THE ENGLISH CONSTITUTION.

THE

ENGLISH CONSTITUTION.

148 c 269

BY

DR. EDWARD FISCHEL.

TRANSLATED FROM THE SECOND GERMAN EDITION,

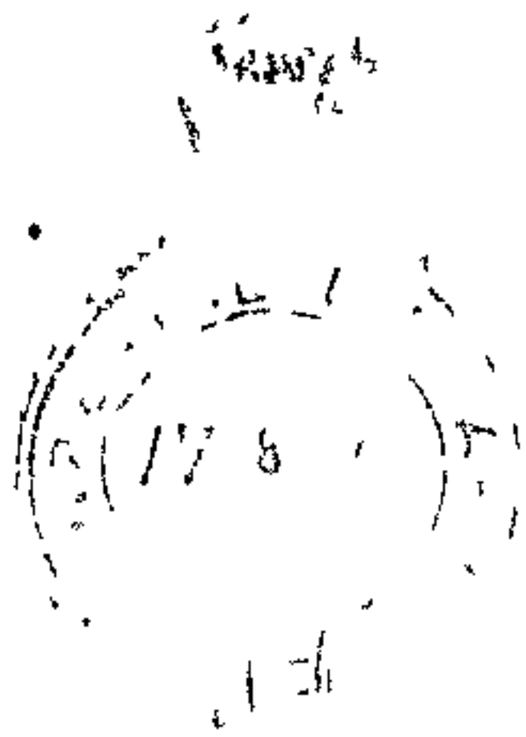
BY

RICHARD JENERY SHEE,

(OF THE INNER TEMPLE.)

"Non omnis arctatio privat libertatem,
Nec omnis districtio tollit potestatem."
(Political Poem of the 13th Century.)

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TRANSLATOR'S PREFACE.

The present volume is substantially a translation of Dr. Edward Fischel's "Verfassung Englands," a work which has obtained considerable popularity in Germany. The first edition, published in 1862, was speedily exhausted, and a second edition was urgently called for, upon which latter this translation is based.

Although the Author is thoroughly at home in his subject, having availed himself of the best text-books and, with great assiduity and laboriousness, consulted the most reliable authorities, he has, as might well be expected while treating of our complicated judicial system, fallen into occasional errors. To have allowed these to appear in the English translation, would inevitably have impaired the credit of an otherwise valuable treatise. Such modifications as were deemed necessary have accordingly been introduced.

It affords matter for congratulation that an impartial survey of that system which the enlightened efforts of Englishmen have secured for themselves should have been presented, with such completeness, to the admiration of a kindred race. The portions of the work, however, which were merely intended to impress

the German public with a reverential regard for those minutiæ of our Constitutional scheme which seem to have struck the Author as worthy of adoption, have been eliminated. Certain other omissions have likewise been made for the purpose of rendering the volume less prolix. The mode of treatment followed by the Author in mapping out his subject under distinct and separate heads, and treating each of them *independently*, has entailed an amount of repetition which it has been sought, to a certain extent, to obviate.

The opinions of Dr. Fischel have been retained intact; in certain instances, however, quotations from and references to authors who have arrived at different views have been supplied. Details of constitutional precedents which the Author has either wholly omitted or imperfectly narrated, have been incorporated with the text.

The book has been prepared not with the view of instructing the professional man, but with the object of affording to the citizen that information which is so absolutely necessary for the faithful discharge of the manifold duties of public life. How often does it happen that men, entering upon the "patrician profession of practical politics," suffer from the want of that preparatory acquirement which a good institutional treatise might afford? It is hoped that the work before us may, in some measure, meet this want, and tend to spread constitutional knowledge, while producing a deeper attachment to those institutions which even foreigners are bent on naturalizing, as far as may be, in their own land.

The Translator has aimed at two things—to deviate as little as possible from the original text; and, at the same time, to present the work in a form agreeable to the English reader.

As the subject-matter of the volume is very extensive, some errors may, notwithstanding the care employed, have escaped notice. It is hoped that a Second Edition may afford the Editor an opportunity of correcting such as may kindly be pointed out to him.

TEMPLE, *April 4th*, 1863.

ERRATA.

Page 11, ten lines from foot, *insert* "and" *before* "became."
„ 60, line 4, *for* "generally" *read* "sometimes."
„ 80, „ 4, *for* "celle" *read* "cette."
„ 90, „ 24, *for* "censure" *read* "censorship."
„ 127, „ 34, *for* "Henry VIII." *read* "Henry VII."
„ 147, last line in notes, *for* "Wilinrich," *read* "Weinreich."
„ 204, line 25, "in England" *should follow* "head of the Church," line 19.
„ 208, „ 26, *for* "Ecclesiastical Tithes Bill" *read* "Ecclesiastical Titles Bill."
„ 218, „ 16 of text, *for* "personæ" *read* "persona."
„ 224, „ 11, *for* "Statutorem" *read* "Statutorum."
„ 229, „ 6 of text, *remove the asterisk to the end of the sentence.*
„ 241, „ 8, *for* "determine" *read* "determines."
„ 242, „ 7, *for* "Charters," *read* "Chartas."
„ 243, last line in notes, *for* "Irish and Co." *read* "Irish Land Co."
„ 257, fourth line from foot of text, the semicolon *should follow* "system."
„ 278, eighth line from foot, *for* "salum," *read* "saltum."
„ 282, line 19, *for* "judge's" *read* "judges."
„ 302, „ 1, *for* "sheriff's" *read* "sheriffs."

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INTRODUCTION.

THE ENGLISH CONSTITUTION.

INTRODUCTION.

First Part.

CHARACTER OF ENGLISH CONSTITUTIONAL LAW.

CHAPTER I.

No Constitutional Records Extant.—Common-Law Origin of the Constitution.—Its Antiquity.—Saxon Constitution.—Despotism of William I.—Treatment of the Saxons.—*Feudal System.*—*Doomsday Book.*—*Leges Edwardi Confessoris.*—The French Feudal System.—Magna Charta.—Power of Legislation in the Parliament.—The Lower House.—Office of Justice of the Peace.—Fortescue on the *English Constitution.*—*Froissart on Englishmen.*—*Decline of the Aristocracy* through the Wars of the Roses.—The Tudors not Unlimited in their Rule.—New-blown Aristocracy.—French Contrasts.—The Stuarts.—Divine Right.—*Passive Obedience.*—*Petition of Right.*—*Charles I. and his Parliament.*—*Progress* of Parliament during the Reign of Charles II.—James II.—Principles of the Revolution.—William III. and the "Parties."—Power of Parliament in the 18th *Century.*—*Power of the Aristocracy.*—*Corrupt House of Commons.*—*Liberty of* England.—French Judgments.—Decline of Self-Government.—Result of Parliamentary Government.—Increasing Power in the Towns.—The Reform Bill.—*Present State of Constitutional Law.*—*Guarantees of Liberty.*—Obsolete Statutes.—Decay of the Prerogative and Royal Power.—Constitutional Experiments on the Continent.—Bunsen on Local Government.

THE English Constitution is not the result of conquest achieved by a people in revolt, nor is it derived from any "act of grace" of a liberal prince. Not by special charter, set forth in titles and paragraphs, does it assert its claim, nor by any contract between prince and people formally drawn up. *It is something more than* a Constitution in the ordinary acceptation—than a mere funda-

mental state-law ratified by document and solemnly sealed. It is not, withal, a mere array of particular charters and statutes; for the principal acts affecting political and legislative relations, from Magna Charta itself down to the Local Government Acts of 1858, comprise but a small portion of the public law of England.

The public law of England is itself but a part only of recognized English customary law in action—a part, consequently, of the "Common Law;" the charters and statutes being but the confirmation of certain fundamental principles thereof*—an assurance that it will be effectually carried out; nay, occasionally, they are even, admittedly, an infringement upon the common law itself. The high antiquity of the latter, its uninterrupted practice through the lapse of many centuries, coupled with its ever-accumulating throng of legal precedents, place Englishmen in a position to illustrate, in a manner altogether exceptional, and from original sources, the law as it actually obtains. It is, then, generally speaking, mere weakness and affectation on the part of any English student of political law, who would elucidate the English constitutional system by examples drawn from Athens and Rome,† inasmuch as the constitution of his country—in other words, the native public law—is abundantly revealed in the history and legal records of his own land. If we would, then, characterize the public law of England aright, we must wend upward to these two sources.

The Constitution of England, like that of most countries of Europe, has grown out of occasion and emergency; from the fluctuating policy of different ages; from the contentions, successes, interests, and opportunities of different orders and parties of men in the community. It resembles one of those old mansions which, instead of being built all at once after a regular plan, and according to the rules of architecture at present established, has been reared in different ages of the art, has been altered from time to time, and has been continually receiving additions and repairs suited to the taste, fortune, or conveniency of its successive proprietors. In such a building we look in vain for the elegance and proportion, for the just order and correspondence of

* "Also, by the old custom of the realm, no man shall be taken, imprisoned, disseized, nor otherwise destroyed, but he be put to answer by the law of the land. And this custom is confirmed by the statute of Magna Charta, cap. 26." —*Doctor and Student*, chap. vii.

† Palgrave, *An Essay upon the Original Authority of the King's Council*, p. 9.

parts which we expect in a modern edifice, and which external symmetry, after all, contributes much more, perhaps, to the amusement of the beholder than the accommodation of the inhabitant.*

However much the Saxon spirit may, according as party spirit urged, have been now embellished or now toned down,† yet it cannot be gainsaid that therein did the tree of English liberty strike root, and that it is accordingly of most ancient growth. England is the home of imperishable institutions. "There is nothing more wonderful in the history of our constitution," says May, "than the stability of each institution which comprises a portion of the political system, despite the constant and continuous changes which many institutions, in relation to power, influence, and privilege, incessantly undergo." "What other country in the world," asks another writer, "is there, at this moment, that is working its way with institutions that have been in action during the last two hundred years?"‡

"The present constitution of our country is to the constitution under which she flourished five hundred years ago, what the tree is to the sapling—what the man is to the boy. The alteration has been great, yet never was there a moment at which the chief part of what existed was not old."§

No revolution has ever interrupted the continuity of the English law: the revolutions of 1641 and 1688 broke out in order to protect, by fresh safeguards, the laws existing, and not to originate any more speculative law of recent conception. When again, in 1649, with the death of Charles, the monarchy lapsed for *a while, the English polity was not shaken to its centre by the* fall; the administration of justice and government retained their forms and went their wonted course. Even when the Civil War raged hottest, the twelve judges were accustomed to go their half-yearly circuit without let or hindrance. The basis of the English Commonwealth thus remained unmoved, while the topmost summits were swaying hither and thither.‖

The Saxon constitution was founded on a free peasant community, with a king at the head, hereditary only upon condition. The characteristic element of this constitution is the great soli-

* Paley, vol. iv. p. 373.
† Brougham, *Constitution*, 131.
‡ *Parl. Rememb.* iv. 1.
§ Macaulay, *Hist. Eng.*
‖ De Tocqueville, *L'Ancien Régime et la Révolution*, 321.

tude accorded to the administration of the law; and the civil regulations affecting personal security. In perfect accordance with this principle is the system of frank-pledge and the administrative division into counties, hundreds, and tithings. The political organization of the Anglo-Saxon peasant class constitutes the social groundwork of this division, inasmuch as the Saxons in England, as in Germany, settled down in separate granges, and not in town-like villages. The underlying character of the Saxon polity was of a federal nature: migrating from seven kingdoms, the subdivisions built up fresh confederations, which did not, however, relinquish dependence upon the general body.

William the Conqueror deduced, it is true, his pretended claim from the will of Edward the Confessor; but never was any nation more completely led under the yoke by another, than the Anglo-Saxon after the battle of Hastings. The property of the Saxons who fell at Hastings, or fled from the battle-field, as well as of those who had betaken themselves to Harold's standard, was confiscated.* All of Saxon race were subjected to tallage, and frequently those who were liable to such assessment were hired out to the barons. The Saxon women became the spoil of the conquerors, and even the Saxon saints were not respected.† To many women the lands of their fallen husbands were granted for life, but out of sheer compassion only; to one Saxon woman was thus accorded the usufruct of her husband's property, but merely on condition of her feeding the king's hounds. The Norman victors perpetrated, moreover, every kind of enormity; at William's coronation they set fire to London, Geoffrey of Mandevil acting with equal ruth at Cambridge. Even in the year 1124 a Saxon chronicler thus lamented: "God seeth the poor people borne down most pitiably; first robbed of possessions and then massacred: it was a miserable time."‡ Hence it is a wild fiction to assume that, because William styled himself the "*purchaser*," and not the conqueror of England, he had any reverential regard for Saxon freedom. As far as the Conqueror was concerned, never did there exist a more absolute monarchy than his; he alone had the right to originate laws, and hence his power of inflicting punishment was almost unbounded.

* Thierry, *Conquête de l'Angleterre*, i. 326.

† Thierry, i. 413; ii. 33.

‡ *The Greatest of all the Plantagenets*, p. 5.

He apportioned the conquered and confiscated estates amongst his feudal dependents; the Saxons possessed of any land were forced to hold it from the victors on feudal tenure, becoming their sub-feudatories. The feuds of the greater vassals were scant enough, however, according to the continental notion. The jurisdiction of the barons was narrowed down to penal cases of a lower grade, and to civil disputes of a petty nature: no manorial court could carry into effect a judgment otherwise than through the sheriff, through an officer of the crown consequently, and from every court-baron appeal lay to the king's court.

William did not recognize in his nobles any exemption from taxation; from their lands he compelled his vassals to discharge the same assessments which they had been wont to afford in the time of the Confessor. The distinctive characteristic of the Norman kings was their exceeding greed, and the administrative system was so directed as to insure the exaction of the highest possible imposts. From this bent originated the great *registration that* William caused to be taken of all lands, whether holden in fee or at rent; as well as the census of the entire population. The respective registers were preserved in the cathedral of Winchester, and by the Norman were designated "le grand rôle," "le rôle royal," "le rôle de Winchester;" but by the Saxons were termed "the Book of the Last Judgment," "Doomesdaege Boc," "Doomsday-book." In consequence of this compilation the *Normans themselves were subjected to the arbitrary taxation that* was levied; and, as they had no faithful sub-feudatories, were fain to submit to the burthen.

The equipoise maintained between the Normans and the Saxons renders it further apparent that William I. succeeded in carrying out unimpeded one of the greatest of political revolutions. In the general assembly, held at Salisbury in 1085, William caused not only the vassals "holding in chief" to tender the oath of fealty, but also their tenants; thus breaking in upon the feudal compact in its most essential attribute—the exclusive dependence of a vassal upon his lord—he substituted his own authority over these sub-feudatories, establishing himself thereby as "Lord Paramount."* This great fact, the qualified ownership of the vassals,

* Hallam, *Middle Ages*, ii. 315; Thierry, ii. 156. The oath runs thus: "De cette heure en ayant, je deviens votre homme liège de ma vie et de mes membres; honneur et foi porterai en tout temps pour la terre que je tiens de vous; qu'ainsi Dieu me soit en aide!"

coupled with the protection which the Saxons found against their petty tyrants under the sway of the tyrant at large, was productive of this result, that the absolute monarchy of William I., though still cramped in feudal forms, embodied already a State according to the modern conception. Hence it was that neither the dynasties of Germany, nor the greater barons of France, ventured to lift the standard of revolt in England; the sense of public tranquillity that prevailed affording but poor chance for such a venture. Any private quarrel which was not adjusted before the civil courts was regarded as a "breaking of the king's peace." The English barons did not consequently succeed in raising themselves to the position of independent princes; nor did they, as in France, remain unswerving antagonists to the body of the nation. The despotism of William and of his successors should be hailed as the progenitor of liberty and of equality before the law; the nobility, oppressed alike with the Saxons, found at last a tower of strength in the laws of the down-trodden natives.

William had confirmed the laws of Edward the Confessor, by which we are to understand simply the customary law of the Anglo-Saxons. So far as this law did not come into conflict with the feudal rights of the Normans and the power of the king, so far, accordingly, as private law and municipal administration were concerned, it was respected.* William Rufus and his successors were frequently entreated to recognize these "bonæ leges Edwardi Confessoris," and they always readily confirmed, it is true, the people's law, although persistently violating it in its political bearings.† As the ownership of land could only pass by inheritance in accordance with feudal law, all landed property being held feudally, the Norman law in this respect prevailed over the Saxon customary law. The law of the people, on the other hand, became, even to the victors, a safeguard against their superior lord; and hence the law "*common*" to every class. By degrees, also, the victors adopted the language of the vanquished. The Lord's Prayer contains sixty-five Saxon words out of sixty-nine; of the eighty-one words in Hamlet's monologue but thirteen are taken from the language of the conquerors.‡

While the Norman kings, and the first Plantagenets, intent upon rendering their subjects tractable, were imparting quickening

* Thierry, ii. 38.
† Phillipp's *Englische Rechtsgeschichte*, 183.
‡ Bucher, *Parlamentarismus*, 72.

life to the Saxon municipal and executive organization—and in no land has the unity of the state more completely existed than in the England of that day—while all the power of legislation, civil jurisdiction, and state government centred in the king and his officials, the latter being, in sooth, frequently taken from the communal body; France, on the other hand, was nothing but a vast confederacy, based on the feudal bond, and endowed with a central hereditary authority.* While the greater Norman barons enjoyed but a restricted seignorial power, and petty civil jurisdiction, the greater French vassals were, in truth, lords of the soil, having power of life and death, the privilege of coining money and of taxing the Jews. They enjoyed the right to protest against the nomination of any bishop who might not be to them a "*persona grata*," and power to make laws binding on all residing within their territory. While in England the newly-invigorated Saxon commonalty was organized into an array of stout-hearted infantry against hostile invaders; France retained, as the leading-stream of her army, the knightly bands of her noble barons.† At Crecy, Poictiers, and Agincourt, it was not merely one embattled host bearing down another, but the modern State-craft achieving its conquest over the feudal polity. The mere framework of the feudal system still endures, as it must be owned, in England: so far, however, as feudal polity converts political power into a private law, making of the king a mere lord of vassals, invested with *right and power similar with his own, it never found an embodiment in the land.* Summing up the fundamental characteristics of Norman State-craft, they may be thus enumerated: absolute monarchy; centralization in the strictest sense; the revival of spontaneous action in the commonalty, so far as needful for the maintenance of peace; the prevention of private warfare, and of a domination of robber-knights like that which prevailed in Germany.

Such kingly despotism, weighing with equal heaviness on all the subjects, evoked, some 150 years after the battle of Hastings, a spirit of union in the entire community. The barons who, at Runnymede (Runningmead), on the 16th June, 1215, wrested from John Lackland the great Charter, "Magna Charta libertatum,"

* Warnkonig, *Franzosische Rechtsgeschichte*, i. 205.

† During the reign of Henry V. the Council established that the usual proportion of archers to men-at-arms, or lances, was three archers to one lance. —Nicolas ii, 331; iii, 135.

placed reliance upon the nation at large. This great charter of liberties contains nothing but the confirmation of the Saxon law, together with certain protective clauses and exemptions from feudal burthens. It ratified the laws of Edward the Confessor and the Saxon county-organization; put a check on the jurisdiction of the king's sheriff; enjoined that such as were accused of felonies should be judged no otherwise than by verdict of their peers (pares); and regulated the judicial authority, inasmuch as the kingdom at large was endowed with a fixed court of judicature in London. Arbitrary taxes and fines were forbidden under threat of heavy penalties; and if the barons were required to bear taxation, their consent was to be previously obtained. Twenty-five barons, whose descendants have failed, were appointed guardians of Magna Charta, and invested with the privilege of summoning both barons and commoners to withstand any infringement thereof. Despite the anxious precautions for the protection of the Magna Charta, the powerful princes who flourished in the 13th and 14th centuries failed not to break through its provisions; it was, indeed, frequently confirmed, but ever and anon violated anew. At length have its fundamental principles, so far as they affect not local and prescriptive rights, become the groundwork of the modern State-government.

The Plantagenet period prepared the way for the right of the commons to initiate laws. The statutes of the Norman kings and of the first Plantagenets were mere royal ordinances, and few in number; the barons found in their good swords better protection against arbitrary power than in abiding by the laws. The Plantagenets, as a rule, did not allow the authority of their statutes to depend on any right of ratification in the commons; merely by right of petition might they have any influence on legislation, and, if the king thought fit, they might further deliberate beforehand upon the laws which he intended issuing. The right of imposing taxes only pertained, as an actual fact, to the parliament, under the most restricted conditions.*

When the representation of the municipal bodies, and of the smaller vassals, by their deputies, began to make itself felt betimes, in the 13th century, the organization of parliament by the representation of the burgesses and the inhabitants of counties

* *Sed vide* Hallam, M. A. iii. 87.

was finally adjusted by law in the reign of Edward I. As far back as the first half of the 14th century the commons separated themselves from the greater barons, and parliament appeared in two sections or houses as at the present day.

With a view to secure the maintenance of peace, the Plantagenets established the influential institution of Justices of the Peace, laying, thereby, the groundwork of the power actually enjoyed by the ruling gentry. The ancient county courts, which the Conquest had spared, now began to wane in presence of the superior authority of the greater landholders, invested as they were with the office of justice of the peace; which office speedily assumed an important part of the business of the ancient local assemblies, and concentrated in itself the keeping of the peace, criminal jurisdiction, and the organization of the militia. The establishment of such authority consequently tended to concentrate more fully the royal or political power, such power being delegated, however, to the local courts, composed of the greater landholders, having a position wholly independent.

Under the Plantagenets personal servitude began to disappear, and traces of a proletarian class became perceptible. This period is further noteworthy as affecting the bearing of England towards Rome, inasmuch as she began to drift away from the papal jurisdiction. Numerous statutes were launched against gifts in "mortmain," yet did not prevent one-fifth of the landed property being vested in the hands of spiritual corporations at the outbreak of the Reformation. To the influence of the Roman and the Canon law the Common law opposed a hardy front, and the royal courts recognized the sway of those non-native laws only within certain restricted spheres, which continued amenable to the common law courts. With the usurpation of the house of Lancaster, the power of the parliament augmented, became henceforth a significant and necessary part of the legislature. The municipal representation in the commons attained the completeright of imposing taxes. The lower house began to emancipate itself from its constituents, the right of voting for knights of the shire in the reign of Henry VI. being restricted to the forty shilling freeholders.

Fortescue alleges, in praise of the English, "that the king of England is subject to the laws; that the people impose their own taxes, are judged by a jury of their own class; that all men

are equal before the law, and that there are many small landholders."* "The king cannot tax the people arbitrarily, as they live by their own laws, and enjoy their property in liberty." "Not only is the might of the king thereby increased, but his credit likewise."† The English monarchy of the later middle ages was, consequently, limited by law and ascertained custom; there was then no question either of despotic, aristocratic, or republican government. Even under the house of Lancaster, the King and the Parliament make up the State, a constitution which even at that period found not its equal.‡ Constantly do Fortescue and the other old jurists insist that the Saxon common law is the bulwark of liberty, whereas the Justinian legislation of Byzantine stamp had elsewhere proved the grave of freedom.

The statement is subject, however, to striking exceptions; the arbitrary power of the crown is shown in the case of Nicholas Thorley, who, for having married the Countess of Oxford without the king's license, was, on the mere order of Henry V., committed to the Tower, and there kept in fetters.§ But such exceptions prove the rule; tyranny was exercised in England in direct hostility to the law; it was not the law of the realm which, as in other countries, sanctioned tyranny. What fruits Englishmen harvested in the war with France, by virtue of this constitution, has previously been shown; the historian, Froissart, says of them, "C'est le plus périlleux peuple qui soit au monde, et plus outrageux et plus orgueilleux."

The wars of the Roses, which two royal houses, with noble adherents equally antagonistic, waged against each other, retarded the internal development of England, but completely annihilated at the same time the feudal Norman nobility. Even under the house of Lancaster the barony or peerage began to become a distinct, political office, apart from any more feudal holding. The nobility had no longer any legal authority over their dependents; every baronial privilege had grown effete, and the "homage" of the tenant was become a vain and empty form.‖ After the battle of Bosworth, the Norman nobility was swept off, and the peerage

* De laudibus legum Angliæ, c. 9.

† Ib. c. 29, et quod non jugum, sed libertas est politico regere populum; securitas quoque maximo nedum plebi, sed et ipsi rẽgi, allevatio etiam non minima sollicitudinis esse.

‡ Pauli, *Englische Geschichte*, v. 661.

§ *Nicolas*, iii. 145.

‖ Palgrave, *The King's Council*.

became what it now is, a political status, transmissible by inheritance; and when compared with the caste-like nobility of the continent, having nothing in common therewith, neither privileges nor territorial power coupled with magisterial authority, nor exclusiveness. The political condition, on the assumption of power by the Tudors, is represented by Froude as being strongly monarchical; "the entire community resembled a thoroughly disciplined army."* The Tudors possessed all that supremacy which sturdy rulers achieve who have procured for a nation, long harassed by civil war, the blessings of tranquillity and peace. There was no nobility which might withstand them, and the burgesses and gentry had no ground to complain of a despotism which seldom violated their commercial or agricultural interests. The guiding principle of taxation through the intermediary of parliament had become so incorporated with the flesh and blood of the nation, that even Henry VIII., in presence of the outspoken opposition of the insurgent commons, was fain to shrink back.

"The English people was not, like the people of the Continent, a clumsily contrived coalition of burgesses and peasants gradually emancipated, but still bowed under the burden of their previous bondage. Into the ranks of the commoners, so far back as the 14th century, the majority of the feudal aristocracy was admitted; all those holders of small feuds who were neither influential nor wealthy enough to share in the superior authority with the barons, yet were proud of their origin, and long in possession of similar rights with them."—*Guizot.*

The Tudors, who had but a handful of armed satellites at their disposal, and against whom, if they sought to oppress the people, an entire nation in serried strength would have uprisen, were forced to govern according to the spirit of the nation at large. In regard to the Reformation, Henry VIII. only helped on the work of the Plantagenets; he dissolved, after a grossly despotic fashion it must be owned, the already slackening connection with Rome, enriched his coffers by the plunder of churches and monasteries, attached to himself thereby numerous adherents, and laid the groundwork of a fresh-minted aristocracy.

We find at the beginning of the reign of Henry VII. a new

* Froude, *Hist Eng.*, i. 11, 13.

and moody aristocracy, which had originated from the soldiers of the civil war, unwilling to submit to the 'oven rule of right, or to acknowledge the supremacy of the law. Nobility of blood had long ceased to exist, but pride of birth and power now strove to create the distinction between *gentle* and *non-gentle*. Attempts were made to imitate the policy of the Continent, and to establish a barrier between the noble and the roturier; but although the nation spurned the distinction,* and although such energetic princes as the Tudors strove to subdue the new aristocracy, they were unable to make head against the ever victorious endeavours of the English people to achieve political power by the acquisition of greater wealth. Vainly did they contend against the absorption of the smaller holdings, and against the accumulation of landed estates. Thus a completely new aristocratic society arose in the nation, in a free and independent manner, without its growth being favōūred by the laws, seeing that they were adverse to the accumulation of landed property and to entails. This aristocracy developed and maintained itself all the more readily from the fact of its ranks being open to every one who might achieve wealth and standing.

The Reformation became first under Elizabeth's reign, through the instrumentality of the Puritans, a thing of deeper growth, and spread abroad among the nation. Only through the indifferentism of the masses under the earlier Tudors can the sudden reaction under Mary with her Spanish connections be rightly apprehended. Even as rapidly did the Catholic church, having no further stay amongst the general body, subside anew to make way for the wrathful vengeance of the Protestant ascendancy. Although under the Tudors arbitrary courts and commissions struck down their crowds of victims; although the importance of Parliament, in presence of Henry VIII. and Elizabeth, dwindled away, yet England was not under this dynasty, either in theory or in fact, an absolute monarchy. The power of parliament in regard to taxation and legislation was recognized; there was no standing army to oppose to the national militia; nay, Henry VIII. expressly required the attendance of the yeomanry at the prescribed meetings for practice in shooting. The High Commission and the Star-Chamber were exceptional tribunals, trial by jury remaining

* Palgrave, *The King's Council*, 102.

from first to last, as a rule, the soul of civil procedure; even the infringements upon the common liberty which rulers like Elizabeth indulged in, serving but to confirm the rule. Whenever monarchy stands forth so pre-eminently as under the last Tudor queen, the people regard their rights with less jealousy than when they have to deal with royal dullards. The parliaments, however, even during Elizabeth's sway, uphold manfully their confirmed rights, and upon the money question were especially tenacious. "The word liberty," says an American historian,* "was never musical in Tudor ears, yet Englishmen had blunt tongues and sharp weapons, which rarely rusted for want of use. In the presence of a parliament and the absence of a standing army, a people accustomed to read the Bible in the vernacular, to handle great questions of religion and government freely, and to bear arms at will, was most formidable to despotism."

To appreciate aright political relations under the Tudors, the aspect of things in England should be compared with the contemporaneous condition of *France*.

To the states-general of 1576 the village of Blaigny, probably Bleigny le Carreau, in the department of the Yonne, presented a bill of plaints and grievances.† The electors therein pray:—

"Que les seigneurs ayant justice auront juges, capables et gardes de justice, comme il avoit été ordonné par les ordonnances, et deffenses d'avoir juges fermiers, à peine de reunion de leur justice au domaine du roy."

In England, on the contrary, patrimonial jurisdiction, save in certain unimportant particulars, had disappeared; the royal courts, although in part composed of the local gentry, determining almost all legal differences that arose. While in England the national militia was the army of the people, and nothing was known of the molestation of a soldiery; thus do they complain in the same bill:—

"Et comme il ne peut pis advenir au pauvre laboureur que la mort, qui ne mettra fin aux malheurs, oppressions et tyrannies que les gens de guerre ont exercé envers eux, remontre le pauvre peuple:

"Qu'il est très nécessaire, se présentant la guerre à l'avenir,

* Motley, *Hist. of the United Netherlands*.

† Augustin Thierry, *Essai sur l'Histoire du Tiers Etat*, 417.

que les gens de guerre soient élus par les provinces, et que les chefs qui en auront charge enrôleront les soldats par leur noms, surnoms, et demeurance, dont ils délivreront acte signé de leurs mains, ou autremont approuvé aux gouverneurs des pays sans que allant par pays, ils puissant changer leur noms, à peine d'être de même tous condamnables à mort."

Whilst in England the keeping of the peace was cared for by local officials without any trouble to the community, the French document thus sets forth :—

"Que les anciennes ordonnances sur le fait de la gendarmerie seront observées : et les seigneurs et les gentilshommes honorés des places que plusieurs autres occupent par faveur, et appetent les dites places pour ruiner le pauvre peuple, allant et venant par le pays, sans qu'en temps de nécessité ils ayent moyen de faire un service au roy, et se mettre en tel équipage qu'il est requis."

The taxes in England were, as a rule, very moderate, the monopolies alone being oppressive; arbitrary imposts were got rid of by means of the sword. The French, on the other hand, pray :—

"Que les surcharges extraordinaires imposées sur le peuple, mêmement les huitièmes, vingtièmes et impositions, vins entrants, gabelles de sel, et autres subsides seront abolis, et le pauvre peuple remis en l'etat et liberté tel qu'il étoit au temps de ce grand roi Louis XII., sans que à l'avenir il s'en puisse donner, *ni faire emprunt sans le consentement du peuple*. Que ceux qui ont manié les finances du roy, en rendront compte, et à l'avenir ceux qui seront introduits en telles charges, seront élus avec le peuple pour éviter à tous *concussions*."

Finally, while in England, the lord and the country squire had to bear the main burthen of taxation, the modest petition of the French communes goes no farther than this :—

"Aussi toutes personnes non nobles seront contribuables aux tailles ordinaires, et encore les nobles qui tiendront en roture, à ce que le pauvre peuple soit soulagé."

When we reflect that at the period in question the German peasant, by means of legal sophisms and lordly domination, was reduced to the condition of a serf; that in Spain, under Philip II., monarchical despotism was established and the population sifted by the Inquisition; that sanguinary civil wars, which imparted new energy to the absolute monarchy, were then desolating France;

England, under Tudor sway, both as regards the increase of power in the citizen class and of the kingdom at large, stood forth as one of the most thriving countries in Europe.

On failure of the Tudor stock, a kingly race, asserting still vaster monarchical pretensions, but devoid of all monarchical initiative and corresponding sense of obligations, ascended the throne. The commons, who had grown prosperous under the Tudors, were indisposed to recognize in a learned pedant like James I., or in a faithless trimmer like Charles I., any specially favourable manifestations of "the kingdom by the grace of God," whereon the Stuarts based their reliance. The "kingdom by the grace of God," as apprehended by the Stuarts, had been depicted by Bracton:—"The king, to wit, as God's representative, should not be able or dare to do any wrong, that is, nothing in contravention of law." The Stuarts, however, meant much more than this by their divinely-constituted kingdom, namely, that the king's will and caprice "should be law," and that all the rights of the people were mere concessions from the king, and revocable at his pleasure.*

The doctrine of passive obedience was forthwith broached, and the creatures of Charles I. declaring in parliament—"That the liberties of parliament should only be accorded by way of sufferance from the king, and that the king might rule at pleasure, either by means of special ordinances or according to the tenor of the laws." The royal signature to the "Petition of Right," was scarcely dry when the king violated it anew, and during a long intermission governed in a wholly absolute manner, without opposition and without the aid of parliament. But when urgent necessity induced the king to summon parliament anew, the respective relations had already grown so antagonistic that the commons necessarily sought for fresh safeguards, which lay partially beyond the region of actual order as by law established. Above all things, however, the Long Parliament adjusted the authority of the courts of law by enacting:—

"That neither the king nor his council should have any jurisdiction, power, or authority by bill, petition, article, libel, or in any other arbitrary way whatsoever, to try, call in question,

* In the debate on the "Petition of Right," Mr. Pym exclaimed: "There is no authority apart from the law, neither in Magna Charta nor in any other statute. Whence should we deduce it, in order to agree to it?"

determine or dispose of any estate, possession, goods, or moveable things of any subject whatsoever, but that all disputes concerning the same should be determined by the ordinary courts of the realm, and according to the ordinary course of law."

Thereby all the rights of the citizens are placed under protection of the courts and of the forms of ordinary civil procedure; a wall of separation is erected between the law of the State and administrative despotism, thus steering clear of the "conflicts of jurisdiction" and other continental shoals.* By such principles, which the omnipotence of parliament alone in after ages succeeded in obscuring, the freedom of England was secured, so far as legislative action could secure it. The omnipotence of parliament was the forced consequence of a rule like that of the Stuarts; any compromise whatever with it was impossible; it could only annihilate parliament, or must itself be trampled down by the parliament. Behind the lower house stood up the great body of the nation; in the towns, and with the majority of the small freeholders, the revolt against Charles was popular. The men of parliament who stood up against Charles I., history has ranged amongst the greatest names of all time, and even for their deeds of violence, in consideration of the pressure of events, has tendered a bill of indemnity. "Every argument which can be adduced in favour of the Revolution of 1688 may be employed with no less vigour in favour of the so-called great Rebellion."—*Macaulay*. The end of Charles assimilated with his beginning; from passages in the Bible his father and he had deduced the right to wear upon their brow the absolute crown of a David and a Solomon; on the strength of other passages from the Bible the fanatical puritans and independents tore from the king both crown and head.†

* Mr. Hyde says, touching the discretionary power of the Star Chamber in 1641: "Such confusion has the notion of 'discretionary' power evoked, that some folks regard it as an urging to violence and vengeance. In consequence of the spread and extension of this 'discretionary' power, have the poor people concluded that this same is the quicksand which has engulphed their property and their liberty."

† The wrong done to Charles I. was afterwards made use of in order to glorify him. The Whigs of the 18th century thought far otherwise about the "Royal Martyr." Chesterfield, writing to his son (*Lett.* i. 214), says "The execution of Charles has been strongly blamed but had it not taken place our liberties would have been lost." Junius writes, in his 12th letter, to the Earl of Grafton:—"Charles I. lived and died a hypocrite. Charles II. was a hypocrite of another sort, and should have died on the same scaffold." Horace Walpole (Earl of Oxford) had a copy of Charles I.'s sentence to death, hung up in his mansion, with the inscription, "Major Charta."

The internal political arrangements of the republic have passed away, but the genius of Cromwell had, during its continuance, elevated England once more to the rank of a power of the first class. Yet the republic only bequeathed to Englishmen an abhorrence for the very name, and a hatred of standing armies. Though the nation welcomed Charles II. with enthusiasm, still not a single one of the conquests which the Long Parliament had achieved did it relinquish. The parliament remained the highest power in the state; the courts maintained their competency, and the king was only able to exercise a lasting influence over the lower house by recourse to bribery. With the disappearance of the small freeholders the local institutions fell into decay, and the nation gradually got accustomed to see its liberties specially cared for by the parliament.

With James II. ended the *struggle between the Stuarts and* Parliament; he suspended the statutes in favour of his co-religionists, and was driven forth by the Dutch, who, in consequence of a conspiracy among the higher nobility, hurried to their rescue under the command of his son-in-law, William of Orange.

The principles of the mutual right of king and people, which were the starting-point of the Revolution, are still at the present day in the ascendant. In the "Memorial" addressed to the Prince of Orange (1688), inviting him to come to England, it is said:—"The truly noble monarchy was founded on equal freedom, and the civil government of England was always of right truly free, because no laws or authorities ever bound the persons and properties of the kingdom, save only those wherein the kings and all the subjects freely agreed; every subject's free consent being deemed by our laws to be given personally, as by his deputies, to the enacting and repealing of every law."

During the Revolution, parliament exercised the dictatorial power of a "National Convention." It assumed that James II. had broken the original contract between prince and people, and had, by his flight, "abdicated." The establishment of William and Mary on the throne was no less revolutionary than the exclusion of the heirs of James II. This act becomes comprehensible, however, on bearing in mind the general belief which obtained, that the Prince of Wales was a supposititious child. His having been educated as a Catholic was a further obstacle in his path. The Revolution preserved withal *its strongly conservative and aristocratic character*,

for the bulk of the people was wholly unintorested in the matter, and looked quietly on while the foreigner drove the king forth. Despite this conservative character of the Revolution, its result was "a vast extension of private feuds, sixty years of national division, and three civil wars,"*—an indication that even the most rightful revolution is, referribly to its result, a doubtful and dangerous crisis in the history of a people.

William III. treated England merely as a mean for the advancement of his political plans. "He had little esteem for the requirements of constitutional government. He badly understood the play of parliamentary parties, which was as yet but confused and poorly combined, and showed himself shocked at the selfishness of the parliamentary factions. He was jealous of his power, and frequently upheld it in opposition to his parliament with more energy than caution."—*Guizot.*

William III., however, was no longer in a position to rule after the fashion of the Stuarts.' The Jacobites were his adversaries; the Whigs, who had elevated and mainly supported him, were inclined to limit the Royal power. Only by availing himself of the two parties, the moderate Tories and Whigs, in opposition to each other, was he able to maintain his power. Hence, the *authority of parliament, as the battle-ground of the two parties,* necessarily became extended.

This power of the parliament, and of the two aristocratic sections controlling it, was in nowise narrowed under the weak and bigoted reign of Anne; as, in consequence of the Act of Settlement, a princely family of foreign lineage had mounted the throne, and was kept there only by the parliament; the supremacy of the latter being thus completely confirmed.

In the 18th century parliament was blessed with an Upper House, composed in great measure of the *novi homines* and of the heirs of peers created by the Stuarts. "Other aristocracies might have been more contemptible, but none less attractive or lovable, than that of the English court under Queen Anne."† This aristocracy—under which we comprise the landed gentry and the nobility—exhibited towards the crown a pride of liberty oftentimes of a truly republican cast. It was dominant in all the relations of social life, and was wealthy enough to devote both its time and its money to the governing of the country. It cherished withal so

* Mahon, *Hist. Eng*, 9. † *Ed. Rev.*, Jan., 1854, 230.

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hereditary a feeling of right, as to dispense the administration of justice irrespective of all spirit of party. Of the higher obligations due to the nation at large, this body was however wholly ignorant; for the education of the masses it took no heed. The people, through puritan meddling, had already lost all its national festivals and its proverbial mirthfulness, and had subsided into a state of uncouth coarseness. The penal laws were of a savage nature, contrived merely for the protection of the rich, and capital punishment was as rife as crimes of the blackest dye. The costly administration of law prevented the poor from prosecuting their claims by a recourse to civil procedure.

This same selfish aristocracy nominated the majority of the lower house; and although the political centre of gravity lay admittedly in the latter, seeing that the crown was bound to take its ministers from the dominant party, yet so many of the members of the lower house were mere puppets of the aristocracy who had nominated them, that the ministry, to attain their own purposes, could only make use of them by a recurrence to bribery. "While the power of the commons increases," says Macaulay, "the power of the people over the commons diminishes. The members of the rotten boroughs are not under the control of the people. Publicity did not exist. The privileges of secrecy which erewhile under the Tudors and the Stuarts, when members were arrested, protected parliament, were, through a superstitious reverence on the one side, and through selfishness on the other, maintained. The lower house consequently, as a whole, was, during the 18th century, anything but a representation of the nation. So far as not controlled by the landed aristocracy, it was filled by the corrupt satellites of the minister, with but a few independent members from the towns and counties. The single remedy which the Government possessed against the serried bands of the aristocracy in the lower house was—corruption."*

All things considered, however, more liberty assuredly existed in England, during the 18th century, than in any other European country: there was none of that interminable bureaucratic display of administration which pervaded the Continent. An aristocracy only oppresses, so far as is needful for the maintenance of its own supremacy; the nation, with which the English aristocracy was allied by

* *Voltaire says: "The best proof is this that folks give themselves the* that you British are worth more than we, trouble to buy you up."

the closest ties, did not require to keep it in control, as previously to 1789 its ascendancy had experienced no opposition. The entire range of the fundamental laws was likewise under the guardianship of the judges, who, dating from the Act of Settlement, had become independent and irremoveable, except on an address to the king from both houses of parliament, and were excluded from the sphere of party contest. The standing army was small, and disinclined to act against the national liberty. It could not be employed for the subversion of the constitution, seeing that the officers belonged to the ruling gentry, and would hence have had to act against the members of their own order in the event of the army seeking to overturn the constitution. While in England the government refrains from interfering with the affairs of private persons, and the old penal laws which fetter religious freedom, the liberty of the press, of commerce and trade, are mere blunted weapons; the Government of France, with the wide-spreading arms of a centralized bureaucracy, reaching into all the occurrences of civil life, has succeeded in destroying all local government. Whilst the liberty of association helps to reform political administration in England, the government on the other side of the channel is made answerable for all the evils which oppress society. Instead of diminishing the burdens of government, the French only find their happiness in a change of government in a democratic sense. How the sentiment of liberty and responsibility was lost in France is proved by the opinion of the emigrants, who were astonished at finding a country governed without a mounted police. "Il est exactement vrai," writes a French nobleman from England, "que tel Anglais se félicite d'avoir été volé, en se disant, qu'au moins son pays n'a pas de maréchaussée. Tel qui est fâché de tout ce qui trouble la tranquillité se console cependant de voir rentrer dans le sein de la société des séditieux, en pensant que le texte de la loi est plus fort que toutes les considérations. Ces idées fausses, ajoute-t-il, ne sont pas absolument dans toutes les têtes, il y a des gens sages qui en ont de contraires et c'est la sagesse qui doit prévaloir à la longue."*

During the 18th century, however, there never was any question raised as to the participation of the people in the universal concerns of State; on the contrary, "a democratic part" of the Con-

* De Tocqueville, *l'Ancien Régime et la Revolution*, 125.

stitution, in official language, was readily spoken of. Oligarchy was designated liberty, an exclusive priesthood, *a national church;* and sovereignty had become the name *of a thing* which had no sway, while absolute power was exercised by those who styled themselves "servants of the people"*

The supreme parliament, as with all despotic rulers, possesses its special administration of justice, and, like all absolutely constituted powers, is conservative; all the newer principles—liberty of the press, religious freedom, and freedom of association—have only been wrung from it after protracted struggles.

