying any of the rules, orders, or regulations of the poor-law commissioners or assistant commissioners, or being guilty of any contempt of the commissioners sitting as a board,—upon a third and every subsequent conviction. 4 & 5 Will. IV. c. 76, s. 98.

One month's imprisonment at the least, fine, and forfeiture.

Willingly using, or causing to be used, any act or acts, mean or means, to, in, or with any kind of linen cloth, whereby the same shall be deceitful or worse to and for the good use thereof. 1 Eliz. c. 12, s. 1.

Fine of £40.

Transporting, bringing, or conveying into this realm of England or Wales, any outlandish persons calling themselves, or commonly called, Egyptians. 1 & 2 Phil. & Mary, c. 4, s. 2.

Imprisonment until the offender brings into court him which was the first author of the tale (vide infra), *and if he cannot find him, then the offender to be punished by the advice of the council.*

Telling or publishing any false news or tales, whereby discord, or occasion of discord, or slander, may grow between the king and his people, or the great men of the realm. 3 Edw. I. c. 34. 12 Rich. II. c. 11.

Devising, speaking, or telling any false news, lies, or other such false things, of prelates, dukes, earls, barons, 3 Edw. I. c. 34. 2 Rich. II. St. 1. c. 5 12 Rich. II. c. 11.

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and other nobles and great men of the realm, and also of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justices of the one bench or of the other, and of other great officers of the realm, whereof discord or any slander might arise within the same realm.

Fine according to the trespass.

52 Hen. III. c. 1. Taking any revenge or distress of one's own authority without award of the king's court.

52 Hen. III. c. 2. Any person (of what estate soever he be) distraining any to come to his court, which is not of his fee, or upon whom he hath no jurisdiction, by reason of his hundred or bailiwick, or taking distresses out of the fee or place where he hath bailiwick or jurisdiction.

52 Hen. III. c. 3. Any person (of what estate soever he be) not suffering such distresses as he hath taken to be delivered by the king's officers after the law and custom of the realm, or not suffering summons, attachment, or executions of judgments given in the king's court, to be done according to the law and custom of the realm.

52 Hen. III. c. 4. One neighbour causing any distress that he hath taken of another, to be driven out of the country where it was taken, of his own authority and without judgment.

52 Hen. III. c. 4.
3 Edw. 1, c. 16. Taking, and causing to be taken, the beasts of another, chasing them out of the shire where the beasts were taken.

52 Hen. III. c. 4.
3 Edw. I, c. 16. Any person taking beasts wrongfully, and distraining out of his fee.

Fine and ransom at the king's will and pleasure.

7 Rich. II. c. 4. Any officer of the forest taking or imprisoning any man without due indictment, or being taken with the mainour, or trespassing in the forest; or constraining any man to make any obligation or ransom to him in any sort against his agreement and the assise of the forest.

8 Rich. II. c. 4. Any judge, or clerk, falsely entering pleas, rasing rolls, or changing verdicts (so that by such default there ensueth disherison of any of the parties).

2 & 3 Edw. VI. c. 6, s. 3. The admiral, or any officer or minister, officers or ministers of the admiralty for the time being, in any

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wise exacting, receiving, or taking by himself, his servant, deputy, servants, or deputies, of any merchant or fisherman, using and practising the adventures and journeys into Iceland, Newfoundland, Ireland, and other places commodious for fishing and the getting of fish, in or upon the seas or otherwise, by way of merchandize in those parts, any sum or sums of money, doles or shares of fish, or any other reward, benefit, or advantage, whatsoever it be, for any licence to pass this realm to the said voyages or any of them; or upon any respect concerning the said voyages, or any of them, (for the second offence).

Grievous fine to the king.

Not being ready and apparelled at the commandment and summons of sheriffs, and at the cry of the country, to sue and arrest felons, when any need is, as well within franchise as without. 3 Edw. I c. 9.

Grievous punishment.

In any city, borough, town, market, or fair, distraining any foreign person, (which is of this realm,) for any debt wherefore he is not debtor or pledge. 3 Edw. I. c. 23.