Through the decline of the institutions of the older self-government, the parliament had to contend with an ever-increasing governmental organization; the counties were ruled entirely by the gentry, and the county assemblies of the free-commoners occupied themselves with scarcely anything beyond elections to Parliament and to the office of coroner. In the parishes, petty exclusive cliques held sway; so with the towns, where oligarchic town officials, self-elective, controlled the administration. As all these local boards moved only in the accustomed routine of an oligarchy, parliament had to intervene by means of statutes in order to meet the local requirements of urgent moment.

The sovereign could only succeed in making his influence personally felt by resorting to intrigue and bribery. In the exercise of his royal prerogative, the memory of the tyranny of the Stuarts ever stood in his path; if he would recur to arbitrary rule he could only effect this with the co-operation of Parliament, and not in opposition to it.

The external results of aristocratic rule in Parliament are singularly significant: England has become the first naval power in the world, and, dating from the 18th century, the sun does not set upon her possessions. In a struggle protracted through twenty-three years with little interruption, the Island Kingdom made head against the French Revolution and Bonaparte, and succeeded in emerging triumphant from the giant contest. Commerce, industry, and the power of invention are raised to a higher level than history has hitherto witnessed. But as gloomy shadows in the background, rise up pauperism, the misery of the lower classes, and national debt. Under the rule of the aristocracy, the normal power of the land, the small yeomanry, disappeared; England pos-

* *Sybil*, by B. Disraeli, vi. cap. i.

sessed, indeed, in the 18th century, numerous day-labourers and, speaking relatively, but few landholders. She actually possesses about 250,000 farmers cultivating their own land, whereas Prussia has her 2,000,000 smaller landholders, 400,000 of whom possess from thirty to sixty acres each. Whole tracts of land in England are withheld from cultivation and pasturage and laid out in extensive parks.

The political ascendancy of the towns over the country districts, since the middle of the present century, having become complete, could no longer pass unregarded by the legislature; with the increase of liberty of the press, and freedom of association, an influence made itself felt outside the sphere of parliament, which began to cope with the power of parliament itself. The Reform Bill, resulting from this struggle, secured to the English middle class a real share in the representation, thereby annihilating the ascendancy of parliamentary parties. Hence, soon after the Reform Bill an endeavour was made to impart fresh efficiency to the corporate system in towns, and this has actually been brought about in the spirit of that organization, by which the people elect their own functionaries. The absence of actual share in municipal life calls for an increased bureaucracy, partly communal, partly governmental, and for an over-augmenting power of the central government to keep pace with actual political exigencies. This strengthening of the central power is really the consequence of the long neglect of care of the poorer classes. In this direction, since 1830, efforts have been made, though often, it must be owned, in a blundering way; for, even when all sense of municipal responsibility had disappeared, ravaging and fatal epidemics brought the fact home that there is such a thing as actual interdependence between rich and poor. The English Constitution exhibited as the result of all these various phases of development, now shows us the royal power as virtually declining. Since 1641, the crown has merged its distinctive prerogative in the Parliament; over the government of the State are virtually placed as guardians, not the servants of the crown, but a select section of the majority in Parliament, in other words, the "Cabinet." The Parliament itself presents the chaotic form of representation by counties, cities, and towns. The internal government of the country lies more directly in the hands of the local boards. In the country the landed gentry occupy themselves with the administration; in like manner in the corporate towns, the chosen deputies of the

burgesses. In the parishes and the newly-organized vestries, the officials chosen by the local electoral bodies control the municipal relations. The social elements of all the power in the State are still composed of the gentry—of that class of proprietors which, by rents issuing out of land, money in the funds, and by higher professional capacity, are in a position to devote themselves to the concerns of local and general interest.

It is not the parliament, but the respective courts charged with the administration of the law in all its branches, which protect the freedom of the citizen—the parliamentary courts only intervening exceptionally. Added to this the enormous power of the press which, judge it as we may, cannot be gainsaid; the absence of a governing body in the nation distinct from the exclusively official class; and the truly law-loving sense of the nation fostered by the time-honoured national institution of the Jury; the opposition to all absolute political theories which, in the treatment of concrete questions and really free principles of political life, gives the English a pre-eminence over the Roman people; the respect paid to a law so long as it is endued with life, and the possibility of ignoring it immediately it has become mere paper;—these are the safeguards of the nation against a meddling governmental rule, safeguards which the continent generally is deprived of. *By reason of the absence of such administrative rule, and of* a governmental body which feels itself called upon to protect, at all hazards, purely abstract rights, a striking illustration of the manner in which statutes may be swept off, is afforded by an Act passed on July 21, 1856. By this single Act more than one hundred obsolete laws were abolished, for instance such as:—

13 Ed. I. c. 41, which required the chancellor and the judges of the King's Bench to follow the king.

5 Ed. III. c. 14, by which night-brawlers and suspicious persons were to be imprisoned.

4 Hen. IV. c. 29, which forbids Welshmen to carry arms; and,

1 Eliz. c. 15, forbidding the consumption of timber in the preparation of iron.

In like manner the trial by 'wager of battel,' was abolished by 59 Geo. III. c. 46, in consequence of an individual accused of murder having claimed it: whereupon it was found that, despite its non-user for many hundred years, no statute had ever been passed to set aside such mediæval entering of proof.

External policy, as well as the protection of the nation against parliamentary ascendancy; the waning condition of the local institutions; the situation of the working-classes, and the inefficient solicitude bestowed on the poor in regard to their private rights and well-being, would seem to justify the desire for a strengthening of royal power in England. Queen Victoria, by reason of her good sense, virtues, and devotedness to the country, takes indeed a prominent position among the sovereigns of England; but what a bevy of tyrants and dullards range between her, Elizabeth, and William III.! And how great a display of material force, and what a series of great events is needful in order to avert from the royal authority the sentiment of distrust which a long series of bad or insignificant rulers has violently evoked!

Disraeli's dictum would pass muster, and the English constitution would be no better than that of Venice, if England only possessed her parliament as sole guardian of national rights, and had no local boards of self-dependent, albeit of aristocratic character, no common law, no independent law courts at Westminster, and above all, no jury. But because the parliament and the aristocracy are not absolute, because both are forced to recognize ascertained boundary lines, the English constitution remains far removed from the Venetian standard. The French, in 1789, endeavoured to imitate parliamentarism; they swept off the municipal groundwork, barricaded the law-courts with conflicting powers, and substituted a national assembly invested with supreme authority. Granting that Louis XVI. might never have been able to assume the character of a dangerous monarch, yet was Robespierre right in theory when, in the sitting of September 1, 1791, with trenchant criticism of the constitution of 1791, and launching condemnation against the constitution-mongers of the continent, who transferred all honour to the parliament, and assumed to believe that it was centred there, and that, by means of such visionary assembly, the overflow of absolutism might be kept in check, he exclaimed —"Louis receives, I doubt not, the constitution with rapture. The entire executive power is made over to him and his family as his patrimony; the right to uphold the measures of the several national assemblies; the power to direct them by motions which he may set aside; absolute control of the entire administrative body, who are made his mere agents; authority to regulate the interests and relationships of the people with foreign nations;

troops without number, of which to dispose; the public treasure, augmented by all the national domains, concentrated in his hands (loud murmurs): no calumny am I uttering, for the constitution says so! All this tells me that there exists no authority in the State which is not overshadowed; and everything assures me that we have refused nothing to render the constitution agreeable to him."

Without local self-government, and free, independent courts of law, trustworthy alike in regard to public and private rights, absolute rule, however covert the guise, cannot be withstood, whether that rule be wielded by the monarchy or the parliament. A parliament, apart from such safeguards, Bunsen rightly characterizes as "une mauvaise plaisanterie."

Second Part.

THE SOURCES OF ENGLISH LAW.

CHAPTER I.

COMMON LAW AND STATUTE LAW.

Scope and Origin of the Common Law.—Precedents.—People's Law.—Statute Law.—Relation between Statute and Common Law.—Writs, Orders in Council, Bye-Laws.

THE Common Law is so called because it is the common municipal law or rule of justice throughout the kingdom. For although there are divers particular laws—some by custom applied to particular places, and some to particular causes—yet that law, which is common to the generality of all persons, things, and causes, and hath a superintendency over those particular laws that are admitted in relation to particular places or matters, is the common law of England.*

The Common law, which does not sever public from private law, is hence the informing spirit of the English constitution. The sources thereof are the unwritten customs of the land; but since the common law, as a law customary, is only recognizable in practice, the decisions of the courts afford means of evidence as to whether a legal conception accords with the common law.† The decisions of the courts and their rulings or "precedents" are to be scrutinized in relation to any after cases that may arise however absurd such precedents may appear.‡

The sources of the common law are, in the words of Lord Hale, "inscrutable as are the sources of the Nile." Englishmen invoke the revered name of Alfred and the hallowed name of the Confessor, as the supposed founders of the system of their law; but,

* Burns, *Eccl. Law*, vol. i., Pref. xxxvi., vii.

† Bl. i. 163.

‡ Toulmin Smith, i. 105.

in fact, the common law is more ancient still, the groundwork being the Saxon law, the customs of the Anglo-Saxons, which in their broad features resemble the laws of all the nations of the Gorman stock.* St. Germain, an erudite Catholic jurist who flourished under Henry VII., enumerates five sources of the common law:—

1. The law of nature and reason; 2. The divine law; 3. General customs; 4. General principles and maxims; 5. Particular law and local customs.

According to Bisner's elaborate treatise,† the common law is based on the following foundations: Anglo-Saxon customary law as the main source; the statutes of the English kings fused therewith; customary law imported from Normandy; theoretical conceptions from the Roman law; the doctrines of legal writers and the decisions of the courts. It is with English law as with the language—one fourth, at most, is of foreign or non-Saxon origin.

The common law is limited by the local customs of certain counties, towns, and boroughs; these customs do not bear upon public law; yet, not only must their legality but their very existence be proved before the courts. The jury find the existence or otherwise of the custom, the court determines its validity. The custom of "gavelkind," whereby the sons inherit equally, and the custom of "borough-English," according to which the youngest son succeeds to the exclusion of the older, are taken judicial notice of by the courts, and do not require to be proved. The customs of the city of London are admitted in evidence by certificate from the Lord Mayor and Aldermen by the mouth of their recorder.

A statute is either declaratory of the common law or introduces some new principle or modification; the statute law is the creature of parliament, and is established in the properly legislative mode. In what particulars this statute law, dating from about 1225, gradually encroaches on the common law, will be eventually shown. The great charters of the nation are usually a confirmation of ancient national law. Of Magna Charta we have previously treated. There are many acts successively confirmatory of its principles, and also of the "Charta de Foresta." The celebrated "Petition of Right," and the later statutes of

* Bucher, *Parlamentarismus*, 47.

† Bisner, *Das Englische Geschworenengericht*, 263.

Charles I., declaring compulsory "loans" and "benevolences" secret imposts contravening law; prohibiting arbitrary imprisonment and the resort to military law, and abolishing the court of "High Commission" and the "Star Chamber," are merely a ratification of the ancient law of the land. The "Bill of Rights," originating from the Revolution (1688) did not create any substantially new law.

There are statutes, however, which have really infringed upon the law of the land, laying down entirely new principles not derived from the common law; amongst which may be enumerated:—

1. The introduction of the forty shilling census under Henry VI., by parliamentary enactment.

2. The Septennial Act under George I.

3. The East India Bill of Pitt, and that of 1858; and,

4. The Reform Bill.

Ministerial regulations and orders are only sources of law within the limits prescribed by the law conferring the authority, and are always subject to judicial determination.

Orders in council and royal proclamations can only carry out existing law, but have no power to create any new law.

Within their own sphere certain corporations are empowered to pass so-called "bye-laws," or local statutes, which affect the respective corporations, but must not contravene the municipal law.

CHAPTER II.

EQUITY.

Judicial Equity.—Prætorian law.—The Prussian Code.—The English Chancellor.—Equitable Jurisdiction.

In the Roman law a distinction is drawn between the "Æquitas" which the judge exercises in the interpretation of the law and the "Æquitas" of judge in establishing the principles of law. "Pure law" is so constituted as to harmonize with the inherent claims of individual good, without establishing consequences; it is an equal law, "*æquum jus*," for equity is the taking account of individual differences and their claims.* Wherever courts and laws exist, this kind of equity prevails: it is not peculiar to any one country.† Every system of law exhibits, in the development of its social bearings, certain inequalities which the judge has to fill up. In the Roman law a *prætor peregrinus* was appointed to decide controversies between Roman subjects and foreigners; and, as the latter could not share the *jus civile*, their relations were determined by the *jus gentium*. Wherever the Roman law failed to meet the wants of society, the prætor introduced by his edict new principles. Without such supplotory action, even a legal decision based on the most elaborately-contrived code, may not be readily appreciable; hence sect. 49-50 of the introduction to the old Prussian code directed—"If the judge find no enactment which may serve to determine the case in dispute, *he shall, in accordance with the principles generally prevailing in the code, and the precedents existing in regard to such cases*, decide to the best of his judgment. He is, however, required to report without delay the seeming deficiency in the law to the "chief of justice." Substituting here for the Prussian "chief of justice" "the King of England," the meaning of "equity" will perhaps be apprehended.

The English courts of common law are courts delegated by the king, the jurisdiction being always determined by the common

* Puchta, *Pandecten*, § 21; Gluck, *Pandecten*, i. 194.

† *Bl.* iii. 426.

law. Civil procedure first became their domain, and in two of the courts, of "Exchequer" and "Queen's Bench," only by assuming certain fictions. Within the sphere of their operation, they afforded relief only in accordance with the common law; should legal relations arise not known to the common law, the party suing—and, during the middle ages, the judges themselves—turned to the source of law, viz., the sovereign, who, instead of fashioning a new law, refered the matter to his Council, which assigned to the chancellor the decision of private and certain public suits. The chancellor was generally an ecclesiastic, and frequently also the king's confessor. He decided either from the analogy of philosophical natural law, or according to the so-called "raison écrite," in other words, the Roman or the canon law, from which he, as a cleric, further borrowed his mode of procedure.

An ordinary common-law jurisdiction, though of an unimportant nature, was coincidently transferred to the chancellor. In his capacity of prætorian judge, and supreme official of the crown, he might of course also order contentious suits, which especially pertained to the courts of the common law, to be referred to his court as not being subordinate to the common law courts, but having with them co-ordinate jurisdiction. Thus, in many instances, he was able to soften the rigour of the law. The Court of Chancery gradually acquired fixed rules, fashioned on recognized precedents there prevailing. Equity is not, therefore, what seems equitable to the mind of the chancellor, but that which is based on the rules and legal usages of the Court of Chancery* (See Bl. v. c. 7). The meaning of "equity" should hence be taken negatively. Wherever the common law and its respective courts afford no remedy, relief *may* still be attainable in Equity.

* Thomas Smith, *Elements of the Laws.* Philadelphia, 1853.

CHAPTER III.

THE ROMAN AND THE CANON LAW.

Introduction of the Roman and the Canon Law.—Subordination to the Common Law.—Distrust of the Roman Law.—The Continental Development of Law not appreciable in English Legal Learning.

WILLIAM THE CONQUEROR sought to uphold his throne by establishing a strict alliance with the Sovereign Pontiff. The canon law, as practised on the Continent, accordingly made its way into England, and, as was everywhere the case in the ecclesiastical courts, the Roman law followed in its train.* In the reign of Stephen, a learned Bolognese named Vacarius visited England, but his lectures were speedily put under ban.† When in the 14th century the upholders of the Roman and the canon law held the professorial chairs at Oxford and Cambridge, the supporters of the national law founded the "Inns of Court" as a bulwark against the foreign law, which was ever regarded as the handmaid of despotism. In matters wherein the courts of law have jurisdiction, the Roman or canon law never influences the judgment arrived at. In cases where the courts of law have supervision, or *power to determine on appeal from the ecclesiastical courts*, account is taken of the Roman and canon law, but they have only *efficacy in subsidio, when the common and statute law are silent*, and, whenever found to contravene the native laws, are disregarded.

They are followed both in the ecclesiastical courts and the universities, but their application is kept within due limits by the common law courts. "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 those 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

* Warnkönig, *Jur. Encyclopädie*, 870. † Hallam, *M. A.* III., 417.

will grant prohibitions to restrain and withhold them. An appeal lies from all these courts to the king in the last resort."*

"These laws of themselves," says Lord Hale, "have no binding efficacy, since they issue from foreign legislators; but all the strength that either the papal or imperial laws have obtained in this kingdom, is only because they have been received and admitted either by the consent of parliament, and so are part of the statute laws of the kingdom, or else by immemorial usage and custom in some particular cases and courts, and not otherwise."† Hence the ecclesiastical courts can only apply the Roman and canon law in those cases where its application is expressly sanctioned by statute or custom.‡ But they are *leges sub graviori lege*, *i. e.*, under control of the common law of England.§

The Lords Chief Justices Holt and Coke were not more favourably minded to the "foreign laws" than Hale himself.‖

The prejudices obtaining in England against Roman law are manifestly of a political rather than scientific nature; the Roman law of the imperial type is regarded as the creature of despotism, and with canon law is associated the recollections of pontifical jurisdiction. As a matter of course, little scientific attention is bestowed on the study of Roman law. At Oxford, only one College, and that but sparsely frequented, professes to teach the Roman law, and the elementary books published are of a most meagre description. The assidnous culture of legal learning in Germany has exercised scarcely any influence in England,¶ but continental influences upon legal learning in England have not hitherto resulted so beneficially as to cause us to desire any further intellectual development in that direction.

* Bl. i. 84.
† Hale's *Hist. of Com. Law*, 27.
‡ Burns, *E. L.*
§ Hale's *Hist.*, 33, 41.
‖ Burns, *E. L.* ii. 30.
¶ Warnkönig, *Juristiche Encyclopädie*, 137.

BOOK I.

Political Rights of Persons.

POLITICAL RIGHTS OF PERSONS.

CHAPTER I.

CHARACTER OF ENGLISH FREEDOM.

The Common Law the Groundwork of Freedom.—Its Antiquity.—Rights and Duties.—Principle of Self-government.—The Three Fundamental Laws according to Blackstone.

WHOSOEVER contemplates England in the outward form of her government merely, remains unconscious of the informing spirit that quickens the entire system. Sir John Fortescue, in his famous work *De laudibus legum Angliæ*, written while an exile in France, during the reign of Edward IV., regards the Saxon, *i.e.* the common law, as the mainstay of English liberty. He takes pride in the guardians thereof, in its judges and jury, which he styles the strong rock of the nation's liberty. To the question wherefore this latter institution thrives in England only and nowhere else, he thus gives answer,—"That his country is richer far than other lands, that it bears the burthen of taxes on its free estates, imposing them of its own accord without being thereto compelled; that all classes, the knight, the squire, free commoner, and villein, are equal before the law, and that it never occurred to the mind of any one of its kings to wish his people as poor as other nations are, to be thereby able, as absolute master, to rule unchecked."* English freedom, so far as certain cardinal principles are involved, finds its ancient family-tree spreading far beyond the conquest;† in this historic land the Great Charter itself is but a re-quickening of Saxon freedom.

* *De Laudibus Legum Anglia*, c. ix. 29.

† It has a pedigree and illustrious ancestors, it has its bearings and ensigns armorial; it has its gallery of portraits, its monumental inscriptions, its records, evidences and titles. (Burke)

Few popular rights are there, and few enactments against arbitrary power, which may not safely be referred back at least to the Plantagenet period.* The "petition of right" itself was nothing but an enforcement or re-assertion of privileges at least three centuries old.†

The Act of Parliament 12 and 13 William III., c. 2, called "the Act of Settlement," declares, "that the laws of England are the birthright of the people thereof," exactly in the spirit in which some seventy-four years later the North Americans contended for rights "*clearly*" inherent in all men.

Never have Englishmen known rights, however, without their corelative duties towards the State, as Fortescue in simple and plain language, has abundantly shown. During the Middle Ages the greater portion of the land was held in England by the respective owners under a strictly military tenure,‡ and "the entire community resembled a disciplined army."§ By 12 Charles II. c. 24, military tenures were abolished, and all lands thenceforth were held in free and common socage. Knight services practically survived, however, in the "county," "the jury," the duty of "keeping the king's peace," and the general obligation incumbent on all classes to contribute to the common burthens.

The entire scheme of continental internal administration prevails in England, and, during the Middle Ages, civil government in the island kingdom was under even stricter control than in France; as contrasted with the continent, however, the internal government is almost wholly entrusted to local bodies, conducting their proceedings under judicial forms, and always under survey of the common law courts.‖ All municipal rights being under their protection, the local courts cannot carry out anything which is against judicial ruling, and in no essential points are their decisions withdrawn from the control of the common law courts.¶

The State guarantees to corporations a protection similar with that accorded to individuals; by the action of the common law courts, both individuals and the State are protected against the encroachments of corporations.**

Blackstone enumerates, as the fundamental rights of every

* Hallam, M. A., iii. 203.
† Forster, *Debates on the Grand Remonstrance*, p. 3
‡ Froude, *Hist. Eng.* i. 11.
§ Froude, *Hist. Eng.* i. 13.
‖ Gneist, ii. 837.
¶ Cox, *Brit. Com.*, 351.
** Bowyer, 63.

Englishman—the right of personal security, the right of personal liberty, and the right of private property. In these things, he says, consist the liberties of Englishmen, liberties which are more talked about than understood.*

* Bl., Com. i. 129.

CHAPTER II.

ACQUIREMENT AND LOSS OF RIGHTS.

Rights acquired by Birth.—Rights of the Sovereign to services of the Subject.—Laws affecting Aliens.—Rights of Foreigners.—Greater Naturalization.—Minor Naturalization.—Denization.

THE rights of an Englishman were originally acquired only by being born in England. By the law obtaining in the middle ages the children of ambassadors, although born abroad, acquired the rights of native-born Englishmen. A statute of Edward III. ensures to all children of Englishmen born in a foreign country, the like rights of inheritance as enjoyed by those born in England. On the other hand, the children of English parents born during exile, on the restoration of Charles II., acquired full rights of citizenship by the instrumentality of an act of parliament conferring naturalization. In conformity with modern statutes, all legitimate children whose father or grandfather possessed or enjoyed the rights of Englishmen, are English subjects, unless, at the date of their birth, their parents were either banished for high treason, or were in the service of an enemy of England. The children of foreigners born in England are likewise, by birth, English subjects. A ship under the English flag is regarded as a portion of English soil.

According to the feudal conception prevailing in England as to the relationship of the subject, the sovereign may withdraw protection from any subject whatever, but the subject never can, of his own free will, throw off his allegiance; just as by birth he obtains the rights of an Englishman, so does the sovereign coincidently acquire claims to his services.

The duties towards the sovereign attach to the subject wheresoever he may go; he may abjure the realm but not the governing prince; he may abandon the fatherland but not the parent thereof.* *"Nemo potest exuere patriam."* By outlawry an Englishman merely forfeits the protection of his country, but not

* *Antley's Guide to the Hist. of the Laws of the Constitution of England*, pp. 94—5.

the country itself, an English fugitive by the mere fact of flight, or prolonged absence from England would never therefore lose his native rights. The enactments against aliens remain during times of peace a dead letter.

The Alien Act (6 Will. IV., c. 11) directing the registration of foreigners, requires every captain of a vessel to declare to the customs' officials whether he has any foreigners on board. Every foreigner, on landing, is bound to produce his passport, and furnish all needful particulars, he thereupon receives a certificate, and his name is registered; there is no penalty, however, attaching to non-registration. In 1842, out of 11,600 foreigners landing, only 6084 were registered under the act. Any foreigner may, on leaving the country, be required to produce the certificate of registration, but a foreigner, on proving that he has resided more than three years in England, does not require any such certificate. In times of peace travelling in England without a passport or other document is as a matter of course; every foreigner, however, is asked by the captain of the vessel bringing him to England to give up his name. In troublous times these regulations revive, and are rendered more stringent by means of special enactments passed to suit the emergency. In time of war alien enemies only travel under a safe-conduct granted by the queen under the great seal, and registered in the Court of Chancery.*

Not only has England offered an asylum to foreigners at all times, but she has likewise abstained from legislating to oppress aliens. A tax for residence has never been imposed. By Magna Charta, freedom of commerce was guaranteed to foreign merchants.† In times of war the kings did emancipate themselves from the humane laws and customs towards strangers. In 1415, certain members of the companies of Florentines, Venetians, and Luccans, dwelling in London, who refused to make a money-present to the king were committed to the Fleet prison.‡ Even at the present day, foreigners can only inherit personal property, from the fact that the inheritance of real property would involve a feudal relationship to the king, which is naturally withheld from foreigners. By 7 and 8 Vict., c. 66, sec. 5, every foreigner belonging to a state in friendly relation with England, is allowed to

* Bowyer, p. 163.
† Hallam, M. A., ii., p. 320.
‡ *Proceedings and Ordinances*, ii., p. 165.

hold a lease of land and houses for twenty-one years for occupation or business, and to follow any kind of trade. He enjoys the municipal rights of an English subject, is liable to the municipal taxes, but cannot record his vote for the election of members to parliament.

The Act of 1844 excludes foreigners from a seat in parliament and from the privy council; a special resolution of parliament may, however, accord the right to sit, and authority to act in both these bodies.* The wife of an Englishman or of a naturalized subject becomes, *ipso jure*, naturalized; sailors, also, who have served two years on board a British ship, foreign Jews, and protestants, who have resided seven years in an American colony, become forthwith naturalized; they cannot, however, sit in parliament or in the privy council. The restrictions in regard to religion, and the obligation to receive the sacrament previous to naturalization, and to take the oaths of allegiance, abjuration, and supremacy have been abolished.

Full naturalization, granting likewise political rights, is only obtainable by special Act of Parliament; lesser naturalization is likewise procurable by an act, containing the clause that the person naturalized is excluded from parliament and the privy council; should the act, however, contain no such clause the naturalization is complete.

The usual form of naturalization is now by certificate from the Secretary of State for the Home Department; such naturalization does not enable the person obtaining it to sit in parliament or in the privy council: generally speaking, further restrictive clauses are appended. As the secretary of state has the power, on granting naturalization, to append optional limitations in relation to political rights, it is generally confined to the right of inheriting and acquiring land, and obtaining an English passport. An alien may, to a certain extent, be made an English subject, under patent from the king, and is termed a "denizen;" he may take lands by purchase or demise, but not by inheritance; and his children born before denization cannot succeed to his real estate; a denizen cannot be a member of the privy council or either house of parliament, or have any office of trust, civil or military, or be capable of any grants of land from the crown.

* Bowyer, p. 163.

CHAPTER III.

THE DIFFERENT CLASSES OF THE POPULATION.

(A.) Social Inequality, and Equality before the Law.—Aristocratic Spirit of the Nation.—The Barons of Magna Charta.—Nobility in the Continental sense does not exist in England.—Importance of Property.—Wars of the Roses.—Recent Origin of the Peerage.—Halo of the Aristocracy.—(B.) Thanes and Ceorls.—Vassals of the Norman kings.—French Feudal Polity.—Powerlessness of the Norman Nobility.—Entailed Property.—Decline of Feudalism.—The Non-free.—Abolition of Serfdom Period Undetermined.—Limitation of Free Workers.—Yeomen.—(C.) Freemen and Slaves.—Misalliance Unknown to the Law.—Privileges of Peers. Titles of the Nobility.—Inheritance of the Peerage.—Peeresses in their own right.—Elevation to the Peerage.—Connection of Nobles and Commoners.—The Gentry, Baronets, Order of the Bath, Knights, Esquires, Yeomen, Farmers, Tradesmen.

ENGLAND is the land where the greatest social inequality prevails coupled with the greatest equality of the citizen before the law. There is no true-born Englishwoman, however humble in the social scale, whom the Prince of Wales, with the permission of the Queen, might not marry to-morrow, and whose children would consequently with perfect right, ascend the throne of England. On the other hand, England possesses the haughtiest and most powerful aristocracy in the world; but being a political institution and not a political caste, and its roots penetrating into the lowest strata of society, the nation at large has remained, both as to its customs and history, aristocratic to the very core. "You may take away the present house of lords and destroy the titles of nobility, and light up a bonfire with peers' coronets and ermines; despite all attempts, the aristocracy would remain stronger than ever, for the source of the aristocracy consists not in painted chambers or crimson woolsack, or in orders of ribands, coronets, and titles; your power, my friends, is in yourselves, your power is grounded on the aristocratic spirit and aristocratic inclinations which govern you."*

To the aristocracy, as an institution which has developed with the most renowned pages of the older history, the nation owes the preservation of its national liberties, but not to the aris-

* Bulwer, *England and the English.*

tocrats for the time being. Chatham once said of the barons who had achieved Magna Charta, "My lords, it is to your ancestors, it is to the English barons that we are indebted for the laws and constitution we possess, their virtues were rude and uncultivated, but they were great and sincere. Their understandings were as little polished as their manners, but they had hearts to distinguish right from wrong; they had heads to distinguish truth from falsehood; they understood the rights of humanity and they had spirit to maintain them. My lords, I think that history has not done justice to their conduct when they obtained from their sovereign the great acknowledgment of national rights contained in Magna Charta; they did not confine it to themselves alone, but delivered it as a common blessing to the whole people."

The families of the great barons have died out, but although impelled by necessity to appeal to the common law of England against the encroachments of a despot, all needful subordination to the general law has ever been upheld by the aristocracy, which has both preserved England from the sway of petty dynasties and the scourge of small seignories, as well as, previous to the revolution, the domination of class against class. England is not blessed with a nobility in the special sense of a "caste" separated by law from the remainder of the community; after the first Anglo-Norman age, nobility of blood ceased to exist, and the laws and customs of England knew of no distinction save that between bondman and free.

"There is no part, perhaps, of our constitution so admirable as this equality of civil rights; this 'isonomia' which the philosophers of Greece only hoped to find in democratical government. From the beginning our law has been no respecter of persons. It screens not the gentleman of ancient lineage from the judgment of an ordinary jury, nor from ignominious punishment. It confers not, it never did confer, those unjust immunities from public burdens, which the superior orders arrogated to themselves upon the continent. Thus, while the privileges of our peers, as hereditary legislators of a free people, are incomparably more valuable and dignified in their nature, they are far less invidious in their exercise, than those of any other nobility in Europe."* "The making of gentlemen," says Thomas Smith, "is not amiss, and has not

* Hallam, M. A., ii. 347.

such results as if it were in France, since the commonalty and the yeomanry are no more subject to taille than the gentleman." "Where the property of all is protected there the gentleman is more charged, which he beareth the gladlier and dareth not gainsay, for to save and keep his honour and reputation."* It is the unfortunate misunderstanding of the laws and customs of his own country which induces Burke, in his attack on the French Revolution, to hit upon analogies between the French nobility and the English aristocracy. He is of opinion that the French aristocracy is not more exclusive than the English, for it is "very easy for a *roturier* to get ennobled." Burke forgets that an ennobled *roturier* is rather a privileged enemy of the commonalty, whereas the English aristocracy is distinguished from that of every other European country in that no one may mark out its boundaries. Burke would seem *never to have read those simple and clear* words of Thomas Smith quoted above.†

The inequality which exists is, hence, not restricted to a particular class, but induced simply by aristocratic usage and the accumulation of property. As a matter of course, therefore, any individual who is wanting in material means is shut out from all share in the government; only under the old Roman empire had the political significance of property obtained so harsh a construction. "To be poor in England is to be without virtue," says one of her leading writers, who is thought to possess an intimate knowledge of English society.‡ We shall have frequent occasion to refer to the neglect of the lower classes by the ruling gentry; for many centuries, however, equality before the law, which the nations of the continent only achieved after prolonged struggles, has been in England of common right. Equality before the law is the cardinal point of English constitutional law; its being *de facto* centred in an exclusively political supremacy of the monied classes, in nowise detracts from the grandeur of the principle.

A German chronicler of the fifteenth century thus expresses himself.§ "For the before-named (Edward IV.) king's sake, and

* Thomas Smith, *Anglice Descriptio*, B. i. c. 21.

† Tocqueville, 169—Au dix-huitième siécle c'est le pauvre qui jouit en Angleterre du privilège d'impôt; en France, c'est le riche. Là l'aristocratie a pris pour elle les charges publiques les plus lourdes, à fin qu'on lui permit de gouverner, ici elle a retenu jusqu'à la fin l'immunité d'impôt pour se consoler d'avoir perdu le gouvernement.

‡ Bulwer, *The Disowned*, p. 146.

§ *Kaspar Weinreichs Danziger Chronik*, p. 1.

for King Henry's (VI.), who before him was king, and driven out from England, many great lords and gentlemen did lose their heads for these two kings' sake. When that the King Edward was crowned in London, there were not more living of dukes in England than two, yet else should there be fifteen, so were they cut up and slain. What of other counts and gentlemen there were slain may one think."

After the battle of Tewkesbury, a Norman baron was almost as rare in England as a wolf is now.* When Henry VII. called his first parliament, there were only twenty-nine temporal peers to be found; of those twenty-nine not five remain, and they, as the Howards, for instance, are not Norman nobility.† A peer with an old genealogical tree is accordingly something unheard of, the real old families of the country are to be found among the peasantry. The gentry, too, may lay some claim to old blood. We owe the present peerage to three sources: the spoliation of the church under Henry VIII., the open and flagrant sale of its honours by the elder Stuarts, and the borough-mongering of our own times.‡

Nothing is more amusing than to read the apocryphal genealogies paraded in the peerage.§ The family of Lord Holland (Fox), according to Collins's *Handbook of the Nobility*, were a distinguished tribe in England previous to the conquest, but the Fox family itself, more modest, alleges that it derives its origin from a certain Palafox, who in 1588 was driven ashore from the Spanish Armada. The real origin of the family is involved in obscurity; according to some, the founder was a chorister of Salisbury cathedral, in the reign of Charles II.; others contending that he was a body servant of this king.‖

The majority of the English nobility have reason to shun the genealogical microscope. George II. was wont to say that the best gentleman in England was Lord Denbigh, because he was descended from the counts of Hapsburgh.¶

The aristocracy maintains its social consideration in consequence of being constantly recruited from the notabilities of the

* Disraeli, *Coningsby*, b. iv. c. 4.
† Ibid.
‡ Ibid.
§ Capitally parodied by Thackeray in his *Newcomes*.
‖ Walpole's *Memoirs*, Introduction. The 18th century in Walpole's correspondence.
¶ Walpole's Correspondence, p. 75.

country, from among the wealthy (Lords Ashburton, Overstone), from the legal and literary celebrities (Lords Brougham, Macaulay, Lyndhurst), partly also from among the favourites of the people, and the most distinguished men in the country. Inasmuch as the aristocracy astutely enough absorbs "the capacities" into the ranks of the peerage, the needful halo continues. This halo, which radiates from a genuine aristocracy, has often sufficed to render equality before the law quite illusory. In the reign of George II. it was esteemed a great concession to public opinion that Lord Ferrers should be executed for murder; the king of a new dynasty, who wished to be popular with the people, insisted on it, and even then he was hanged with a silken cord.*

The Saxons, like all nations of the German stock, drew a distinction between freemen and slaves; this was, indeed, the only actual distinction. A thane was not a nobleman, but a landowner merely on a larger scale, and, as such, bound to feudal and military service, and subject to the lord's jurisdiction. The thanes were very numerous. The were-gild of the "king's thanes" was valued at 1200 shillings, the lives of those of inferior degree at half that sum. Among these greater landowners, the earls hold the most prominent position. They first achieved importance, however, in the 11th century, under Saxon rule, as shire officials. So long as the Saxon kings were in complete possession of power, the earls were impotent. In the reign of Edward the Confessor, however, five earls rendered the kingdom insecure.† The number of the thanes constantly fluctuated. By a law of Athelstan, a merchant who had made three voyages by sea became a thane. The peasants (ceorls) were, as a rule, not annexed to the soil; their were-gild was estimated at £10; if possessed of 600 acres, a church, and mansion of their own, they might become thanes. Ceorls might be reduced to serfdom by way of punishment. The chief stock of the serfs, or villeins, was composed of subject Britons. The villeins had still, under William I., their were-gild, and a slave if wounded by his master, became free.

On this Saxon peasant community was engrafted the Norman feudal monarchy. The Saxons were oftentimes despoiled of their

* Disraeli, *Coningsby*, b. iv. c. 4.

† Hallam, M. A., ii. 274. Among all the northern nations the were-gild, or compensation for murder, was the standard measure of the gradations of society.

property. Many provinces, through the conquest, were completely laid waste, and received new proprietors. The province of York was thus reduced to the condition of a desert, and, as waste land, was granted out anew.*

The feudal hierarchy established in consequence of the conquest, comprised five classes:—

I. *Tenentes in capite, barones majores*, only twelve in number. These vassals had been previously great lords in Normandy, and were mostly counts of this class. The Earl of Chester alone held an entire county in fee.

The landed possessions of the greater feudatories were not to be compared with those of French vassals, such as the Duke of Guienne and the Count of Toulouse. To the possession of the greater feuds was annexed also that of the burghs, the lord of the soil enjoying jurisdiction therein, and the privilege of levying taxes at his good pleasure.

II. The *barones minores*, who likewise were *tenentes in capite*, that is, holding directly from the king. Their estates, like those of the great barons, lay widely-scattered. On equality of rank with them range the knights, bound to unlimited service under the dukes. In this class, including the spiritual corporations, are the fourteen hundred temporal barons, and other spiritual feudatories. It should be borne in mind that William apportioned 28,115 knights' fees in favour of the spiritual, and 30,000 in favour of the temporal barons.† All barons might by grant receive jurisdiction over their vassals; but only in cases of a petty nature might they proceed summarily, the bondmen themselves not being absolutely cut off from law.

III. The Saxon thanes were not represented in the first two classes. Such estates as were left them they had to hold in fee from the Norman barons. The number of sub-feudatories, dependents of the greater freeholders, Saxons, etc., amount in *Domesday Book* to 7871.

IV. The free yeomen and the small landowners were specially numerous in Leicester, Lincoln, Norfolk, and Suffolk. They likewise had to enter into feudal relation with the lord of the soil, take an oath of fealty, and submit to a share of the feudal burthens.

* *Domesday Book*, t. ii. 309. Omnia nunc wasta.

† Lappenberg, *Eng. Geschichte*, ii. 146.

V. The non-free, or peasant class, and the "absolute villeins," comprise further subdivisions.

Privileged villeins and absolute slaves comprise still further subdivisions.

A *free ownership (Allodium) did not exist after the conquest*; the fees even were, mostly, only large enough to maintain a well-armed man.* The chief deviation from the principles

* *Vide* Gneist, p. 10. Absolute free ownership of land (*Allod*), *according to* English legal conception, is possessed by no subject; all the land belongs to the sovereign, and by him is *granted out* in fee. An Englishman consequently can only possess a "*fee*" (feudum, fief) which signifies, according to Spelman, the "right which the vassal or owner of the ground and soil has to use the same, and to draw profit therefrom for himself and heirs, and by reason thereof is to afford the services due to his superior lord." An "estate" indicates the rights which an individual possesses. As regards the right of enjoyment, it means the conditions and circumstances which control a person in the exercise of such right of enjoyment. An estate in fee-simple or "*fee-simple*" is therefore a "limited" right of enjoyment to a portion of land under the superior lordship of the king; it is in reality a free heritable property, coupled with the right to alienate in accordance with the common law, and a right of disposition conformably with the laws affecting real property. In the event of there being no "heirs," the fee simple lapses by way of escheat to the lord.

A base or qualified fee, is such a one as has a qualification enjoined thereto, and which determines whenever the qualification annexed to it is at an end. As in the case of a grant "to A. and his heirs, tenants of the manor of Dale;" *whenever the "heirs" of A. cease to be* the tenants of the manor of Dale, the grant is entirely defeated.

A conditional fee *at the common law* was a fee restrained to some particular heir, or "to a man and the heirs of his body," by which only his *lineal* descendants are admitted in exclusion of collateral heirs. Such an estate, since the statute *de donis*, is called an "estate in fee-tail," or "estate tail" (from the French "*tailler*). When land is limited "to a man and the *heirs of his body*, it is called an "estate tail general." All the issue of the grantee are capable of succession, and the estate, on failure of the issue, does *not go to the next heirs, but reverts to* the grantor. If the inheritance be limited to certain issue only, for instance, if the estate be granted "to a man and the *heirs male* or *female of his body*," it is called an "estate in tail male, or an estate in tail female." Again, if an estate be given to a man and the heirs of his body by a particular wife, he has an estate in tail special, and none can inherit but such as are his issue by the wife specified. Every Englishman has the right to create such entailed property; not only landed property, but other real rights and dignities may be "entailed." (Bl. ii. 112). How unfavourable has been the practice of entail, will appear in course of our treatise (see Crabb, 370).

A name of dignity may be entailed within the statute *de donis*, as dukes, marquesses, etc., because they are names of some county, manor, town, etc. There are many titles of dignity without any place; the naming a place is not essential to the creation of a dignity—the Earldom of Rivers being an instance. If the king grants a dignity to one, and the heirs-male of his body, without naming any place, the grantee shall have a fee conditional and not an estate tail as if a place had been mentioned. If a dignity is entailed neither the donee nor his issue can by any means bar it.

An "estate for life" is an estate granted for the life of the grantor, of the grantee, or of any third person. An estate granted to a widow "so long as she remain unmarried" is an estate of freehold, it *may* last her life, but will be determined upon marriage. All the previous limitations are estates of freehold, because granted for a time indeterminate, and the right of enjoyment to the same only ceases by death, mischance, by act of the party enjoying, or by failure of issue.

Estates less than freehold are:—

I. Estates for years; that is, granted for an ascertained period.

of the continent was, however the transmutation of all sub-feudatories into feudal holders from the king. The sub-feudatories took an oath of fealty subordinate to their allegiance to the king and his heirs.* *Salvâ fide debitâ domino regi et heredibus ejus.*

On instituting a comparison between the feudal relation of England and that of France, we find that the great feuds in the latter were violently wrested from the Capets; whereas, in the former, they were granted out by the sovereign. A French barony was always a kind of autonomic government, whereas an English baron, in relation to his jurisdiction, was subordinate to the king. In France a barony was an agglomeration of estates, remarkable both for their extent and the rank of the holder. Each barony comprised a moated town.† The independence of the greater vassals in their feudal holdings was as large as if they held *Allodia.* So far back as the commencement of the eleventh century, the dukes and counts in France were in possession of ter-

II. Estates at will; that is, where one person lets land to another to hold at the will of the lessor.

III. Estates at sufferance arise where a person has held by a lawful title and continues the possession after his title has determined.

The inheritance to landed property in England is feudal in its nature, so far as they consist of "Estates" of inheritance, dignities, rights, etc., there being no exclusively favoured classes. But every Englishman has the power, by will, to alter the devolution of his property. According to the principles of feudal inheritance an ascendant never succeeds to landed property. The primary rule of succession according to the Norman and the English feudal law is, that all inheritance follows the direct line of succession downwards, *in infinitum*, but never upward. By the 3rd and 4th Will. IV., c. 106, this feudal rule was abolished, and by sec. 5, it was enacted, that on failure of the lineal descendants or issue of the "purchaser" the estate shall descend to the nearest lineal ancestor. The male paternal ancestors and their descendants are admitted before any of the female paternal ancestors or their heirs, all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors, or her or their descendants; and the mother, and all the male maternal ancestors and her and their descendants before any of the female maternal ancestors or their heirs. From the succession to personal property ascendants are not excluded. In the next place, the male branch always takes precedence of the female. If there are several males equally removed, the eldest only inherits. Females of the same degree of consanguinity inherit altogether. In case of succession to the throne, however, the eldest of the princesses, alike removed, succeeds. All the lineal descendants, *in infinitum*, of any person deceased, "represent" their ancestor; thus the oldest of the first-born, but pre-deceased son, excludes his uncles. Collaterals do not succeed until the issue of the "purchaser" has been exhausted.

* Lappenberg, *Englische Geschichte*, ii. 146.

† Dom Morice *Mémoires pour l'Histoire de Bretagne*, t. ii. Preface, p. ix.:—

"Dès que droit de baronie est donné à un seigneur il peut clorre sa principale ville et la murer avec tours et pont levis sans aucune nouvelle impétration du prince.

ritorial jurisdiction, and more powerful than the German princes of the period.*

The great lords or vassals exercised all royal privileges; they arrogated the right to levy war, and carry out feuds of private revenge, and were the superior lords of the bishoprics and abbeys within their territory; no bishop could be nominated against their will; they conferred privileges on towns and villages, had the right of coining, and might even prohibit the circulation of the royal money. They founded abbeys and bishoprics without consent of the king, established free burghs and fortifications, and down to the 13th century, lorded it absolutely over the lives, limbs, and property of their vassals and feudatories. Every French baron exercised complete civil and criminal jurisdiction within his territory, and enjoyed the regal privilege of taxing the Jews. The barons were subject only to extraordinary subsidies.†

These rights were in the main withheld from the Norman nobility in England. The Saxon municipal government was revived in order to keep that nobility in check. At the commencement of the 13th century, the kings had so far oppressed the nobles that they were fain to seek reliance in the subject race, and, by a grand uprising, battled manfully for the revival of the old Saxon law, with a view to their own protection.‡

In the wars of the Roses, the Norman nobility was almost wholly extirpated, and became unable to create sovereign lordships. With the English titles of nobility there is not bound up, as with the names of the French lords, either the remembrance of long centuries of oppression or of a single century of ancient renown. The Bedfords and the Talbots have, in fact, died out, and the mere modern holders of the historic title of baron are not answerable for any of the oppression practised by the Normans.

From the beginning of the Plantagenet period the Norman nobility struggled hard to secure a strict entail of property. The second statute of Westminster, 13 Edward I., c. 1, called "*De donis conditionalibus*," was passed to abolish the interpretation put by the judges upon the gifts of land which the barons

* Warnkönig, *Französische Rechtsgeschichte*, i. sec. 112.

† Warnkönig, i., sec. 113.

‡ Pauli, *Englische Geschichte*, iii., 384.

sought to confine "to a man and the issue of his body." Estates tail were not liable to confiscation on attaindor, and thus the barons could, with less injurious consequences to their families, oppose the reigning authority. It was to the interest of Edward IV.'s despotic authority that the legal fictions of the courts, by which entails could be destroyed, should be upheld. The final decisive measure in regard to legislation upon entails was passed under Henry VIII., one of whose statutes declared them to be subject to confiscation like all other land.* Later enactments of the same king rendered entails, by assuming certain legal fictions, alienable, with the exception of such as had been granted by the crown. By 33 Henry VIII., c. 9, all such estates in the hands of the heir are rendered liable for debts due by the ancestor to the crown. They may also be barred and disposed of in bankruptcy for the benefit of creditors (21 James I., c. 19). A statute of the present reign has rendered them liable to judgment debts (1 and 2 Vic. c. 110). As, however, a great deal of entailed property exists in England to the detriment of agriculture, it is only aristocratic usage which upholds such property. For, while the Tudors made efforts to protect the smaller holdings by enactments against entailing and against the accumulation of estates, the destruction of cottages and arable land, the social current went against the enactment, and thus a new aristocracy arose constituted, not by compulsory legislation, but by character, social bearing, and political importance.*

With the Plantagenets the feudal polity, by reason of the revived Saxon militia, began to decline equally with serfdom; the difference between vassals and sub-vassals disappeared; the body of the knights began to make itself felt as a political unity. Instead of personal feudal services, the sovereigns willingly allowed of a commutation, and, in the reign of Charles II., even this equivalent vanished, together with the privileges of the sovereign arising out of the feudal relation, *e.g.*, guardianship in chivalry.

So complete was the fusing of the free English into a commu-

* In his "Use of the Law," in Law Tracts, p. 146, 2nd edit, Bacon deplores the condition of the English landowners, "tied to the stake by these perpetuities of entails, and restrained from disposing of their land to their own or to their children's good;" and concludes that "it is worthy of consideration whether it be better for the subject and sovereign to have the lands secured to men's names and bloods by perpetuities, with all the inconvenience above mentioned, or to be in hazard of undoing his house by unthrifty posterity."

nity, where the aristocrats are merely the apices, not separate from the general structure, that the English law, so far back as the 13th century, takes no notice whatever of any special privileges of knights or gentry. Bracton divides the English into freemen and slaves, whereas a contemporary French jurist, Beaumanoir, referring to the gentry of his own land, draws a distinction between those ordinarily free and the not free.* The position of the bondmen since the conquest had become materially worse; serfs were unable to acquire property, and hence could not purchase their freedom,* but were liable to be sold by their lord. A *female villein*, in the reign of Henry III., might be purchased for eighteen shillings, and a male was worth two or three pounds only in the market.† Froissart, however, describes the serfs in England as being subject rather to services than as being actual slaves.‡ Considering that in France the lord, at that time, possessed almost absolute power of life and death over his bondmen, the contrast between French and English serfdom is very striking, from the knowledge that even the villein enjoyed the protection of Magna Charta. They are free as regards all persons save their immediate owner;§ and in certain cases have even the right to institute a plaint against the latter;‖ the lord consequently dare not commit against his bondmen the crime of Mayhem (Maihem), that is, inflict such mutilation as to render him unfit for warfare or for defence.¶ The lord might cut off the ears of his serf, but could not deprive him of his foretooth or break his finger. There was an *intermediate* class between the freeborn and the slaves; these were the "privileged villeins," who were personally free but annexed to the soil; they were found chiefly in the king's domains.**

Serfdom is met with for the last time in the statute-book of England under Richard II.†† By reason of the *thriving condition* of the towns, many villeins who had betaken themselves thither, partly with consent of their owners and partly in secret, became

* Pashley, *Pauperism*, 182. Glanville, v., 5.

† Motley, *United Netherlands*. Hallam, M. A., ii. 347.

‡ Froissart, ed. Buchon, viii. c. 6.

§ Coke, *Inst.* ii. p. 45.

‖ Item chescun villein est able et franke de suer touts maniers d'actions envers chescun person sorspris envers son seignior a que il est villeine. Et encore en certaine chose il poit avoir action envers son seignior. (In the succeeding sections Littleton enumerates them, § 189 *et seq.*)

¶ Bl. iv. 205.

** Crabb, 366.

†† Froude, *Hist. of Eng.*, i. 13.

free.* If a slave remained a year and a day in a privileged town without being reclaimed in the interval, he became free.† The wars carried on against France, the fact that serf-labour had become more expensive than that of free-men, thus rendering emancipation an "economical" consideration, and finally, frequent uprisings, contributed to diminish the number of these poor helots.‡ How rapidly serfdom must have fallen away may be inferred from the fact that the rebels under Wat Tyler, in 1381, clamored for the removal of serfdom; the followers of Jack Cade, in 1450, for everything else save the abolition of slavery.§ Thomas Smith, private secretary of Edward VI. and Elizabeth, declares that he did not know of any suit by a bondman relating to personal bondage. The few purchasable slaves under the Tudors were met with only on the property of the churches, the monasteries, and the bishoprics. This slavery was often of a voluntary nature.‖ On the king's domains bondmen were only emancipated by Elizabeth in 1574. The last traces of personal slavery, and of a subject race permanently annexed to the soil, are met with in the reign of James I. As a rule, it may be assumed that, with the Tudors serfdom disappeared in England.¶ Free labourers and freed men were not, however, by any means wholly free; the plague of 1348 had rendered free labour dear, and the State interfered for the benefit of land-holders, in relation to the employment of labour (23 Edward IV). A statute of Edward III. regulates arbitrarily the wage of labour; every labourer being bound thereby to work as long as required at the rate customary in the district. Even "artificers" and "people of mysteries" were compelled to qualify themselves for the gathering-in of the harvest at a fixed rate. If any such labourer went away without leave he was thrown into prison and branded on the forehead with a hot iron. When a lord competed with any other landed proprietor as a hirer of labour, the labourer was bound to work for the former.**

* Pashley, 161.

† Pashley, 164.

‡ Pauli, v. 654. The feeling of equality before the law begins to prevail among the English yeomen class from the time of Richard II., and finds expression in the celebrated distich of John Bull, assumed to have been a disciple of Wickliffe.

When Adam delved and Eve span,
"Where was then the gentleman?"

Hallam, M. A., iii. 180.

§ Forster, *Debates on the Grand Remonstrance*, pp. 5, 6.

‖ Smith, *Commonwealth of Eng.*, lib. iii. p. 10.

¶ As to the nature of villenage and serfdom in this country, see Mr. Hargrave's argument in the case of Somerset. —Howell's *State Trials*, vol. xx.

** Pashley, 163.

This system remained in force two hundred years, and in the reign of Richard II.* was rendered more severe by the fact that no labourer without letters patent, under the king's seal, could quit his hundred or wapentake. According to 7 Henry IV. c. 17, only such folks could apprentice their children to trades as were owners of land yielding twenty shillings yearly rent,† a sum which at that period was not within the means of many.

In Fortescue's time the free peasants had grown important. He speaks of many, who in consequence of their holdings, were qualified to be jurors. Since the Tudors this class of the community rapidly declined.‡ The terrible social consequences did not escape the quick-minded patriot, even at that period. Bacon complains of the disappearance of the prosperous peasant class, which he styles the groundwork of all healthful political life.§

Modern English legislation recognizes only the free-born; a slave who touches English soil becomes forthwith free, inasmuch as he cannot contract any obligation to serve his master as a slave; and according to the English law the mere fact of purchase does not give any title to the services of a man.‖

From the 1st of August, 1834, negro-slavery ceased to exist in all the British colonies. All Englishmen are equal before the law, the legal pre-eminence of classes is unknown; the privileges of peers and peeresses are only of a special personal nature; the son of a peasant may legally attain the highest rank in church and state.¶ A misalliance between nobles and commoners, or exclusion of commoners from the inheritance of baronial estates, are as unknown to the English law as the exemption of the great landholders among the nobility from taxation.** An antiquated statute forbids the marriage of a noble ward with a man of the citizen or peasant class, but if the noble maiden at the time of her marriage were fourteen years old, and had contracted it without compulsion, the marriage was valid. To check mis-alliances, Elizabeth decreed that no peer should marry without her consent; but this statute

* 12 Richard II. c. 3, called "Statute of Labourers."

† Crabb, 336.

‡ See chap. iv. of this Book.

§ *Essay on the Greatness of Kingdoms and Estates.*

‖ Bl. i. 127. Christian's Notes, ed. 1809, *note* 4, 127, *note* 1. p. 425.

¶ Christian's Note, 28. Bl. i. 407.

** Hallam, M. A., iii. 347.

fell into desuetude under the Stuarts.* Any one in England may establish entails. The right of primogeniture is a fundamental law in the succession to landed property, consequently the common law of the land and not any privilege of the nobility.

Such a distinction as we have already seen is not recognised in law; the nobility or peerage is not a class, but only an office. With the exception of a seat in the upper house, which any English peer may take, the peerage merely enjoys the right to be judged by the upper house, in cases of treason and felony.† Peeresses enjoy the same right. This follows from the principle of Magna Charta c. 29, that every Englishman is to be judged by sentence of his peers in case he be accused either of treason or felony. In misdemeanours, consequently for libel, riot, conspiracy, the greatest peer in the realm is tried by a jury composed of commoners.‡ Scotch peers have the like rights, whether they sit in the upper house or not. Irish peers enjoy all the privileges of the English peers so long as they are not elected to the lower house, in which latter case they are tried as commoners. English peers who are minors, and who do not yet sit in the upper house, can only be judged by verdict of their equals.§

Bishops are not reckoned among the nobility, although they are members of the House of Lords, and for all offences they are tried by the ordinary courts.‖ Peers and peeresses can only be imprisoned for treason, and consequently not for debt. This privilege arises merely from their office, as permanent councillors of the crown. Without any logical sequence, it is granted likewise to peeresses. The libelling of a peer or peeress is a crime of a special nature "*scandalum magnatum.*"¶ Under these three heads—the exceptional jurisdiction in cases of felony, exemption from insolvency, and the greater protection against libel—the actual privileges of the nobility are summed up. On the trial of a peer in the upper house, his verdict is given upon "honour," and not upon oath, whereas every other Englishman is bound, when called as a witness, to take an oath.**

* Même de nos jours, en France, après soixante ans de démocratie, les familles anciennes et les nouvelles qui semblent confondues en toutes choses, y évitent encore le plus qu'elles le peuvent de se mêler par le mariage.—De Tocqueville, *L'Ancien Régime*, p. 147.

† Crabb, 357

‡ Coke, Inst. iii. 30.

§ Bl. iv. 265; 39, 40 George III. c. 67.

‖ For instance, in the trial of the bishops under James II.

¶ Bowyer, 453.

** In judicio non creditur nisi juratis.

The king is the fountain of honour, and can create new titles. The following, however, are those in ordinary use:

1. Duke, a Saxon title; the Conqueror did not grant it. Edward III. first conferred it on the Black Prince, who assumed the title of "Duke of Cornwall." The title of "duke" first became a permanent one under James I.

2. Marquess, Marchio, Marquis, Markgrave, from the office of guarding the frontiers of the realm. The earliest creation of Marquess, as a title of honour, was in the ninth year of Richard II., when it was conferred on Robert de Vere, Earl of Oxford.

3. Earl (Comes or Count). From Ealdorman, Elder, a Saxon title. The Norman title, "count," disappeared as a title of the English nobility. Whereas for duke and marquess the corresponding female titles, duchess and marchioness, exist; that for earl is wanting. The wife is accordingly in England always styled countess. The title "earl" is one so peculiarly English, that it cannot be made to correspond with the continental title of count; a foreign count consequently never becomes "earl" in England, but is always styled "count." The earls have no longer any connection with the administration or government of the country. In writs and commissions, the king addresses earls as "Trust and well-beloved cousin." This custom derives from Henry IV., who was related to all the earls in his kingdom.

4. The title Viscount (Vicecomes) first came into use in the time of Henry VI., and was first conferred on John Beaumont. The rank and precedence were more distinctly defined in the 23rd of Henry VI., to be above the heirs and sons of earls, and immediately after the earls themselves.

5. Barons (from *baro*, a man) were originally all peers; until Richard II. all barons were "*tenentes in capite*," or lords of the manor. From Edward III. (according to others, Richard II., or Henry IV.),* barons possessed of no barony, but having the mere title, sit as barons in parliament. At the present day there is no such connection between the title and the barony, as that the alience of a barony becomes thereby ennobled.

The crown can give to one peer precedence over every other. From 31 Henry VIII. c. 10, however, the precedence by law of the actual classes of the nobility, so far as it confers a seat in

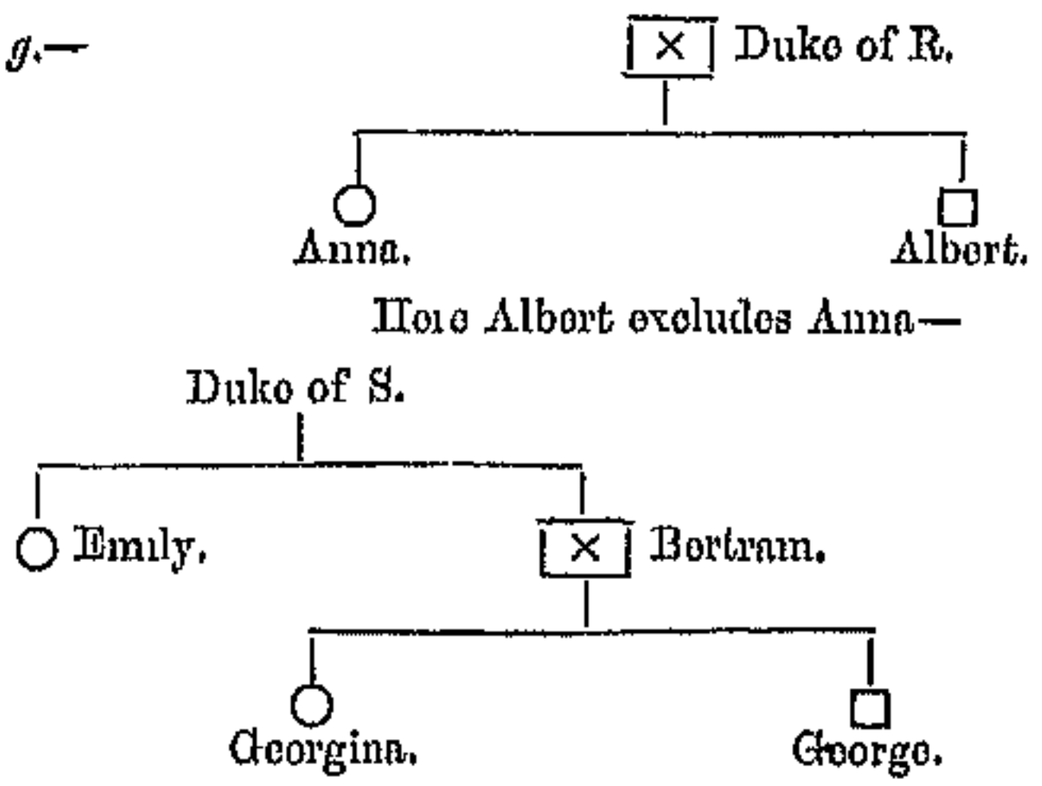
* Bowyer, 445

parliament and in the council, is established. No actual notice is taken by the upper house of this statute.

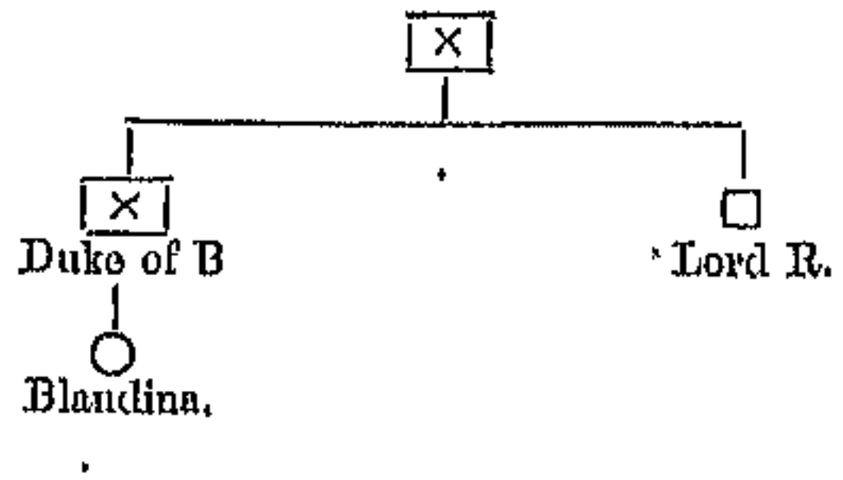
The peerage is, as a rule, hereditary in the male branch. Females also of the same line may, in certain cases, inherit the dignity on failure of males.*

The dignity is in abeyance in the event of several co-parceners coming after the last holder.† A dignity or name of nobility does not descend to or vest in co-heirs, as they are altogether incapable of taking in the only way in which the subject-matter can be enjoyed—*i.e.*, by wearing the dignity. The title is then in a state of abeyance and reverts to, and so long as such abeyance continues, remains in the crown—the fountain of honour from which it originally proceeded. It is competent to the crown to termi-

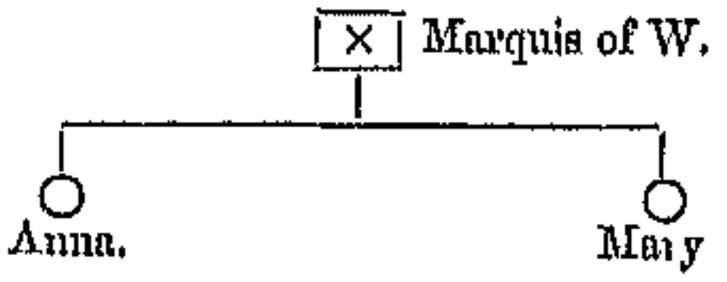
* *E. g.*—



Here George succeeds to the Duke of S, and excludes his aunt Emily and his sister Georgina, as the next male heir.



Here Blandina succeeds as next in succession to the Duke of B.



Here the peerage is in abeyance, because there is no one to inherit.

nate the abeyance of the dignity in favour of either of the co-heirs or the heir of any of the co-heirs.

The king, however, may transfer a peerage to one of several sisters, which will then be inherited in the male branch. The king may also nominate any woman as "peeress in her own right," thus the widow of Canning received for herself and her heirs the rank of the peerage.

Life peerages to which women were appointed have ceased to exist since the reign of George II. Lord Brougham maintains that such nominations, by reason of their long non-user, would at the present day be against law.

A peeress in her own right does not lose her privilege by marrying a commoner; should a peeress, however, have acquired rank only by marriage, she loses it on re-marrying a person not a peer.* If a duchess, whether noble by birth or by marriage, marry a peer, baron, or earl, she remains duchess all the same, because her husband was noble, and all noblemen are of equal rank (*pares*, peers).†

The king may create new English and Irish, but not new Scotch peers. The elevation to the peerage does not ennoble the collaterals. The ordinary form of nomination to the peerage is by patent,‡ which grants the rights of a peer to the individual named and the heirs-male of his body. It confers nobility at once, whether the peer take his seat in the upper house or not. If one is summoned by royal writ to assist at the sittings at the upper house, he must, in order to acquire the dignity of peer, actually take his seat, in which case the dignity descends to his lineal descendants, both male and female.§ In the nomination by writ, the right to inherit is understood as of course; whereas in that by letters patent, the right to inherit must be actually expressed to allow of the peerage passing by inheritance. It may likewise be so limited as absolutely to exclude females. Territorial peerage, depending on the possession of a specific landed estate, wholly disappeared under the house of Lancaster.

The peerage is lost by death or by "Bill of Attainder." Under Edward IV., George Nevill, Duke of Bedford, was degraded by

* Coke, Inst. ii. 50.

† Bowyer, 468.

‡ The first instance of a barony conferred by patent was in the twelfth year of Richard II., when Sir John Holt, a judge of the Common Pleas, was created Lord Beauchamp of Kidderminster.

§ Bowyer, 460.

Act of Parliament for poverty, as unable to support the rank of a peer, but this case is an isolated fact in history.*

The eldest son of a peer is a commoner when not called in the lifetime of his father to the upper house,† as generally happens in the case of eldest sons of dukes, marquesses, and earls, and which has even occurred on two occasions in the case of simple barons. The sons of barons in law, have no further privileges than the commonalty generally. Every Englishman, therefore, not having a seat in the upper house, is a commoner; in the stricter sense a "commoner," is one who has the right to co-operate, in the capacity of elector, in the construction of the lower house.‡ Amongst commoners the gentry hold the foremost position; but do not, as in the case of the nobility, constitute a political "class." In conjunction with the nobility, however, they constitute that political aristocracy which governs the country. The gentry, as such, have never enjoyed any special privileges, and since the Middle Ages, have been liable to all the imposts of the State.§ The power of the nobility and gentry is founded upon large possessions and a higher standard of education.

The census of England and Wales for the year 1851, gives the number of 17,047 landed proprietors, amongst whom the smaller yeomen, cultivating their own land, form but a small minority, ever decreasing. The greater land-owners, who chiefly live upon their rents and seldom cultivate their own property, savants, lawyers, merchants, officers, and clergy constitute the "gentry," from whose ranks the nobility is recruited. "As for gentlemen, they bee made good cheape in England, for whosoever studieth in the laws of the realme, who studieth in the universities, who professeth liberall sciences, and, to be short, who can live idlely, and without manuale labour, and will beare the port, charge, and countenance of a gentleman, he shall be called "Master," for that is the title which men give to esquires and other gentlemen, and shall bee taken for a gentleman." ‖

This notion prevailed so far back as the commencement of the

* Bowyer, 453.
† Russell, *Eng. Const.*, c. i.
‡ Bl. i. 178.
§ Hallam, *Const. H.*, i. 160.
‖ Nam quantum ad nobiles spectat, ali pretio hic in Anglia sunt; quisquis enim legibus patriis operam navat, quisquis in academiis incumbit litteris, quisquis artes liberales profitetur, neque (ut verbo dicam) manuum labore vel artificio aliquo victum quæritat; ille, si personam sustinere et impensas quas solent nobiles facere velit, *dominus* vocabitur (quæ vox nobilibus armigerisque tribuitur), et nobilis ipse reconsebitur.—*Anglie Descriptio*, B. I, c. 20, T. Smith.

17th century. The difference between a gentleman and a non-gentleman is of a social as well as political nature; the expression "he is no gentleman," comprising in itself a complete social excommunication: hence the English proverb, "The king truly may make one a nobleman but not a gentleman."

From the nobility downwards, the sons of peers and the higher state officials are now numbered in the ranks of the gentry. The knights banneret held a distinguished position amongst the gentry; if created by the king on the battle-field, they took precedence of all other gentlemen. The title has now become antiquated from the fact that no sovereign, since the middle of the last century, has been actually present on the field.*

Baronets were first created by James I. in 1611, when he was in want of money to reduce the province of Ulster. Baronets, on this account, have the arms of Ulster—a bloody hand—on their family escutcheon.† The dignity is heritable according to the rules of succession to real property. There are now about eight hundred baronets in England.‡

The "Knights of the Bath," so called because previous to initiation they went through the ceremony of bathing, belong to one of the military orders founded by Henry IV., and revived by George I. in 1725. Since 1815 there are three classes of the order—grand cross (G.C.B.), which is granted to seventy-two persons at most; knights commanders (K.C.B.); and companions (C.B.)

The most ancient of all noble titles is that of "knights bachelor" or "knights." Since Charles I., flagrantly chaffered for the title, it has fallen into discredit. The great mass of the gentry consists of "esquires" and "gentlemen."§ One is an "esquire" by virtue of a dignity or office, or by descent from peers and knights. The title "esquire" is no longer specially granted, and on writing to any gentleman the title "esquire" is employed as a matter of course. Thomas Smith‖ declares that "escuiers," "esquieres," or

* In the old records barons are distinguished by the appellation of "sire," bannerets have only that of "monsieur." Bannerets were frequently summoned to the upper house of parliament, constituting a distinct class inferior to barons, though generally named together and ultimately confounded with them.

† Bl. i. 104.

‡ May, *Const. Hist.*, i. 208.

§ Milton, in the discourse of Satan, gives the most perfect expression to the English consciousness of social difference in rank:

"If not equal all, yet free,
Equally free: for orders and degrees
Jar not with liberty, but well consist."

‖ T. Smith, *Angliæ Descriptio*, lib. i. c. 19.

"squires" do not constitute any special class, and are generally so styled by virtue of some office. The distinction of rank has only any importance at court and on occasion of public festivals.

Next to the gentry come the "yeomen" or "peasantry," who possess free land worth forty shillings yearly. This important and influential class, since the time of the Tudors, is gradually disappearing.

The "copyholders," who have one-eighth of the entire land, were originally "villeins" bound to the soil. They are now protected in their possession by force of "prescription" on showing, by copy of court roll, that they and their forefathers had been in possession from time immemorial. From the decline of serfdom they remained subject to every kind of customary service.* At the present day even, copyholders are subject to certain fines on alienation and to heriots, and the lord has the right of distraint.† Since the statute of *quia emptores* no manor can be created, and consequently all copyhold estates are of a date prior to 1290. By recent legislation "enfranchisement" of copyhold land may be compelled either at the instance of the tenant or of the lord. The word "*farmer*" is a general designation, but is particularly applied to those who hold land on a lease for years at a rack-rent. Their entire number amounts, in England and Wales, to more than half a million. Day-labourers, artizans, tradesmen, and artificers, since Henry V. c. 5, in civil and criminal suits, are to be indicated by the name of their trade or calling. The relation of servants to their masters is not of a purely contractual nature: Elizabeth decreed that the poorer class should be forced to work for hire. The compelling of pauper children to serve as apprentices and be educated for service is enforced by law even at the present day. For any misconduct on the part of agricultural labourers, they may be summarily punished by a magistrate, and sentenced to three months' imprisonment with hard labour. Such punishment may likewise, according to George IV. c. 34 and 53, attach to servants who, having entered into a written contract to serve commit a breach thereof.

* Very remarkable customs exist in Scotland, especially in the highlands, for instance, the duty of amusing (!) the lord by playing the bagpipes.

† Gneist, i. 244.—In contemplation of law a copyholder is only a tenant at the will of the lord according to the custom of the manor, the letting of the lands held by copy of court-roll being in the lord.

CHAPTER IV.

FREE LOCOMOTION—RIGHT TO TRAVEL AND TO CHANGE DOMICILE.

Writ *ne exeat-regno*.—Right not to be sent out of the kingdom.—Settlement Act.—*Before Charles II.*—*Statute of Charles II.*—*Law of Domicile*—Adam Smith's opinion touching these Laws.—Pashley's Reforms in the 18th century.—Poor Law of 1834.—Changes under Queen Victoria.—Announced withdrawal of the Law of Settlement.

THE King of England, by means of a writ *ne exeat regno*, can forbid any subject whatsoever to quit the realm or to travel without his permission. Elizabeth acted severely towards even the lords and gentry, inasmuch as without her consent they could not leave England. During her reign Sir William Evers was subjected to punishment on account of a secret journey to Scotland. Even in the year 1700, the Duke of Shrewsbury required the special permission of William III. to enable him to travel abroad; in the year 1712, Marlborough could only succeed in obtaining a pass, in the face of strong opposition from many members of the cabinet. The price of such a pass then amounted from £6 upwards; it now costs 2*s*. The restriction on freedom of locomotion gave rise to the custom of many Englishmen travelling with passports from foreign ambassadors.* All those restrictions are now, happily, abolished. The Stuarts tried to restrain emigration. It is a well-known fact that Cromwell, in consequence of a prohibition issued by Charles I., was forced to remain in England. Now-a-days, vast numbers of Englishmen emigrate annually, without hindrance, to distant quarters of the world. Soldiers and sailors only may be sent by the sovereign out of the country against their will. On the other hand, the sovereign cannot, according to the Habeas Corpus Act, send anyone beyond the seas without his consent, neither as lord-lieutenant to Ireland, nor as ambassador abroad.†

Parliament alone has power to banish an English subject; transportation is a measure introduced by special enactment of

* Mahon, i. 18. † Bowyer, 427.

parliament; such mode of punishment was unknown to the common law.* To realise the legal position of Englishmen it is needful to consider the Local Settlement Acts, however gloomy they may appear, and adverse to cherished views of English freedom. The picture of the English labourer hunted from parish to parish is quite as consistent with the truth as Chatham's famous saying: "Storm and rain may penetrate into the cottage of the English labourer, but the king cannot." In the classic period of English parliamentarism, the sovereign was not, so far as the English proletarians were concerned, an efficient agent either for good or for evil.†

By reason of the system of frank-pledge prevailing in the tithings, hundreds, and counties, it was but natural that no district should be bound to take care of needy persons not belonging to it; so long, therefore, as needy persons existed in England, orders of removal were necessary to transport such needy persons from one parish to another.‡ As the poor increased these removals increased coincidently. But the rule remained in force, that when individuals became a burthen to the parish, in the event of their remaining, they were liable to removal. An obligation on the part of each parish to feed its own poor was first enforced in the reign of Elizabeth. From that time forth the right of removal has been, of course, treated more strictly; but this right became a weapon in the hands of the ruling gentry from the moment when they got the upper-hand on the restoration of the Stuarts.

After the return of the Stuarts the greater landowners, coincidently with the introduction of the corn-law, passed the notorious Law of Settlement (13 and 14 Charles II., c. 12), rendering the agricultural labourer a slave of the soil (*glebæ adscriptus*) inasmuch as, ignoring the earlier principles of the common law and practice, it declared everyone who became a burthen to the parish liable to removal if they had not a settlement there. Legal settlement was acquired first, by birth; a child had his settlement, or *primâ facie* domicile in the place where he first saw the light of day, until the contrary was shown; bastards could only have such "*primâ facie* domicile." Second, by parentage; the children

* Bl., i., 137.

† If we compare the English lower classes with those of Germany, we find greater rigorism practised against them in the island kingdom than elsewhere.

‡ Toulmin Smith, 416.

acquiring the domicile of their parents. Third, the wife by marriage obtained the domicile of the husband. Fourth, domicile was acquired by notorious and public residence of forty days in a district or parish.

In the following cases the residence need not be notorious:— Whoever, for one whole year has, in a certain spot, paid £10 rent and resided forty days in the parish. Second, whoever has paid the public taxes and has remained forty days in the parish. Third, whoever has discharged for one whole year a parochial office in the parish. Fourth, unmarried persons having no children who, for one whole year, have remained in one and the same service. Fifth, whoever has an estate of his own there, of whatever value, and whether the interest be legal or equitable. Sixth, by being bound apprentice, or a servant who has worked or served respectively in the same place *forty days successively*.

Within the said forty days, however, apprentices and servants, when out of work, as well as other persons likely to become a burthen to the district, at the suit of an overseer of the poor, may be sent back to their own parish on an order from two justices of the peace, unless they have a settlement in the parish arising from £10 rent or lease. If the parish assumed to be the native parish, by appeal to a court of law, rejected the certificate, the pauper was again sent back to the parish which obtained the order.*

"The common people of England are indeed very jealous of their liberty,† but like the common people of most other countries, never rightly understanding wherein it consists, have now for more than a century together suffered themselves to be exposed to this oppression without a remedy. Though men of reflection, too, have sometimes complained of the Law of Settlement as a public grievance, yet it has never been the object of any general popular clamour, such as that agitated against 'general warrants,' an abusive practice undoubtedly, but such a one as was not likely to occasion any oppression. There is scarce a poor man in England of forty years of age, I will venture to say, who has not, in some part of his life, felt himself most cruelly oppressed by this ill-contrived

* Pashley, *Pauperism and Poor Law*. 212. Lond, 1853.

† This statute was certainly a great infringement of Magna Charta and the liberty of the subject. There is nothing which can be more cruel or impolitic than to prevent a person from residing in that situation where, by his industry and occupation, he can best procure a competent provision for himself and his family.—Bl., i., 362. *Note by Christian.*

Law of Settlement. To the removal of other abuses let that of the Law of Settlements be added, so that if a poor labourer be out of work, he may betake him to some other calling, or some other spot, without fear of being troubled or removed."*

"The poor man, only nominally free, again becomes the mere slave of the land, and the agricultural labourer has hardly a better place assigned to him, in the political and social organization of England, for the last two centuries, than that which he possessed, throughout the greater part of Europe, during the feudal age. The name of serf or villein has, it is true, fallen into disuse, but the spirit of serfdom and villeinage has been preserved by the legislation of Charles II., the practical effect of which, from the very first, has been to retain every labouring man within the parish where accident may have given him a settlement. The serf or villein of feudal barbarism effectually acquired his freedom if, escaping from the bondage of his original settlement, he resided for a year and a day within the walls of a town, but no term of mere residence, even if it endured from generation to generation, could destroy the poor man's liability to removal to the original place of his derivative settlement."†

Under James II. these enactments were confirmed, and remained unchanged down to the Revolution of 1688. Under William III., the first slight modifications were introduced. "The first substantial advance was made in the 18th century, by requiring that, as soon as a person had been recognised by a certificate as a resident of a certain parish, he should only be subject to removal, in the event of his becoming chargeable to the parish where he happened to be. This last limitation, viz., the actual burthen to the community in which a pauper resides, was extended by 35 Geo. III., c. 110, sec. 1, to all strangers in any parish. In future, therefore, a person must really be a burthen to the parish, to admit of his being removed.

Finally, the new poor law of 1834, following always on the track of the law of Charles II., has newly regulated the system of domicile. Relationship, apprenticeship, marriage, and residence accord domicile as formerly. Bastards, however, now follow the domicile of the mother until they attain the age of sixteen or gain a domicile for themselves. Anyone paying the ordinary municipal

* Adam Smith, *Wealth of Nations.* † Pashley, 283.

taxes need not have resided in the place of his domicile in order to avail himself of his rights. The Law of Settlement is independent of municipal law, and may also be acquired by foreigners. It accords to all who acquire it a right to relief. The fact of hiring and service no longer gives domicile. The most recent substantial reforms have been introduced during the present reign. By 9 and 10 Vict. c. 66, no person can be removed from a parish in which he has resided for five years next before the application for a warrant for his removal.

A later enactment restricts the settlement to a five years' residence within any poor law union. A statute of the year 1853 has extended this provision to a settlement of three years duration in such union.

The speech from the throne with which the session of 1854 was opened, promised ample reforms of the Laws of Settlement, but 'until now they have remained mere words. Viewed in theory,' however, the 'enactments have been condemned by 'all parties.'" "That they still endure," says Pashley,* "is a memorable example of the slow progress of reason and justice among the rulers of a just and reasonable people." The interminable difficulty of the question should not be kept out of view; whether these laws can be abolished without a fundamental reform of the entire poor-law system is a question that can neither be safely affirmed nor denied.

* Pashley, p. 315.

CHAPTER V.

FREEDOM OF COMMERCE.

Restraint of Trade unknown to the Common Law.—Regulations affecting trade under the Tudors.—Introductions of freedom of Trade.—Restriction on certain callings. —Hawkers.—Factory Workers.—Physicians.—Apothecaries.—Boarding Houses. —Granting of Beer and Spirit Licenses.—Political Influences affecting the Grant of Licenses.—Withdrawal of Licenses.—Public Companies, Railways, Canals.

By the common law all trades were free. Restrictions were first introduced by statutes and grants of corporate rights to "mysteries," and guilds. According to the trade-regulations under the Tudors, the pursuit of any trade depended on seven years' apprenticeship. The practice of the courts interpreted all those privileges very narrowly and strictly. In the country parts the pursuit of trade remained unfettered. An interesting insight into the statutory restraint of trade is afforded by a previously-mentioned statute of July 21, 1856, whereby a hundred antiquated laws affecting trade were at one stroke abolished. Amongst them we meet with a statute characteristic of the earlier restrictions to trade; viz., 10 William III., forbidding the manufacture and sale of certain kinds of buttons. The guilds began to decline under the Stuarts, becoming mere associations, or companies, for the purposes of common revelry.

The statute 54 George III. c. 96, gave force of law to that which had long obtained, viz., that the pursuit of trade should be wholly free apart from all guilds. Notwithstanding the general freedom of trade, strict police regulations are in force touching certain callings; for instance, bakers, brewers, butter-dealers, coal dealers, millers, manufacturers of arms, apothecaries, knackers, sellers of gunpowder, brokers, pawnbrokers, pilots, chimney-sweeps, marine-store dealers. For the greater part of these trades the permission of inspectors must be obtained previous to taking a factory or place of business. Dealers in, and manufacturers of, guns and pistols, can only sell arms which have been officially tested. Pedlars are specially subject to manifold restrictions; if met with not having their trade licenses, they are liable to one

months' imprisonment with hard labour. Only licensed manufacturers and retailers of tobacco can deal in tobacco and snuff. Whosoever contravenes these regulations (5 and 6 Vic. c. 93, s. 13) *is punishable by forfeiture of the property, and a penalty of* £100, or three months' imprisonment with hard labour. All infractions may be proceeded against by way of indictment, the informer receiving a portion of the penalty. These enactments are milder in practice than in theory. Justices of the peace in all such cases are very lenient, which is all the more possible as the English law refuses to the prosecutor any appeal.

Later legislation has exhibited special solicitude for workers in factories. By 6 George IV. c. 129, the Tories abolished the laws which punished peaceful strikes for the purpose of obtaining higher wages, and the enactments of the first two Georges owe their origin to the Whigs. The truck system is forbidden under penalty by 1 and 2 Will. IV., c. 36, 37. The Factory Bill, 3 and 4 Will. IV., c. 103, enacts that young children shall not be allowed to work *at night in factories. To carry out its provisions, special* inspectors of factories are appointed, under the control of the Home Office. They may inflict a penalty ranging from £1 up to £20, and from their sentence there lies no appeal.

Many persons can only follow their calling by virtue of a license obtained from a magistrate, amongst whom may be mentioned persons who let to hire carriages and hackney coaches. By the *London Cab Act (1 and 2 Will. IV., c. 22), every cab*-driver must be provided with a certificate of good conduct, otherwise he is not allowed to follow the calling, but strict attention can scarcely be paid to this requirement, seeing that London cab-drivers are very rough-spun, and take especial advantage of foreigners. By the act of July, 1853, parliament reduced the cab-fare from eightpence to sixpence per English mile. A grand strike was the consequence, but *after holding out for three days,* the cabmen surrendered to the omnipotence of parliament.*

In former times doctors drove a free trade. Since the Medical Act (21 and 22 Vic. c. 90), a registration has been introduced for all doctors having a degree and who have passed an examination. Only doctors so registered can bring an action for their

* A capital description of the consequences of this strike, in a metropolis like London, is to be met with in the *Annual Register* of 1853, p. 91.

fees, according to the recognized scale. Apothecaries have only a right of action in case they have received an official license. In the interest of public safety, knackers' yards, gunpowder factories, and tobacco manufactories, must obtain licenses. Common lodging-houses, boarding-houses, and furnished hotels, since the 16 and 17 Vic., c. 41, have to obtain a license, such license to be withheld whenever a satisfactory certificate of character is not produced. Keepers of beer-houses and hotels were exempt from all restrictions in the middle ages. The 6 Edward VI., c. 25, introduced the licensing of ale-houses by two justices of the peace at quarter sessions. The landlords must bind themselves also not to permit any forbidden games. Whosoever sells beer without a license is subject to a penalty.* All licenses for the keeping of a bar, and of a hotel in which spirituous liquors are sold retail, must be renewed yearly at the general annual licensing meeting. Such license is not granted to persons who are not of good character. If withheld, appeal lies to the quarter sessions, in which justices of the peace other than those in the first case have to determine. No further appeal is permissible. In the event, however, of partial motives being feared, the matter may, by *certiorari*, be brought for decision to the Queen's Bench. No competitor of the person applying for the license is allowed to act in such case as justice of the peace. The license is transferable. To facilitate such transfer, from four to eight licensing meetings are held annually. Besides this license, every hotel keeper and publican requires also an excise license. The landlord, by his license, is only empowered to sell beer and cyder out of the house. In country districts and towns not represented in parliament, a landlord, to obtain such license, further requires yearly a certificate of character from six residents in the district, undersigned by a poorlaw overseer. In London and the parliamentary boroughs, no such certificate is required, but both beer-shops and public-houses are there subject to strict police supervision. The question of granting licenses has not always been withdrawn from the sphere of party politics. In 1682 the justices of the peace in London declared the frequenters of "Conventicles" inadmissible as publicans. The practice of the courts of law has since then kept in check such magisterial display of authority. The judges have determined

* Crabb, 477.

that no mere vague imputation, but only the want of legal qualifications, can justify the refusal of a license. Lord Mansfield allowed proceedings to be taken against two justices of the peace for having refused a license to a publican, on the ground of his having given an adverse vote at the parliamentary election. Complaints are made, even at the present day, that on grounds purely political the granting of licenses is frequently arbitrarily determined. In this particular, the reform of the town corporations has introduced many improvements.*

The license may, according to 9 Geo. IV., c. 61, and 39 Geo. III., c. 79, be withdrawn at once, by two justices of peace, in case any riotous or immoral publication be met with in any ale-shop or public-house, or any riotous unlawful assemblage has been held with concurrence of the landlord. On account of any other offence, a license can only be withdrawn at the quarter sessions and on a verdict given by the jury; the withdrawal of the license renders the person thereby affected incapable of keeping either a bar or hotel for three years.