When a debtor can find able and convenient surety until a day before the day limited to the sheriff, within which a man may purchase, remedy, or agree for the demand, not releasing the distress in the mean time. 28 Edw. I. St. 3, c. 12.

Amercement at the king's pleasure.

Deforcing widows of their dowers or quarantine of the lands, whereof their husbands died seised, and the same widow, after, recovering by plea. 20 Hen. III. c. 1.

Fine at the discretion of the court, so that the same do not in any case exceed £100.

Any employer of any artificer in any of the trades mentioned in 1 & 2 William IV. c. 37, (an act to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm,) by himself, or by the agency of any other person or persons, directly or indirectly entering into any contract, or making any payment declared illegal by such act (for the third offence). 1 & 2 Will. IV. c. 37, s. 9.

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Fine of £5, and avoidance of sale, &c.

31 Eliz. c. 12, s. 2.

Any person in any fair or market, selling, giving, exchanging, or putting away any horse, mare, gelding, colt, or filly, unless the toll-taker there, or (where no toll is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall take upon him perfect knowledge of the person so selling, &c., any horse, &c., and of his true Christian name, surname, and place of dwelling, or resiancy, and shall enter all the same his knowledge into a book there kept for sale of horses; or else, that he so selling, &c., any horse, &c., shall bring unto the toll-taker, or other officer aforesaid, one sufficient and credible person that can, shall, or will, testify and declare unto and before such toll-taker, &c., that he knoweth the party so selling, &c., such horse, &c., and his true name, surname, mystery, and dwelling-place, and there to enter or cause to be entered in the book of the said toll-taker, &c., as well the true Christian name, &c., of him that so selleth, &c., such horse, &c., as of him that so shall testify or avouch his knowledge of the same person, and shall also cause to be entered the very true price or value that he shall have for the same horse, &c., so sold; or any person taking upon himself to avouch, &c., that he knoweth the party so offering to sell, &c., such horse, &c., unless he do indeed truly know the same party, and shall truly declare to the toll-taker, &c., as well the Christian name, &c., of himself, as of him, or for whom he maketh such testimony and avouchment; and any toll-taker, or other person keeping any book of entry of sales of horses, in fairs or markets, taking or receiving any toll, or making entry of any sale, &c., of any horse, &c., unless he knoweth the party that so selleth, &c., any such horse, &c., and his true Christian name, &c., or the party testifying and avouching his knowledge of the same person, so selling, &c., such horse, &c., and his true Christian name, &c., and making a perfect entry into the said book of such his knowledge of the person and of the name, &c., of the same person, and also the true price or value that shall be *bona fide* taken or had for any such horse, &c., so sold, &c., so far as he can understand the same, and then giving to the party so buying, or

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taking by gift, exchange, or otherwise, such horse, &c., requiring and paying 2*d.* for the same, a true and perfect note, in writing, of all the full contents of the same, subscribed with his hand.

Fine 40*s.*

The owner, governor, ruler, fermer, steward, bailiff, or chief keeper of any fair and market overt within this realm, not appointing and limiting out, yearly, a certain and special open place within the town, place, field, or circuit, where horses, mares, geldings, and colts, have been and shall be used to be sold in any fair or market overt, and not appointing there one sufficient person or more, to take toll and keep the same place from ten o'clock before noon until sunset of every day of the aforesaid fair and market. 2 & 3 P. & M. c. 7, s. 2.

Any toll-gatherer, his deputy or deputies, during the time of every the said fairs and markets, not taking their due and lawful tolls for every such horse, &c., at the said open place to be appointed as aforesaid, and betwixt the hours of ten o'clock in the morning and sunset of the same day, if it be tendered; or taking the same at any other time or place; or not having presently before him or them, at the taking of the same toll, the parties to the bargain, exchange, gift, contract, or putting away of any such horse, &c.; and also the same horse, &c., so sold, exchanged, or put away; and not then writing, or causing to be written in a book, to be kept for that purpose, the names, surnames, and dwelling places of all the said parties, and the colour, with one special mark, at the least, of every such horse, &c.