Monopolies are unknown to the law of England. All the railways and docks, many of the harbours, and all the canals are the property of private individuals, who are mostly associated with a view to common profit. All such companies are corporations, and must acquire, by an act of parliament, the rights of ("moral") persons. The government has a supervision over railways, the direction of canals, etc., may establish scales of charges and regulations; and, within the scope of such regulations, the ministry is ordinarily invested with full power. A truly continental mode of issuing governmental regulations has already been inaugurated.

The system of assurance has always been unfettered.

* Miss Martineau, *Hist of Eng.*

CHAPTER VI.

INVIOLABILITY OF PROPERTY.

Confiscation.—Action of Law on Local Taxation.—Expropriation.—Royal Game.—Later Game Laws.—Consequences thereof.—New Game Law.—Relief.

The forfeiture of both real and personal property still attends a conviction for felony or high treason.* In case of conviction for high treason the lands of the traitor escheat to the crown; in case of felony, where the specific offence is murder, the lands go to the crown for a "year, day, and waste." Since the statute 54 Geo. III., c. 145, he who is attainted of any other felony than high treason and murder forfeits the profits of all his estates of freehold during his life only; with regard to lands of inheritance, the general opinion is that, as the attainder has relation to the time of the offence committed, any intermediate conveyance or incumbrance will be void. Forfeiture of chattels has no relation backward, so that all alienations made *bonâ fide* and for value after committal of the offence, and before conviction, are good.

Against the impositions of local taxes, recourse to the law is admissible, and the ground of such imposition may be contested before a court of law. In the case of local taxes in arrear, and which have not been questioned, distraint is carried out in a very summary and expeditious manner.

According to modern statutes, expropriation, for the construction of railways and for the carrying out of public works, may take place under the Land Clauses Consolidation Act (8 Vict., c. 18, for England and Ireland; and 8 Vict., c. 19, for Scotland). In cases of minor import an arbitrator declares his award; in cases of higher moment a jury determines the amount of indemnity.† The free enjoyment of property has been for a long time limited in England by reason of the mediæval game laws. After the conquest, hunting was made a "royal" privilege; the severe forest laws of William I., were however by the "*Charta*

* Bl. iv., 94-95; Coke, *Inst.* iii., 15; Shakespeare's Henry VIII., act iii. s. 2 (Suffolk to Wolsey).

† Bowyer, 428.

de Foresta," of 1217 toned down; a later charter of Henry III., withdrew from many forests the royal privilege of hunting, substituting a fine and imprisonment for killing the king's deer, in lieu of capital punishment.

Even at the present day, in view of law the sovereign is the only person in England who has a right to pursue game; whoever wishes to acquire such right must obtain a license from the crown.

Sovereigns have, however, since the conquest, frequently granted the right of hunting to the gentry, who might exercise it in parks or "chases," in certain cases also, but not indiscriminately, on land belonging to other persons.* Thus gradually did the right come into the hands of the landed gentry; the laws affecting such right have remained in all their mediæval harshness for the advantage of the ruling class. Blackstone† breaks a lance against the game laws as the product of tyranny, contending, "that the only difference between the old Norman forest laws and the new game laws is, that formerly there was only one great hunter throughout the land, whereas at present a petty Nimrod reigns in every manor-house."†

No one not possessing a freehold producing £100 a-year durst hunt game upon his own land. Whoever held such right was bound to have a license.‡ Characteristically enough, a forty shilling freeholder might elect to parliament, and anyone with £20 yearly income might be a juror, but, to be able to shoot a partridge, a man must have fifty times as much income as a parliamentary elector, and five times as much as a juror.

As a consequence of such laws, in 1830, the prisons were half-filled with offenders.§ In 1829, a bill tending to render the sale of game free was defeated in the Upper House; Lord Westmoreland was of opinion that by such a law the country would be depopulated of its gentry!! And Lord Eldon exclaimed, "The *friends of liberty in the other House must have slept when they allowed such a bill to pass!!*"

Finally, modern legislation has approximated to the good old Saxon law; the statute 1 and 2 Will. IV., c. 32, maintains the right of pursuing game on the land of another, so far as it may have been granted, and the right pertains to the crown in its

* Bl., ii., 38, 416.
† Bl., iv., 416.
‡ Bl., iv., 416.
§ Miss Martineau, iii., 4.

forests. On the other hand, everyone may freely follow game on his own land on obtaining a license. Whoever follows game without such license incurs a penalty of £5. The preserving season is strictly upheld by severe police regulations. Infractions of the game laws are punishable by two justices of the peace. *Poaching practised at night, and in armed bands is subject, to* severe punishment. The greater land-owners may appoint game-keepers, and may authorize them to seize and take away all dogs, nets, and other engines and instruments for the killing and taking of game, used by any person not authorised to kill game for want of a game-certificate. Dealing in game is allowed by license and trade-certificate. Any person in actual occupation of any enclosed lands, or any owner thereof who has the right of killing game thereon, since 11 and 12 Vict., c. 29, may, by himself, or by any one person authorised by him, in writing, in such form as by the act provided, take, kill, or destroy any hare on such land, without paying duties or obtaining an annual game-certificate.

By the 25 and 26 Vic., c. 114, any constable or peace-officer is authorized to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, and having in his possession any game unlawfully obtained, or any gun or engine used for the killing and taking of game. Should the officer find any game, or any such article or thing as aforesaid upon any such person, he is empowered to seize such game, article, or thing; the officer, however, in such case, must apply to a justice of the peace for a summons, citing such person to appear before two justices of the peace; and if such person shall have obtained such game by unlawfully going on any land, or shall have used any such article or thing for unlawfully killing or taking game, such person shall, on conviction, pay a sum not exceeding £5, and forfeit such game, gun, etc. If no conviction take place, the game or any such article as aforesaid, or the value thereof, shall be restored to the person from whom it has been taken. No conviction or order, under this Act, is to be quashed for want of form, or removed by *certiorari*. An appeal lies from the decision of the magistrate in petty sessions to the next court of general or quarter sessions, which shall be holden not less than twelve days after conviction. The appellant must give to the complainant notice in writing within three days after the conviction and seven clear days before such sessions.

CHAPTER VII.

RELIGIOUS LIBERTY.

Laws of Henry V. against Heresy.—Penal Laws of Elizabeth against Catholics and Puritans.—Intolerance of the Long Parliament.—The Corporation and Test Act. —Penal Laws against the Catholics —Oppressed condition of the Catholic Landowners.—Penal Laws against Priests.—Montesquieu's Opinion touching these Laws.—*Blackstone's.—Modifications under George III.—Laws for Relief of* Roman Catholics in England and Ireland.—Emancipation of the Catholics —The Position of the "Catholic" Church.—Penal Laws against Jesuits and Monks.— Prohibition of Processions.—Legacies for "Superstitious Uses."—Civil Marriage, —Political Rights of Catholics. —Toleration Act in favour of Dissenters.— *Emancipation of Dissenters.—Quakers.—Jews in the Middle Ages.—Naturali*zation.—Political Rights.—Admission to Parliament.—A Mohammedan Attorney.—Keeping the Sabbath.—Churchyards.—Laws against Blasphemy.

THE common law does not know of the offence of "heresy." The convocation and the spiritual courts, to whose decrees the temporal power gave no effect, proceeded against heretics by spiritual punishments, such as excommunication and the like. By a statute of Henry V., passed against the Lollards, entitled "*De heretico comburendo,*" the arm of the civil power first gave effect to the sentences of the spiritual courts, and, on the issuing of a writ in chancery, delivered up the heretic to the punishment of death by fire. As this statute had simply in view the saving of the soul, the persons condemned did not suffer forfeiture of their goods and chattels. The statute against heretics remained in force down to the time of Charles II. From the time of the Reformation it was called into activity against Catholics and dissenters.

The English Reformation was originally a Reformation merely of *jurisdiction*, inasmuch as the Pope ceased to be the last resort in religious disputes, and the king assumed to be his successor. To question the infallibility of the king and parliament in matters of religion became an act of heresy, as had previously been the case with reference to the infallibility of the "Bishop of Rome," as the Pope, since the Reformation, has been "officially" styled.

This supremacy of the king over the church was fully established by 1 Elizabeth, c. 1 (1562), called the "Act of Supremacy and Conformity," whereby it is ordered that all clergymen and laics who are invested with any office under the crown, shall take the oath of supremacy, and abjure the spiritual and worldly jurisdiction of every foreign prince, under penalty of loss of office or benefice. Defection from the legalised religion, and the spreading of contrary principles, entailed the penalty of high treason.

Ecclesiastics not conforming to the English liturgy, were forbidden to exercise their functions, under severe penalties, which might involve imprisonment for life. A later statute declared the making of proselytes with intent to procure their return to catholicism and the publication of papal bulls as high treason. Heavy penalties were further threatened against such as remained away from church.

During her reign no milder measure was meted out to Protestant dissenters; Udal, a puritan clergyman, was executed for having published a book against episcopacy.* In the eyes of the Established Church, not only are Puritans, but *Catholics* likewise, doomed "Dissenters." Against the Catholics both the Parliament and the kingdom at large acted most aggressively under the first two Stuarts. The Puritans brought the Long Parliament and Commonwealth to bear against Charles I.

The Long Parliament deprived all Catholic peers of their seat in the upper house, and Catholic officers of their posts in the army. Though Cromwell, on political grounds, vehemently persecuted the Catholics, the measures adopted by him with regard to Ireland were of a far more rigorous character than those applied to the Catholics in England during his "Protectorate."

The Restoration was especially intolerant against the Puritans. By the Corporation Act of 13 Charles II., st. 2, c. 1, it was provided that no person should thereafter be elected to office in any corporate town, who should not, within one year previously, have taken the sacrament of the Lord's supper, according to the rites of the Church of England; and every person

* Mr. Hallam is of opinion that he died of the effects of confinement in prison. Neal says that he suffered death for an alleged libel on the bishops.

so elected was also required to take the oaths of allegiance and supremacy.

By the Act of Uniformity, 13 and 14 Charles II. c. 4, it was enacted that no person should thenceforth be capable of holding any ecclesiastical promotion or dignity; or of consecrating or administering the sacrament, until he should be ordained priest according to episcopal ordination; and, with respect to all ministers who then enjoyed any ecclesiastical benefice, it directed that they should, within a certain period, openly read morning and evening service according to the Book of Common Prayer, and declare before the congregation their unfeigned assent and consent to the use of all things therein contained, upon pain of being *ipso facto* deprived of their spiritual promotions.

This Act is really the test-act of the English hierarchy. It operates most upon its clergy, and by its enforcement in 1662, 1800, 2000, or, as others state, 2400 of its most efficient and devoted ministers were deprived of all promotion.

Charles II., whose Catholic tendencies began to develope with years, suspended the penal laws against Catholics and dissenters, just when nothing was so popular with the people as the persecution of Catholics. This line of conduct had no further result than to force upon him the Test Act (1673), to the adoption of which the second "long parliament"* (1660 to 1678) compelled the king. By this act, any one about to be invested with a public office was bound to subscribe a declaration against the real presence of Christ in the Eucharist, *i. e.*, "transubstantiation," and also to receive the sacrament of the Lord's Supper "according to the usage of the Church of England."† This provision excluded

* James II. openly dispensed with this Act. The validity of such dispensation was questioned in a collusive action brought against Sir Edward Hales, a Roman Catholic, in the name of his servant, to recover the penalty of £500, imposed by the Test Act for accepting the commission of colonel of a regiment without the previous qualification of receiving the sacrament in the Church of England. The judges decided in favour of the defendant, upon the principle that it was an inseparable prerogative of the crown to dispense with penal laws in particular cases, for reasons of which it was the sole judge. One of the charges brought against James was the assuming and exercising a power of dispensing with and suspending laws without the consent of Parliament.

† Sir John Howell, Recorder of the City of London, sent back a jury repeatedly, and intimidated them for the purpose of securing a verdict against the Quaker Penn, for riot and conspiracy, the worthy judge exclaiming—"Now I for the first time understand the craft and wisdom of the Spanish Inquisition; and it will not be well with us until we get such an institution in England.—Disraeli, *Curios. Lit.* i.

Roman Catholics and dissenters from every considerable place of trust and public employment.

The revolution occasioned by the Catholic tendencies of James II., rendered the position of the Catholic body in many particulars still more unendurable.* In the first half of the 18th century they were still unusually oppressed. Blackstone gives the long and terrible list of punishments to which they were subjected. Penalties for non-attendance at church continued after the Revolution; whosoever read mass was subject to a fine of 200 marks, whosoever heard it, to 100; both priest and hearer were alike subject to one year's imprisonment.

No one of the age of eighteen, who had not taken the oath of allegiance and supremacy, and signed the declaration against "Transubstantiation", and prayer to the saints, could either purchase or otherwise acquire land. No Catholic could teach in any school, or keep one, under penalty of imprisonment for life. Catholics could not exercise the rights of presentation to a living. If any Catholic sent a co-religionist to the continent for education in a Catholic college, both the person sending and the person sent, and any one contributing money for the education, became incapable of defending or instituting a suit in the courts of law, of being executors or adminstrators, of inheriting any legacy, or being invested with any public office; and forfeited, moreover, all their property, both real and personal. Apostacy and the making of proselytes still remained high treason. Popish recusants† convicted in a court of law of not attending the service of the Church of England, were subject to the following disabilities, penalties, and forfeitures, over and above those before-mentioned: they were considered as persons excommunicated,‡ and could not take any office, bear arms, go further than five miles from home,

* For proof of this, see the disgraceful Act of 1700 "against the growth of Popery." Burke, in his address to the electors of Bristol, gives an account of the circumstances under which it became law.

By this Act the saying mass was forged into a crime punishable with perpetual imprisonment, the teaching school, even the teaching in a private family, was in every Catholic subjected to the same unproportioned punishment. Every Roman Catholic was to forfeit his estate to his nearest Protestant relative, until through a profession of what he did not believe, he redeemed, by his hypocrisy, what the law had transferred to the kinsman as the recompense of his profligacy.

† *Recusant* is one who refused to acknowledge the king's supremacy in matters of religion, or to conform to the English Church. This term would seem to embrace Nonconformists, of every class.

‡ Bl. iv. 56.

unless by licence, come within ten miles of London on pain of £100, or appear as plaintiff in any court of law or suit in equity. Marriages, christenings, and burials, might only be conducted and registered by the clergy of the church established; all marriages concluded between Catholics in a Catholic church, and celebrated by a Catholic priest, were invalid, and the children born of such union bastards.* The son of any Catholic, by becoming a Protestant, might forthwith enter into possession of the family estate; a child of ten years, by conforming, might thereby deprive the whole of his family of their property. Every Protestant son might summon his father, being a Catholic, before the Court of Chancery, and compel him, on oath, to surrender his property; a yearly income for his life, in conformity with a judgment of a court of law, would thereupon be allotted from the father's income. By 7 Will. III., cap. 4, a union between Catholics and Protestants is prohibited; in the event of mixed marriages having been concluded abroad, the children belonging to the Catholic side shall be taken away and brought up as Protestants. In the event of a Catholic being brought before a court on the ground of his religion, or any of the matters abovementioned, he was not allowed the privilege of being tried by a jury; the burden of proof lay upon the accused.† Two justices of the peace might, on any occasion, proceed forthwith to search the house of a Catholic. Catholic priests saying mass (excepting in the house of an ambassador) were, by 11 and 12 Will. III., cap. 4, liable to perpetual imprisonment. If a priest celebrated marriage between Catholics and Protestants, he might be hanged.‡ According to statute 27 Eliz., c. 2, any priest born within the dominions of the crown of England, who shall come over thither from beyond sea, or shall be in England three days without conforming and taking the oaths, is guilty of high treason; and all persons harbouring him were guilty for felony without "benefit of clergy."§ In Ireland, the priests were registered and durst not quit the district assigned to them. Such was the legal position of Catholics under Will. III., Anne, and the first two Georges. It was rendered more oppressive still when Walpole, in 1722, caused a penalty of £100,000 to be levied against all Catholics and Nonconformists on the ground

* Hansard, iii., Ser. v., p. 1201.
† Hallam, c. ii. iii., 333.
‡ Miss Martineau, ii. 7.
§ Bl. iv. 57.

of the Jacobite conspiracy. Montesquieu, who only was acquainted with the statute-book, and knew nothing of English practice, thus alludes to these laws: "Les lois contre ceux qui professeraient cette religion ne seraient point sanguinaires, car la liberté n'imagine point ces sortes de peines; mais elles seraient si réprimantes qu'elles feraient tout le mal qui peut se faire de sang-froid."*

The laws, however, have never been effectually carried out; "indeed, if they were, it would be very difficult to excuse them," says Blackstone.† The discretionary power of English judges exercised in favour of individuals, softened down these laws whenever they came within the review of courts of law.‡ There was, moreover, no inquisitorial state-police to track out the Catholics.

When all fear of the Pretender had disappeared, these laws began to be restrained in their operations.§ By the 11 George III., c. 60 (1779) Catholics, on taking the oath of allegiance, abjuring the Pretender, denying the temporal power of the Pope, and declaring their horror of the doctrine that princes who had been excommunicated by the see of Rome were worthy of death, and might lawfully be dethroned, were allowed to purchase, inherit, and otherwise acquire land. This statute, moreover, abolished the penal regulations against priests and Catholic teachers.‖

The later enactments which conceded further rights to Catholics, were 31 George III., c. 32 for England, and 33 George III., c. 21 for Ireland. The former abolished all penal regulations against Catholics. Every Catholic who, conformably with 11 George III., c. 60, took the oath and signed the respective declaration, received a certificate in the local or royal courts, and enjoyed full liberty of religion. Priests and places of worship belonging to the Roman Catholics were to be registered. Such registered ecclesiastics were not required to take the oath; divine service in registered chapels was protected against all disturbances. No Catholic house of worship could have either bells or

* Montesquieu, *Esprit des Lois*, B. xix., c. 27.

† Bl. iv. 57.

‡ Hallam, C. H. iii. 214; Bl. iv. 58. "For it ought not to be left in the breast of every merciless bigot to drag down the vengeance of these occasional laws upon inoffensive though mistaken subjects in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty."

§ Mahon, i.

‖ Bl. iv. 58. The passing of this bill excited the notorious Gordon riot, *vide* Mahon, vii.

a tower; and no priest wear his vestments outside the church, even in the most restricted family circle.

Every Catholic registering his name at the quarter sessions, *was allowed to teach, but might not educate "Protestant" children.* No religious order was permitted, and every gift to Catholic schools and colleges was invalid. From that time Catholics might become barristers, attorneys, and notaries, but were not to have a seat in parliament or the privy council, nor might they become guardians of Protestants. In Ireland, they might not expose *for sale arms or powder; and, in regard to carrying arms, lay* under severe restrictions. By the above-indicated Irish statute, Catholics were declared incapable of sitting or voting in either house of parliament, or exercising the office of Lord-Lieutenant of Ireland, Lord Chancellor, or Keeper of the Great Seal, Lord High Treasurer or Chancellor of the Exchequer, Lord Chief-Justice or Judge of the King's Bench and Common Pleas, Chief-Baron or Baron in the Exchequer, or Judge of the Admiralty Courts, or Registrar of the Superior Courts, Secretary of State, Keeper of the Privy Seal, Vice-Treasurer or Deputy Vice-Treasurer, Accountant of the Treasury, Accountant-General, Lieutenant-Governor or Custos Rotulorum of any county, Secretary of the Lord-Lieutenant, Member of the Privy Council, Attorney-General, Solicitor-General, Queen's Counsel, Master in Chancery, President or Member of Trinity College in Dublin, Postmaster-General, Field-Marshal, Lieutenant-General of Artillery, Commander-in-Chief, General of the Staff, Sheriff or Under-Sheriff of any county; or of undertaking any office in contravention of the privileges assigned by recent statutes to corporations.

By section 4 of the same act, they were excluded from voting at vestry-meetings concerning the distribution of money or the repairing of parish churches, or other matters touching local *churches, or the parish generally. On the other hand they might* enjoy the full right of election. The opinion for a long time obtained that by means of these enactments all the requirements of justice had been abundantly complied with. George III. declared that he would regard every one his political enemy who should venture to introduce further measures to remedy the political incapacity of Irish and English Catholics. In practice, moreover, these paltry measures of relief were interpreted in a very narrow-hearted man-

nor.* From the passing of the Catholic Emancipation Act, 10 Geo. IV., c. 7 (1829), the position of the Catholics in England is as follows:—

By 10 Geo. IV., c. 7, almost all the civil disabilities under which the Roman Catholics laboured have been removed; they are empowered to vote at elections for members of parliament, and to sit in both houses of parliament, upon taking the oath prescribed by the act; Catholic priests, however, are excepted from the latter privileges. Roman Catholics may hold offices of preferment of all kinds, with the exception of those of Guardian, Justice, or Regent of the United Kingdom, of Lord High Chancellor, or Commissioner of the Great Seal, Lord-lieutenant, or Lord-deputy of Ireland, or Lord-commissioner of the Assembly of the Church of Scotland, and of any office in the Church or Ecclesiastical Courts or foundations, universities, colleges, or schools. They may.

* *Smith's City and Country Almanac* for 1822, indicates the offices which Catholics in Ireland might fill, and those actually held at the time:—

	The entire number of places.	Number of Catholics.
Post-office, comprising the sub-postmasters	346	25
Bank of Ireland—Governor, Vice-Governor, Directors, officials and Clerks	127	6
Royal Society of Dublin—President, Vice-president, and Members	17	—
Paving Commission—Commissioners and officials	16	2
Water-supply Commission	8	—
Commission for the maintenance of Dublin Harbour	25	—
Street Improvement Commission	26	—
Heads of Linen-trade Bureau	74	—
Subordinates of this department	72	3
Stamp-office	61	2
Court of the Lord-Lieutenant, with exception of the Chaplains	20	—
Town and Privy Council	125	—
Water-pipes Committee	56	—
Police-office in Dublin	58	—
Auditors of Accounts, Commissioners, and officials	9	—
Court of Chancery, including Commissioners in Bankruptcy	65	—
Insolvent Debtor's Court	5	—
King's Bench	22	2
Common Pleas	31	2
Exchequer, Law and Equity	63	3
Treasurers	2	—
Inferior Law Courts	18	—
Registry for Contracts	4	—
Assistant-Barristers of Counties	31	—
Clerks of the Crown and Peace	85	—
Crown Solicitors	9	—
Coroners for Ireland	108	14
Commissioners of Affidavits	262	29
Royal Treasury officials	35	1
Customs	296	11
Excise	265	6
Military-posts	48	—
Army Agents	15	—

become members of any corporations; but cannot vote in any ecclesiastical appointment.

The "Catholic" Church is not recognized as a church, but rather ignored, inasmuch as the English Established Church puts itself forward as a Church Catholic. The Catholic archbishops and bishops (in Ireland four archbishops and twenty-two bishops) are *not recognized by the state, and have neither jurisdiction nor* rank.* Cardinal Wiseman, in order to avoid the penalties of the "Ecclesiastical Titles" bill, was fain to style himself Archbishop *in* Westminster. Had he styled himself Archbishop *of* Westminster this would have been regarded as an assumption of jurisdiction, and would have involved penalties.† No Catholic clergyman has any right to bring an action for his fees.‡ The only Catholic college endowed by the state is that of Maynooth, in Ireland, a seminary founded, in 1795, for the education of native priests.§ *The prohibition to wear vestments outside the church has, since* the Act of Emancipation, been more stringently enforced, and is now punishable by a penalty of £50. Every native Jesuit or member of other religious orders, coming into the realm, is subject to banishment for life; but any Protestant secretary of state may grant a license to any Jesuit to come into the realm, subject to its revocation at pleasure. In case Jesuits and monks receive members into their order, they are guilty of a misdemeanour; the person received may be banished from the realm; should he, however, remain within the realm for three months, he is liable to transportation for life. The provisions of this act are not to extend to any religious order consisting of females. The restrictive regulations are, however, virtually evaded, and, by reason of the absence of a secret police, are mere blunt weapons.

Since 2 and 3 Will. IV., c. 115, Catholic houses of worship and schools are not subject to any other restrictions than those of Dissenters, which will be explained further on. The prohibition against processions outside the church has, on the contrary, received fresh vigour. Even on 15th June, 1852, a proclamation appeared forbidding all such processions, because "they caused scandal and annoyance to many people, and disturbed the public peace."‖

* Gneist, i., 564.

† As the union of Scotland and of Ireland had never been officially notified to the Pope, Cardinal Wiseman was empowered to take spiritual possession of "*florentissimum regnum Angliæ*."

‡ Gneist, i., 564.

§ Meidinger, *Das Britische Reich in Europa*, 511.

‖ Ann. Reg. 1852, 430.

The prohibitory measures of 1 Geo. I., c. 20, 24, whereby land cannot be given to so-called "superstitious uses," have been modified by later enactments. A gift for the education of Catholic priests would, probably, not fall within this law; on the other hand, the Court of Chancery has recently declared as invalid a legacy for saying masses for the dead.*

The marriages of Catholics and Dissenters must formally, to prevent their being deemed invalid, have been solemnized according to the rites of the Church of England.† The statute of 17th August, 1836, however (6 and 7 Will. IV. c. 85), introduced new regulations having principally in view the relief of persons dissenting from the discipline and doctrine of the Church of England. A superintendent-registrar was appointed for a district within which marriages might be celebrated by means either of the superintendent-registrar's certificate without license, or by his certificate with license. Civil marriages may be celebrated on any week-day from 8 till 12, either in presence of the registrar, or two or more witnesses, in any registered house of worship; or in the official residence before the superintendent-registrar, registrar, and two witnesses. Hence, those not desirous of being wedded in church, and who are not "Dissenters" or "Jews," but belong to the Established Church, may conclude a "civil" marriage. As the religion of the parties desirous of contracting is taken no heed of under this form, mixed marriages between Jews and Christians may be concluded before the recognized official. The license of the Archbishop of Canterbury is not withdrawn by the statute, it has merely become an optional affair, and, by reason of the heavy sum charged, is seldom resorted to. If the celebration take place in any other house of worship than that named in the certificate, or without permission of the registrar, the clergyman officiating shall be deemed guilty of felony.

By the 7 and 8 Vict. c. 102, and 9 and 10 Vict. c. 59, almost all the enactments imposing disabilities on Roman Catholics were repealed, and, with the few exceptions pointed out by the Catholic Emancipation Act, Roman Catholics enjoy the same privileges as members of other religious creeds.

Since the Revolution of 1688 the most oppressive measures against Protestant dissenters have been set aside. By the Act of

* Burns, ii., 168.

† An exception was admitted as regards the marriage of Quakers and Jews.

Toleration, 1 Will. and Mary, sec. 1, c. 18 (confirmed by 10 Anne, c. 2), all persons dissenting from the Church of England, except Papists and persons denying the Trinity, were relieved from such of the acts against nonconformity as prevented their assembling for religious worship, or otherwise restrained their religious liberty, on condition of their taking the oaths of allegiance and supremacy, subscribing a declaration against transubstantiation, and in the case of dissenting ministers, subscribing also to certain of the Thirty-nine Articles. This limitation, however, ceased after the "Act to Strengthen the Protestant Interest." The Toleration Act does not protect clergymen of the English Church who, being members of the Church, violate the precepts thereof.* Whoever, by word, teaching, preaching, or writing, denies the truth of the Christian religion, the Divine authority of the Holy Scriptures, and the Trinity, is, according to 9 and 10 Will. III. c. 32, declared incapable of all offices. In case of a second offence he incurs three years' imprisonment, and becomes incapable of conducting all civil actions, of discharging the office of guardian and executor, and unable to acquire inheritances and legacies. The statute 53 George III. c. 106, sec. 2, removes the penalties relative to the denial of the Trinity, thereby placing Unitarians on the same level with other dissenters.

The Test and Corporation Acts were abolished under the reign of George IV. Since the accession of the House of Hanover it had, however, fallen into desuetude, inasmuch as a bill of indemnity was passed annually qualifying dissenters for most offices. The statutes 7 and 8 Vict. c. 102, and 9 and 10 Vict. c. 59, have mainly done away with the older statutes against dissenters. 18 and 19 Vict. c. 86, abolishes penalties for the non-registration of dissenting chapels. The fact of registration, however, still secures many privileges; for instance, the exemption of the clergyman from serving on juries. The services of dissenters conducted in secret and with closed doors are prohibited. Of late years, also, dissenters are admissible to the universities. In regard to political rights, since the removal of the Test and Corporation Acts, and 9 George IV. c. 17, they are placed on the same level as members of the Church of England. If elected to a municipal office they have to subscribe a declaration to the effect that they

* So decided on 12th Feb. 1742 (Burns ii., 188).

will not use their office to the injury of the Established Church. Dissenters and Catholics, who become mayors of corporations, are not allowed, under a heavy fine, to visit in their robes of office the chapels of their respective religious creeds.* A bill for the abolition of the declarations was thrown out by the Upper House in the year 1861.†

As far as Quakers are concerned, their marriages, when conducted according to their religious usages, are valid; since 22 George II. c. 46, a solemn "affirmation" has been substituted for the usual oath.

In the middle ages the Jews were treated according to the arbitrary authority of princes; a special fiscal regulation having been introduced for the levying of taxes from them. Edward I. banished all Jews, and Cromwell was the first to allow their return to England. A rich Jew of Amsterdam, Manasseh-ben-Israel, had previously petitioned in vain the "Long" and the "Barebones" parliaments. Cromwell was more tolerant; he succeeded, notwithstanding the violent opposition he had to contend with, in establishing that, by his special commission, Jews might settle in England. Manasseh-ben-Israel received a pension from the Protector.‡ Their worship has not been subjected to any restriction; their marriages, concluded in conformity with the Mosaic provisions, have always been valid; until the introduction of the Divorce Act, 1857, their marriages, like that of all other members of the community, could only be dissolved by an Act of Parliament; Jews might, however, by a judgment of the ecclesiastical court, have been separated, *a mensâ et thoro*,§ Jews who have lived seven years in any English colony are naturalized, *ipso jure*. The statute 26 George II. c. 26, of 1753, which the Pelhams introduced, and which allowed Jews to be naturalized by an Act of Parliament, without their being obliged to take the sacrament, was, in consequence of the clamour of the excited population, withdrawn.‖

* *Parl. Rem.*, vol. ii., 133.

† *Parl. Rem.*, vol. ii., 44.

‡ Carlyle, *Cromwell's Speeches and Letters*

§ Burns ii., 336.

‖ The populace were wont to shout "No Jews, no Jews! no wooden shoes!" —the token of serfdom. Walpole capitally describes the agitation against the Jew Bill in his Memoirs (1753):—"Truly this holy excitement only seized the populace and the lower class of the clergy; but they had so much at heart the honour of the prophecies which foreboded misfortune and eternal confusion to the Jews, that they seemed to fear lest their fulfilment might be prevented by an Act of Parliament, and nothing was

The words "on the true faith of a Christian," were, by 10 George III. c. 4, s. 18, omitted in favour of Jews, on their taking the oath of abjuration.* But this form of oath remained in force for members of parliament, and Jews were thereby excluded from the lower house. Finally, the oath of abjuration, with the other oaths of allegiance and supremacy being removed, by 21 and 22 Vict. c. 48, and the denial of the Pretender being set aside as obsolete, a new oath of allegiance was introduced. Either house of parliament, by the succeeding statute, 21 and 22 Vict. c. 49, was empowered to omit, in favour of a Jew, the words "upon the true faith of a Christian," and qualify him thereby to sit in parliament. The same act excludes Jews from such offices as Catholics are not allowed to assume, and enables the Archbishop of Canterbury to exercise the rights of presentation to any living acquired by a Jew.†

As the oath of abjuration has fallen out of use, and the formula above indicated is only applicable in case of being elected to parliament, Mohammedans are also enabled, since 1858, to discharge public offices. In the year 1858 Comrooden Tyabjee, a Mohammedan, was admitted as an attorney in London, after prolonged argument, Lord Campbell releasing him from the necessity of taking the oath.‡

These tolerant measures have not, however, deprived the Church Established of her rights as the State Church. Jews and Catholics, like all other Englishmen, are subject to the ecclesiastical courts. Those who do not belong to the Established Church, *i.e.*, one half of the population, are bound to pay tithes and church-rates, whenever the latter are imposed by the vestry. To the due observance of the Sunday all religious parties are

wanting to their zeal save the sending of a petition to both houses to determine the fulfilment of these prophecies. The village parsons preached against the bishops, because they had proved themselves untrue to the Gospel, and aldermen got tipsy at the county clubs in honour of religion, as erewhile they had done for King James's sake. The ministers gave in to this unreasonable cry, and allowed the bill to be withdrawn in order to secure their measures." Hogarth, also, in one of the "Election" sketches, has famously hit off the pious zeal of these drunken heroes of the Faith.

* Burns ii., 1858, 183.

† The pertinacious opposition against the admission of Jews to Parliament had partly a secret reason; it was feared that if the formulæ of religious oaths were removed, opulent Mohammedans and Hindoos might succeed in buying their way to Parliament; hence, only by special resolution of either house are the words "on the true faith of a Christian" omitted in favour of Jews; the entrance to Parliament remaining still barred to Mohammedans and Hindoos.

‡ *Ann. Reg.*, 1858, 188.

alike compelled; the first ordinances in this particular appeared under James I., who forbade shoe-making or shoe-mending on the Sabbath. Charles I. dispensed with the regulations in the case of carriers, butchers, and drovers, who required the Sunday for the pursuit of their calling. 29 Charles II. c. 7, enacts that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, or business, or work of their ordinary calling upon the Lord's Day (works of necessity or charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit five shillings: all contracts coming within the operation of this statute are illegal. The contracts prohibited by the statute are not every contract made on Sunday, but contracts made in the exercise of a man's ordinary trade or calling. 48 George III. c. 70, s. 5, forbade the baking of bread after one o'clock in the morning, printing, and meetings on Sundays.* Playing at cards and music were forbidden on the Sundays in places for which a license is required; these prohibitions have repeatedly been reinforced by royal proclamations.

The exclusiveness of the established clergy is sufficiently demonstrated by the fact that they do not allow the bodies of dissenters to be interred in their churchyards. It would seem that there is no objection to the burial, in such churchyards, of dissenters who have been baptized in infancy; the only service, however, allowed at the burial is that of the Church of England. A bill tending to modify this was thrown out in the last session.

Statutes against blasphemy have been in force even in our century. In 1824, eleven clerks at Carlisle were sentenced to fines and imprisonment for having sold Tom Paine's works. The Lord Chancellor Eldon, in 1822, refused protection to the copyright claimed in Byron's "Cain," because the book was of a blasphemous nature. The same Lord Chancellor, in the following year, rejected the prayer of Dr. Lawrence, the celebrated physician, for protection against the infringement of copyright of his lectures, because he denied therein the immortality of the soul.† Under the same system Shelley was even deprived of the guardianship of his own children, as being a blasphemer.

* Burns, ii. 32.

† Miss Martineau, ii. 6.

CHAPTER VIII.

LIBERTY OF THE PRESS AND OF SPEECH.

The Press according to the Common Law Free.—The Statute "De Scandalo Magnatum."—*Censure Regulations.—Conception of "Libel" in the reign of James I.* —Milton.—Sketch of the Censorship under Charles II.—Its Removal after the Revolution.—William III. and the Danish Ambassador.—Disparagement of the Freedom of the Press by Parliament.—Parliamentary Reports.—Parliamentary Publications.—Disfavour of the Judges in regard to the Liberty of the Press.—Penal Laws against the Press continued under the House of Hanover.—Later Legislation.—Meaning of the word "Libel."—Formerly every Blaming of the Government was called "Libel."—Scandal.—Difference between the Punishment of Libel and Scandal.—Restriction of Powers of the Jury in Prosecutions for Libel.—*Fox's Libel Law.—Timidity in Instituting Prosecutions for Libel.*—Actual Circumspection of the Press.—Aversion of the Government from Instituting Press Prosecutions.—Responsibility of the Printer and Seller.—Confiscation of Publications.—Censorship of Plays.—Licenses for Playhouses.—Anxious supervision of Theatres during the time of the French Revolution.

"No law," says Selden, "can prevent the printing of a book; only by a decree of the Star Chamber can a book be forbidden."* The Star Chamber, in the opinion of Selden, and all people of an independent mind, was an illegal institution. Hence it cannot be doubted that, by the common law, the liberty of the press was more ancient than parliamentary government, inasmuch as the common law was unacquainted with the licensing of books.

The oldest enactments against the liberty of writing, and speech, and their misuse, were the statute of Westminster, 3 Edward I., against the spreading of false news and intelligence, and the statute of "scandalum magnatum," 2 Richard I., against the spreading of "false" and "monstrous" lies.

Under the Tudors, very stringent laws against the liberty of the press and speech were passed, an instance of which has been previously exhibited. Only in Oxford, Cambridge, and London might printing-presses be erected. The civil authorities supervised the sale of books, and even private libraries were liable to be searched by them. Every publication had to be submitted to

* D'Israeli's *Curiosities of Lit.*, ii. 191.

the censorship exercised by the Archbishop of Canterbury and the Bishop of London. But the censorship did not protect from punishment; any one libelling the queen was, for the first offence, placed in the pillory, and had his ears cut off; for the second offence he was punished as a felon. By a law temporarily enacted under Philip and Mary, an author named John Stubbs, and his publisher, had each a hand cut off, in the reign of Elizabeth. Those judges who questioned the applicability of the respective acts, were either sent to the Tower or dismissed from office. No books could be introduced from beyond seas. A book entitled the "Russian Commonwealth," condemnatory of Russia, by one Giles Fletcher, was suppressed by Elizabeth.

In the reign of James I., the Star Chamber decided that a libel against an officer is a libel of a special nature. Deceased persons also might, in the opinion of the Star Chamber, be libelled, as little question was made of the "truth" of the facts alleged as of the reputation of the party libelled. A libel might be committed either by printing, writing, pictures, or the like signs. If directed against an officer, every one who obtained knowledge of such publication was bound to give information. The punishments were penalty and imprisonment. In cases of graver moment, the cutting off the ears and the pillory were allowed.*

Under the Commonwealth Milton strove in vain, by his celebrated publication, to combat against the censure of the freedom of the press.†

After the Restoration the old enactments of the Tudors were renewed. An act of 1662 introduced temporarily the censorship, and forbade the erection of printing-presses saving in the corporate towns of London and York. An act of 1666 pretended that, according to the common law (*sic.*), the king hath a general prerogative against the printing of books; and that no one can print books without his license. This act expired in 1679, and with it

* Crabb, 514.

† From the celebrated *Areopagitica* we extract the following leading passages:

"Who kills a man kills a reasonable creature, God's image; but he who destroys a good book, kills reason itself—kills the image of God, as it were, in the eye."

"Bad books to a discreet and judicious reader, serve in many respects to discover, to confute, to forewarn, and to illustrate."

"What advantage is it to be a man, over it is to be a boy at school, if we have only escaped the ferula, to come under the fescue of an Imprimatur? If serious and elaborate writings, as if they were no more the theme of a grammar-lad under his pedagogue, must not be uttered without the cursory eyes of the temporizing and extemporizing licenser?"

the censorship. Recourse was had, however, to the confiscation of books. In 1685 the licensing act was revived for seven years, and in 1692 for two years longer. But though frequent attempts were made by the government to revive it, the parliament resisted it so strongly that it finally expired, and the press became properly free in 1694, and has ever since so continued.

The Continent at that period had not any further privilege or exemption in matters relating to the press in England than the English monarch himself. When the Danish ambassador appealed to William III. *for a prohibition against an unfavourable pamphlet*, which Lord Molesworth had published against his country, exclaiming, "If a Dane had done the same with the King of England, he would, on complaint being made, have his head taken off." "That I cannot do," replied the sovereign; "but, if you like, I will tell the author what you say, and he shall put it in the next edition of his book."*

Hostility to a free press had not, however, subsided, for we find both houses of parliament, in 1751, declaring a publication entitled "Constitutional Questions," as "infamous," and ordering it to be burnt by the hand of the common hangman. On the 21st February, 1764, on the motion of Lord Lyttleton, the Upper House declared that the pamphlet published by the pettifogging attorney Brecknock, under the title of "*Droit le Roi*," was Jacobinical, hostile to the Bill of Rights and to the Revolution, worthy to be burnt by the hangman, and the author condemned to imprisonment. Even in 1834, Mr. Bittlestone, *editor of the "Morning Post," was consigned to the custody* of the Usher of the Black Rod, and imprisoned by the Upper House, for libelling the Lord Chancellor Brougham. Such resolutions were frequently passed by both houses of parliament without observance of any of the forms of ordinary legal process, in violation of Magna Charta, viz., the trial by one's peers; and, at any moment, may still render the freedom of the press a mere fiction. The right of communicating to the public the proceedings of parliament has, after prolonged struggles, been at last achieved. The publication of parliamentary reports was formerly strictly forbidden. Even in 1738, Pulteney spoke violently against "members being made responsible outside the house for

* D'Israeli, *Cur Lit.* ii. 192.

what they had spoken inside." The reports formerly given were of no value whatever, as they were based on the mere recital and communication of the members.* Since 1771 parliamentary reports have been permitted, but the reporters durst not take any notes in the house, and had to write their reports from memory. Even in 1807 a reporter of the Lower House was prosecuted for having taken notes. Reporting is now fully allowed; but the report of parliamentary proceedings remains still a breach of privilege.† A member of parliament occasionally avails himself thereof in order to prevent the appearance of some unfavourable reports. Only in the face of violent opposition, and ultimately by the intervention of an act of parliament, has the printing and publishing of parliamentary papers been protected against legal proceedings (3 and 4 Vict. c. 9).

The law courts were not more favourably inclined towards the liberty of the press than parliament itself. Even Lord Mansfield understood by the liberty of the press the mere right to publish without being subject to censorship. Lord Brougham observes that most of the judges of the present day have held views not more liberal.‡

Even the barbarous penalties which the Tudors and the Stuarts enacted against offences of the press remained in force after the "glorious Revolution." Under George I. a printer was punished by loss of his ears for libelling his Majesty.§ Daniel Defoe, as it is well known, stood in the pillory for libel. A similar punishment for a like offence was incurred by a Dr. Shebbeare, who was condemned to three years' imprisonment.‖ In Scotland, indeed, so late as 1794, Muir and Palmer were sentenced to fourteen years' transportation for the publication of Paine's "Rights of Man," and similar works.¶ The last general attack on the liberty of the press took place consequent upon Lord Sidmouth's notorious circular under George IV., whereby he invited justices of the peace to endeavour to seize all satirical publications. Two acts of Queen Victoria now regulate the material rights of the press.

* May, *Const. Hist.* i. 428.

† May, *Const. Hist.* i. 431.

‡ Brougham, *Const.* 201.—In 1790, Mr. Walter, of the *Times*, was sentenced to a year's imprisonment for libelling the Prince of Wales, merely because he stated "that he had had differences with his father." Archenholz, *Brit. Ann.* v. 121.

§ Horace Walpole, *Mem. Introd.* 6.

‖ Horace Walpole, *Mem.* i. A servant stood by his side while in the pillory, and held an umbrella over him to protect him from the rain. Geo. III. gave him and Smollett a pension.

¶ Hughes, *Continuation of Hume*, ch. 37.