Any toll-gatherer, or keeper of the said book, not bringing and delivering his said book within one day next after every such fair or market, to the owner, &c., of the said fair or market, or such owner, &c., of the said fair or market; or such owner, &c. not then causing a note to be made of the true number of all the horses, &c., sold at the said market or fair, and then subscribing his name, or setting his mark thereunto. 2 & 3 P. & M. c. 7, s. 3.

To be disabled and made incapable ipso facto *to bear office, and disabled to make any gift, grant, conveyance, or*

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other disposition of any of one's lands, tenements, hereditaments, goods, or chattels, or to take any benefit of any gift, conveyance, or legacy to one's own use.

16 Car. I. c. 10, s. 6.

Any lord chancellor, or keeper of the great seal of England, lord treasurer, keeper of the king's privy seal, president of the council, bishop, temporal lord, privy councillor, judge or justice, whatsoever, offending or doing any thing contrary to the purport, true intent, and meaning of 10 Car. I. c. 10, (an Act for the regulating of the privy council, and for taking away the court commonly called the Star Chamber,) for the third offence.

ANALYSIS OF CRIMES COMMITTED IN 1837.

The criminal tables exhibit a considerable increase in the number of offenders brought before the criminal courts in 1837. Comparing the total numbers in England and Wales, in the years 1836 and 1837, the increase in the latter year amounts to 2628 persons, or nearly 12·5 per cent. Comparing the numbers in 1837 with the average of the three preceding years, the increase in 1837 is 2224 persons, or 10·4 per cent. If these general results are examined in detail, it will be found that an increase has taken place in thirty-three English counties, and in both North and South Wales. In eight counties it has exceeded 30 per cent., in nine counties it has been between 20 and 30 per cent., and in ten counties it has been between 10 and 20 per cent. These counties are,—

Counties in which crime has increased.

	Per Cent.		Per Cent.
Northampton	59	Durham	23
Stafford	43	Essex	21
Cornwall	42	Hereford	21
Leicester	39	Derby	18
Wilts	36	Southampton	12
Bucks	34	Rutland	12
Dorset	33	Chester	11
Berks	32	Northumberland	11
Somerset	29	Oxford	11
Monmouth	28	Salop	11
Devon	27	Sussex	10
Worcester	25	York	10
Westmoreland	25	Gloucester	10
Lancaster	24		

Of the remaining six counties, the increase in Cumberland is 8 per cent., in Warwick 7 per cent., and in Hertford, Kent, Nottingham, and Lincoln, not exceeding 3 per cent. In North and South Wales, the increase is respectively 3 and 2 per cent.

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Counties in which crime has decreased.

In seven counties there has been a *decrease:* in Middlesex of 2 per cent., in Surrey of 3 per cent., and in five contiguous counties of the Norfolk circuit, viz. in Bedford of 24 per cent., Norfolk 11 per cent., Cambridge and Suffolk 7 per cent., and Huntingdon barely 1 per cent. Of the forty English counties, there has been a continuous *decrease* during each of the last three years in Middlesex and Surrey only; and during the same period, a progressive increase in Essex, Somerset, and Cumberland only.

The increase in the number may, perhaps, in a great degree, be ascribed to the increased proportion of apprehensions consequent upon the extensive establishment of an efficient police in the municipal boroughs, and to the greater facilities in criminal proceedings afforded by the extended grants of local sessions.

Increase of crime in 1837, chiefly confined to offences of the least atrocious character.

But the increase of crime in 1837, has been chiefly confined to offences of the least atrocious character. On the *first* class,—the offences against the person,—there has been a decrease of 12 per cent.; in murder, attempts to murder, and manslaughter, the decrease is 7 per cent. as compared with the preceding year, and 14 per cent. as compared with the average of the three preceding years; in the unnatural offences there has been a great decrease, so also in assaults on peace officers, and common assaults. But in rape and attempts to ravish there is an increase of 8 per cent. In the *second* class,—the violent offences against property,—the increase of the last year is 6 per cent.; but, if compared with the average of the three preceding years, it is reduced to 2 per cent. The principal increase in the second class has been in burglary, and in house, shop, and warehouse breaking; in sacrilege and robbery there has been a decrease. The gradual but certain proportional decrease, which the total numbers, charged with violent offences against the person and against property, included in the above two classes, have borne to the total of offences, is worthy of observation. This proportion was,—

	Per Cent.		Per Cent.
In 1834 - -	17·44	In 1836 - - -	15·50
1835 - - -	16·25	1837 - -	13·21

It is in the *third* class, containing the great bulk of

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offences committed by simple theft or fraud, that the increase has principally occurred, having amounted to nearly 17 per cent. In sheep stealing there has been a considerable increase in each of the last two years, and in larceny by servants in each of the last four years. In simple larceny alone the increase exceeds 18 per cent. In malicious offences against property there has been a decrease which has reached 32 per cent., and has extended, with one exception, to every offence included in this class. In forgery and offences against the currency, there has been an increase of 27 per cent. In the *sixth* class,—the miscellaneous class,—there is a trifling increase, though there has been a marked decrease during the last three years in the offences against the game laws, which are included in it.

In looking at the increase generally, it may be observed, that assaults, both common assaults and those on peace officers, robbery, and attempts to rob, larceny from the person (picking pockets), riots, breaches of the peace, &c., which, from their nature, are immediately open to the observation and prevention of a police, have *decreased;* while, on the contrary, those offences, not so immediately within the view of a police, whose action tends rather to their detection and prosecution than to their prevention, have increased,—such as larceny in dwelling-houses, thefts by servants, embezzlement, receiving stolen goods, frauds, uttering counterfeit coin, and keeping disorderly houses.

COMPARATIVE VIEW OF THE SENTENCES PASSED ON CRIMINALS DURING 1834, 1835, 1836, 1837.

The following is a comparative view of the sentences passed during each of the last four years:—

	1834.	1835.	1836.	1837.
Death - - - - -	480	523	494	438
Transportation for life -	864	746	770	636
15 years - - -	...	...	...	66
14 years - - -	688	554	585	479
10 years - - -	...	...	...	179
7 years - - -	2,501	2,325	2,249	2,413
Other periods - -	7	4	7	12
Imprisonment for				
3 years, and above 2 years	6	11	1	14
2 years, and above 1 year	308	290	285	394
1 year, and above 6 months	1,582	1,543	1,455	1,628
6 months and under -	8,825	8,071	8,384	10,258
Whipped, fined, and discharged - - -	727	651	535	562

The sentences classed in the tables under the head "imprisoned 6 months and under," comprise so large a proportion of the punishments, that in order to show them with greater exactness, the numbers have been calculated which fall under these more minute periods, namely:—

Imprisoned	6 months,	and above	5 months	2261
"	5 months,	"	4 months	51
"	4 months,	"	3 months	748
"	3 months,	"	2 months	2461
"	2 months,	"	1 month	1731
"	1 month,	"	2 weeks	1890
"	2 weeks,	"	1 week	597
"	1 week,	"	3 days	376
"	3 days, and under			143

This calculation strongly exhibits the leniency with which the law is administered. Of the whole number convicted, 42 per cent. were sentenced to periods of imprisonment not exceeding three months; and the proportion sentenced to periods not exceeding 6 months reaches 60 per cent[19].

Leniency with which the law is administered.

[19] The numbers capitally convicted and executed in France in 1832, 1833, 1834, as compared with the same three years in England, were,—

		In France.		
1832.	Sentenced to death	90	...	Executed 41
1833.	"	50	...	" 34
1834.	"	25	...	" 15
		In England.		
1832.	Sentenced to death	480	...	Executed 34
1833.	"	523	...	" 34
1834.	"	494	...	" 17

In 1826, the numbers capitally convicted in France were 150, of whom 111 were executed.

The education of criminals in both countries has been ascertained under the same definitions, and admits therefore, of a direct comparison. In France, the instruction of those tried before the *Cours d'Assizes* only (6,952) has been ascertained. The following is the centesimal proportion:—

	France.	England and Wales.
Neither read nor write	58·7	33·52
Read and write imperfectly	29·7	52·33
Read and write well	8·7	10·56
Superior instruction	2·9	0·91

Included in the above numbers are 1,400 criminals who had undergone a previous punishment (*recidives*). They may be safely assumed to be of the worst class. Their degree of instruction has been separately distinguished. The principal difference in the results is in the most educated class:—

	Recidives.		Recidives.
Neither read nor write	59·0	Read and write well	8·1
Read and write imperfectly	31·7	Superior instruction	1·2

NOTES.