According to 11 and 12 Vict. c. 12, every public invitation, whether by printing, writing, or speaking, which tends to dethrone the Queen, to levy war against her, to employ force against her or the parliament, or to cause an invasion, is punishable as felony, in other words, with death or transportation for life. By sec. 5 of the late act for amending the law respecting defamatory words and libel (6 and 7 Vict. c. 96) it is provided that if any person shall maliciously publish any defamatory libel he shall be liable to fine or imprisonment, or both, as the court shall award, such imprisonment not to exceed one year. By sec. 4, if any person shall maliciously publish any defamatory libel, knowing the same to be false, he shall be imprisoned for a term not exceeding two years, and pay such fine as the court shall award. The person instituting the suit, and failing to prove his case, incurs all the costs.

Nothing is, however, more difficult in the English law than to define the meaning of the word "libel." "For my part, I could never learn what is a libel," says Pitt the older. According to Cox, "a libel is a publication without justification or lawful excuse, which tends to injure the reputation of another, by exposing him to hatred, contempt, or ridicule."*

The vagueness of the meaning of the word "libel" is thus illustrated by O'Connell:† "Lord Redesdale having been called 'a stout-built special pleader,' it was held to be a libel; and Lord Hardwicke having been called 'a sheep-feeder from Cambridge,' that, too, was held to be a libel; and he would pledge himself that he never yet read a newspaper which did not contain something which, under the existing law of libel, could not be construed into a libel. If it were a ministerial paper, it libelled the people: and if what was called a 'popular' paper, it libelled the ministry; and if a neutral paper, the chances were it libelled both."‡

Before the Revolution of 1688, it was assumed at Westminster that every publication which blamed or criticized the government was a libel, and might be suppressed. Chief-Justice Holt, in Tutchin's case, says, "To possess the people with an ill opinion of

* *British Commonwealth*, 237.

† Hansard, Ser. iii. vol. xxi. 470.

‡ Libel consists in the publication by the defendant of matter defamatory to the plaintiff, by means of printing, writing, pictures, or the like signs—Bl. *Com.* iii. 125. Slander consists in the publication by the defendant of matter defamatory to the plaintiff by means of words spoken.—Bl. *Com.* iii. 123.

the government, that is, the ministry, is a libel." And the Attorney-general urged, "that there could be no reflection on those that are in office under her majesty, but it must cast some reflection on the queen who employs them."* Lord Mansfield even punished libels against the dead in case any evil reflection had thereby been cast indirectly upon the living.

The Court of Common Pleas in 1812 ruled that a libel was a writing whereby a person was exposed to hatred, contempt, or ridicule. Blackstone is of opinion that any writing which provokes any one to wrath is a libel.† Other lawyers even go so far as to declare that to be a libel which may generally bring damage to another.‡ In 1840 the Justices Erle, Barons Parke, Alderson, and Gurney held, "that every citizen has a right to make observations on the acts of public officials which concern him as a subject of the realm, provided he do not make his commentary a cloak for malice and scandal; but every imputation of a base or vile motive is a libel." Formerly, on an indictment for libel, the defendant was not allowed to allege the truth of it; as, even if true, it tended to a breach of the peace;§ the dictum of Lord Mansfield is well known, "The greater the truth, the greater the libel." By 6 and 7 Vict. c. 96, the proof of the truth exempts from punishment when the matters charged have been made known "for the public benefit."‖ Though the definition of them coming of the word "libel" is, according to English practice, so vague, defamatory words *spoken* are interpreted narrowly and strictly.

A parole imputation which merely offends a man's feelings, but does not cause any damage, is not punishable. Imputations concerning matters punishable by an ecclesiastical court must be prosecuted before such court; for instance, calling any one an "adulterer," etc.¶ The words "rascal, liar, fool, knave," and such like, may be spoken without inducing punishment; to render a parole imputation punishable, one must give expression to defamatory imputations and accusations which, if based on fact, would expose the offender to punishment. It is punishable, accordingly, to call a man a "highwayman," for highway-robbery falls within scope of the laws; but to say to a man, "You are worse than a

* Hallam, C. H. iii. 229.
† Bl. iv. 150.
‡ Hansard, Ser. iii. vol. xxii. 412.
§ Hallam, C. H. iii. 229.
‖ In an *action* for libel the "*truth*" of the matter published always affords a justification; on an *indictment* for libel the truth of the defamatory matter does not constitute a valid defence.
¶ Bl. iii. 312.

highwayman," is not punishable, on account of its vagueness. Chief-Justice De Grey says that "an action for scandal can only be brought when damage has resulted therefrom, or is likely to arise, but when one by parole doth impute to another the want of virtues, or only doth reproach him with faults rendering him contemptible, he is not punishable." If the "*vulgarest*" word in the language be applied to a respectable woman, only a relatively moderate punishment can be imposed by a judge of the Ecclesiastical Court. If the imputation, however, be made in the City of London, an action may be maintained for damages and ample punishment before the City courts, on the ground of an old custom, whereby the mayor and aldermen are empowered to have unchaste women whipped from the streets.* Whenever, therefore, (by words spoken) a person exposes another to hatred, contempt, or ridicule, no punishment attaches; the same imputations when published, either in writing or printing, become a libel. If the above imputations had only been *spoken* against Lord Hardwick and Lord Redesdale, they would not have been punishable. A young lady, against whom imputations were made, in a pot-house publication, affecting her chastity, obtained £4000 damages; had the scandal been spoken merely, she would not have obtained one penny, unless she could have proved special damage. Despite the severe laws against libel, a greater liberty of the press in regard to the action of the government obtains in England than in any other country in Europe. The reason may be found partly in the laws, and partly in the mode of public life prevailing in the land.

During almost the whole of the last century the judges declared that it was the province of the jury, on indictments for libel, simply to find that the party accused was the author of the publication. Numerous convictions in cases of press prosecutions resulted from this doctrine.† Fox's Libel Bill of 1792 empowered the jury to determine whether a publication was a false and scandalous libel; thereupon restrictive limits were established against judicial onesidedness, and the government was ultimately defeated in the prosecution of suspected publications. The absence of a special functionary‡ charged with press prosecutions af-

* Bl. iii. 125; note 5 to 15, Ed. Christian; and note 9, Bl. 76; Burns E. L. ii 126

† Bl. iii. 230.

‡ The continental Staats-anwalt is a public officer who searches through all

fords a further protection, whereas the action of the jury in assessing the damages in cases of individual wrong caused by the press is treated even more strictly; to secure damages, however, a libel must be at once of a false and scandalous nature.

Because the law of libel is so vague, the issue of a prosecution for libel is always extremely doubtful; private individuals, when calumniated, fear to have recourse to law; and hence the press secures an unwarrantable license. "I do not know any one," says O'Connell, "who has instituted an action for libel who has not come out from the prosecution much worse than he went in."* So far as the press has no interest in keeping matters concealed, it goes to work with an *aplomb* and freedom wholly unknown during the last century. Even Smollett, in his continuation of the History of England, did not venture to make use of the words, "king," "ministry," "government," or "parliament;" Wilkes was the first who had the hardihood to indicate, in the "North Briton," the names of high-placed officials and other leading men.

Ultimately, the excess of the *materia peccans* contributed to render all proceedings against the efforts of the press impracticable.†

In 1777 the well-known preacher, Horne Tooke, was condemned for having opened a subscription in 1775 "for the relief of widows, orphans, and gray old men of our beloved American brethren, who, true to their character as Englishmen, preferred death to slavery; and on this account were brutally murdered at Lexington and Concord by the king's troops." During the last Chinese war, the attack upon Canton was frequently stigmatized as "piracy," and the acts of the English soldiers "murder." The government deemed silence the safer tactics, the dangers of an acquittal being likely to exceed tenfold the advantage of procuring a conviction. The old severe statutes are allowed to slumber, in order, when occasion serves, to be able to bring them out from the lumber-room of the past. "Though the law of England on the subject of the press, is as servile to this day as it was in the time of the Tudors, there is little danger of its being actually put in

the periodicals, in order to pounce upon anything indictable, and forthwith prosecute. In Prussia he has the right to confiscate, even before the judge has decided about the contents of the work.

* Hansard, Ser. iii. vol. xxi. 470.

† The influence of the press in its operation upon public opinion, will be treated of in Book vii.

force against political discussion, except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety."*

For the contents of the publication, the publisher or propagator of a libel is primarily responsible; and, if he cannot be found, the printer may be prosecuted: the author, however, only in case he assume the responsibility. Both publisher and printer must, in the event of their being made responsible, afford proof of their ignorance of the contents. It has been decided by the courts that the exposing a libel for sale in a bookseller's shop, is to be considered as *primâ facie* evidence that it has been propagated by the proprietor of the shop; but he may show proof to the contrary.† A person becomes responsible, also, for reprinting extracts from the publications of others.

No political publication is subject to seizure, so long as a verdict has not been pronounced; this was decided by the House of Commons, 25th April, 1766. On the other hand two statutes *of the last year of George III. and first of George IV. enact, that* all copies of a libel subject to punishment—that is, *after* the judge shall have pronounced such publication libellous—are subject to suppression. *By Lord Campbell's 20 and 21 Vict. c. 83,* an official seizure, without previous sentence, is permissible in the case of obscene and immoral books and prints; any police magistrate or two justices of the peace may, on a sworn information, issue a warrant for the seizure of such productions by day; and, if need be, by breaking in the doors.

The compulsory newspaper stamp has, by recent enactment, been abolished; as an equivalent for the impressed stamp, the post-office undertakes to forward publications free of charge.

Theatres are under survey of the Lord-Chamberlain and his subordinates; this claim was originally uphold as a custom merely. Walpole sanctioned the system by an Act of Parliament; his

* Mill, *On Liberty*, p. 31. Mr. Mill further says, that the government press prosecutions of 1858, although an ill-judged interference with the liberty of public discussion, have not induced him to change the opinion above expressed —1*st*, because the prosecutions were not persisted in; and, 2*ndly*, because they were not, properly speaking, political prosecutions: The offence charged was not that of criticizing institutions, but of circulating what was deemed an immoral doctrine. Mr. Mill is of opinion that there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.

† This was decided by the House of Commons, 25th April, 1766, *vide* Julius Lorbeer, *Die Grenzlineen der Rede und Pressfreiheit nach Englischem Rechte*, p. 418.

Playhouse Bill, 20 George II. c. 28, enacted, that every piece should, fourteen days before its production, be submitted to the censorship, under penalty of £50 and loss of license; any actor who, without a fixed place of abode or license from the Lord-Chamberlain, should represent any such piece, should be treated as a "rogue."*

The Lord-Chamberlain grants licenses to theatres, according to 6 and 7 Vict.; the Home Secretary may pass regulations affecting all theatres, with reservation of local observances. Theatrical representations in booths, markets, and fairs are granted by a justice of the peace or local authorities. The Lord-Chamberlain further orders the closing of playhouses in the event of a death in the royal family. In the present year Lord Sidney, the actual Lord-Chamberlain, has roused the clergy to excitement for having accorded permission to open theatres during holy week.

Mahon† boasts that the censorship of plays has never been exerted in the interest of any party; a certain administrative solicitude has, however, been occasionally brought to bear. Thus, during the French Revolution, the Lord-Chamberlain, in a piece called the "Iron Mask," converted "the Bastille" into "the Island of St. Margaret," with a view to forestall ill-timed allusions.‡ This was, indeed, at a period when the keeper of a public-house in Cambridge was forced to take an oath to denounce all political conversation;§ and when a militiaman, for employing democratic language, at the mere order of his superior officer, was flogged‖—a period when the English aristocracy seemed fairly to have taken leave of its wits.

* Mahon, ii.
† *Ibid.* ii.
‡ *Moniteur Universel*, 1790, 8, Dec.
§ Archenholz, *Brit. Ann.* x. 188.
‖ *Ibid.* xi. 41.

CHAPTER IX.

PROTECTION OF PERSONAL LIBERTY.

Magna Charta.—Protection of Prisoners.—Arbitrary dealing of the Tudors and Stuarts.—Petition of Right.—Acts under Charles I.—Habeas Corpus Act.—Jail Delivery.—Who may Arrest.—Form of Arrest.—Warrant of Commitment.—Bail.—House-searching.—Insolvency.

Magna Charta, repeating the "good old Saxon law," enacts, Art. 39, "Nullus Liber homo capiatur vel imprisonetur, aut disseisietur de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nisi per legale judicium parium suorum vel per legem terræ." "No free man shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free-customs, or be outlawed or exiled, or any otherwise destroyed, but by lawful judgment of his peers, or by the law of the land."* Chatham declares that this barbarous Latin of the "Iron Barons" is worth all the classics.†

Later statutes aimed at protecting prisoners from arbitrary treatment. In the reign of Henry II. it was forbidden to put fetters upon prisoners. Bracton says, "Imprisonment should serve for safe custody, and not for punishment." In every court of law the accused, from the time of the Plantagenets, must appear without fetters.‡

All these wise provisions were found insufficient against the arbitrary authority of the Lancastrian kings, the Tudors, and the Stuarts. Under Mary, Sir Nicholas Throgmorton was charged with levying war against the queen, being an accomplice in Wyat's conspiracy, intending to depose and destroy her Majesty, and in order to it, with conspiring to seize the Tower of London.

* "Neminem captivari permittimus nisi jure victum," says the old Polish Habeas Corpus Act of the 16th century, (vide *Poelitz, Europaeische Verfassungen*, vol. iii.)

† Brougham, *Statesmen*, etc, London, 1855, 37: "Those iron barons (for so I may call them when compared with the silken barons of modern days) were the guardians of the people, and these words of their barbarous Latin, 'nullus liber homo,' are worth all the classics."

‡ Crabb, 311.

The jury brought in a verdict of not guilty, but the court, acting in a very arbitrary manner, remanded the prisoner back to the Tower under pretence that the government had other matters against him. The proceeding against Sir N. Throgmorton is the first in the State Trials that has the appearance of a regular trial. Throgmorton displayed remarkable skill and courage in his defence; the court did all in its power to browbeat the jury and wrest the law to his destruction.

Such cases were then of frequent occurrence. The older remedies serving as a safeguard against unlawful imprisonment, were—I. The writ of Mainprise, ensuring the delivery of the accused to a friend of the same, who gave security to answer for his appearance before the court when required, and in token of such undertaking he held him by the hand (*le prit par le main.*) II. The writ "*De odio et atiâ*," *i. e.*, of hatred and malice, which, though not abolished, has long since been antiquated. It was an ancient provision for restoring the liberty of the subject. By the common law no man imprisoned for an offence which, if proved, would touch his life or members, could be bailed out but by the Supreme Criminal Court. Hence, in unsettled and oppressive times it became a practice for malicious persons to have a man imprisoned for a capital offence without either indictment or appeal brought against him, and there he was, of necessity, to lie until the justice in eyre came into the county to deliver the jails, which, regularly, was but once in seven years. To avoid this hardship, the writ *de odio et atia* was invented and issued out of the Chancery. By Magna Charta it is ordered to be granted without any purchase or reward; it directed the sheriff to make inquisition in the county court whether the imprisonment proceeded from malice or not. If the jury found it did upon its return, the person accused had a right to a writ, ordering the sheriff to bail him.* III. The writ "*De homine replegiando*," or replevying a man, that is, delivering him out on security to answer what may be objected against him.

A writ is, originally, a royal writing, either an open patent addressed to all to whom it may come, and issued under the great seal; or, "litteræ clausæ," a sealed letter addressed to a particular person; such writs were prepared in the royal courts or in the Court of Chancery.

* Sullivan's *Lectures*, 487.

The most usual instrument of protection, however, against arbitrary imprisonment is the writ of "*Habeas corpus,*" so called from its beginning with the words, "Habeas corpus ad subjiciendum," which, on account of its universal application and the security it affords, has, insensibly, taken precedence of all others. This is an old writ of the common law, and must be prayed for in any of the Superior courts of common law. The chancellor also, in his mixed jurisdiction, might issue writs of "habeas corpus cum causâ." A defendant arrested upon any obligation or bond, extorted by fraud or duress, might, since the origin of the separate Chancery jurisdiction, obtain relief by means of such a writ, returnable in Chancery. The operation of every writ of *habeas corpus* extends into all counties, the king himself thereby requiring the person having any one of his subjects in custody to produce him before the court, with a return of the day and cause of commitment, that the party detained may, according as the judge shall decree, be put at liberty or kept in prison. "So odious was unjust imprisonment, or unjust detaining of any free man in prison," says Lord Coke,* "that the English law has always provided remedies for which the writ of *habeas corpus* is the readiest, because of its simplicity and promptness; the very essence of the remedy being that the innocent shall not be worn and wasted by long imprisonment."†

But this writ, which in cases of violent arrest brought about by means of private persons, or obtained at their instance, might afford some kind of remedy, proved but a feeble, or rather wholly ineffectual protection against the arbitrary power of the sovereign. The right of an English subject to a writ of *habeas corpus*, and to a release from imprisonment unless sufficient cause be shown for his detention, was fully canvassed in the first years of the reign of Charles I. Five knights, Darvel, Corbet, Earl, Heveningham, and Hampden, were imprisoned by the Privy Council for refusing their quota of the taxes arbitrarily imposed by Charles; they sued the Court of King's Bench for a writ of *habeas corpus*, the warden of the Fleet made return, that they were committed by the special command of his majesty; this gave rise to the question, whether such return was sufficient to justify the court in remanding the parties to custody; the judges appointed *durante bene placito* and influenced by the court, decided in favour of the crown.

* *Inst.* ii. 182 † *Ib.* 315.

The parliament endeavoured to prevent such arbitrary imprisonment by passing the "Petition of Right," which enacted that no freeman, in any such manner as is before mentioned, should be imprisoned or detained. Even this act was found unavailing against the malevolent interpretations put by the judges; hence the 16 Charles I., c. 10, was passed, which enacts, that when any person is restrained of his liberty by the king in person, or by the Privy Council, or any member thereof, he shall, on demand of his counsel, have a writ of *habeas corpus*, and, three days after the writ, shall be brought before the court to determine whether there is ground for further imprisonment, for bail, or for his release.

Notwithstanding these provisions, the immunity of English subjects from arbitrary detention was not ultimately established in full practical efficiency until the passing of the statute of Charles II., commonly called the "Habeas Corpus Act." A striking case gave rise to this enactment. Jenks, a citizen of London, on the popular side, was committed by the king in council, for a mutinous speech in Guildhall; an application was made to admit him to bail, which the justice at Quarter Sessions refused, on pretence that he had been committed by a superior court; they also denied him trial because his name did not appear in the calendar of prisoners. Application was made to the Chancellor for a *habeas corpus*, who declined to issue it during the vacation. The Chief Justice of the King's Bench, to whom application was afterwards made, gave such dilatory answers that Jenks lay in prison for several weeks. After the prisoner had lain two months in the Gate-house the Council voluntarily admitted him to bail.*

On the 27th May, 1679, the Habeas Corpus Act, entitled "An Act for better securing of the liberty of the subject, and for prevention of imprisonment beyond seas," was passed. It provides: That when any person shall bring a writ of *habeas corpus* directed to a sheriff or jailer, or other person whatsoever, for any person in his custody, such sheriff, or jailer shall, within three days after service (unless the commitment were for treason or felony, plainly and specially expressed in the warrant of com-

* Hallam, iii., *C. H. N.* Mr. Hallam seems to be of opinion that this case did not produce the famous Act of *Habeas Corpus*. He thinks that the arbitrary proceedings of Lord Clarendon were what really gave rise to it.—Delolme, b. i., c. 14.

mitment) make return of such writ, and bring the body of the party so committed or restrained, before the Lord Chancellor or the judges or barons of the court from which the writ shall issue; and shall then likewise certify the true cause of his imprisonment. It is further provided that, on complaint and request in writing by or on behalf of any person detained for any crime (unless for treason or felony, and other than person convicted, or in execution by legal process), the Lord Chancellor, or any one of the judges of the three courts, upon view of a copy of the warrant, shall, in vacation time, and out of term, award a *habeas corpus*, returnable *immediately before himself or any other of the judges*. And within two days after the party is brought before the judge, he shall discharge the prisoner from his imprisonment, taking his recognizance, with one or two sureties, for his appearance in the court where the offence is properly cognizable, unless it shall appear that the party is detained on legal process, order, or warrant, out of some court having jurisdiction of criminal matters, or by some warrant signed and sealed by any of the judges, or by some justice or justices of the peace for matters or offences which, by law, are not bailable. The party accused, if not tried in the next succeeding term or sessions, must be discharged from imprisonment. If a judge deny a writ of *habeas corpus* after motion made for it, he shall forfeit to the prisoner £500. That no inhabitant of England, excepting those convicted of crimes entailing transportation, shall be sent as prisoners to Scotland, Ireland, Jersey, Guernsey, or any places beyond seas within or without the dominions of the Queen. Whosoever acts contrarywise, shall forfeit to the person aggrieved £500 with treble costs; shall be disabled to bear any office of trust or profit, and shall incur the penalties of *præmunire*, and shall be incapable of the Queen's pardon. Officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand, a copy of the warrant of commitment and detainer; or, of transferring the prisoner from one prison to another without sufficient ground, or without an authorization permitted by the act; for the first offence shall forfeit to the prisoner £100; and for the second offence £200 to the party aggrieved; and he shall, henceforth, be incapable to hold or execute his office. That persons set at large by *habeas corpus* shall not be again imprisoned or committed for the same offence, other than by legal

order and process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause. Any person knowingly committing to prison contrary to this enactment, or knowingly aiding or assisting therein, shall forfeit to the prisoner £500. The utmost limit for the production of a prisoner before the judges is not to exceed twenty days.

All these provisions extend also to the Channel Islands. The benefit of the writ was confined to cases of commitment or detainer for criminal, or supposed criminal, matter; but not on account of any other loss of liberty. A writ of *habeas corpus* was refused to a gentleman who, in 1758, had, by mistake, been impressed as a soldier.

According to 56 George III., c. 100, writs may further be issued during vacation in cases which have not been comprised in the Act of Charles II. By the more recent enactments the judges of the several courts have power to grant the writs and make them returnable in any court. A judge may even grant in vacation a *habeas corpus*, returnable before himself in chambers. The Habeas Corpus Act can only be suspended by consent of parliament. On such consent being obtained, suspected persons may be incarcerated without special warrants, and kept in prison for an unlimited time. In 1817, the Habeas Corpus Act was thus suspended, the respective statute 57 Geo. III., c. 3, being entitled "An Act to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government."

Should the Suspension Act not otherwise provide, those classes of prisoners to which the act applies cannot be discharged on bail, and cannot require to be judged within a time specified. For unlawful acts the respective officials remain still responsible; on the withdrawal of the exceptional law, a "bill of indemnity" is, however, passed for the protection of magistrates who have acted in the interest of public safety.*

Against the arbitrary dealing of the judges no such protection is now required, inasmuch as they are independent, and removed from the sphere of party politics; their commission of jail-delivery is a sufficient safeguard to protect England from the terrors of secret inquisitorial process, as it imposes upon them the obligation to try and deliver every prisoner who shall be in

* Bowyer, 424.

jail when the judges arrive at the circuit town, whenever or by whomsoever indicted, or for whatever crime committed, so that one way or the other the jails are in general cleared, and all the prisoners tried, punished, or delivered, at least twice in the year. If the witnesses for the crown are not produced at the second term, the party accused is liberated, so that five months' detention may occur, but that is regarded as the maximum. The Queen's Bench has the undoubted right to issue writs of *habeas corpus* into any colony,* but as the Habeas Corpus Act forbids the taking of any prisoner out of his country, to bring him beyond seas, it seems against the tenor of the law that the Queen's Bench should, "*quasi per saltum,*" issue a writ of *habeas corpus* into a colony where courts fully capable of issuing such writs already exist. An act of the present year establishes, accordingly, that no such writ shall issue out of England into any colony or foreign dominions, where there exists a court "having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion."† The king cannot, personally, cause any one to be arrested,‡ although the privy council, the secretaries of state, and justices of the peace may.

Arrests may take place:—

1. On *hue* and *cry* raised upon a felony committed, or any person having been wounded, assaulted, or robbed. In such case both officers and private men may arrest. Prosecution takes place forthwith through the constable and the county.§

2. Any private person that is present when any felony has been committed, is bound by the law to arrest the felon, on pain of fine or imprisonment if he is negligently permitted to escape. A private individual, and, *a fortiori,* a peace officer may, upon probable suspicion, arrest the felon or other person so suspected; but a private individual is not justified in arresting unless he can prove an actual commission of the crime by some one, whereas the peace officer will be justified if he acted upon reasonable suspicion, though no felony had been committed.

3. A justice of the peace may, without warrant, apprehend any person committing a felony or breach of the peace in his presence. The sheriff, the coroner, and the constable have a

* *Ex parte* Anderson, 3 *L. T. Rep.*, N.S. 622.

† 25 and 26 Vict. c. 20.

‡ Hallam, iii. 16.—*Note.*

§ Coke, iii. 52.

similar authority. If a breach of the peace is being committed, a private individual may arrest the offenders, or give them in charge to a constable who has seen the affray; after the termination of a breach of the peace, and when there is no probability of its renewal, a private individual is not justified in arresting the parties.

4. Finally, the privy council, secretaries of state, justices of the peace, and justices of the Queen's Bench can issue warrants to appear.

The "warrant of apprehension" must be issued against a particular person,* on account of some particular offence, and be signed and sealed by a magistrate. The governor of the prison cannot otherwise receive a prisoner.† The course adopted in the case of Wilkes, in 1763, was in contravention of law, inasmuch as the Secretary of State, without pointing out particular individuals, issued a warrant to apprehend the authors, printers, and publishers of certain seditious libels; the validity of the warrant was disputed, and the whole Court of Queen's Bench adjudged it to be void. After this the issuing of such general warrant was declared illegal by a vote of the House of Commons.

Any justice of the peace, instead of issuing in the first instance his warrant to apprehend a person charged or complained against, may issue his summons directed to such person, requiring him to appear before the said justice at a time and place mentioned; the grounds of suspicion must be sufficiently apparent to the Judge§ (11 and 12 Victoria, c. 42, s. 1, 9, 10.) A warrant of the Queen's Bench extends over the whole of England. To render effectual a warrant of a justice of the peace beyond the jurisdiction of such magistrate, it must be "backed" by a justice of the peace within whose jurisdiction the accused person is suspected to be (24 George I., c. 55, s. 1.) A warrant of apprehension must likewise be issued whenever an arrest, which has taken place *in flagranti* without warrant, is to lead to further proceedings. Any order to arrest may be executed on the Sunday, and authorizes the breaking open of doors. Any person arrested *in flagranti*, or on a warrant, must be forthwith brought before the magistrate; the latter must, in the presence of the prisoner, take down the depositions of those who know the facts of the case, and

* Bl. iv. 291.
† Schlosser, 18. Jahrhundert, iii. 335.
‡ Bowyer, 425.
§ Vincke, 26.

put the same into writing; the depositions are to be signed by the witnesses and the justice, and read over to the prisoner, who shall be asked if he wishes to say anything in answer to the charge, after previous caution that his statement may be read in evidence against him; he is not bound to give answer, however, according to the principle of the common law, "*nemo tenetur prodere seipsum.*"

In certain cases the magistrate may be liable for an illegal incarceration, as where he issues his warrant maliciously, and without reasonable and probable cause. The person arrested is either *forthwith discharged, sentenced by the judge, so far as his* jurisdiction extends, bound over on his recognizance, or retained for further examination. The Bill of Rights, 1 William and Mary, statute II., c. 1, enacts that excessive bail ought not to be required from the accused. If a magistrate demands what seems excessive bail, or refuses to admit the accused to bail, application for relief may be made to a judge at chambers, or to the Court. Whenever parliament orders any one to be arrested, it does not accept bail; so with the courts of law, and the county courts, whenever any one has been arrested for "contempt of court," or whenever a person is charged with felony. But even in case of an examination for felony, the Queen's Bench may, according to circumstances, allow the accused to be discharged on bail; should he not be so discharged, if the examination is to be proceeded with, a definitive "warrant of commitment," setting forth the charge, name, and "addition" of the accused, is to be at once signed and sealed by the justices of the peace. The governor of the prison becomes thereby bound to hold the accused in custody until he is released in due course of law. In the case of needy persons the expenses for the imprisonment are borne by the county.

Houses can only be searched on a properly-issued search-warrant (7 and 8 George IV., c. 29), to be determined by judicial regulation. The place in which the search is to be made must be distinctly set *forth by the informant. General search warrants, applicable* to entire districts, are illegal. Only in very urgent cases, for instance, in suspected houses, can a search take place at night.

So particular and tender a regard is paid by the law of England to the immunity of a man's house,* which is styled his

* "My house is my castle"—"Quid enim sanctius, quid omni religione munitius quam domus unus-cujus que civium?"—Cicero *pro domo sud*. Chatham's cele-

castle, that the law will never suffer it to be violated with impunity, and civil execution is confined within far narrower limits than in other countries. Generally speaking, the doors of a house cannot be broken open for the purpose of carrying it out. Every house, however, in which personal property of a debtor happens to be, may, provided the doors are open, be entered by the sheriff's officers. When the creditor takes the body of his debtor upon a *capias ad satisfaciendum*, he forgoes his right to seize the debtor's property. Coke is of opinion, however, that by the common law such arrest is not allowable. The debtor remains in prison until such time as the creditor has been satisfied, even should this endure to the last moment of his life. If the creditor releases his debtor from custody the debt is extinguished. Formerly, if the debtor had died in prison, or been discharged by *privilege of parliament*, the *creditor's remedy* was at an end; but by the 2 Jas. I., c. 13, and 21 Jas. I., c. 24, execution is given after the privilege of parliament has ceased, and against the deceased's goods and chattels.

By the 7 and 8 Vic., c. 96, s. 59, a *Ca. Sa.*, will not lie unless the judge who tries the cause certifies that the defendant has been guilty of fraud, or where the sum recovered exceeds the sum of £20 exclusive of costs.

brated saying reverts to the mind: "The poorest man's cottage may bid defiance to the combined power of the King of England. It may be crumbling into ruins; *the roof may be torn down, the winds* may penetrate and the storm may shake it, but the King of England is forbidden an entrance. The entire power of the State dare not cross the threshold of the *decaying structure.*"

CHAPTER X.

PRIVACY OF LETTERS.

Cromwell Established the Post-office for purposes of State.—Statute touching the Privacy of Letters.—Constant Violation thereof.—Parliamentary Reports.—Letters of foreign Ambassadors.—An Order by Fox.—The Emperor Nicholas.—Mazzini.—The Universality of the Abuse has caused Inquiry to lie over.

When Cromwell, in 1657, established the post-office, it was constituted on the ground that such an institution, besides the benefit to commerce and the convenience of conveying public dispatches, afforded the "best means to discover and prevent many dangerous and wicked designs against the commonwealth"* The statute 9 Ann, c. 10, s. 40, threatens the detaining and opening of letters with penalties; and only allows the Secretary of State to open letters on the ground of a special warrant at the period in question.

All *general* warrants were not less excluded than in the case of arrests. The privacy of letters has been most shamefully infringed in England, in contravention of all law, and even down to our own times. Two committees of both houses, appointed in consequence of a petition presented by Thomas Duncombe, accumulated a mass of interesting matter on the subject. We subjoin a few details.

In 1735, several members of the Commons complained that their letters had been read by the secretary of the post-office. It was pleaded, by way of excuse, that the post-office officials had merely been desirous of ascertaining whether the right of franking enjoyed by members of parliament, had not been taken advantage of by strangers. The Commons declared such proceeding a breach of privilege. During the rebellion of 1745 letters were opened in the most unrestrained fashion.†

In 1758 a physician named Dr. Hensey was accused of high treason, for having kept up communications with the enemy; the

* Bl. i. 322. The *post-office as organised by the Protector and his parliament, was upon nearly the same model as has been ever since adopted.*

‡ Commons' Report.

only witnesses produced against him were a letter-carrier and a secretary of the post-office. The latter had opened the letters and taken them to the ministers. During the government of the younger Pitt, when letters addressed to Englishmen were opened, the words "Opened and read by the government" were inscribed outside.* This did not, of course, take place in the case of letters of foreign ambassadors, which were opened as an every-day occurrence whenever consigned to the post.† The committees adduced orders which had been issued by Fox in the year 1782, wherein he directed the detention and opening of letters of the foreign ambassadors. Lord Tankerville further bore witness to the reality of such orders, and moreover that the letters from and to Lord George Gordon (that famous eccentric who eventually lapsed into Judaism), had been submitted to a like ordeal.‡ The Lords' committee reported that it was to be assumed, as a general rule, that in the 18th century all letters of foreign ambassadors were sent by the postmaster-general for the inspection of the minister of foreign affairs. The committee added, by way of consolation, that the postmaster-general, on ascertaining that there was no sufficient legal authority for such a practice, had since June 1844 discontinued the same.§ *Credat Judæus Apella!* he would scarcely have been previously kept in the dark as to the point of law.

When the Emperor Nicholas came to London, in 1844, the Home Secretary, Sir James Graham, thought himself bound, with a view to the safety of the Emperor, to issue several "general warrants" respecting the opening of letters. Amongst others he issued:—

1. On 17th April, 1844, an order that "all letters" for Mr. Worcell and Mr. Stultzman; and

2. On 5th June, an order that "all letters" to Herr Grodicki in Paris, were to be opened.‖

Finally, on the ground that Mazzini was devising an insurrection in Italy, an order was issued for all letters from him and to him to be detained and opened.¶ During four months, the Minister of Foreign Affairs, Lord Aberdeen, was thereby kept completely advised as to all Mazzini's correspondence, and the noble lord did not fail to communicate, in the interest of the peace of

* *Portfolio*, 1844, iii. 640.
† *Commons' Rep.* 16.
‡ Miss Martineau, *Hist. Eng.* iv.
§ *Lords' Rep.* 3.
‖ *Commons' Rep.* 14.
¶ Ibid. 14.

Europe, to foreign powers the intelligence which he had surprised.* The committee stated that from 1799 to 1844 inclusive, 372 such orders were issued; in 1812, 28; 1831, 17; 1839, 16; and 1840, 20. On an average eight annually.

When the post-office law of 1830 and 1837 was changed, it was twice resolved that special warrants on the part of the secretary of state were a needful measure. The parliament, however, allowed the matter, by a mutual compromise of parties, to lie over.† All parties had been indulging in a like illegality; all the ex-ministers had, of their own accord, availed themselves of the self-same expedient as Sir James Graham, and the respective parties pronounced a mutual acquittal, so as not to risk a mutual peril.‡ That no amelioration in regard to postal exemption was introduced, may be taken as a matter of course.

As we have seen, the secretary of state can only in exceptional cases lawfully cause letters to be opened; it may be doubted whether any party-minister should be entrusted with such powers; but the irresponsibility of ministers, which all parties unanimously uphold, has hitherto allowed ministers to violate, far beyond all legal measure, one of the most sacred asylums of human thought.

* *Lords' Rep* 2.

† "Anti-Graham protective envelopes" were at the time advertised in all the newspapers.

‡ Miss Martineau, vol. iv.

CHAPTER XI.

THE RIGHT OF PETITION.

Limitations after the Restoration.—The "Bill of Rights" insures Right of Petition.—Popular Meeting intending to Petition, forbidden in the neighbourhood of the Parliament Houses.

THE restoration introduced restrictions on the right of petition, which had been carried to an enormous height in the times preceding the grand rebellion. By 13 Charles II., s. 1, c. 5, a petition to the crown or either house of parliament for alterations in church and state might only be signed by twenty persons, unless the contents had been previously approved, in the country by three justices of the peace, or the majority of the grand jury at the assizes and quarter sessions; and in London, by the lord mayor, aldermen, and common council. No petition, as a general rule, could be presented by a company of more than ten persons. A penalty not exceeding £100, and three months' imprisonment, sanctioned these provisions.

The Bill of Rights (1 William and Mary, s. 2, c. 2), expressly guarantees the right of the subjects to petition the king, and declares all commitments and prosecutions for such petitioning illegal.* Whether the statute 13 Charles II. c. 5 has been thoroughly repealed has been much controverted; at all events, it has become obsolete, and therefore will not again be resorted to.

By 57 George III., c. 19, s. 23, every meeting in the open air consisting of more than fifty persons, for the purpose of considering or preparing any petition to king or parliament, is forbidden within the circuit of one English mile from Westminster Hall, on any day on which the two houses, or either house, of parliament shall meet and sit, or shall be summoned or ad-

* Bl. iv. 148.

journed, or prorogued to meet or sit, on any day on which the courts shall sit at Westminster Hall,—every such meeting is made by the act an unlawful assembly.

Respecting the form of petitions to parliament, and the mode of conducting them, we shall give all needful particulars in Book VII.

CHAPTER XII.

THE RIGHT OF MEETING AND ASSOCIATION.

Prohibition of Political Speeches.—Of Secret Societies.—Of the Reciprocal Intercourse of Political Societies.—Assemblages calculated to Disturb the Peace.—Riot Act.

In the reign of Charles II. (1678) all political associations in coffee-houses were prohibited. With the Revolution of 1688, however, political discussion and meetings in coffee-houses revived. By 39 George III., c. 79, every political association is unlawful, where the members are bound on oath and under obligation, or have signed any declaration or engagement not authorized or required by law. Again, societies where the names of the members are kept secret, or where a part of the leaders is not made known to the general body; further, where the society consists of several branches, and has special officials for each branch. Religious and benevolent associations and freemasonries are excepted. Localities used for debating clubs and reading rooms are to be licensed by two justices of the peace.

57 George III., c. 19, forbids the assembling of any association (*scientific and benevolent associations excepted*), and the assembling, by delegates, of several unions in one convention. Since 9 and 10 Vict. c. 33 (1846), indictment in such case is withdrawn, and only the law officers of the crown, the attorney and solicitor generals, are empowered to proceed by "criminal information;"* for the time being this statute slumbers. Meetings of three or more persons for the purpose of disturbing the peace are forbidden and punishable, whenever assembled, so far as a reasonable man may determine, to disturb the peace. All who are present at any unlawful and riotous assembly, consisting of twelve persons, if they contemn the orders of a magistrate, etc., to disperse, and continue together for one hour afterwards, are guilty of felony. According to 13 Henry IV. c. 7, two justices of the peace, accompanied by the under-sheriff and the *posse*

* Gneist, ii. 216.

comitatûs, may at once put down all riotous meetings. (See Chap. XI.)*

A special Riot Act was first granted under Mary. This was thought a necessary security in that sanguinary reign; at first it was made only for a year, and was afterwards continued for that queen's life. By 1 Eliz. c. 16, it was revived for her life also, and then expired. In the first year of George I. it was renewed and made perpetual with large additions. It provides that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by a justice of the peace, sheriff, mayor, or other officer, by proclamation in the king's name, to disperse, shall remain or continue together for one hour, such continuing together shall be adjudged felony, and the offender shall suffer death. Whosoever shall pull down chapels and houses before the reading of the respective proclamation, or shall prevent the justices of the peace from reading the same, or, whenever any twelve persons, one hour after such reading has been prevented, are assembled for any unlawful purpose, the same shall be guilty of felony. The military authorities can only be called in against rioters at the instance of the civil authorities, both being liable to severe punishment if recourse had been had to arms by the military without observance of the prescribed legal formalities.

* Bl. iv. 148.

CHAPTER XIII.

THE RIGHT OF RESISTANCE.

Magna Charta Sanctions Legal Insurrection.—Passive Obedience.—The Bill of Rights Sanctions the Right of Resistance.

"DIVINE right and passive obedience are the most slavish and horrible of all doctrines," says Blackstone. Englishmen regard the right of resistance against unlawful authority as a fundamental principle of law. Legal insurrection was, for a long period, the only protective measure against the arbitrary acts of the sovereigns, especially of the Tudors. In Magna Charta it is expressly laid down that the conservators thereof (the twenty-five barons), "together with the community of the whole kingdom (*cum communa totius terræ*) may distrain and oppress us (the king) in all possible ways, viz., by seizing our castles, lands, possessions, and in any other way they can, till the grievance is redressed according to their good pleasure, saving harmless our person, and the persons of our queen and our children, and when it is redressed they shall obey us as before."

This clause further empowers the assembled people to oppose resistance when the feudal lord has infringed the protection, yet with due observance of prescribed legal forms. The right of private war on the part of individual vassals against their superior lord is henceforth excluded; it is the community alone which may stand forth to protect its rights.*

When the Stuarts strove to transmute the doctrine of lawful resistance into that of passive obedience, the theory of Magna Charta was legalized anew by 1 William and Mary, s. 2, c. 2, whereby the constitutional theory of resistance was developed, and is thus commented on by Blackstone:—"If these rights are actually violated or infringed, the English subjects are justified in defending them, and indeed to require, first of all, a regular government and a free administration of justice in the courts of

* Gneist, i. 30.

law; next, to present to the king and parliament petitions for the removal of the difficulty; and finally, to have and employ arms for its own security and defence."

This theory, however, is in direct antagonism with the unrestricted authority of parliament. According to the point of view adopted, it is regarded as lawful or otherwise, to resort to resistance against parliament and its arbitrary power. The Tories are most inclined to sanction resistance to parliament; from this point of view do many Conservatives regard the resistance of the Americans against the mother country. Though George III. was the moving spirit in all the measures resorted to, he leaned throughout upon the *support* of parliament. The Americans, therefore, in the first instance merely contended against the parliament,* as Lord North himself acknowledged in the debate on the address (27th November, 1781). "America," he says, "has not withstood the prerogatives of the crown, but only the pretensions of parliament, the war is kindled because they have felt the supremacy of parliament, and wish to maintain the legal functions and privileges thereof."

At the present day Englishmen in general acknowledge that the resistance of the Americans was legitimate, and there is no further controversy as to the fact of the resistance having been directed not less against the parliament than against the crown. Individual resistance against any unlawful act has been repeatedly recognized by the courts as justifiable. In the reign of Queen Anne, a constable had arrested a woman beyond his district, and, consequently, in contravention of law. A certain Tooley, interfering for her protection, assaulted and killed the constable. He was indicted for murder. On the question of fact the jury gave a special verdict in his favour; and in consequence thereof the twelve judges, under the presidency of Lord Chief-Justice Holt, declared, by a majority of seven against five, "that when a person has been arrested by any unlawful authority, this was a sufficient cause for any one, out of compassion, to come to his assistance, all the more

* "Whoever will place himself back, and view with a mind unprejudiced by the result, the heroic courage and daring that were requisite in that fragment of population to dare and achieve so mighty an enterprise, must rest satisfied that something better and nobler inspired and sustained the injured in that struggle than visionary projects as to forms of government or accidents of sovereignty. The colonists took up arms against usurpation; their aim was right, their strength the law."—*Canada under Successive Administrations*. 1814. P. 1.

indeed, if the arrest took place under a semblance of legality; that when an attempt on the liberty of the subject was made, this amounted to a challenging of all the subjects of the King of England; that every one was bound to uphold the Habeas Corpus Act and the laws, and that when an official arrested any one in contravention of law, he was violating the Habeas Corpus Act." In consequence of this legal ruling the accused was only found guilty of "manslaughter," and allowed the benefit of clergy.*

* De Lolme, ii. c. 14; Report of Cases argued and debated in the time of Queen Anne.

BOOK II.

The Crown.

CHAPTER I.

THE ENGLISH KINGDOM.

The Saxon King and the Norman King.—The King subject to the Law.—Bracton, Fortescue, and Onslow, on the English Kingdom.—"The King can do no wrong."—The Kingdom "by the Grace of God," of the Stuarts.—In Disfavour under George I. and George II.—Titles of the King.—Prerogative.—George III.—The King of England not a Great Elector.—Loyal Feeling towards George IV.—Towards Queen Victoria.—The Miraculous Cures of the English Kings.—Oath of Allegiance.—Duties of the Subject.—The Actual King.—The Lawful King.