The number of executions during 1837 is far below that of any previous year on record. Eight persons only were executed, all of whom were convicted of murders of an atrocious character; two for one offence in Norfolk, and one in each of the counties of Middlesex, Surrey, Bucks, Gloucester, Worcester, and York.

TOTAL NUMBER OF THOSE WHO WERE ACCUSED OF CRIMES IN 1837, BUT SUBSEQUENTLY ACQUITTED, OR NOT PROSECUTED.

The total number acquitted was 6496: viz., on trial, 4388; had no bills found against them, 1637; not prosecuted, 471. This gives the proportion of acquittals to convictions of 1 in 3·6. The proportion acquitted in the different classes of offences, was,—

1st class	1 in 2·6	4th class	1 in 1·5
2d class	1 in 3·7	5th class	1 in 4·7
3d class	1 in 3·8	6th class	1 in 2·7

This variation in the proportion is a result which might be anticipated from the different nature of the offences of which the classes are comprised. In the offences against property, in the 2d and 3d classes, the property stolen affords not only the clue to detection, but its possession one of the strongest proofs of guilt; a proof which does not exist in the offences against the person in the 1st class, nor in the malicious offences of the 4th class. The large proportion of convictions in the 5th class may be attributed to the prosecution of offences against the currency by the officers of the mint. In uttering counterfeit coin, the proportion acquitted is only 1 in 5·6. At the same time it will be found, that the acquittals bear some proportion to the penalty attached to the offence; and that where the most severe penalties are incurred, a stronger proof is necessary to insure conviction than in the lighter offences. Taking some of the

The proportion of juvenile offenders is far greater in England and Wales than in France: but the comparison is made between the total of offences in this country and the most violent classes in France—those tried by the *Cours d'Assizes*. Aged under 16, France 1½ per cent.; England and Wales 11½ per cent.

By the French code, a material modification is made in favour of prisoners under 16 years of age. If it is decided that the prisoner committed the offence *without discernment*, he is acquitted; but, according to circumstances, he is either placed in a house of correction, to be *élevé et detenu*, or delivered to his friends. If he is found to have committed the offence with discernment, the punishment he has incurred is greatly diminished, and in no case can he be punished by death, *travaux forcés à perpétuité*, or any other punishment which includes public exposure.

offences separately—in arson and attempts to burn dwellings, &c., (offences, however, of extremely difficult proof,) the acquittals are 1 in 1·2; in murder and attempts to murder, 1 in 1·5; in rape, and assaults with intent to ravish, 1 in 1·7; in forgery, 1 in 2·5; and in robbery, 1 in 2·2; though in burglary and house-breaking, the acquittals are only 1 in 4·5,—a very high proportion, and greater than in simple larceny, in which offence they are 1 in 4·2.

Proportion of prisoners acquitted during 1834, 1835, 1836, 1837.

The proportion acquitted in each of the last four years, was

In 1834	1 in 3·5	In 1836	1 in 3·4
1835	1 in 3·5	1837	1 in 3·6

which would seem to show an increased certainty of procedure in the last year, and that the recent alteration in the law, allowing prisoners the assistance of counsel, has not caused an increase in the number of acquittals.

On a comparison of the returns from the several counties a great disproportion is exhibited in the acquittals. The general average, as before stated, is 1 in 3·6. This average has been exceeded in sixteen counties, the most prominent of which are—

Warwick	1 in 4·8	Leicester	1 in 4·1
Lancaster	1 in 4·5	Wilts	1 in 4·0
Nottingham	1 in 4·4	Bedford	1 in 4·0
Chester	1 in 4·4	Middlesex	1 in 3·9
Gloucester	1 in 4·1		

The ten counties in which the proportion acquitted was the greatest, are—

Hereford	1 in 2·2	Surrey	1 in 3·1
Monmouth	1 in 2·3	Suffolk	1 in 3·1
Cumberland	1 in 2·7	Oxford	1 in 3·1
Stafford	1 in 2·9	Cambridge	1 in 3·1
Northumberland	1 in 3·0	Devon	1 in 3·1

NUMBER OF OFFENDERS TRIED BEFORE THE DIFFERENT COURTS IN 1835 AND 1837.

The number of offenders, tried before the different courts, in the years 1835 and 1837, are as follow:—

	1837.	1835.
County Quarter Sessions' Courts	13,044	10,737
Circuit Assize Courts	3,466	3,408
Local Courts	4,027	3,737
Central Criminal Court	3,075	2,849

The proportion tried at the Quarter Sessions in 1835 was nearly 52 per cent.; in 1837 it was above 55 per cent. The proportion tried at the assizes, on the con-

NOTES.

trary, was 16 per cent. in 1835, and had decreased above 1·5 per cent. in 1837.

AGES OF THE CRIMINALS.

With respect to the ages of the criminals, the following table will show the numbers in 1837 at the different periods of life, and a comparison of the proportion at these ages in each of the last three years:—

	1837.		1836.	1835.
	Number.	Proportion.	Proportion.	Proportion.
Aged 12 years and under	358	1·52	1·84	1·67
16 years and above 12	2,296	9·72	9·71	9·70
21 years " 16	6,902	29·23	29·03	29·65
30 years " 21	7,494	31·74	31·42	31·92
40 years " 30	3,439	14·56	14·43	14·01
50 years " 40	1,571	6·65	6·76	6·60
60 years " 50	764	3·24	3·33	3·24
above 60 years - -	365	1·55	1·40	1·30
unknown - - - -	423	1·79	2·08	1·91

Juvenile delinquency.

Such particulars have been collected relative to juvenile delinquency, as could be obtained from the criminal returns, in addition to those which have been embodied in the tables. The actual ages of the prisoners contained in the first two of the above divisions, were—

	Male.	Female.		Male.	Female.
Aged 7 years -	0	1	Aged 13 years -	295	31
8 " - -	11	1	14 " -	453	65
9 " - -	22	1	15 " -	480	87
10 " - -	50	15	16 " -	734	151
11 " - -	70	12			
12 " - -	150	25	Total -	1962	334
Total -	303	55			

The offences of these prisoners are separately distinguished in the tables, but the result of the charges is not separately mentioned. This is worked out with respect to the 358 prisoners comprised in the first division, and the results will be found in the following tables.

TABLE showing the Result of the Proceedings against the Offenders, aged 12 Years and under, with reference to their respective Ages.

AGES.	TOTAL.	Death.	Transportation. 10 years.	Transportation. 7 Years.	Imprisonment.											Whipped.	Fined.	Total Convicted.	Not Guilty.	No Bill.	No Prosecution.	Total Acquitted.
					3 Years and above 2 Years.	2 Years and above 1 Year.	1 Year and above 6 Months.	6 Months and above 5 Months.	4 Months and above 3 Months.	3 Months and above 2 Months.	2 Months and above 1 Month.	1 Month and above 14 Days.	14 Days and above 7 Days.	7 Days and above 3 Days.	3 Days and under.							
7 Years . .	1	..	..	..	..	..	..	..	..	..	..	..	..	..	1	..	..	1	..	..	..	..
8 „ . .	12	..	..	1	..	..	..	..	..	..	1	2	3	1	..	..	..	8	1	2	1	4
9 „ . .	23	..	2	2	..	..	..	..	..	..	2	3	3	3	2	1	..	18	3	2	..	5
10 „ . .	65	..	..	8	..	2	1	2	..	5	7	8	5	7	..	4	1	50	8	6	1	15
11 „ . .	82	..	1	4	1	1	3	7	..	7	4	14	6	5	5	..	..	58	10	10	4	24
12 „ . .	175	1	..	19	..	..	4	8	3	20	19	31	10	19	6	4	2	146	17	6	6	29
Total .	358	1	3	34	1	3	8	17	3	32	33	58	27	35	14	9	3	281	39	26	12	77

In addition to the above terms of Imprisonment, of those aged 12 years, 32 were sentenced to be Whipped once, and 12 twice; of those aged 11 years, 15 once, 2 twice, and 1 thrice; of those aged 10 years, 12 once, and 1 twice; of those aged 9 years, 5 once, and 1 twice; and 1 aged 8 years, once.