THE Saxon king was the chief of a free confederation, and as such bore the title of "Basileus of Britain, king of all its nations, the monarch of Albion."* The crown was hereditary only upon condition of the successor being of full age, and competent for the office. Alfred based his right to govern on his father's will, on the contract with his brother Ethelred, and the consent of the people; excluding the sons of his older brother from succession to the throne.

William the Conqueror asserted that he had taken possession of England as rightful successor, by virtue of a pretended grant from the Saxon king, thereby expressly recognizing the public law of the Saxons, although his rule was, in fact, the merest negation of such law. The formulæ of the charters, and proclamations of William I., commencing "Statuimus, volumus, præcipimus," or, "Præcipio, prohibeo," indicate that the king alone exercised the right of legislation. But the absolute monarchy, *de facto*, but never *de jure*, breaks down when the strong-handed sovereigns disappear, and the barons have to choose between usurpers and pretenders.

In the conception of English jurists, dating from the Plantagenet period, the king is limited in his acts by the law and its representatives. Bracton says—"The king must be under the law, for the law maketh the king. Let him render to the law what the

* Hallam, *Middle Ages*, i. 108

law hath invested him with, viz., dominion and power; for there is no true king where will and pleasure rule, and not the law. The king, as God's servant, can do nothing but what comes to him through the law.* Bracton accordingly contends, as against the principle of the Byzantine law, that the prince is bound by he laws, and asserts that the king of England is not only limited by the abstract law, but also by its living representatives at the court of counts and barons, for they are, therefore, only called 'comites,' because they are the companions of the king, and whosoever has a companion has one who restrains him, and if the king were without check, that is, without law, one should place a check upon him."†

In the year books, 19 Hen. VI. c. 63, it is said:—"La ley est le plus beau inhéritance que le Roy 'ad; car par la ley il même et toute ses sujets sont rulés et si la ley ne fuit, nul roi, et nul inhéritance sera."‡ Fortescue describes to his pupil the Prince of Wales, son of Henry VI., the features of a monarchy regulated by law:—

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

* Lib. i. c. 8.

† C. ii. c. 16. An old poem of 1258, in the time of the Mad Parliament runs thus:
"Adquid vult libera lex reges arctari?
Nec possint adultera lege maculari.
Et hæc coarctatio non est servitutis
Sed est ampliatio regiæ virtutis."

‡ Bl. i. 234.

§ *Tallagium* is a general word, including all subsidies, taxes, tenths, fifteenths, impositions, or other burthens or charges,—Coke.

of Cyprus, 'De regimine Principum,' wishes that a kingdom could be so instituted as that the king might not be at liberty to tyrannize over his people, which only comes to pass in the present case, that is, when the sovereign power is restrained by political laws. *Rejoice, therefore, my good prince, that such is the law of that* kingdom to which you are to inherit, because it will afford, both to yourself and subjects the greatest security and satisfaction."*

Under the Tudors, in like manner, an absolute monarchy was not recognized by the nation. The speaker, Onslow, says in 1556:—"According to our common law, many privileges and dignities are secured to the governor, yet is it forbidden by the law that the king should take money or other things, and do *what to him seemeth good. He must rather allow his subjects* to enjoy their fortune without arbitrary oppression, whereas elsewhere princes have the liberty to take whatever pleaseth them."

On these principles alone is based the legal dictum, "the king can do no wrong;" which does not anywise represent that the person of the king is so sacred as that he cannot do wrong in any way, but it means simply that the law has so placed the king of England that he is not in a position to do wrong. The judicious Hooker, in his *Ecclesiastical Polity*, written in the reign of Elizabeth, says, "Lex facit regem;" the king's grant of any favour made contrary to the law is void. "Rex nihil potest nisi quod jure potest."* The true meaning of the maxim—"The king can do no wrong," is, therefore, to be taken in a prohibitive sense.† It *pronounces, in a very civil form, the principle that the king is so* hindered by the law that it is impossible to him to do wrong. Whosoever, therefore, obeys the king in contravention of law, affording thereby occasion to violate this principle, is punishable.‡ No decisions bearing upon punishments for common criminal offences committed by any king are to be met with in the books, English jurists contending that the case of a sovereign being guilty of a common crime is to be treated as the laws of Solon treated parricide—it must be regarded as not being possible.§

The Stuarts endeavoured to introduce into England the

* Amos' Fortescue, 26, 27.
† Parl. Rem. iv. 199.
‡ Bowyer, 136.
§ Bl. iv. 33. Lord Coke says: "It is assumed that the king (as the source of law) treasures up all law in the shrine of his breast (Præsumitur rex habere omnia jura in scrinio pectoris sui). In like manner all franchises proceed from the king."

Byzantine conceptions of a kingly authority which was above the law. "As it is atheism and blasphemy in a creature," says James I., "to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good Christians will be contented with God's will revealed in his word, and good subjects will rest in the king's will revealed in his law."* The consequences of such theory were a twofold revolution, and the downfall of the Stuarts. As the two Pretenders claimed the throne "by the grace of God," whosoever during the reign of the first two Georges contended for the theory of a "kingdom by the grace of God," as had been the fashion under the Stuarts, incurred disfavour. Blackstone, the embodiment of the dominant legal expression of that period, says, "The kingdom which is established by God may suit the children of Israel, but it is unknown to the laws and customs of England."† A conception of a king who, according as circumstances prompted, may merge the rights of his subjects, who are to rest satisfied with his "responsibility before God," is consequently most un-English. The kingdom "by the grace of God" is accordingly to be apprehended in the sense of Bracton's and Fortescue's meaning,—that God, as the stronghold of all law, compels the sovereign likewise to act according to the law. Under the ministry of Lord John Russell, the words, "by the grace of God," disappeared from the florin, which gave rise to much offence, and the old pious formula had to be again introduced.‡

The title of the king has undergone frequent change. William I. and Henry I. styled themselves "Rex Anglorum;" Henry II. "Rex Angliæ, Dux Normanniæ." Under Henry VIII. the crown became "Imperial," the realm was styled "Empire," in order to indicate the plenitude and authority of kingly power as sundered from the supremacy of a foreign sovereign. Henry styles himself "Henry VIII., by the grace of God, King of England, France, and Ireland, Defender of the Faith, and of the Church of England, and also Ireland, in earth the supreme head."

The 35 Henry VIII. c. 3 declares it high treason to deprive

* King James' Works, 557, 531.

† Bl. i. 211.

‡ The Commons of "the Rump" grounded their revolutionary power and their judgment of Charles I. on "the grace of God" (Journals ii. iii., 4th January, 1649):—"That the people are, under God, the original of all just power; that the Commons of England, in parliament assembled, being chosen by, and representing the people, have the supreme power in this nation."

the king of his title. This king was likewise the first to assume the title "Majesty."

The title "King of France" had been assumed by the English kings down to the 1st January, 1801, when the lilies were for the first time erased from the royal arms. Until then, in diplomatic communications on the part of England, a "most Christian king" was recognized, but never a "king of France." Even James II., at St. Germain, was always titular "king of France," by a fiction based upon a fiction. Louis XVIII. was subsequently the first king of France with whom England entered into diplomatic intercourse as virtual "king of France." The title which George III. assumed in 1801 was "Dei gratiâ Britanniarum Rex, Fidei Defensor," which title has till now continued.

The representation of the State, both abroad and at home, centres in the king. He is the fountain of all offices, dignities, honours, and of all jurisdiction. By a fiction he is personally present in all the courts of law; in all state and criminal prosecutions appears as prosecutor; he is the visible head of the church, and all the revenues of the country pertain to him. The parliament likewise is but an outflow of his power; he summons and prorogues it, creates peers, and dissolves it. He is entrusted with the execution of the laws; his consent makes bills binding laws, and when once assented to, he dare not alter them in any particular, still less dare he impose taxes upon his subjects without their consent.

All the prerogatives of the king are actually existent, but parliament is the grand centre from which they emanate, the crown having scarcely power sufficient to impose effectual check upon Lords and Commons. In describing the public law of England, it is needful in the outset to form a notion of the theoretical rights of the sovereign in order to appraise his actual power. To achieve a complete sketch of the English kingdom, it will be expedient, when describing the parliament, to revert anew to the actual state of the prerogatives of the crown. How far cabinet and parliament may arrogate the exercise of such prerogatives depends now-a-days materially upon the sovereign himself and on his personal capacity; the royal prerogative, for instance, under George III. had a far different import from that under George II. "The King of England," says Lord Brougham, "does not resemble the Grand Functionary of the Abbé Sieyes, the hog to be fatted at the rate of £120,000 a year

('Cochon à l'engrais à la somme de trois millions par an'). The English animal, according to the Whig doctrine, much more nearly answers this coarse description, for the Abbé's plan was to give his royal beast a substantial voice in the distribution of all patronage, while our lion is only to have the sad prerogative of naming whomsoever the parliament chooses, and eating his own mess in quiet."* The leader of the Tories in the Upper House, Lord Derby, on the other hand, has urgently protested "that the Queen was not a mere automaton, that she exercised an influence and a control over the concerns of the country."†

The sentiment of the English nation, saving, perhaps, the dominant Whig class and certain radical elements in towns, is of a bias strongly monarchical, reverencing in the sovereign, after a fashion more enthusiastic than on the Continent, the symbol of the state power and state authority.

"They who remember the winter of 1820," remarks Lord Brougham, in his portrait of George IV., "must be aware that the same individual who, a week before the death of George III., had travelled to and fro on the Brighton or Windsor roads, without attracting any more attention than any ordinary wayfaring man, was now, merely because his name was changed to 'King' from 'Regent,' greeted by crowds of loyal and curious subjects, anxious to satiate their longing eyes by a sight of a king in name."‡

Touching the accession of Queen Victoria, the same keen observer remarks:—"A young lady of eighteen, suddenly transplanted from the nursery to the throne, might, however great her qualifications, be deemed hardly fit at once to hold the sceptre of such a kingdom in such times. But all apprehensions on the subject must have instantly ceased when it was observed that there broke out all over the country an ungovernable paroxysm of loyal affection towards the illustrious lady, such as no people ever showed even to monarchs endeared, by long and glorious reigns, to subjects upon whom their valour and wisdom had showered down innumerable benefits. At any rate the feeling of enthusiastic loyalty and devotion to the sovereign, merely because she was a sovereign, could not be doubted, and it could not be exceeded."§

* *Statesmen*, i. 13.
† *Ann. Reg.*, 1851, 11.
‡ *Statesmen*, ii. 48.
§ *Statesmen*, ii. 49,50.

For many centuries the English sovereigns, as heirs of Edward the Confessor, were assumed to be inheritors likewise of his sanctity and his virtues. Amongst the lower classes this intuitive feeling reigned supreme, the craftier sovereigns having always shown themselves graciously disposed and imbued with benevolence.* In their quality of "saint," English kings, down to the reign of George I., repeating *portions of the Liturgy in solemn audience*, touched for the "king's evil," by imposing their hands on persons afflicted with scrofula.† During the sway of the Stuarts, the very physicians inclined to believe that it was only the hallowed hand of the king that could effect such wondrous cures.

The legal relation of the subjects to the king is embodied in the oath of allegiance. Every Englishman on attaining the age of twelve years *is subject to take this oath; as a rule it is only* required on assumption of any office. It was originally an oath of a purely feudal character, and down to the revolution of 1688 was sworn "to the king and his heirs," since then, "to the king" merely.

From the Reformation the oath of supremacy has been superadded, and, since 13—14 Will. III. c. 6, the oath of abjuration, the latter being directed against the claims of the Pretender. How this oath has been modified in later years we have above seen. The duty of an English subject towards his king—"*natural* allegiance"‡—arises from the moment of birth, and cannot be abrogated by "abjuring the realm"; from the fact of the feudal relation in which all Englishmen are conceived to stand to the sovereign, not allowing it to be changed on one side merely.§ In contrast with this is the "local," or "temporary allegiance," owed by an alien residing temporarily in the country.

Sir Matthew Hale is of *opinion that to a de facto king*, as well as to a king *de jure*, the duty of allegiance is owing as soon as he has taken possession of the crown.§ In perfect accordance with this is a resolution by the judges under Henry VIII:, "that as soon as any one is crowned, all discussion touching his right to the crown is inadmissible." The parliament, likewise,

* In Shakspeare's *Henry V.*, act 4, sc. 1, the king says:—

"Five hundred poor I have in yearly pay,
Who twice a day their wither'd hands hold up
Towards heaven."

Even Henry VIII. provided many of the poor with food.

† Macaulay. Smollett, c. 7.

‡ Bl. i. 457.

§ 1 *Hale, P. C. 60.*

of that period acknowledged that it was no treason to serve the *de facto* king.* Edward IV. punished the treasons which had been perpetrated against Henry VI., although Henry VI. and his house were, by the house of York, regarded as mere usurpers. This opinion that only the actual king is the real king to whom allegiance is due, we find also expressed in Shakspeare's *Henry VI.* Part III. act 3, scene 1, where two gamekeepers say to the Lancastrian king, who refers to his character as their sovereign—"We were subjects but while You were king." The mode of action adopted by Edward IV., the legal observance above mentioned, both of the judges and parliament, the exclamation which Shakspeare attributes to common folk, serve to indicate how inaccessible to English minds was the conception of the mere term "legitimacy."

* 11 Hen. vii. c. 1.

CHAPTER II.

INHERITANCE AND LOSS OF THE CROWN.

The Claims to the Crown Regulated by Law and not by Birth.—Transfer of the Crown to the House of Hanover.—No Elective Monarchy.—Deviation from the Ordinary Line of Succession.—Order of Hereditary Succession.—Succession in Females.—The Coronation and Coronation Oath.—Presumed Abdication.

THE Crown in England is hereditary by the common law of the land, and not by any divine right. "While I speak of a hereditary, I by no means intend a *jure divino* title to the throne."* This opinion of the renowned commentator is based upon the statutes passed after the Revolution of 1688. The statute, 6 Anne, c. 7, declares it high treason if any one shall "maliciously, advisedly, and directly, by printing or writing, maintain and affirm that the kings and queens of this realm are not able, with and by the authority of parliament, to make laws and statutes of sufficient force and validity to limit and bind the crown and the descent, the limitation, inheritance, and the government thereof."

The hereditary right is consequently of a nature liable to modification dependent upon circumstances. An indefeasible right of succession does not exist, the king and the parliament may exclude every rightful claimant from succession, and, by law, call to the throne an expectant further removed.† The Exclusion Bill, which under the reign of Charles II. was rejected by the Upper House, only failed to pass because the Lords contested, not its legality, but merely its necessity. William and Mary, as well as Anne, acquired their right to rule not by right of "*descent*," but by way of donation or "*purchase*," by which lawyers mean the method of acquiring a title to an estate otherwise than by descent.‡ They merely strove to solder the hereditary right to the revolutionary title in the best manner possible. The Tories, in the reign

* Bl. i. 209.
† Ibid.
‡ Bl. ii. 204, *Purchase* in law is used in contradistinction to *descent*, and is any *other* mode of acquiring real property, viz., by devise, and by every species of gift or grant; and as the land taken by purchase has very different inheritable qualities from land taken by descent, the distinction is all-important.

of Anne, essayed to represent the hereditary right of the Queen as emanating directly from Edward the Confessor.* Accordingly, she also touched for the "king's evil," a thing which her revolutionary predecessor had scorned attempting. The Act of Settlement, 12—13 Will. III. c. 2, of 1701, has guaranteed the accession of the House of Hanover to the throne. The act simply excluding the son of the Pretender and the next "Catholic" heirs of the same, the succession to the throne remained accordingly in the House of Stuart, and was only transferred to its Protestant branch exceptionally, inasmuch as, passing over Queen Elizabeth of Bohemia, daughter of James I., it transferred the crown to the surviving daughter Sophia, Dowager Electress of Hanover, to the exclusion of the heirs who were incapacitated to accede to the crown.†

If we accept the Bill of Rights as consistent with law, this was not a proceeding of a specially revolutionary nature; those only were excluded who, by reason of their religion, had become disqualified from satisfying, conformably with the Bill of Rights, the duty of English kings as heads of the "catholic" Church of England. The act determines accordingly, that the king of England shall in future belong to the Church by law established.

An elective monarchy has never really existed in England. If the "Chronicle of Dunstable" makes mention of the "election" of Richard I. by the clergy and the people,‡ all that is meant thereby is the assent of the "*homage*" (*homagium*) by tender of the oath of fealty. A fixed line of succession to the throne was first established in the 18th century.

The descent of the crown is governed in England by the same

* Smollett, c. 7, 29.

† James I.

Charles I.	Elizabeth.
Charles II.	James II.
	James (the Elder Pretender).
	Charles Edward (the Younger Pretender).
	Sophia.
	George I.
	George II.

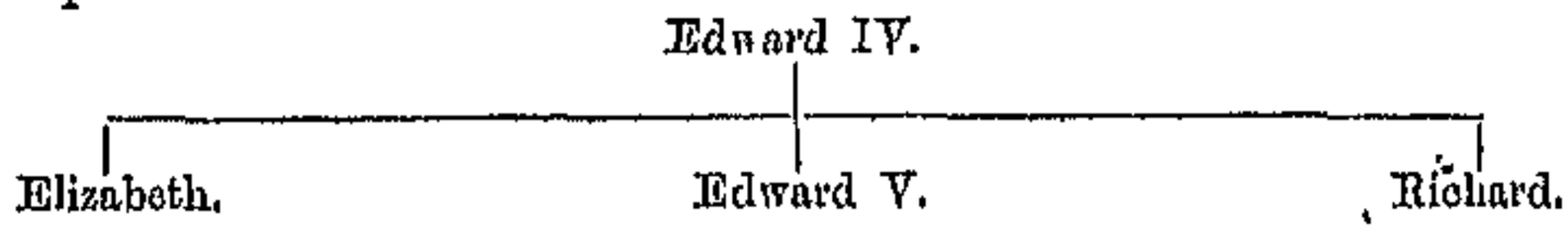
‡ Lytt. vii. 42, "Hereditario jure promovendus in regnum, post cleri et populi solemnem electionem.

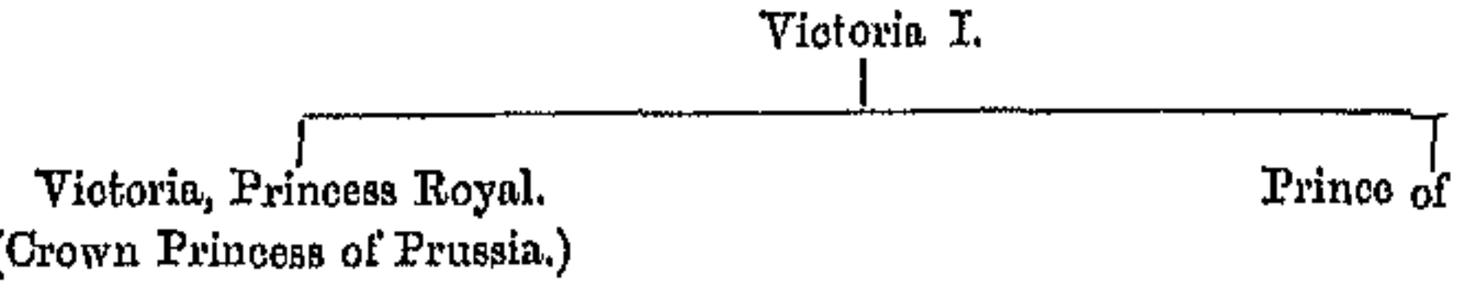
rules which regulate the descent of real property at common law, with two exceptions, which Lord Lyndhurst has pointed out.*

1. That the half-blood is no bar to the succession, provided that the common father was of royal blood.

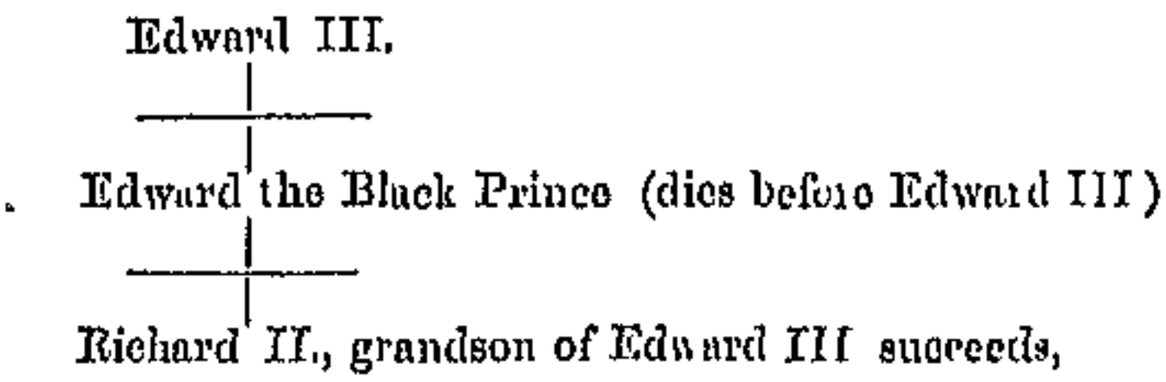
2. That in the case of two or more daughters, the eldest only succeeds, and that the kingdom is not, like any other feudal estate, apportionable, as succession to the throne cannot be severed.

In all other respects hereditary succession takes place exactly in the same way as the inheritance of family estates and real property. Just as in the common law, the first-born excludes where there are many claimants of like degree, and the male branch of the same line excludes the female. Thus, for example :—



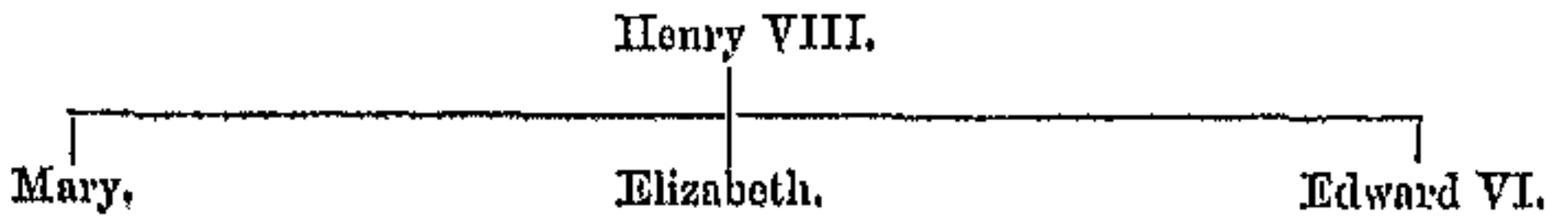


Here the Prince of Wales excludes the first-born, the Princess Royal. In this hereditary succession, "right of representation" likewise occurs, for instance :—



excluding his uncles or younger children of the grandfather.

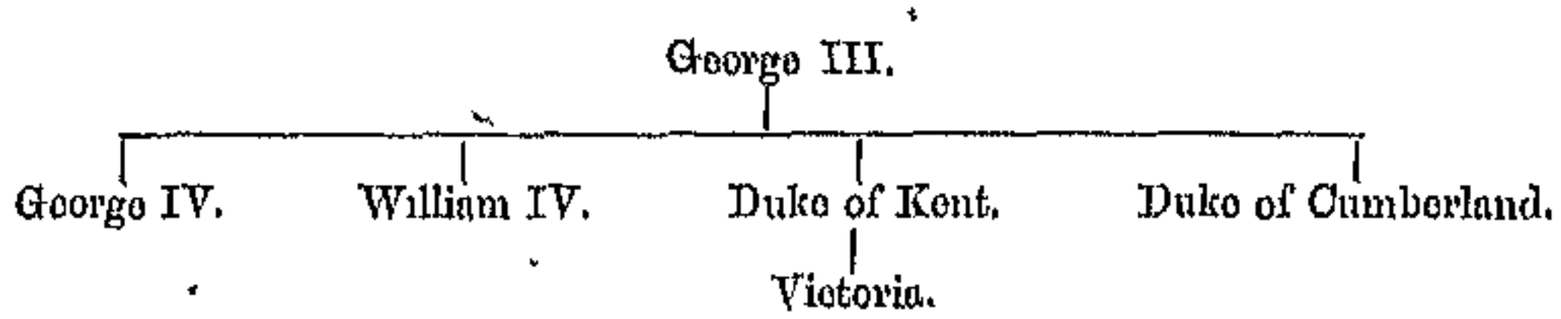
Within the same line, in the event of there being no males to inherit, the eldest princess succeeds, and a queen regnant, since 1 Mary, c. I enjoys the same rights as a king, *e. g.* :—



Edward VI., although the youngest born, took precedence of

* Bowyer, 153.

his two older half-sisters. Upon his death, however, his two childless half-sisters succeeded, the older first. The females of the nearest branch exclude the further removed collaterals. Here also the "right of representation" obtains:—



Had the Duke of Kent outlived William IV., he would have succeeded to the throne. In his stead came his surviving daughter the Queen Victoria, excluding the Duke of Cumberland, the eldest brother of the deceased king; as, however, the crown in Hanover is hereditary in the male branch only, Queen Victoria was, on the other hand, excluded by her uncle from that succession.

Under Elizabeth it was held that the royal dignity, as limited by the law, precisely by reason of such legal limitation, was well fitted to adorn the head of a woman. Aylmer, afterwards Bishop of London, published a book against Knox to uphold the "regiment" of women. He says therein:—"England is no mere monarchy as some, for lack of consideration, think, nor a mere oligarchy, nor democracy, but a rule mixed of all those wherein each one of these have, or should have like authority. In the parliament house the King or Queen representeth the monarchy, the noblemen, which be the aristocracy, the burgesses and knights the democracy. If the parliament use their privileges, the king can ordain nothing without them; if he do, it is his fault in usurping it, and their fault in permitting it. Hence it is not in England so dangerous a matter to have a woman ruler as men take it to be, for it is not she that ruleth, but the laws; the executors whereof be her judges appointed by her; she maketh no statutes or law but the honourable court of parliament.*

The coronation invests the king, as the privy council, on occasion of the coronation of George IV., acknowledged,† with no further rights than those previously possessed by him, for the king never dies; hence the maxim, applicable to all German hereditary succession, "Le mort saisit le vif," holds good of the

* Hallam, *Const. Hist.*, 281. † Hughes, c. 61.

succession to the throne. Hence no profering of the crown is needful, nor is an interregnum possible.*

The coronation is deemed necessary, however, to confirm the rights of the people, to sanction the laws and constitution of the realm. As we have seen, by the fact of coronation every doubt touching the lawfulness of the king is removed. The coronation oath also serves to sanction the feudal relation between prince and people.

The coronation oath has been settled by William I. and Mary, s. 1, c. 6. Conformably with which the king must swear to rule "in accordance with the statutes of parliament and the laws and customs of the realm, to maintain right and justice, to uphold the Protestant religion, and the privileges and rights of e clergy." By 5 Anne, c. 8, the sovereign must further swear to protect and uphold the Protestant religion and the Presbyterian Church of Scotland. By the 'Act of Settlement' every king must, moreover, either at his coronation or in his first parliament, sign the declaration against Popery, according to the Test Act.

Should a sovereign refuse either to take the oaths or allow *himself to be crowned—which would have an equal significance*—such refusal would be regarded as an 'abdication.' All acts which the sovereign may have done previous to the coronation remain, nevertheless, entirely valid.†

At the coronation, the office of Lord High Steward of England revives for one day; he sits as judge in Whitehall, and has to decide respecting the pretensions of those who claim the privilege of discharging certain functions at the coronation. ("Court of Claims.")

On this occasion also, the office of Lord High Constable again comes into being; the last person invested therewith was the Duke of Wellington. At the coronation banquet a knight, fully equipped (a member of the family of Dymock), appears in the banqueting hall, and challenges all who contest the rights of the sovereign to meet him in mortal combat.‡ During the ceremony, besides the coronation oath, the 'homage' of the bishops and peers takes place.§ As George IV. was crowned in perfect accordance with the ancient observance, and the coronation had excited a sad

* *Vide* page 119.

† Bl. i. 235.

‡ *Henry* VI., *Part* III., *act* 4, sc. 7:—

"*Montgomery.* And whoso'er gainsays
King Edward's right,
By this I challenge him to single fight."

§ Gneist, i. 161.

rather than an imposing impression,* by reason of the personal character of the king, and other circumstances, the respective state ceremonial has since been materially simplified. The court held at Whitehall, the coronation banquet, and the 'champion,' have been altogether dispensed with.

The deposing of James II., in the opinion of English jurists, affords a precedent for any future case. "So far as the precedent goes," says Blackstone, "but no further, can we at present determine the law as an aid against oppression. If, therefore, any future ruler should endeavour to subvert the original contract between prince and people, and to violate the fundamental laws of the realm, and should withdraw himself from the kingdom, we should regard this combination of circumstances as an abdication of the government; and the throne would, in such case, become vacant.† The law has, moreover, since the revolution particularized certain cases, in which the lawful heir and the king regnant shall lose the throne. Such a case would occur, as we have observed, if he refused to assume the duties of a king, and abstained from taking the coronation oath.‡ As the sovereign of England must belong to the Church Established, his conversion to any other church would be forthwith regarded as an abdication. In like manner, the king may not marry a Catholic, and marriage with one would be regarded as a resignation of the crown.§

* Queen Caroline's application to be crowned was refused. Popular commotion, or infractions of the public peace were expected, and the Government did all in their power to attract the populace from the vicinity of the Abbey. Troops lined the streets and barricaded the approaches. At length came his Majesty along the platform extending from Whitehall to Westminster Abbey, with tottering steps, scarcely able to support the glittering crown, which produced so sad a contrast with the sunken features."—Hughes, c. 61.

† Bl. i. 210.

‡ In the west Gothic kingdom the bishops in such case expressly released the vassals from their services.

§ George IV., while Prince of Wales, lived a long time in simulated marriage with Mrs. Fitz-Herbert, a Catholic lady.

CHAPTER III.

THE PREROGATIVE OF THE SOVEREIGN.

Meaning of Prerogative.—Special Prerogative.—Irresponsibility of the Sovereign.—Perfectibility of the Sovereign.—The Sovereign never a Minor.—Immortality of the Sovereign.—The Sovereign Owner of all Land.—War and Peace.—Chief Magistrate.—Ambassadors.—Treaties.—Letters of Marque.—Authority over Strangers.—Legislative power of the Sovereign.—Acts of Parliament only bind him conditionally.—Generalissimo.—Harbours.—Lighthouses.—The wearing of Arms.—*Prohibition to quit the Kingdom.*—*The Sovereign the Supreme Judge.*—The King the general State Prosecutor.—Right of Pardon.—Proclamations.—Granting of Privileges.—Markets.—Coining.—Head of the Church.—No co-ownership with the King.—High Treason and Forfeiture.

"By the word prerogative we usually understand that special pre-eminence which the king has over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity."*

The prerogative is absolute, so far as it is not limited by the law; hence, so far as the law has not imposed restrictions, the king may do what to him seems good—having no superior beyond the law. An improper use of the prerogative does not invalidate any act of the sovereign, but renders his advisers responsible.

Following out the enumeration of the prerogatives given by Blackstone, vol. i. c. 7, 237-281, we find—

1. The sovereign cannot be sued before the courts, either criminally or civilly.† To carry out any civil claim against the sovereign, application must be made by petition of right to the Court of Chancery. The Lord Chancellor then issues his decree; but such right is only *formally* accorded as an act of grace, for the Chancellor is not bound to accord, in the name of the king, any right to the petitioner.‡ By the Act 23 & 24 Vict. c. 34, the law

* Bl. i. 239.

† The Prussian code regards the kingly dignity as an office merely, and not as a purely personal attribute, the "Chief of the State" being the hereditary head functionary of the commonwealth. In his private capacity, accordingly, he can be sued civilly in the courts, as a matter of course.—§ *Einleitung der A. L. R.*; § 18, Th. ii., Tit. 13.

‡ How far the king is bound in his private capacity to undertake municipal charges and offices is doubtful. George II. was nominated churchwarden of St.

relating to petitions of right was amended, the procedure therein simplified, and provision made for the recovery of costs in such cases. The object of the Act is to assimilate the proceedings as nearly as may be to the course of practice and procedure now in force in action and suit between subject and subject. By this Act petitions of right may be instituted in any of the superior courts at Westminster, in which the subject-matter of the petition would have been cognizable if the same had been a matter in dispute between subject and subject. It further enacts, that such petitions shall be addressed to Her Majesty, in the form or to the effect in the schedule annexed to the Act. The petition is to be left with the Secretary of State for the Home Department, for Her Majesty's *fiat* that right be done. The practice and course of procedure in action and suit between subject and subject shall extend to petitions of right, so far as applicable.

2. The king is perfect, "the king can do no wrong;" such perfection is withal inherent in the parliament also, whereof the sovereign forms a part. The sovereign is not responsible for his acts. (See Chap. I. of this book.) He cannot even meditate wrong; in the event, therefore, of his allowing any wrong to be done, he is held, in such case, to have been deceived. The parliament can, accordingly, appeal from the king ill-advised, to the king better-advised; convenience requiring that all his acts shall be regarded as issuing simply from his advisors.

3. The king is never a minor. A child would, in the event of an act of parliament not having previously provided, have by law the full right to govern. A general regency law does not exist in England, and cannot exist, inasmuch as it would be antagonistic to the conception of the perfectibility of the sovereign, who is never deemed impotent or incapable of governing. If a sovereign who is a minor give his assent to a bill, it becomes a binding law in its fullest form. Henry VI. was crowned when not quite eight years of age.* The coronation is, as we have seen, the solemn compact established between the king and his people; therefore, a king who is considered incapable of reigning, cannot be crowned.

Martin's; he observed, "I ought to congratulate myself that they have not chosen me as constable." The parishioners threatened to bring an action to compel him to assume the functions. He accepted the office, and got himself represented by deputy.—Archenholz, *Brit. Ann.* v.

* *Proceedings of the Privy Council*, iii. 3.

4. "The king never dies;" hence an interregnum is not possible. The death of a sovereign is, accordingly, never styled "death," but always *demise* (demissio regis vel coronæ) which merely indicates a transfer of estate. When, therefore, the "demise of the crown" is spoken of, it signifies that the crown has been transferred to the successor. So far Blackstone. But the acts of the privy council at the beginning of the reign of Henry VI., show the fallacy of the usually received opinion, that formerly, as at present, the accession of each monarch was dated from the day on which his predecessor died; for the last day of August is there mentioned as the day of Henry V.'s demise; and the accession of Henry VI. is dated from the day following.*

5. The king, by a fiction of law, is the sole owner of all landed property in England. All the soil is regarded as being granted out in fee by him. To him belongs all the state property; and all the revenues of state are, in contemplation of law, his revenues.

6. The sovereign alone represents the nation abroad. He alone has the right to declare war and conclude peace. Whatever is done by individual subjects against foreign powers, is the act of private men only. By 2 Hen. V. cap. 6, it was high treason to commit acts of hostility upon any nation in league with the king, without a declaration of war on the part of the king. Since 20 Hen. VI. cap. 11, such offence is no longer punishable as treason, but only as piracy and robbery.† The king can, however, dispense with the Foreign Enlistment Act, which forbids service in the army of foreign powers. This was the case in the reign of Henry VI., where license was granted to certain of the king's subjects to enter the service of the king of Denmark.‡

7. The king is the chief magistrate of the nation. All other magistrates only act by reason of his "commission."

8. The king alone has authority to send ambassadors to foreign states, and to receive ambassadors at home.

* *Proceedings of the Privy Council*, Preface, ii.

† In the case of enlistments for Garibaldi, the Queen's Bench refused to interfere by way of indictment, and determined that no precedent could be found to meet the case where, on the ground of a violation of the "Foreign Enlistment Act," proceedings by way of indictment could be taken. The fact may be all very well, but proceedings by way of indictment can only be restrained by virtue of *special* statutes.

‡ *Proceedings and Ordinances*, iii., Preface xlviii.

9. He alone can conclude treaties and alliances.

10. Letters of marque can only be granted by him conformably with 4 Hen. V. cap. 7. They are grantable according to the law of nations, whenever the subjects of one state are oppressed by those of another. According to later practice, the Lord High Admiral, or the Lords Commissioners of the Admiralty, grant commissions to the owners of private vessels, or "letters of marque." The shipowners must, however, give security to the Admiralty that they will not injure the vessels of friendly powers. At the Paris Conference, in 1856, the ministers of England disclaimed the right of granting letters of marque, and, in like manner, the right of search. Only a temporary disclaimer can, however, have been intended, inasmuch as by any mere convention with a foreign power, the prerogative which pertains to the king of England, in accordance with the law of the land, whereby the right to grant letters of marque is inherent in the sovereign, cannot be put in abeyance.

11. The king can expel all foreigners from the kingdom. This right has been strictly regulated by special acts relating to aliens, the last being 11, 12 Vict. cap. 20 (1848); foreigners who behave loyally while residing in the country are placed under the special protection of the sovereign.

12. The king grants, in event of war, safe-conducts to the subjects of the hostile power.

13. The power of initiating measures pertains to the king in the case of general pardon bills; bills for the restitution of honour and blood originate in the Lords, and money-bills must first be introduced in the Commons.* No act of parliament becomes law without the assent of the sovereign, but since the reign of William III., no sovereign has refused assent to a bill approved by both houses of parliament. To the Regency Bill of 1811 assent was presumed, the royal consent being granted by virtue of a commission entrusted with the great seal, under authority of parliament. When George IV. became unable to write, 11 George IV. cap. 22, enacted that the king might nominate persons who, by means of a stamp impressed with a

* "The true principle of all free government, which England has consecrated, is that no proposition can be made in the name of the king, because the deep reverence on the part of the legislature for the chief of the executive power might impart a dangerous bias to their deliberations."—Barnave in the National Assembly, 17 Aug., 1790.

fac-simile, and always to be affixed in presence of the king, might render his signature valid.

14. The king may claim the advantage of every act of parliament, even when not named therein. An act in which his rights are affected, must, to have binding force on him, expressly mention him, and the king, by accepting the bill, undertakes the obligation imposed.

15. The king is generalissimo of the army of Great Britain. He alone has the power to raise and regulate fleets and armies, and establish fortifications. Since the siege of Dettingen by George II., no English king has led the forces in the field. A contrary practice would not accord with modern parliamentary usage.*

16. The king grants ports and havens. The number of havens was formerly limited; originally there were only five, "The Cinque Ports;" constituting a kind of naval barony, or intermediate authority between that of the knight and the earl.† The privilege of having a haven, once granted, is never withdrawn. The limits of the havens, wharves, and quays, are determined by the Treasury.

17. The king alone can erect lighthouses and beacons, and since 6 & 7 Will. IV. cap. 97, sink buoys and sea-marks; a right previously possessed by the Trinity House.

18. The king can forbid the wearing of arms.

19. By a writ of "*Ne exeat Regno*," under the great seal, he can forbid any one of his subjects, under penalty, to leave the realm. Such writs are only employed in the courts of equity, to prevent the flight of suspected debtors. The court of bankruptcy and the county court can only issue "orders of arrest."

20. The king is the highest judge in the realm. All jurisdiction proceeds from him, he is regarded as being present in all the courts, which is termed "ubiquity of the king." The judges only act on the ground of a "royal commission."

21. The king alone prosecutes criminals before the courts. Private persons prosecuting criminally are regarded as representing him as the chief magistrate. The king being, further, chief conservator of the peace, is likewise chief state prosecutor. If the king appear as a suitor, he can never be nonsuited, because a non-

* Stahl, *Rechts philosophie*, ii. 2 Abt. p. 349. † Pauli, iv. 680.

suit is the desertion of a suit, or non-appearance of the plaintiff, which can never occur in the case of the king, since he is always considered as being present in the court. A "*non vult prosequi*," however, or refusal to proceed, on the part of the Attorney-General, works the same effect.*

22. The king has the right of release and pardon. The former is, however, excluded in case of the impeachment of a minister: On the impeachment of Danby, Charles II. pardoned his minister before the termination of the proceedings, that is, he availed himself of his right of release. The parliament declared, however, that the royal grace could not interfere with the proceedings against a minister. The Act of Settlement, accordingly, expressly declares that no pardon under the great seal shall be made available against an impeachment. When a sentence condemnatory has been passed, the king may pardon the impeached minister or other high official who has been tried by the Lords. Every act of grace or release is granted on the recommendation of the Home Secretary. It is a modern usage for the Secretary of the Home Office to free culprits condemned by local magistrates. On the 14th of June, 1861, by order of the Secretary of State, a man was released from prison who had been condemned on the 12th by a London magistrate to ten days' imprisonment. The like favour was accorded on the 3rd of August, 1861, to a man condemned to three weeks' imprisonment in the house of correction, by a magistrate at Rye.†

23. The proclamations of the sovereign, so far as they are borne out by the laws, have binding force when, conformably with law, an embargo has been laid on foreign vessels. By such proclamations the laws cannot, as a matter of course, be changed, nor can new ones be introduced.‡

24. The crown grants privileges, patents for inventions, rights to corporations, dignities and orders; for new offices the crown cannot, however, establish new fees.

25. The king grants the right to hold markets and fairs.

26. He exercises the right of coining, but cannot debase the currency.

27. He is at the head of the Church. Since Charles I. he may, in such character, but only with consent of parliament,

* Bl. i. 270.
† *Parl. Rem.*, ii. 131—181.
‡ Bowyer, 1731.

make binding regulations having force of law. On the other hand, the king may, by proclamation, appoint days for fasting and prayer, and forbid all swearing, profanation of the Sabbath, card-playing on that day, as well as all outward manifestations of immorality.

28. The king cannot possess property in common with another; when, therefore, a horse is given by way of legacy to the king and any third person, the king takes the whole property.

Stringent statutes of treason protect these privileges of the sovereign; the penalties, in cases of high treason, being, moreover, of a revolting nature. Down to 30 Geo. III. cap. 48, women were, for high treason, burnt alive; in future they are for any such crime to be hanged. Males guilty of high treason were, till the 18th century, tortured to death in the most abominable fashion. Since that period they are to be decapitated under an order from the king.*

As the relation between the king and the subject is based, theoretically, upon the relation of the lord to his vassal, and as the conception of King and State is one and the same thing, the conception of high treason involves that of forfeiture of land.†

* Bl. iv. 92.

† Bl. iv. 75.

CHAPTER IV.

THE REGENCY.

No General Regency Law.—Minority of Henry VI.—Commission for the Minority of Edward VI.—Philip of Spain eventual Regent.—Regency Law under George II. —Regency Law of 1765 not carried out.—First Illness of George III.—No one has any Right to the Regency.—Regency Law of 1811.—Regency Law under William IV.—Under Queen Victoria.

As we have seen, precautionary measures have to be resorted to, through the channel of the law, in every special case where the sovereign, by reason of youth or illness, is incapacitated from discharging the duties of his offices.

Henry V. had by will appointed the Duke of Gloucester as protector during the minority of his son. On the death of the king several spiritual and temporal peers convened parliament, which was opened by Gloucester, by virtue of a royal commission under the great seal. Parliament declared, however, the will of Henry V. not binding. His (Gloucester's) claim "was nought caused nor grounded on precedent, nor in the law of the land, the which the king, that dead is, in his life he might by his last will, ne otherwise alter, change, nor abrogo, without the assent of the Three Estates; nor commit or grant to any person governance or rule of this land longer than he lived; but, on that other behalf, the said lords found your said desire not according with the laws of this land, and against the right and freedom of the Estates of the same land."* In consequence whereof, on the formal motion of the boy-king, Henry VI., an act was passed whereby, during his minority, the Dukes of Bedford and Gloucester, with a council of sixteen peers, were appointed as protectors of the kingdom.

Henry VIII. and his parliament had fixed the majority of Edward VI. at the age of eighteen.

In the reign of Mary, Philip of Spain was declared regent in the event of the birth of an heir to the throne.

* *Rot. Parl. and 6 Hen.'s VI.*, Vol. iv. p. 326.

The Regency Bill of 1751 enacted that, in the event of George II. dying during the minority of the Prince of Wales, the Princess Dowager (the widowed Princess of Wales) should govern the realm as regent and guardian of the king, assisted by a council, to be nominated by the king. The Regency Bill of 1765 allowed George III., in the event of his becoming incapable of governing, to summon to the regency one of the royal personages named therein; George III. did not, however, avail himself of this act. When he fell ill in 1788, the Parliament found itself in the greatest embarrassment, as there was no person at hand to whom the king had previously transferred his authority. The matter was discussed from a party point of view. Fox and Sheridan, the personal supporters of the Prince of Wales, asserted that George III. was, in consequence of his malady, civilly dead. Pitt placed himself, on the other hand, on the broad ground of the sovereignty of the people, contending that no hereditary prince had any right to the regency; that the Parliament, as representative of the nation, should determine who was to be regent, and should likewise "limit" his powers. The recovery of the king put an end to the controversy.

English jurists at a later period declared for the view advocated by Pitt.* No person, therefore, is qualified *ipso jure* to be either regent or guardian; an act of parliament alone can create a regent or guardian; the official powers to be regulated according to law by the king and parliament to suit the particular case.

When George III., in 1811, fell into his last sad malady, a bill passed (57 George III. c. 1) whereby the Prince of Wales was to become regent conditionally upon signing the declaration against Popery; the regency to be forfeited in the event of the regent's residing abroad or marrying a catholic. The invalid king, agreeably with the same law, was to be consigned to the guardianship of the queen and a committee consisting of eight persons. In the event of the king's recovery, such committee were to communicate the proofs thereof to the privy council; the regency was to determine as soon as the king, with the concurrence of six privy councillors, was deemed fit to resume his authority. By this bill the Prince Regent was empowered to exercise all kingly functions, but was neither to create new peers, change the line of

* Bowyer, 150.

succession to the throne, the Act of Uniformity, nor the act assuring to Scotland the Presbyterian Church.

By 1 Will. IV. c. 2, the Duchess of Kent was named guardian of the Princess Victoria, and, in the event of Queen Victoria's not having attained the age of eighteen on her succession to the throne, the duchess was to be regent. By 3-4 Vic. c. 52, the late lamented Prince Albert was not only appointed guardian of the royal children, but regent also, in the event of the future heir not being eighteen years old on her Majesty's demise. By the said act, Prince Albert was to lose all rights as regent and guardian in case he became a Catholic or married a Catholic. Remarriage with a foreignor would not have affected his rights.

CHAPTER V.

OF THE KING'S REVENUE.

Ordinary and Extraordinary Revenue.—Civil List from George I. down to William IV.—Civil List of Queen Victoria.—Jewels and Treasure of the Queen.

THE funds and revenues which the sovereign nominally levies as representative of the State, are divided into 'ordinary' and 'extraordinary.' The former are those which from time out of mind have belonged to the king, and which do not depend upon the disposal of parliament, or which he has, with the consent of parliament, acquired by purchase or exchange out of the property previously belonging to him. The ordinary, as well as the extraordinary revenue of the king, since government by parliaments, is, in fact, the revenue of the State, and will be fully explained when treating of the budget.

As by the revolution of 1688 the duty of the king to bear the expenses of government out of the State income allotted to him was abolished, certain portions of the income of the country have been assigned to the king to meet the expenses of the royal household. Under George I. this sum amounted at times to £1,000,000 sterling. If it did not reach £800,000 the deficiency was covered by parliament. In 1777 the civil list of the king was fixed at £900,000, and the income over and above that sum from the hereditary possessions of the crown passed to the Treasury. The high total of this civil list becomes explicable on bearing in mind that the king was still under the necessity of paying the salaries of the judges and ambassadors, and other high-placed officials. Under William IV. the civil list was relieved of many burthens, and fixed at £510,000.

By 39-40 George III. c. 88, Pitt contrived to bring about that the king might have a private and separate estate. It is established by 1-2 Vic. c. 2, that as long as Queen Victoria lives all the revenues of the crown shall be a part of the consolidated fund, but that a civil list shall be assigned to the Queen. This amounts to £385,000, of which £325,000 are destined for the

expenses of the household and £60,000 for her private personal expenditure. No State official at the present day receives his salary from the civil list. If the outlay, including the £60,000, exceed annually the £385,000 allotted, this is to be duly notified to parliament. A bill, recently before parliament, allows the Queen the right of disposing of estates purchased by her out of the savings of her private purse. She may dispose of them by will; but, on the other hand, is bound to pay all local and State taxes chargeable upon such estates.

CHAPTER VI.

THE SOVEREIGN'S FAMILY.

No Equality of Birth requisite.—Exceptional Rights of the Queen Consort in regard to her Fortune.—The House of Lords.—The Court of Law for the Queen.—Coronation of the Queen Consort unnecessary.—Queen Dowager.—Consort of a Queen Regnant.—Rights of the late Prince Consort.—The Heir to the Throne.—His Consort.—Princess Royal.—Royal Family.—"Royal Marriage Act."—Provision.

THE Queen of England is either queen regnant, and, as such, enjoys all the rights of a king (*vide* caps. 1, 2, 3 of this book), or she is queen consort, or queen dowager. The marriage of the king is only valid when contracted with a woman born in wedlock; if this requirement be fully observed the king of England may lawfully wed any Protestant whatever, however humble her origin, for the English law does not recognize a *mésalliance* in the case of the king.* Thus, Edward IV. married Lady Grey; Edward Prince of Wales, son of Henry VI., married the daughter of Warwick; and Henry VIII. married Ann Boleyn, Jane Seymour, Catherine Howard, and Catherine Parr: simple English ladies and English-born subjects.

The queen consort enjoys certain exceptional privileges, which do not pertain to any ordinary woman. She can convey lands, *inherit and make leases without the concurrence of her lord*; is capable of taking grants from the king, whereas such grants between husband and wife are, otherwise, invalid. She is empowered, likewise, to sue and be sued alone, without "joining" her husband. The law treats her in all respects as an independent, unmarried woman (*feme sole*), and not as a wife (*feme coverte*). Sir Edward Coke alleges as the ground for this exception from the common law, that the king ought not to be troubled on account of his household affairs. Palaces, however, and chattels, bequeathed to the queen for her life, cannot be freely disposed of. She further enjoys freedom from toll and from amercement in any

* "The crowning in England holdeth that a king may take a maiden to wife, whose she might be, yet true born withal."—Wilmrich, *Danziger Chronik*, p. 2.

court. Where the law has not expressly exempted her, her legal relations are determined by the common law.

As regards the protection of her person she is put on the same footing with the king; it is high treason to compass her death, or violate her person. Should the queen consort commit adultery, the person committing the offence and the queen consenting are punishable alike for high treason. If the queen commit high treason she is arraigned before the House of Lords, as in the case of Anna Boleyn. By a statute passed after the execution of Catherine Howard, it was made high treason if the queen, before marriage, deceived the king in the point of her continency.

The coronation of a queen-consort is not a ceremony of material import, as has been fully determined on occasion of the claims asserted by Queen Caroline during the reign of George IV.* In consequence of the judgment of the privy council, Queen Caroline was not admitted to Westminster Abbey during the ceremony.†

The queen dowager, "*pro dignitate regali*," no man can marry without special licence from the king; if she marry a peer or commoner, she still retains her regal dignity. A conspiracy against her life, attempts upon her person, and connection with her out of marriage are not regarded as high treason. The consort of the reigning queen is her subject; he either bears no title at all, or the title of "king consort," or "prince consort," the latter having been the title conferred on Prince Albert. Generally speaking, the consort of the queen has not any authority in the government. From the time of Philip of Spain such authority was expressly withheld by Parliament. William III., on the other hand, mounted the throne as 'king regent' in conjunction with Mary.

The late Prince Consort could only have governed had the Queen died leaving the Prince of Wales a minor. He was a member of the privy council, and, as Lord Campbell expressly declared in the Upper House, was constitutionally bound, as 'Consort,' "to give advice to the Queen."‡ This view was supported in the Upper House by Lord Aberdeen, and in the Lower House by Lord John Russell.§

* The ceremonial on such occasion is described in Shakespere's *Henry VIII.*, Act 4, s. 1.

† Hughes, c. 60.
‡ *Ann. Reg.* 1854, 12.
§ *Ann. Reg.* 1854, 10—12.

The heir apparent is usually, by special creation, made "Prince of Wales," and "Earl of Chester;" as eldest son of the sovereign he is, by inheritance, "Duke of Cornwall." A conspiracy directed against him, or his consort, or against the eldest princess (the Princess Royal), or adultery committed on either of the above-named princesses, or any violent attempts against their persons, draws down the penalties of high treason. The Prince of Wales has his own privy council, to which formerly an appeal lay from the Court of Stannary, in Cornwall. The royal family comprises, in a more extended sense, all those who might lawfully inherit, that is, all the "Protestant" descendants of the Electress Sophia. In the more restricted sense the nearest relatives of the king constitute his family. The younger sons and daughters have precedence over all Peers and Government officials. The brothers uncles, nephews, grandsons, and grand-nephews have equal rank.

The king has the right to superintend the education of his grandchildren, even while their parents are still living. By the Royal Marriage Act 12 George III. c. 11, no descendant of the body of King George II., other than the issue of princesses married into foreign families, is capable of contracting matrimony without the previous consent of the king; such of the said descendants as are above the age of twenty-five may, however, after a twelvemonth's notice given to the Privy Council, contract marriage without the consent of the Crown, unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage.

Parliament generally, on the marriage of princes or princesses, makes the necessary pecuniary provisions; the "eldest daughter," or *Princess Royal, being especially favoured, as being the object* of one of the ancient feudal aids which the Lord was entitled to claim.

CHAPTER VII.

THE COURT.

Lord Steward of the Household.—Treasurer.—Comptroller.—Master of the Household.—Secretary of the Board of Green Cloth.—Mistress of the Robes.—Master of the Horse.—Bishop of London.—Chaplains.—Hereditary Offices.

THE court of the sovereign is thus composed:—

I. (1.) *The Lord Steward of the Household,* whose jurisdiction is now very limited, and with reference to civil matters, has been wholly taken away by 12 and 13 Vict., cap. 101. (2.) The Treasurer of the Household, and (3.) The Comptroller of the Household; the Lord Steward and the Treasurer always sit in the Privy Council, but the Comptroller only occasionally—all three offices change with the ministry; (4.) The Master of the Household, and (5.) The Secretary of the Board of Green Cloth, do not change with the ministry: they have the supervision of the servants, and control of the household generally.

II. *The Lord Chamberlain,* Vice-Chamberlain, the Lords in Waiting, the Captain of the Bodyguard (Gentlemen-at-Arms), the Captain of the Yeomen of the Bodyguard, change with the ministry. They exercise control over the royal apartments. The Comptroller of Accounts, and the Master of the Ceremonies, are permanent appointments. The Mistress of the Robes is the chief of the court ladies. There are besides, eight ladies of the bed-chamber, eight bed-chamber women, and eight maids of honour—the latter being companions to the Queen, and bearing the title of "Honourable." The Lord Chamberlain presents to the Queen those who appear at court.

III. The Master of the Horse and the Clerk-Marshal (the office of Chief Equerry being combined with the latter) as well as the Master of the Buckhounds, change with the ministry. There are besides, four equeries in ordinary, and four pages of honour in this department.

IV. The Bishop of London is the "Dean in Ordinary" of the Chapel-Royal. He nominates a sub-dean. The royal domestic

chaplain is the "Clerk of the Closet;" and has the right to say grace at table. With him officiate forty-eight other chaplains who celebrate divine service daily in the Chapel-Royal.

V. Of the hereditary offices the following have remained from the times of the Normans: (1.) The Earl Marshal; this office is hereditary in the family of the Duke of Norfolk. He has to regulate the ceremonial at all the great state festivals, such as coronations and marriages, is the head of the "Court of Chivalry," and supervises the "heralds" and the "college of arms." (2.) The office of Lord Grand Chamberlain, honorary governor of the castle of Windsor, is now discharged by the Marquess of Cholmondely. (3.) The Marquess of Exeter is hereditary Grand-Almoner, and has the function of distributing largesse amongst the crowd at the coronation. (4.) A title purely hereditary is that of "Grand Falconer of England." It is now inherited by the family of St. Albans.*

* Gneist. i. 566.

BOOK III.

The Civil Government.

CHAPTER I.

THE EXECUTIVE.

Independence of the older Central Government—Modern Bureaucratic Organization. —Compared with that of the Continent.—War-Minister.—No Minister of "Worship," "Justice," or "Police."—Subordinates not subject to be Displaced.—Separation of the Judicature from the Administration of Justice.—Financial System.—No "special" men at the Head of Affairs.—Ministers shift from one Department to another.—Patronage.—Seniority.—Number of Officials.

As compared with the continent, the sway of the executive in England is very restricted; the powers of justices of the peace are controlled by the right of appeal; over corporate towns the Government exercises but a limited right of supervision. So far as the gentry, by means of taxation locally raised and applied, control the local requirements, the Government, by reason of the social standing of the ruling gentry, remains unimpeded in its general action. *Lords-lieutenant, sheriffs, and justices of the peace, are so constituted* that they can bear with all possible equanimity the consequences of their not being acceptable to "the powers that be." When parties change, the individual who was found anything but agreeable under the retiring government, becomes the right man in the right place under the succeeding; on this account also, the old local self-government remains tolerably safe guarded from governmental encroachments. That lords-lieutenant and other local functionaries, who happen to be not approved of, should get dismissed,—*that a Lord Sidmouth, on the downfall of Napoleon,* should try to egg on justices of the peace to a general razzia against the press—are rare exceptions. Many of the newly-created local boards, on the other hand, help out the action of the central Government; *in this regard we find already, in full play, the* mode of legislating, prevalent on the continent, *i. e.*, by means of ministerial "orders" and "regulations." The acts establishing certain institutions empower the central Government to lay down, within a certain range, regulations having binding force. *There is ample scope for the employment of such regulations in matters* affecting the poorer classes. In lieu of the courts introduced by

the Local Government Act of 1858, we find substituted, the arbitrary powers enjoyed by a "Minister of the Interior;" measured by a continental standard, however, such powers are, as yet, very restricted. The more, however, local bureaucracy usurps the place of local self-government, the greater will be the effort to introduce, through the agency of the executive, the inevitable checks and restraints ever accompanying the system. For the time being, it may be taken as a general rule, though subject to numerous exceptions that, in the most important concerns of state, the English Government exercises neither legislative nor judicial control by means of either "Rescript" or "Information."

The functions of every branch of Government—jurisdiction over the church, the army, and the administration of justice, are, mayhap, more fully matured in England than elsewhere, but in almost every department there is wanting that ubiquitous "ministration" which, directed and controlled by one master-mind, serenely robed in light and power inaccessible, by means of a throng of agents intrudes into every sphere of action:—

"Straight at one stroke unnumbered threads uplift,
The shuttle, darting to and fro, firm binds,
With trackless haste, the web; full-sure and swift,
A thousand filaments with one move winds."*

England, sooth to say, during the last thirty years has made regrettable progress in this direction, but the wide-spread arms of her bureaucracy are either not far-reaching enough, or are not uniformly developed.

If we scan more narrowly the leading departments, we find them without any visible ministerial head; the army is sundered from the range of governmental life; by its officer-class it is intimately allied with the gentry, and yet leads an existence completely isolated both as regards the State and the community at large. The Secretary of War is merely a kind of mouth-piece in Parliament and the Cabinet for military affairs; he is a purely government-official, and has no direct action in military matters of a technical nature, or with the *personnel;* the commandership-in-chief is virtually under his control, but it is only in nominating to the higher posts that he represents the interests of his party.

* Goethe.

There is no "minister of worship;" the legislation in relation to church matters pertaining to the Sovereign and Parliament. The nomination of the dignitaries, so far as not otherwise controlled, depends on the Crown, or in other words, on the Premier for the time being, and the Lord Chancellor. The limited powers of the Education Committee of the Privy Council are not to be compared with those exercised by a "Minister of Instruction."

Neither has England any "Minister of Justice." The Lord Chancellor, in regard to the new County Courts has, indeed, acquired certain powers of the kind, in respect to the nomination of the judges of these courts; the appointment of the other judges is exercised by him in conjunction with the Premier and the Home Secretary.

Still less does England endure, in the continental sense of the term, a "Minister of Police," having under him an array of officials wholly subject to his direction. The really "acting" functionaries of the several departments are not affected by the change of parties. The patronage is merely "conveyed," the respective parties having too much consideration for the exigencies of the public service to displace the officials on every party change. The English Government, as influenced by "party," should be conceived of as a pedestal of bronze, whereon, according as circumstances urge, one or other party-leader is uplifted; it is of little moment whether to-day, Lord Derby, or to-morrow Lord John Russell, or the next day, Lord Palmerston takes his stand thereon, the pedestal will still remain solid and unshaken.

The severance of the judicature from the administration has taken a course widely different from that prevailing on the continent. *Government functionaries, as a rule, have no jurisdiction* whatever, so that whatever devolves upon the ministers of justice is simply incumbent upon them in mere course of law. On the other hand, we find the courts of law acting as final courts of appeal in the case of certain government officials, magistrates, and justices of the peace. This separation of the judicature is further indicated in technical phraseology; the purely executive being styled "ministerial," and the other "judicial" offices. The functionaries purely executive are—the officials of the customs,

revenue, and post-office—so far as they have not to determine appeals—and, finally, the "police."

The centre of gravity of the State government lies in its financial system; the administration of the revenues pertaining to the State alone, without any co-operation on the part of local governing bodies. "Municipal" taxation is wholly distinct; the State deriving nothing therefrom; the coffers of the State, however, often afford aid for municipal purposes.

The parliamentary chiefs of the several departments are, generally speaking, not men "*specially*" qualified; the Lord Chancellor alone, who is generally a lawyer of great repute, forming the solitary exception. The remaining departments are generally filled by men who have gained their spurs in parliamentary contests; as a matter of course they make over the actual government to the fixed under-secretaries of State and other officials holding permanent appointments; hence they are only able to act upon broad general principles. The routine of Government thus never gets disturbed, and so far as bureaucracy in its actual working does obtain in England, its machinery moves with greater regularity and smoothness than elsewhere. Disarrangements resulting from political pressure are just as little to be feared within the range of the ministerial departments, as in the local governing bodies, seeing that antagonistic tendencies and principles of administration, especially within the sphere of the State Government, are not fostered by either of the ruling parties.

How easily English ministers shift from one department to another may be illustrated by a few examples, taken partly from the present Cabinet.

Lord Palmerston, the present premier, was, for a long time, "Minister of Foreign Affairs;" in 1852, under the Aberdeen Cabinet, he was "Home Secretary." The actual Secretary for War, Sir G. Cornewall Lewis, has been previously "Chancellor of the Exchequer" and "Secretary of the Home Office;" the present Secretary of the Home Office, Sir George Grey, was formerly Chancellor of the Duchy of Lancaster; Mr. Cardwell, who now fills this office, was previously General Secretary for Ireland, and, in a former ministry, President of the Board of Trade. The late Sir James Graham was, in 1843, Home Secretary, and in 1853 became the First Lord of the Admiralty.

The English Civil Service system is availed of as a refuge for the destitute, where the friends and supporters of the ruling ministry may be comfortably cared for. Little as it may interest "John Smith," the clerk, as to whether Lord Derby or Lord Palmerston be at the head of the Treasury, it is all-important to secure a patron among the ruling powers, in order to get the *entrée* into a department, the nomination of almost all the officials, from the "heads of department" downwards, being carried out by means of patronage. Complaints long and loud have oftentimes been raised relative to this monster abuse. "Nothing can exceed the greed, the selfishness, the insatiable appetite, and the blameable neglect of all claims that are based on merit and apt qualifications, as is too frequently the case with people in a high position,"* once exclaimed Mr. Windham, in the House of Commons. If a post in the "Stamp" or "Post Office" fall vacant anywhere, the minister writes to the respective member of the locality—provided he belongs to his party—begging him to propose a candidate.† Mr. Walmsley, a wealthy radical, once applied to the ministry for some favour, which they were unable to ensure, soon afterwards he received, by way of atonement, an open nomination for an appointment in the Post Office, everything being filled out saving the name. In several departments examinations have been introduced. Every candidate for an appointment is expected to pass the examination, should it however be "dispensed" with, patronage, as in the good old times, spreads its protecting shield over the examinee.

However great the drawback presented by the English Civil Service system, it is withal protected from all sycophancy and servility which cannot, as in other lands, advantage the subordinates in any measure, promotion by favour being unknown.‡ *Heads of departments are nominated for life, and are taken from* the body of clerks, the rule of "seniority" being upheld by "*esprit*

* Hansard, *Debates*, xiv. 758.

† A universal thirst after salaried public employment is the worst of all social maladies; it infects the whole body politic with a venal and servile humour, which in no way excludes, even among those who may be the best paid, the spirit of faction and anarchy. It creates a crowd of hungry suitors, capable of every excess to satisfy their longings, and fit instruments for every base purpose as soon as they are in place. A population of place-hunters is the most despicable of all people. There is no ignominy of which it it is not capable."—De Montalembert, *Political future of England*.

‡ Gneist, i. 592—594.

de corps," and only after long service do they attain to the higher posts, without reference to any more patronage.

By law every official appointment determines on demise of the sovereign, the appointment is, however, always renewed. The dismissal of an official is almost unheard of; letter carriers and sorters, who are only appointed at a weekly salary, are equally protected by this observance. On one occasion, in consequence of the dismissal of a letter carrier, 2160 folio pages of evidence were laid before parliament.*

The census of 1851 gave 64,224† salaried civil functionaries, a goodly crowd of officials assuredly, considering the vast number of town and municipal offices, purely honorary, and the total absence of government railway functionaries, etc., with which the Continent swarms.

* Gneist, i. 299. † *Ibid.* i. 581.

CHAPTER II.

THE PRIVY COUNCIL.

Coke respecting the Privy Council.—The Five Ministers since the Accession of the House of Lancaster.—Authority of Privy Council.—"Star Chamber."—"The King in Council."—Nomination of Privy Councillors.—Duties of Privy Council.—Members thereof.—Their Oath.—Juntos.—Cabal Cabinet.—Lord Somers against "Cabinets."—Prohibition against Cabinet Government by the "Act of Settlement."—Cabinet and Privy Council on the Death of Queen Anne.—The "Cabinet" unknown to the Law of England.—Sir G. Cornewall Lewis and Macaulay respecting the same.—Unimportance of the Privy Council.—The Right to cause Persons to be Arrested in case of High Treason.—Judicial functions.—Standing Committees.—Judicial Committee.—Committee of Privy Council for Education.—Functions of the Board of Health.

"THIS is a most noble, honourable, and reverend assembly of the king and his privy council in the king's court or palace; with this council the king himself doth sit at pleasure. These councillors, like good sentinels and watchmen, consult of and for the public good, and the honour, defence, safety, and profit of the realm."* Thus does Coke introduce his description of the first governing authority of the realm, which has really fallen into disuse, but which continues withal intact.

Out of the "*Magnum Concilium*" there was, at an early period, formed a more select body, especially during the minority of Richard II., which gave advice touching the requirements of the realm. It numbered in its ranks the judges of the Exchequer and the King's Bench; was called the king's "continual," or "permanent" council, in contradistinction to the "great councils," which met only in consequence of special writ of summons.† In the fourteenth century, the following generally belonged to it, the five ministers, two archbishops, and five other peers or distinguished personages.‡ Since the abolition, under Henry II., of

* Coke, *Inst.* iv. c. 2.

† Nicolas, *Proceedings and Ordinances of the Privy Council of England*, commencing 10 Rich. II. to 33 Hen. VIII. The proceedings during the wars of the Roses are unfortunately not extant.

‡ Pauli, iii, 662.

the office of "*Justiciarius totius Angliæ*," and since the office of Lord High Steward, "*Senescalcus totius Angliæ*," ceased to be a permanent office with the accession of the house of Lancaster, in which family it had, since the time of Henry III., been hereditary, the five ministers were :—

1. The Lord High Chamberlain, at the same time administrator of certain offices.

2. The Lord High Constable (*Constabularius totius Angliæ*). This hereditary office first appears under Stephen, the kings having till then always commanded in person. Subsequently it became merely an honorary office, from the moment when the command in the feudal army, and the functions of the office of treasurer began to be administered by a "commission."

3. Keeper of the privy seal.

4. Chancellor (*Cancellarius*), generally an ecclesiastic.

5. The Lord Treasurer: in former times frequently an ecclesiastic, but since Henry II. a "baron" of the Exchequer.* In the year 1406, there belonged to the council the Archbishop of Canterbury, the Bishops of London, Winchester, and Durham, the steward, lord treasurer, the keeper of the seal, and other notables.* At an early period, the parliament evinced much solicitude respecting the appointment of the members of the council; and though both their nomination and removal were vested in the crown, the sovereign seems to have been careful to select those who were acceptable to the lords and commons. The regulations by which the council was governed were often the subject of parliamentary discussion. The members of the "continual council," in the reign of Richard II., and apparently in that of Henry II., were appointed for one year only, at the expiration of which they were again usually chosen, unless any charges of abuse of office were brought against them, or their request to be allowed to retire had been complied with.

This privy council sat ordinarily in the presence of the king, and generally between the hours of eight and nine in the morning.† It deliberated, first of all, upon the affairs of the king, and then upon legal matters. In the latter, the council had concurrent jurisdiction with the "King's Bench" and the "Chancery."‡ Even

* *Nicolas, Proceedings, &c.* i. 295.

† "Les seigneurs du consail se taillant estre au consail parentre oyt et noef de la clokke au plustard."—*Minutes of Council, 8th March*, 13 Ric. III., 1390; Nicolas I., 18a.

‡ Palgrave, *The King's Council*, 18, 19.

so early as 25 Edw. III., however, many complaints were raised by the parliament against the transgressions of the privy council in regard to the administration of justice.* At all events, the privy council was then decidedly an instrument of the royal despotism for the purpose of encroaching on the ordinary jurisdiction. It was in consequence of the antagonism to the See of Rome that the king's council first acquired its legal jurisdiction by statute.† A contest which Richard II. had with his great council (parliament) has been preserved in the minutes of the year 1389. They afford evidence that the king's council acted with the consciousness of being responsible to the parliament for their conduct ;‡ the privy council promising in no way to disturb the common law for the oppression of the people.§ Notwithstanding this, we find the complaints of the commons touching the extraordinary jurisdiction of the council repeated under the reigns of Henry IV. and Henry V.‖ The council gave final decision in penal cases of a lower nature: thus, on 19th February, 1407, several persons who had used unlawful nets and kydels in fishing, at the suit of the mayor and aldermen of London, were condemned by the privy council.¶ The suits which that body took upon itself to determine were of a very various nature. The council which decided the gravest matters of state, fixed likewise the wages of the king's clock-maker.** Special ecclesiastical cases were settled in this court. A monk, who, with the Pope's dispensation, passed from a lenient order to one more severe, craves the king's pardon for not having asked his license beforehand.†† The nuns of Rowney begged the king's permission to admit as confessor to their nunnery an old, holy monk, they being unable to pay a very dear confessor, and being very loth to take a young one‡‡

Whether the notorious "Star Chamber" was a special committee of the privy council or a separate department, has been much controverted. The latter opinion would seem to have the greater number of upholders. So early as the reign of Edward III. a select body from the Privy Council sat in the "Chambres des Etoiles," so called from the stars painted on the ceiling.§§

* Palgrave, *The King's Council*, 36, 37.
† Palgrave, *Ibid.*, 39, 40.
‡ *Proceedings, &c.*, i. 11, Preface.
§ Palgrave, *King's Council*, 43.
‖ *Ibid.*, 44.
¶ *Proceedings, &c.*, i. 298.
** *Ibid*, iii. 289—291.
†† *Ibid.*, vi. 66, 67.
‡‡ *Ibid.*, vi. 67, 68.
§§ Crabbe, 427; Palgrave, 38

The star chambers were, probably called into existence by the transfer of the extended jurisdiction of this court to another court of law, comprised in great measure of the members of the privy council.*

The fact of the privy council, as such, having been confounded with the Star Chamber, has arisen from this: the entire privy council formerly held its sittings in the Star Chamber itself.† In the times of Henry VII. and Henry VIII., the privy council sat at Whitehall and Greenwich. Its criminal jurisdiction was shared with the new court of the "Star Chamber."‡ Before the latter degenerated into a mere engine of state, it was not devoid of utility. Against noble offenders recourse to the Common Law was of no avail, for there was no jury in the country bold enough to pass sentence upon them. Hence, the power of the Star Chamber in the time of Henry VII. had become indispensable for the preservation of the rights and liberties of the people.‖ In the year 1536, the insurgents of York complained that the privy council was then formed of too many people of humble birth.§ The privy council of Henry VIII. had in no wise the weight it had in the reign of Henry VI. Henry VIII. very often in matters of foreign affairs dispensed with his privy council.¶ The jurisdiction of this privy

* Hallam, *Const. Hist.* i.

There belonged to the Star Chamber, the Lord Chancellor, the Lord High Treasurer, the Lord Privy Seal, a bishop, a lord of the Privy Council, and the Chief Justices of the King's Bench and the Common Pleas.

This new court of jurisdiction, organised by Henry VII., in 1487, owes its origin to the decrees of this king, directed against the armed combinations and giving of liveries. The act in question is entitled "An Act giving the Court of Star Chamber, authority to punish divers misdemeanours." Bacon praises the court as being composed out of good elements. This may have been the case at the commencement (*Pauli*, vol. v., 543), gradually, however, the jurisdiction of this court took extension. It ceased from merely serving "to bridle stout noblemen and gentlemen;" and was taken advantage of to deprive the burgesses of the privilege of being tried by their peers. Efforts were made on the part of the Star Chamber to influence juries. If they entered a favourable verdict in cases of political trials, they were summoned before the Star Chamber or the Privy Council. The judges themselves acted as tyrannically in the second year of Queen Mary; causing a jury, who had returned a favourable verdict, to be incarcerated incontinently, without troubling the Star Chamber to interfere. The proceedings of the Star Chamber, conducted inquisitorially, without a jury, and with the employment of torture, were perfectly arbitrary. The judges, appointed at the king's good pleasure, pronounced sentences of fines, imprisonment, and death (Hallam). At the time of the gunpowder plot two Catholic lords were fined by this court, because, by their absence from the Upper House, they had given occasion to suspect that they were partizans of the conspiracy. The Long Parliament, finally, put an end to the monstrous existence of this court.

† Hallam,

‡ Palgrave, *The King's Council*, 99.

§ *Ibid.*, 101—105.

‖ *Proceedings*, vii., Pref. iii.

¶ *Ibid*, vii. Pref. xii.

council was under his reign very arbitrary. The rack both in this court and in the Star Chamber was frequently employed.* No right was secure before the scrutinising power of the king's council. The rights of corporations were not safe under its guardianship.† It had acquired by statute a large authority in commercial matters, in fixing the highest market prices for sugar and Gascony wine.‡

The sovereign of England surrounds himself with his privy council ("the king in council"), and is advised by the same in reference to the exercise of those prerogatives which are not exercisable with the assistance of parliament. The sovereign is the sole constituent of the privy council. The number of the privy *councillors amounted in 1540, under Henry VIII., to nineteen* members;§ under the Stuarts, generally to twelve members only. But when Sir William Temple re-constituted the privy council in 1679, and composed it of men of all parties, Charles II. nominated to the same council the fifteen highest state functionaries, ten lords and five commoners, as members. The number of privy councillors is now unlimited. Every Englishman is qualified to become a privy councillor, but a naturalized subject is not, the "Act of Settlement" forbidding this. Parliament may, however, make exceptions, as in the case of "Prince," afterwards King Leopold (56 George III. c. 12), and Prince Albert (3 and 4 Vic. c. 1). The lord president of the privy council, who is generally a member of the cabinet, alone holds his office by virtue of a royal patent; the other privy councillors sit merely by special nomination. In 1855 there were about 192 privy councillors in the kingdom. To all the sittings, held every three or four weeks, the members are specially summoned by the lord president. Six councillors and the clerk of the council are sufficient to constitute a full meeting. The privy council at large has not been re-summoned since the announcement of the marriage of Queen Victoria. By 6 Anne, c. 7, the members hold their office till the expiration of six months from the demise of the sovereign, in case it has not been otherwise determined. Generally speaking, the old privy councillors are confirmed in their office. The king may strike out any privy councillor from the list. This has not, however, occurred since 1805.

* *Proceedings*, vii., 81—83.
† *Ibid.*, vii., 250, 243 244.
‡ *Ibid.*, 93, 276, 113.
§ *Ibid.*, vii. Pref. xv.

The lord president lays before the sovereign the business and decisions of the privy council. In like manner the lord privy-seal, who is now a minister without a seat in the cabinet, is bound carefully to inspect and to draw up a report of all the acts of state which the sovereign has to sanction, even when the contents thereof are not conformable with law, or not expedient.

The lord privy seal, with the exception of giving advice in the cabinet, has simply to affix, or cause to be affixed, once or twice a week the seal to acts of state.* The Queen is not bound by the advice of the privy council, though under the obligation of summoning it upon all affairs of state. Any minister may, on his side, refuse to carry out or recognize any royal act which has not received the assent of the majority of the council. At law the privy council has ever been a mere council-board, the sovereign alone finally pronouncing. Even the judicial committee has but a formal right of propounding, the queen issuing the definitive decree in council.†

To the privy council belong ordinarily of late years the prince of the blood, the two archbishops, the Bishop of London, the lord chancellor, the first lord of the admiralty, certain of the superior judges, the Speaker of the House of Commons, the president of the board of trade, the paymaster-general of the forces, and certain other special functionaries who are ordinarily summoned to be present at the sittings of the privy council.

The oath which privy councillors have to take indicates the scope of their duties. They swear "to advise the queen according to the best of their cunning and discretion; to advise for the queen's honour and the good of the public without partiality through affection, love, meed, doubt, or dread; to keep the queen's counsel secret, to avoid corruption, to help and strengthen the execution of what shall be resolved; to withstand all persons who would attempt the contrary; and to observe, keep, and do all that a good and true counsellor ought to do to his sovereign lady the queen."‡

Every privy councillor is responsible for his advice. The mode indicated of advising upon affairs of state in a deliberative assem-

* Gneist, i, 330.
† Bowyer, 128.
‡ Bowyer, 128.

bly freely summoned by the sovereign, in which men of all parties were present, was first disregarded by Charles I., by means of his Juntos, and subsequently by Charles II. and his "Cabal," which, in conjunction with the king, aimed at re-establishing, by such an engine of despotism, arbitrary power. The "Cabal," advised in secret,* obtained the sanction of the king without the assent of the privy council, and merely presented *pro formâ* their decisions to the council. When, however, Sir William Temple became the first counsellor of the king, the latter promised to rid himself of the advice as given by the secret committees, and to *return to the old practice.* Sir William Temple *declared hereupon* to the king, "that if he did not think the persons or number of this present council suted to his affairs, it was in his power to dissolve them, and constitute another of twenty, of ten, or of five, or any number he pleased, and to alter them again when he would; but to make counsellors that would not counsel, I doubt whether it were in his majesty's power or no, because it implied a contradiction. Also he could not understand how an affair which had *previously been decided in the council, might be changed in the* cabinet."†

A curious illustration of the way in which Charles II. conversed with his ministers across the council-table, exists among the papers of John Evelyn, son-in-law of Sir Richard Browne, clerk of the council. This paper is now in possession of one worthy of John Evelyn's name and estate. On a sheet of foolscap paper, without date, is preserved the following written conversation, which took place across the council-table, in the following exact terms :—

" "

King—"Must there not be a letter to the K. of France by Mon. D'Estrada, if there be, lett it be prepared.

"C. R."

Lord Chancellor Clarendon—"It will be necessary to write, though you have no letter on your hands, but if you have any letter upon your hands unanswered, as I suppose you have, it is fitt it should be delivered, that notice may be taken of it (*i. e.* by the council). I pray call to the secre-

* Hallam, C. H., iii., 250.
† *Memoirs for the Peace in* 1679. Sir W Temple's Works, vol. ii. pp. 532—537 and App. p. 554. (London, 1770.)

taries to know if they have any such letter in their hands, and then I will give direction for preparing what is fitt, which must be done this night."

King—"There is never a letter upon my hands, the subject of this letter ought to be upon the returns of the Am^r., and our private correspondence.

"C. R."

At the foot of this interesting document is written by the hand of John Evelyn, recording what he learnt from Sir Richard Browne:—

"This is the usual intercourse of his Ma^tie. and the Lord Chancellour at councill-table at some intervall of business delivering the paper to each other."*

The Revolution in 1688 reverted anew to the system of governing by means of a section of the privy council, which speedily was to develope into a parliamentary section. The relations of the cabinet to the government of the realm will be described when treating of parliamentary government. All the powers of the privy council, in so far as special committees thereof are not ranked as purely independent boards, have, since the period just named, been centred in the "Cabinet," the privy council only taking a silent part in the high acts of state.

This important political transmution was not effected without keen opposition. Somers calls the cabinet "a new thing, invented by bad ministers. It was unheard of that affairs like peace and war should merely be treated of in the bosom of a secret cabal, and only *pro forma* pass through the privy council as through a conduit, in order to procure for the resolution of the cabal the needful authority from the people."†

By the Act of Settlement 11 and 12 William III. c. 2, the standing practice of "Cabinets" was declared as illegal. All acts of state were henceforth always to be advised upon and signed by the privy councillors specially summoned.‡ The respective clause of the Act of Settlement was, however, by 4 Anne c. 8, again withdrawn;§ whereby affairs returned to their old position, for as

* *Parl. Rem.*, v.

† Lord Somer's *Tracts*, xi. 276.

‡ Hallam, *C. H.*, iii. 250.

§ *Ibid.*, 253.

the privy council did not owe its existence to the Act of Settlement, the removal of that clause could not abolish the privy council and create for the cabinet a better legal foundation than it previously possessed.

On the approaching demise of Queen Anne the full authority of the privy council revived; Bolingbroke, and the majority of his cabinet, had already decided on recalling the Stuarts, when the Dukes of Somerset and Argyle, in their capacity of privy councillors, uninvited, but in secret understanding with the Duke of Shrewsbury, one of the cabinet ministers, appeared in the council chamber of the *cabinet*, or, as Smollett* affirms, in the committee of the privy council. On the advice of those so assembled, the Duke of Shrewsbury received from the queen the office of lord treasurer; thereupon the entire body of the privy council was summoned. Thus, despite the treason of the majority of the cabinet, the Hanoverian succession was rescued.† On the accession of George I., he summoned a privy council, consisting of thirty-three members, and, in conjunction therewith, a Cabinet composed of eight members. How far cabinet government in England is expedient, and how far beneficial, will be discussed in Book VII. The only question now to be treated is, how far the constitution of a secret committee, deliberating without any record of its proceedings, is reconcilable with the old customary law of England and with the actual legal authority of the privy council.

The "Cabinet" veils its existence from the laws of the land. This has never been indicated in a more trenchant manner than by a member of the present cabinet, Sir G. Cornewall Lewis. On the 20th July, 1859, in answer to a question from a member who was desirous of knowing the names of the members of the new cabinet, he says:—"The House of Commons was not like a court of justice, which only took notice of the facts proved before it. The hon. gentleman asked for a list of ministers of the crown; but it was not very clear what was meant by that. Did he intend to include the officers of the household, who were also ministers of the crown, or the under secretaries of state? It would be necessary if the motion were agreed to, that some more precise language should be used in it. Again, the hon. gentleman required cabinet minis-

* Smollett, *Hist. Eng.* b. xi. c. 43. † Mahon, i. 95.

ters to be distinguished from others; but it was well known that the cabinet was not recognized by the constitution of this country, the House of Commons had never recognized the existence of such a council in any of its authentic acts; it was merely a voluntary meeting of certain ministers, and the archives of the country contained no means of distinguishing between a cabinet minister and any other."

Macaulay, while a jealous upholder of cabinet government, and although he terms its opponents "old-fashioned politicians," nevertheless observes:—"Strange to say, the cabinet continues to be altogether unknown to the law, the names of the noblemen and gentlemen who compose it are never officially announced to the public, no record is kept of its meetings and resolutions, nor has its existence ever been recognized by any act of parliament."* In another passage he terms it, "An institution which is unknown to the country, a state organization which no statute mentions, and of which historians like Delolme and Blackstone take no notice."† Hallam regards this innovation very adversely.‡ Bowyer§ also concedes that the cabinet has no legal existence, and one of the most recent writers‖ says, "I am glad to say that the words minister, prime minister, cabinet, and the synonymous word 'administration' are as strange to our language as to our laws." In an edition of Blackstone, published in 1856, to which questions on the Text are appended to the text, we find the following:—"From what time has the cabinet 'usurped' the functions of the privy council?"¶

"Her Majesty's most Honourable Privy Council" has retained all its functions legally; the privy council accordingly exercises by law legislative, judicial, and administrative powers. In the privy council the Queen issues all important proclamations; orders for the dissolution and prorogation of parliament; declarations of war; the laying on of an embargo; and the execution of international treaties. All these matters, however, the cabinet has previously resolved upon, and they are only formally sanctioned in the privy council. In like manner the decisions of the privy council respecting laws and ordinances for colonies which have no legislature of their own, ratification or rejection of resolutions of the

* *Hist. Eng.*
† *Ibid.*
‡ *Const. Hist.* iii. 249.
§ Bowyer, 128.
‖ *Brit. Comm.* 111.
¶ Bl, I. Ed. 1856, p. 273.

colonial legislatures, decrees for the Channel Islands, grants for the regulation of towns since 1835, the indication of places where assizes are to be held, regulations concerning quarantine, and granting of privileges of copyright, are merely introduced, the actual resolutions respecting the same taking place in the cabinet. In the privy council, on the other hand, important concerns having reference to the royal family are brought forward; resigning ministers surrender their seals, and succeeding ministers receive their seals of office from the hands of the Queen, after having been sworn in as privy councillors.

When the privy council sits as a court of record, the Queen is not actually present. Such court of record is, in fact, merely a committee of the cabinet; it can carry out investigations touching political crimes, issue orders of arrests conditionally upon the observance of the Habeas Corpus Act; it is authorized to receive depositions on oath, and relegate the accused to the ordinary courts. Through such court of record the mental condition of George III. was inquired into, and the claims of Queen Caroline to be crowned were rejected. It is the privilege and the duty of the privy council to inquire into all crimes against the state. Whenever the Habeas Corpus Act has been suspended, an extensive and oftentimes tyrannical use has been made of the privilege in the matter of arrests, particularly at the time of the French revolution. In all legal matters in which the ordinary courts of law, and even the courts of equity, are unable to afford relief, an appeal lies "to the Queen's Majesty in Council." Upon any such appeal, petition and remonstrance being made, committees of inquiry may be constituted.

There are also "standing committees" of the Privy Council constituted by force of special Acts of Parliament; the Board of Trade, as a distinct body, dissevered from the Privy Council, being an instance. "The Judicial Committee of the Privy Council" exists likewise as a separate body, endowed with all the power of a legal tribunal, although it only formally receives from the Queen the right of propounding, the latter nominally determining the questions raised.*

From the nature of its composition, the committee is unfettered by party influence; it comprises the Lord President, the Lord

* Gneist, i. 324.