The sentence of the capital convict was commuted to one month's imprisonment.

TABLE showing the Result of the Proceedings against the Offenders, aged Twelve Years and under, with Reference to their Offences.

OFFENCES.	TOTAL.	Death.	Transportation. 10 Years.	Transportation. 7 Years.	Imprisoned. 3 Years and above 2 Years.	Imprisoned. 2 Years and above 1 Year.	Imprisoned. 1 Year and above 6 Mths.	Imprisoned. 6 Months and under.	Whipped and Fined.	Total Convicted.	Not Guilty.	No Bill.	No Prosecution.	Total Acquitted.
Manslaughter	1	...	...	...	...	...	...	...	...	...	1	...	...	1
Assault	1	...	...	...	...	...	...	1	...	1	...	...	...	...
Burglary	1	...	...	...	...	...	...	...	...	...	1	...	...	1
House-breaking	5	...	1	2	...	...	1	...	...	4	1	...	...	1
Curtilage-breaking	3	...	...	...	...	...	...	3	...	3	...	...	...	...
Robbery	2	1	...	...	...	...	...	...	...	1	1	...	...	1
Horse Stealing	3	...	...	...	...	...	1	1	...	2	1	...	...	1
Larceny, to the Value of 5*l.*, in a Dwelling House	2	...	...	...	...	...	1	...	...	1	1	...	...	1
Larceny, from the Person	20	...	2	1	1	...	...	14	1	19	1	...	...	1
Larceny, by Servants	13	...	...	2	...	...	...	8	...	10	...	2	1	3
Larceny, simple	276	...	...	29	...	3	4	176	11	223	25	21	7	53
Stealing Fixtures	10	...	...	...	...	...	...	7	...	7	...	2	1	3
Embezzlement	2	...	...	...	...	...	...	1	...	1	1	...	...	1
Receiving Stolen Goods	7	...	...	...	...	...	...	2	...	2	2	...	3	5
Frauds and Attempts to Defraud	7	...	...	...	...	...	...	5	...	5	1	1	...	2
Arson (Capital)	1	...	...	...	...	...	...	...	...	...	1	...	...	1
Uttering Counterfeit Coin	2	...	...	...	...	...	1	...	...	1	1	...	...	1
Riot	1	...	...	...	...	...	...	1	...	1	...	...	...	...
Misdemeanor—(Administering Poison to Harass and Annoy)	1	...	...	...	...	...	...	...	...	...	1	...	...	1
Total	358	1	3	34	1	3	8	219	12	281	39	26	12	77

NOTES.

It is remarkable, that the proportion acquitted in the above tables is only 1 in 4·6; the general proportion being 1 in 3·6.

Of 301 persons (out of the above total of 358), the periods of imprisonment before trial appear from the returns; they are found to average 26 days. Of 205, who upon conviction were sentenced to terms of imprisonment, 77 had undergone, before trial, a longer imprisonment than that to which they were afterwards sentenced by the court.

DEGREES OF INSTRUCTION WHICH THE PRISONERS HAD RECEIVED.

The degrees of instruction which the prisoners of the years 1836 and 1837 had received, are as under:—

	1837.		1836.
Unable to read and write - - - -	35·65	...	33·52
Able to read and write imperfectly - -	52·08	...	52·33
Able to read and write well - - -	9·46	...	10·56
Instruction superior to reading and writing well	0·43	...	0·91
Instruction could not be ascertained -	2·18	...	2·68

Of the 358 offenders aged 12 years and under, 50 per cent. were uninstructed; 48 per cent. were able to read and write imperfectly; and little more than 1 per cent. to read and write well.

THE END.

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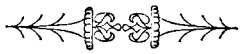

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