Chancellor, and all the privy councillors who, either for the time being fill, or have filled, the office of Lord Privy Seal, First Lord Commissioner of the Privy Seal, Chief Justice of one of the courts of law, the Master of the Rolls, Vice-chancellors, and Judge of the Court of Bankruptcy. The Queen may further nominate four other judges, two of whom must have served in the colonial possessions. The court is fully qualified to sit whenever the Lord President, and three other members of the court are present. It is empowered to examine witnesses on oath, and to summon a jury for the establishment of facts. This committee is a Court of Appeal in the last resort:—*

I. From sentences of the Ecclesiastical Courts,† in sentences against ordained clergymen; all archbishops and bishops who are Privy Councillors sitting as judges.

II. In matters of "prize."

III. In decisions in the courts of the colonies and the East Indies.

IV. In matters of lunacy or idiotcy; appeals from the decisions of the Lord Chancellor being brought in this court.

V. Relative to the grant of patents and the extension of the time of patent grants. The proceedings in this court are very protracted and expensive.

Another "standing committee" is that of "the Committee of the Privy Council for Education," which exists since 1839. It is composed of the Lord President, the Home Secretary, the Chancellor of the Exchequer, and three or four other members of the Privy Council. Touching the granting of disposable money, only the Lord President and four members of the Privy Council may finally determine. By 19 and 20 Vic., c. 116, the Queen is empowered to appoint from time to time a Vice-president of Education. In 1834 Parliament made its first grant of £20,000 for national education. In 1850, however, we find the figures in the Budget amounting in Ireland to £120,000; in Great Britain £110,000; for pupils in parochial union schools, £35,000; in all, for schools, science, and art (exclusive of poor schools), £378,957; of which £44,514 for the British Museum, £1800 for purchases on the part of the same. In the year 1860 Parliamentary grants for public education amounted to £798,167.

* Burns, E. L. i. 64. † Bowyer, 128.

To indicate more fully the development of the system, we subjoin the Statement of the Estimates for 1862-3, compared with those for 1861-2 :—

	1862-3.	1861-2.	Increase.	Decrease.
	£	£	£	£
Public Education, Great Britain	842,119	803,794	38,325	...
Science and Art Department...	116,695	111,484	5,211	...
Public Education, Ireland	290,901	285,377	5,527	...
Commissioners of Education, Ireland (Office Expenses)	795	1,257	...	462
University of London	5,473	4,995	478	...
Universities, etc. in Scotland...	20,161	16,285	3,876	...
Queen's University in Ireland	2,312	2,336	...	24
Queen's Colleges, Ireland	4,800	4,800	...	...
Royal Irish Academy	500	500	...	...
National Gallery of Ireland	2,750	...	2 750	...
Belfast Theological Professors, etc. ...	2,500	2,500	...	...
British Museum	99,012	100,414	...	1,402
National Gallery	11,953	12,134	...	181
British Historical Portrait Gallery ...	2,000	2,000	...	...
Scientific Works and Experiments ...	6,640	7,620*	...	980
Royal Geographical Society	500	500	...	...
Royal Society	1,000	1,000	...	...
Purchases from Soltykoff collection ...	...	3,000	...	3,000
	£1,410,114	£1,359,996	£56,167	£6,049
		Deduct Decrease ...	6,049	
		Increase compared with 1861-2 ...	50,111	

Total Expenditure from 1839 to 31st December, 1861, £5,936,119 12s. 7d.

The government exercises an actual control over the national education *in those schools only which have voluntarily submitted* thereto, and received grants; such submission may determine at any time, *the subvention, of course, ceasing coincidently.* In Ireland, in the schools subventioned by the State, it is understood *that religious belief is not to be interfered with.* In 1849 pecuniary grants were secured to 627 schools, containing 97,370 scholars.† *Now from 5000 to 10,000 schools receive* support, in which 2875 certificated and uncertificated teachers hold *appointments.*‡

A body of Inspectors superintend the system of education in *the name of the Committee.* Since 21 and 22 Vic., c. 97, the powers possessed by the "Board of Health," based on the Diseases Prevention Act (18 and 19 Vic., c. 116) 1855, have since the abolition of that board in 1858, been transferred to the Privy Council. The functions of the Privy Council are exercisable by

* Including £1000 voted on a Supplementary Estimate for astronomical observations at Poonah.

† Meidinger, 493. ‡ Gneist, i. 328.

three members at the least, of whom the Lord President must be one. The vice-president of the Committee of Education is always to belong to this body. It may issue regulations respecting vaccination, appoint medical officers, and order inquiries to be instituted. The regulations concerning this central body are merely provisional.

CHAPTER III.

FINANCIAL SYSTEM.

Court of Exchequer.—Lord High Treasurer.—Treasury since the House of Hanover. —First Lord of the Treasury.—Chancellor of the Exchequer.—Junior Lords.—The "Court of Exchequer;"—Separated from the Treasury.—The Comptroller-General.—The Bank of England.—Official power of the Comptroller-General.—Paymaster-General.—Solicitor of the Treasury.—Commissioners of Inland Revenue.—The Customs.—Post-Office.—The Mint.

THE Exchequer (*Scaccarium, Eschiquier*), so called from the checkered cloth covering the table in the room where the sittings were held, was the sole fixed central authority in the time of the Norman kings. The Exchequer was the Court of Revenue, where the king, at times, personally presided, the members, or "Barons of the Exchequer," being amongst the highest functionaries in the realm; the "Chancellor of the Exchequer" and the Treasurer being likewise taken from the body. In this court were periodically determined, in solemn audience, questions relating to the State and the revenue. The sheriffs here presented their accounts in person; their offices were here filled up and farmed out respectively, and the oath was administered to them; and, finally, advice was taken relative to their dismissal. As the sheriffs were likewise the commanders of the militia, the solemn summons for the defence of the country was hence issued. As the entire government of a state depends intimately on the state finances, and as the taxation of all classes alike had been early introduced into England, the office of "Treasurer" naturally became one of the most important in the realm.

On the accession of the House of Hanover the office was administered by the "Lord High Treasurer," and, as such, this official was also head of the Court of Exchequer; the combined functions of the Treasury have, however, since been discharged by "the Lords Commissioners of the Treasury," the first of whom, as "First Lord of the Treasury," is now "the head of her Majesty's Government," in other words, the "Premier." He constitutes the Cabinet, and apportions the several

departments and offices of second degree, comprising sixty places in all. The Queen nominates the archbishops and bishops on his proposal, and disposes of all canonries and livings, pertaining to the crown, which amount to 950; 700 smaller livings being in the absolute gift of the Lord Chancellor. Since the Emancipation Act of 1829 no Catholic can be "First Lord of the Treasury;" nor can a Jew. He nominates the judges presiding at Westminster, and exercises control over the nomination to other important posts; as of Ambassadors. On his recommendation the Queen creates new peers, and confers other honours.

The Second Lord Commissioner of the Treasury is the minister charged with the special control of the finances, "the Chancellor of the Exchequer." He is always a member of the Cabinet, and ranks as Under Treasurer. The office, in recent years, has been separated from that of the First Lord, but is occasionally, as in 1844, united with that of Premier. As the Chancellor of the Exchequer has to propose to Parliament the "budget" or "estimated expenses," and as this can only take place in the Lower House, the office must always be filled by a "commoner." He only sits in the Exchequer once a-year, at the nomination of the sheriffs. Three junior lords—one for each kingdom—changing with the Cabinet, but not having a seat in the same, constitute "the Commission of the Treasury." With the ministry, the two joint-secretaries or under-secretaries of state, likewise change. The Premier seldom takes part in the deliberations of the commission, the special business being attended to in their respective departments by the under-secretaries—a permanent law-clerk, and an assistant-secretary—who cannot have a seat in Parliament.

The Court of Exchequer is now completely separated from the Treasury, and constitutes a civil law court at Westminster, the equity jurisdiction whereof has been invested in the Court of Chancery.

All payments in the Treasury-office whether based upon the general or special grant of Parliament are made on Treasury-warrants, supervised by "the Comptroller-General of the Receipts and Issue of her Majesty's Exchequer," which functionary was introduced by 4 Will. IV., c. 15, and holds office "during good behaviour." He cannot be invested with any other office, nor can he sit in Parliament. When a payment is to be made out of the treasury a royal order is issued undersigned by the Commis-

sioners of the Treasury, requiring him to deposit the requisite sum in the Bank of England, for the department which is to receive the money, transferring it from the general account of the Exchequer. The Bank of England is the banker of the Queen and of the State respectively. To it, consequently, pertain the State revenues, and since 1834, 4 Will. IV. c. 15, it makes the entire payments of the State, among which are the annuities, dividends, and interest of the national debt.

The Comptroller-general has always to examine whether the required outlays correspond with the parliamentary grants. No royal order is necessary for the payment of interest on the national debt, or for payments in regard to the civil list. In case the Comptroller-general refuse to order the payment, or maintain that parliament has not granted the sum required, or not to the amount applied for, and, on such ground, refuses to give an order on the bank, *the Treasury applies for a "Mandamus" to the Queen's* Bench. Should he persist in refusing, there arises, in the Queen's Bench, conflicting proceedings touching the lawfulness of the claim made by Government.* The Comptroller-General manages the operations of drawing and honouring the so-called "Exchequer-bills," by the issue whereof, with the assent of parliament, the state income is anticipated. He is also the guardian of the imperial weights and measures of the realm. He is, finally, together with the Treasury, the guardian of the imperial coins in silver and gold, which are deposited in the Royal Chapel of Westminster Abbey, and at intervals, made use of at the trial of the "Pyx."†

The Paymaster-general has now scarcely anything but formal functions, and frequently sits in the cabinet as minister without having a vote. The solicitor of the treasury, a functionary who is taken from among the barristers of repute, acts as law-officer for the treasury, the lower and upper house consulting him in matters relating to the revenue. A permanent body exists under the treasury for the audit-system, consisting of five commissioners of audit, the business of the "sinking-fund" being nominally attended to by a commission, but actually by the "Comptroller-general."

The collection of the state revenues, so far as they arise from taxes, is intrusted to the "commissioners of inland revenue,"

* Bowyer, 210.

† Gneist, i., 347. In 1672, the first copper coinage (farthings) was introduced. By 56 Geo. III. c. 68 the gold standard was established.

comprising a chairman, vice-chairman, and four commissioners. They control, by means of the 5740 subordinates the excise and stamps, the raising of the assessed taxes, of the property and income-taxes. The commissioners do not change with the ministry. For the collection of the taxes, England and Wales are apportioned into fifty-five, Scotland into thirteen, and Ireland into fifteen "districts," which are again divided into sub-districts, a collector being placed at the head, who has to determine appeals against taxes. On doubtful cases arising, they apply for instructions from London. The commissioners themselves pass final decisions in cases of appeal, revision, and control. In cases of fraud upon the taxes, the district collectors and the justices of the peace may decide summarily,* but if it be a matter involving transportion a jury must be impanelled.† In the event of the taxes being refused, or of no appeal being made against them, in writing, execution by way of legal process may issue.

The "customs," throughout the United Kingdom and the Colonies, is managed by the "commissioners of customs," a body which is quite as numerous as the preceding. It is under the supervision of the lords of the treasury, but is independent of any change of parties. This commission also may officiate as a court of law. Appeal lies, however, from it to the lords of the treasury. A crowd of officials, numbering 11,292,‡ carry out the directions of the commission.

The Postmaster-general,§ under direction of the treasury, manages the entire postal system. He changes with the cabinet, and frequently has a seat in the same. He has under him three secretaries, a receivor-general, and accountant-general. The East Indian and Colonial postal system is subordinate to the general post-office. By reason of the penny post, introduced since 1840, the number of *employés* has considerably increased. In 1856 there were 22,748 *employés*, 3124 for London alone.

Since 1851 the Mint is placed under a permanent "master and worker of the Mint." At the trial of the "pyx," which takes place every three or four years, the lord chancellor and a commission of privy councillors act as judges. A jury of twelve, chosen from twenty-five members of the Goldsmiths' Company, is impanelled on the occasion.‖

* Gneist, i. 360.
† Bowyer, 344.
‡ Gneist, i. 354.
§ Gneist, i. 360.
‖ Gneist, i. 353.

CHAPTER IV.

THE SECRETARYSHIP OF STATE.

The Secretary of State formerly an unimportant Official.—His Importance since the Introduction of Parliamentary Government.—Secretaryship of State still Comprises one Body only.—1. Secretary of State for the Home Department.—Officials of the Civil Service.—Right of Appeal Centred in the Minister.—Secretary for Ireland.—Lord Lieutenant of Ireland.—2. Minister of Foreign Affairs.—Lord John Russell and Lord Palmerston concerning Fixed Embassies.—3. Colonial Secretary.—4. Secretary-at-War.—The War Secretary only a Government Functionary.—5. Secretary for India.—Council for India Impotent.—Privilege of the Secretaries of State to sit in the Upper House.

THE office of secretary of state is one of very ancient date. At first, like the chancellor, he was a clergyman, and was called the "king's clerk." He was the king's private secretary and keeper of his private signet, and was the ordinary channel of communication between the sovereign and the subject. He was first styled the "king's secretary" in the will of Henry III. From the reign of Edward II. he began to sit in the privy council, and from the middle of the reign of Henry VI. was a permanent member of that body. In point of rank he was classed below the "king's physician." From the time of Henry V. we find subordinate secretaries for certain branches of business. There was a separate secretary "in his majesty's realm of France," for the despatch of business relating to that country. The importance of the principal secretary developed under Richard III.; he acquired rank between the comptroller of the king's household and the Chancellor of the Duchy of Lancaster. The statute of 28th April, 1539, regulating precedency, assigned to him, in the event of his not being one of the "barons of parliament," a place on the woolsack. The duties of the office till the reign of Henry VIII were performed by a single person. In the year 1539 there were two secretaries of equal rank; in 1553 there were even three; Elizabeth reduced their number to one. Sir Robert Cecil (1601) was the first who was styled "principal secretary of state." Clarendon mentions that at the commencement of the reign of Charles I., the secretary of state had the office of draw-

ing up reports at the conclusion of the sittings of the privy council. But in the privy council itself he still played a subordinate part. From the moment, however, when fixed embassies were adopted in Europe, the office of secretary attained the highest significance; thenceforth all the communications of England with foreign powers passed through his hands, and he became in fact a minister of state.

Since the mode of governing "under advice of the privy council" came to an end, and government by means of a "cabinet" was introduced, the necessity was felt of having some member of the cabinet who might support, not merely the general interests and politics of the cabinet in parliament, but also manage the actual business of certain departments. The increase of the subject-matter which the state government had to control, rendered the severance of the secretaryship of state more needful, and from one the number has been expanded to five. They are all appointed as the single secretary of state was formerly, by mere delivery to them of the seals of office, each being capable in point of law of performing the duties of all the departments, and the offices still being so much considered one and the same, that upon removal from one department to another, a member of the house of commons does not vacate his seat. The nomination to certain offices, moreover, pertains to the secretaries of state in common; the united secretaryship has, furthermore, the right of issuing writs of arrest in case of grave crimes, and of causing letters to be opened by "special warrant." These functions are, however, usually exercised by the home secretary only. The secretaries of state, on the other hand, have no direct police authority; judicial authority has been conceded of very late years to the home secretary in special matters concerning the government.

All the secretaries of state sit in the privy council, and are assisted by two under-secretaries of state, one having a seat in Parliament, and changing with the government, the other, or really acting assistant secretary, holding office permanently, and attending to the business of the separate department.

1. The principal secretary of the home department, down to 1801, was likewise colonial minister. He is at the head of the internal adminstration of the country, but his authority is limited by the powers of the local boards. As "secretary of state" he receives petitions and memorials to the Queen, undersigns the

"creation" of peers; patents, charters of incorporation, and commissions of the peace pass through his hands; he confirms the nomination of lords-lieutenant, and dismisses them, directs the correspondence with the local boards; is the head of the police and militia, and to him belongs peculiarly the maintenance of the peace within the kingdom, with the superintendence of the administration of justice as far as the royal prerogative is involved in it. It is his duty to see that the sentences of all courts of criminal judicature are rigidly carried into effect, except where mitigated by the royal prerogative of mercy, and it is chiefly by his advice that the exercise of this prerogative is guided. Hence he is in frequent communication with the judges who preside in the Central Criminal Court and at the assizes, and with magistrates all over the kingdom. He is himself a magistrate, and has a power of commitment to prison by warrant for a just cause. He appoints stipendiary magistrates for towns. The London police is under his direct authority. He has the supervision of prisons for criminals and debtors, and controls the expenditure of funds for the prosecution of criminals. He has the superintendence of public buildings, baths, and wash-houses; is likewise the head of the civil system of registration: the actually directing functionary is, however, the "registrar-general of births, deaths, and marriages" (since 6 and 7 William IV. c. 86, etc.), who discharges his office "during pleasure," having under him "superintendent-registrars," charged with the inspection of registrars of "unions." These latter officials also celebrate civil marriages.* The "registrar-general" appoints the union registrars. The guardians of the poor law union have, however, to ratify such appointment. The registrars receive registration-books, which are drawn up according to a certain formula. They are bound to take information touching every case of birth and death, and register the same as speedily as possible; and the parents or occupiers of the house in which any birth or death happens may, within forty-two days next after the day of such birth, or five days after the day of such death respectively, give notice of such birth or death to the registrar of the district. After the expiration of forty-two days from the day of the birth, the district-registrar is not bound to register the same until certain fees are paid him by the party requiring the registration. On a death occurring,

* Burns *E. L.* iii. 471.

information respecting the same must be furnished to the registrars at their demand.† When the right of appeal is exercised against the decisions of the local boards of health, the home secretary may, after the continental fashion, determine the matter "administratively," without any right of further appeal.

The local governments of Jersey, Guernsey, Alderney, Sark, and Man, Scotland, and Wales, are directly subordinated to this minister, that of the viceroy of Ireland in an indirect manner only. As assistant to the viceroy, or lord-lieutenant of Ireland, a special secretary of state, the "Chief Secretary for Ireland," is attached as third under-secretary of the home department; he is frequently a member of the cabinet. The actual administrative functionary of the home department is, however, in this instance also the permanent under secretary.

The lord-lieutenant of Ireland acts as representative of the sovereign authority. He bears the title of "excellency;" a privy council, but not invested with any powers, tenders him advice; the lord-lieutenant enjoys an independent right of pardon and commutation of punishment. He is likewise empowered to confer knighthood.

2. The principal secretary of the foreign department is the responsible adviser of the crown in regard to communications with foreign powers and their representatives. He corresponds both with English ambassadors abroad, and with the ambassadors of foreign powers in England. He grants passports, and insures protection to Englishmen travelling abroad. He has the right of appointing ambassadors and consuls, provisionally, upon the formal ratification by the Queen. He watches over the carrying out of the law against the slave-trade.

Only in Paris and Constantinople are there ambassadors with full powers. Next in rank come the "envoys extraordinary," and "ministers plenipotentiary," who are accredited to the greater and smaller courts. Ambassadors do not, as a rule, change with the ministry.

In 1850, the committee of the Lower House was formed to inquire into the appointment of ambassadors. It recommended a complete revision of the present system of the diplomatic service, inasmuch as family influence, and other considerations, generally exercised great and hurtful influence in the disposal of the posts.

† Toulmin Smith, 459.

Lord John Russell, on this occasion, expressed himself against the principle of fixed embassies. He conceived that "the former way in which the diplomatic service was conducted of appointing persons from time to time from this country, who were men of good information, and competent to give an opinion upon foreign politics, was a better way of conducting the diplomatic service than making it a regular profession, as it has been."

Lord Palmerston, on the other hand, held "that fixed embassies, after the present mode, were very necessary; for the ambassadors were the eyes, ears, and the tongue, by means whereof the English government sees, hears, and speaks in foreign affairs. The importance of diplomatic agents was now greater then ever, because in the affairs of foreign countries there was less secrecy practised than formerly;* and the agents also of foreign countries might acquaint their governments with the condition of public opinion in England."†

3. The colonial minister, "principal secretary of state for the colonial department," from 1806 to 1854, was likewise, as "secretary for war and colonies," actual war minister. Since 1854, he merely manages the affairs of the colonies. The nomination of governors, the ratification or rejection of colonial laws or important governmental acts in the colonies, are carried out through his agency.

4. The ministry of war is a department created in 1854. Until then a secretary of war, in his capacity as head of the finance and administration of justice in the army, acted as a representative in parliament for military interests. He drew up the military budget, and supported its adoption, as well as that of the annual "Mutiny Bill." His functions are now combined with those which the colonial minister formerly discharged as secretary for war, and in that character he is the war minister of England. He draws up also the military budget, and supports its adoption, as well as that of the annual Mutiny Bill. He controls the nominations to the higher military posts. The governmental powers, which formerly belonged to the master of the ordnance and the direction of the artillery and engineers, have been transferred to him. He has the right also of proposing persons for the Order of the Bath. In time of war, he corresponds with the commander-

* *Vide*, Book VII. ch. ii. *post.*

† Government may get it much cheaper by procuring a copy of *The Times.*

in-chief of the army in the field, and approves of all the plans of operation.

The secretary of war is at present a mere government functionary, and the office is ordinarily filled by a civilian, *e. g.*, the Duke of Newcastle, Lord Herbert, etc. General Peel was the first, and, up to the present, the only military secretary of war.

5. *Secretary for India.* Since the statute 21 and 22 Vict. c. 106, on the abolition of the "board of control," and the withdrawal of governing powers from the East India Company, a "principal secretary of state for India" has been named, to whom all the governing powers of the Company and the "board of control" have been transferred. He is assisted by a "Council of India," which, as previously stated, has no actual powers. The council consists of fifteen members, of whom seven were appointed by the directors of the East India Company, and eight by the crown. The government of India, since the above-mentioned statute, has been completely centred in the cabinet and this minister. Every vacancy happening from time to time among the members of the council appointed by her majesty, is to be filled up by her majesty by warrant under her sign manual, and every other vacancy is to be filled up by the council by election made at a meeting held for that purpose. The majority of persons composing the council must have been ten years in India. They hold office during good behaviour, can only be dismissed on an address from both Houses, and cannot sit in Parliament. The secretary of state is the president of the council, and may divide it into committees. There must always be five members of council present, to allow of its sitting. War regulations and declarations of war relating to India, must be made known to parliament at the latest within three months, and if it be not for the time being assembled, in the first month of the session ensuing.

The right of secretaries of state to appear in the upper house, and there sit on the woolsack, is no longer exercised.

CHAPTER V.

THE NEWLY CREATED PARLIAMENTARY BOARDS.

Board of Trade.—Naval Department.—Railway Department.—Subordinate Boards.—Office of Woods and Forests and Land Revenues.—Board of Works.—Poor Law Board.—Copyhold Enclosure and Tithes Commission.*

I. THE board of trade, which was founded by William III., in 1695, was united to the privy council in 1784, on colonial affairs having been withdrawn from its control. It has actual powers as "The Committee of her Majesty's Privy Council appointed for the consideration of matters relating to trade and foreign plantations." It consists of a chairman, who solely presides over the office, *generally having a seat in the cabinet, a vice-president,* and seventeen privy councillors, amongst whom, are the premier and lord chancellor. As a committee, the body is without importance.

To the department of the board of trade pertain the decisions respecting treaties of commerce, the protection of the public interests in deliberations upon private bills, and decisions respecting applications for charters in matters relating to industry and the granting of patents. *On questions relating to colonial legislation* and colonial government the secretaries of the board of trade confer with the colonial minister.

With the board of trade the following special departments are combined :—

1. The naval department, which superintends the merchant service and pilotage.

* 2. *The railway department; the board of trade decides re*specting difficulties arising between competing railway companies, controls railway tariffs, regulations, and officials.

3. The department of practical science and art, which exercises supervision over all the royal schools of navigation, art, and industry.

Under the board of trade are ranged also the following subdepartments :—

* Gneist, i. 443.

1. The joint stock registration office.

2. The office for the registry of designs.

3. The coalwhipper's office, for the control and regulation of the transport and unlading of colliers in the port of London.

4. The controller of corn-returns' office.

5. The statistical department (established 1832).

II. At the head of the office of woods and forests and land revenues, since 1810, are placed two commissioners; the first, who generally sits in the cabinet, but discharges his functions under supervision of the treasury, is at the same time "the first commissioner of her Majesty's works and buildings," but of the government buildings, only the "Ordnance" and the "Admiralty" are under his superintendence.*

III. The first commissioner of her Majesty's works and public buildings,† has the superintendence of all the palaces and official residences (with the exception of the Ordnance and Admiralty), and the royal parks. He generally sits in the cabinet. The secretaries of state and the minister of trade and commerce act nominally with him as joint commissioners.

IV. The poor-law board, "the superintending and chief department for the local government of the poor," has become, since 1847, a distinct department, with a president at the head, having generally a seat in the cabinet. The first commissioner named by patent from the Queen, "for administering the laws for the relief of the poor in England," (since 1838 in Ireland), is the president and actually directing minister. The following are also poor-law commissioners—the lord president of the council, lord privy seal, chancellor of the exchequer, secretary of the home department, and others, whom the queen may nominate. Their commission is, however, only *pro forma*. The power of the minister is very extensive; his orders having binding force quite in the style of continental rescripts; he may exercise legislative powers and establish new districts for the administration of the poor. When treating of the poor-laws (*vide* Book VI). we shall become acquainted with his official authority. The Poor Law Board has been continued from 1860 till 23rd July, 1863.

V. "The Copyhold Enclosure and Tithes Commission" is a department constituted out of two commissions previously existing,

* Gneist, i. 466.

† Gneist, i. 468.

and comprises a body consisting of three members; the assistant Commissioner and special Secretary are appointed by the home Minister; the commissioners are subject to removal at his discretion. The commutation of tithes is tolerably completed; since 1836 all the tithes have been commuted for a money charge, which may also be compounded for; the rent charge fluctuates according to the price of corn, taking an average of seven years. For the speedier despatch of business "special" commissions are also named. The above-mentioned commission is charged with the enfranchisement of copyhold land, or the conveyance of the freehold of such lands from the lord to the tenant, whereby the copyhold tenure with all its incidents is for ever destroyed. By 15 and 16 Vict. c. 51, the enfranchisement of copyholds is rendered compulsory at the instance either of the tenant or the lord. If the enfranchisement is at the instance of the tenant, the compensation is to be a sum of money, to be paid at the time of the completion of the enfranchisement; when effected at the instance of the lord, an annual rent charge issuing out of the lands enfranchised.

CHAPTER VI.

DIRECT GOVERNMENT BOARDS.

The Admiralty.—Chancellor of the Duchy of Lancaster.—Lord Warden of the Cinque Ports.—Lord Chancellor.—Attorney-general.—Solicitor-general.

I. THE ADMIRALTY. The office of High Admiral has been resolved into the "Commission for executing the office of High Admiral of thekingdom." The respective commissioners are:—The Frst Lord of the Admiralty, having a seat in the cabinet and the entire patronage; and five junior lords, changing with the cabinet. Four of the latter are naval lords, and consequently scientific men, two being usually admirals; the fifth is ordinarily called "the civil lord." These five lords are at the head of special departments; but, in important cases act in concert. Certain of the junior lords generally have a seat in the Lower House; a "chief secretary" of the Admiralty is usually appointed.

II. The office of Chancellor of the Duchy of Lancaster is a sinecure; the chancellor need not be a lawyer, and frequently has a seat in the cabinet. The special control of the Duchy of Lancaster, which is hereditary in the crown, is withdrawn from the scheme of the civil list, as will be explained when treating of the counties.

III. The "Cinque Ports," Dover, Sandwich, Romney, Hastings, and Hyde, were formerly accounted the chief ports of the kingdom; Winchelsea and Rye were subsequently added. They were invested with a special jurisdiction, and possessed as governor, either an admiral or the "Lord Warden of the Cinque Ports."* This office is now a mere sinecure, without any salary attached, and is actually filled by Lord Palmerston.

IV. The functions of the Lord Chancellor, the Attorney-general, and the Solicitor-general will be explained in Book V.

* Bl. iii. 79.

CHAPTER VII.

THE ARMY.

Only the Militia known to the Law.—The Militia under the Tudors and Stuarts.—Decay under the house of Hanover.—Yeomanry during the French Revolution.—New Militia since 15 and 16 Vict. c. 50.—General Obligation to Serve.—Invalids.—Volunteers.—Standing Army.—No Military Punishment by the Common Law.—No Army without Consent of Parliament.—First Mutiny Act.—"Articles of War."—Opposition to Standing Armies.—No Exemption from the Ordinary Courts.—Privileges in case of Debt.—Intervention only allowable on Requisition from the Civil Authorities.—Responsibility of Officers and Soldiers.—The Porteous Mob.—Case of the Six Miles Bridge.—The Interests of the Officers assimilate with the Parliamentary Government.—Purchase.—Promotion.—Serjeants.—Commander-in-chief.—No Army Corps, Divisions, or Brigades.—Extent of the English Army.—Native Indian Troops.—Foreign Troops.

The law of England recognizes no other permanent armed force than the national militia. The king had it in his power to summon his military tenants for the defence of the kingdom. In process of time the personal service was commuted for a pecuniary compensation or aid, thus reducing the amount of military service by tenure very considerably. It was frequently found necessary to resort to commissions of array of all the freemen in every county. The first assize of arms, enacted 27 Henry II., obliged every adult, according to his estate and degree to armed service, and itinerant commisioners were charged with the execution of the royal ordinances. The shoriffs were entrusted with the command of the local troops. The statute of Winton (Winchester), 13 Edward I. c. 6, obliged every man between fifteen and sixty to provide himself with arms, according to the value of his lands and goods. Whoever had forty shillings income from land must possess a sword, a bow, arrows, and a dagger. The constables were empowered to see that the arms were provided, to report defaults to the justices, who were to present such defaults to the king in parliament. The Tudors, by means of stringent provisions, imparted renewed vigour to the militia.* In 1511 the statute of Winchester was re-enacted, and all laymen saving the judges were bound to

* John Forster, *Debates on the Grand Remonstrance*, p. 84.

exercise themselves in shooting.* The Revolution which cost Charles I. his throne and life was instrumental in making England first acquainted with a strong standing army, wholly independent of the local governments. The infractions committed by this armed force on the laws rendered a standing army an object of abhorrence to Englishmen, and on the Restoration led to the disbanding of the land forces. The king was unwilling to part with the whole of the army and General Monk's regiment, called the "Coldstream," and one other of horse, were accordingly retained in his service. Another was formed out of the troops brought from Dunkirk; and thus began, under the name of "guards," the present regular army of Great Britain.† But, instead of restoring the old national militia, and making every free man liable to serve in person,‡ the oligarchic parliament of that period remodelled the entire system; every man who possessed £500 a year derived from land was bound to provide, equip, and pay, at his own expense, one horseman; every man who had £50 a year derived from land was charged in like manner with one pikeman, or musketeer. The furnishing of infantry and cavalry being thus thrown as a burthen upon the land, personal service was abolished. From the time of the Tudors the militia had been officered by the landed aristocracy, the lord lieutenant of each county held command as "chief of the miltia," and appointed meetings for drilling and inspection. As the landed gentry were, for the most part, Tories, and on that account regarded as not being favourable to the Revolution of 1688 and Hanoverian succession, the militia was allowed gradually to fall into decay, and became eventually an object for scorn and ridicule. There still remains some remembrance of the City of London train bands in Hogarth's History of the Idle and the Industrious Apprentice. Besides the militia, we must take into account the corps of yeomanry and volunteers—a description of forces which originated in the menaces of French invasion in the reign of George III., and which are distinct from the militia. The entire militia of the kingdom is under the control of the Home Secretary; the Privy Council has to determine how many militiamen each county is to contribute; the lord lieutenant is still the commanding officer; the deputy lieutenant, together with the justices of the peace, are charged with the regulation of the militia. The justices of the peace, as in the case of the

* Froude, *Hist. Eng.*, i. 62. † Hallam, ii. 315. ‡ Macaulay, 115.

regular army, draw up the enrolment list and administer the oath, both to militiamen and to regulars. They decide appeals of masters in respect to their apprentices who may have enlisted, and punish deserters; to them also are referred all orders of the central department having reference to the militia.

By 18 and 19 Vict. c. 100, the qualification of officers of the militia is determined. A colonel must have £600; lieutenant-colonel, £400; major, £300; captain, £200 yearly income, arising from an estate for his own life, or for the life of another, or for any greater estate. A similar interest arising, also, from personal estate will qualify. From the captain downwards no property qualification is required for the officers. The lords-lieutenant appoint the officers, subject to the ratification of the Queen; the greater part of the officers being, at the same time, justices of the peace. Certain posts can only be held by military men who have served in the regular army. These latter constitute, together with the officers who have served, a *cadre* for each regiment, so long as it is not called out.

In time of peace the government can enrol 80,000 men in five years. In time of war or threatened invasion, the number may be carried to 120,000. On the termination of the Crimean war there were 114,235 men fully equipped; in April, 1860, there were but 19,333 actually under arms. The militia has merely served hitherto as a depôt for the army.* When men cannot be raised by voluntary enlistment, her Majesty in council may order a ballot. Men shall not be liable to be balloted for the militia after thirty-five years of age. Peers, soldiers on active service, clergymen, members of the university, and students, sailors and apprentices are exempted from serving. The duties may be discharged by means of paid substitutes. The Government can incorporate 10,000 pensioners for the protection of the country. In Ireland there is a body of police, organized on a military footing, numbering 12,400 men. The "volunteer corps," established since 1859, and which have already attained the number of 180,000 to 200,000, have, for the time being, no legal organization; they are simply voluntary associations of armed men. According to circumstances, however, these volunteer corps may possibly lead to a revival and re-organization of the

* On the 19th July, 1859, it was stated by the Home Secretary, in the House of Commons, that the militia of Gloucester and Worcestershire had never practised with ball-cartridge. — *Parl. Rem.*, vol. ii., 133.

national militia. The standing army is an agent in the State organization, which is merely endured. On the Restoration, Charles II. began to create, on a small scale, out of his revenues, a new standing army which, in 1662, amounted to above 5000 men; in 1685 there were in England 7000 foot soldiers and 1700 horse soldiers under arms. The discipline was very lax, only "military" punishments existed; the officers contravening the law, inasmuch as the common law knows nothing of courts-martial. A soldier, by knocking down his colonel, only incurred the ordinary penalties of assault and battery. If he slept on guard, only light punishments could affect him, inasmuch as no Briton, excepting constables and watchmen were forbidden to sleep at night.* Deserting his colours in time of war, constituted by statute-law, on the contrary, the offence of felony without benefit of the clergy; deserting in time of peace, however, was merely a breach of contract.

James II. endeavoured to carry out, by means of the army, his absolutist plans, but the instrument was not pliant to his hand. After the Revolution it was provided by the "Bill of Rights" that no standing army should be maintained by the king without consent of the parliament. Yet, one year after the Revolution (1689), these powers were suspended by parliament. In consequence of a military outbreak at Ipswich the first Mutiny Bill was passed, which provided that every desertion and every act of resistance against officers should be punishable with death or other heavy penalties, on sentence of a court-martial. The bill was only to remain in force for six months (1 Will. and Mary, s. 1, c. 5). Since then, however, the Mutiny Act has been renewed annually, and generally bears the following title—"Bill for preventing Mutiny and Desertion, and for the better payment of the Army and their Quarters;" and thus the continuance of a standing army is made dependent on the will of parliament.

The Mutiny Bill allows the sovereign to exhibit articles of war, giving unlimited power to mark out new military offences and prescribe for the same, corresponding punishments. It also provides that no person shall, by such articles of war, be subjected to any punishment of transportation, or any punishment extending to life or limb, for any crime which is not expressed to be so punishable by the act itself. It is further enacted that, where a soldier

* Macaulay, vol. i.

is accused of any offence against a subject of the realm, punishable by the known laws of the time, he shall be delivered over to the civil magistrate. Corporal punishment is only permissible on sentence of a court-martial. The wish expressed by Blackstone* that the parliament would establish standing articles of war as in the case of the navy, has, up to the present, not been carried out. The right to lay down discretionary articles of war is annually conceded by parliament to the crown. Should the mutiny bill, however, not pass through parliament, officers and soldiers, in case of deserting their colours in time of war, would be brought before a jury for felony; desertion in time of peace, and insubordination, would again become a breach of contract; and illtreatment of officers would only rank as a mere assault. The Mutiny Act draws no distinction between time of peace or war; any soldier sleeping on guard in time of peace may, by reason of the penalties annually set forth by the bill, be sentenced to death.† Civilians inducing soldiers to desert or mutiny, are very severely punished by the existing laws.

Attempts were not wanting in the last century to abolish the standing army. On 24th February, 1717, thirty lords protested against the Mutiny Act: "1st. Because a standing army is especially dangerous to liberty; and all the more dangerous because submitted to a military law unknown to the common law: 2nd. Because officers and soldiers are thereby deprived of the rights of free Englishmen, and because we believe that none are such apt and willing instruments, to deprive others of their rights, as when they are themselves deprived: 3rd. Because the King, by the right of prescribing articles of war, acquires a discretionary power of legislation."

A like protest was renewed in 1721, and in 1732 Pulteney spoke with great warmth against standing armies. The officers and soldiers of the English army have no especial immunity in view of the law with regard to crimes not punishable by the Mutiny Act.‡ For felony or misdemeanour they are brought before the judges of the common law courts. The powers of the earlier mutiny acts, exempting them from the jurisdiction of the common law courts in cases of lighter offences committed against

* Bl. i., 416.

† Bowyer, 497.

‡ Fielding recounts that even on the march against the rebels in 1745, an officer was brought before the justices of the peace for disorderly conduct and committing an assault.

civilians, have not been renewed by the later acts. A bill before parliament last session, the "Jurisdiction in Homicides Bill," proposed that soldiers committing murder or manslaughter on one of their comrades, should be tried at the central criminal court, even when not within its ordinary jurisdiction.* Soldiers have the privilege of not being arrested for debt under £30. An officer who should resist the execution of the civil jurisdiction may be dismissed at once from the service. The wills of soldiers are invested with certain privileges; when in actual service they may make nuncupative wills, and dispose of their goods, wages, and other personal chattels without the usual solemnities prescribed by the law.

While on home service the army can only be called upon actively to intervene on requisition of the civil authorities, for which requisition the latter are personally responsible; the soldier himself is likewise responsible, and if he do not act within the limits of the law, is subject to punishment. "For a man by enlistment is not freed from any law, he only has a new one imposed upon him; he is still the servant of the civil law, in addition to which he is the servant of the military. In regard to the action of troops within the realm, these landmarks are respected; any soldier receiving an order which is unlawful, as, for instance, to fire on a mob, he himself not being attacked, and the Riot Act not being read, knows full well that he will be hanged if he obeys, therefore no such order is ever given."† When, upon one occasion, an officer affirmed "that he would rather be shot for disobedience to his colonel than be hanged for exceeding the law and violating liberty," the Duke of York replied, "An officer who should act otherwise would deserve to be both shot and hanged. For my part, I believe that British officers would just as little obey an unlawful order, as that every commanding-officer would be incapable of giving one."‡

English history furnishes many instances of soldiers having been delivered up for criminal trial on the ground of illegal interference; Sir Walter Scott's narrative of the Porteous mob recurs at once to the memory. In 1768, in connection with the riots on account of Wilkes, a certain Allan was shot; the coroner's jury returned a verdict of "murder" against private Donald M'Clean

* *Parl Rem.* v. 113.
† Urquhart, *Familiar Words*, 128.
‡ Sir W. Scott's *Memoir of the Duke of York.*

and ensign Murray; both were afterwards acquitted by the special jury. At the general elections of 1852 a party of soldiers, escorting a number of electors to the polling booth, were set upon by the crowd at Six Miles' Bridge, and, in self-defence, made use of their fire-arms; six persons were in consequence killed, and several wounded; the coroner's jury brought in a verdict of "wilful murder" against eight soldiers who had taken part in the affray; this verdict was regarded by the Queen's Bench as of no account. The soldiers meanwhile went unpunished, the grand jury of the Clare assizes having rejected the bill of presentment. However odious such a verdict may be, it shows what danger a soldier exceeding his duty is exposed to.

In the year 1747 Pitt the elder, on the discussion of a new mutiny bill, said, "Without the valour and discipline of our army, lords, commons, and the English nation might intrench themselves up to the teeth behind parliament, and yet the sword would find a way to the vitals of the constitution." If we substitute the word "valour" for "interest," and the word "army" for "officers," we must fain concur in Pitt's assertion. The provisions of the Mutiny Act and the watchfulness of the law courts would scarcely of themselves prove effectual in preventing an army which, by its very organization, stands outside the law, from subverting that law. So long as the nobility and gentry, parliament and the church, have the upper hand in England, a conflict between state and church is not possible; so long as the aristocracy has the whip-hand of the army, just as little can a conflict arise between the army, the cabinet, and parliamentary government, which is made up of the nobility and gentry; for, apart from the guiding spirit of the nation, what should induce the English officer-class, chiefly consisting of younger sons of the nobility, to act against the parliamentary government, where one brother sits as marquis in the Lords, another as member in the Commons, a third as colonial secretary, and a fourth is a bishop. So long as the officer-class and the parliament is compounded of such elements, England need not think of binding the army by oath to maintain the laws and the constitution. Collisions between soldiers and civilians are not, however, of rare occurrence; the privates are not in high estaem, being enlisted from the lowest of the population; and the officers in certain regiments affect a *hyper*-aristocratic tone which occasionally leads to social conflicts. We may

readily conceive that Junius was fully justified in scarifying the "unfledged ensign."

The army being placed under control of the cabinet, it is still a matter of question whether the gentry would lose its supremacy over the army, even if the purchase system were wholly laid aside. There are many who, in a reform of the English army in this particular, dread the downfall of all liberty. "Junius need not be told," remarks Sir William Draper, "that should the time ever come when this nation is to be defended only by those who have nothing more to lose than their arms and their pay, its danger would be very great."

Most of the commissions in the infantry and cavalry* are still acquired by "purchase," being obtained through "connection," from the commander-in-chief. The highest post purchaseable is that of lieutenant-colonel. On every promotion the promoted officer pays the difference between the rank he has hitherto held and the higher grade; every officer must, however, serve a certain time in every grade before being advanced to a higher. Whoever falls on the field loses simultaneously his life and purchase-money. If any one retires on half-pay, he may require from his successor one half of the purchase money. An officer placed on half-pay may, on payment of one-half of the purchase-money, return again to active service. The purchase system is excluded from the artillery and engineers. A post can only be attained by purchase when the party seeking to purchase has withdrawn from the army voluntarily. Vacancies by death are filled up by the lieutenant-colonel according to seniority; vacancies resulting from dismissal may be filled up by the commander-in-chief of his own option. Cadets who have passed their examinations at Sandhurst with the mark "good," and non-commissioned officers who have served their time, receive commissions. These, however, can only be promoted to posts that have fallen vacant through death or dismissal, and consequently in times of peace they are but few in number.

The higher commands are granted by the commander-in-chief, on the recommendation of the secretary of state for the war department. The promotion from lieutenant-colonel to the post of colonel is according to favour or long service. The same holds good with regard to promotion to the post of general.

† Gneist, i. 416.

Sergeants are regarded as non-commissioned officers, and hence are not subject to bodily punishment. The drill-corporals attend to the training of the recruits, the officers scarcely ever meddling with the matter. The gulf existing between the officers and the sergeant, and between the latter and the private, in consequence of the casteliko organization of the English army, is not to be bridged over; many sergeants who were made officers during the Crimean war soon got their names erased from the army list in consequence.

At the head of the army is the commander-in-chief, for the time being the Duke of Cambridge. He is the acting head of the infantry and cavalry, and, since the office of master of the ordnance was abolished in 1855, the head likewise of the artillery. The entire patronage of the army is in his hands. Down to the year 1846 the commander-in-chief was a member of the cabinet; he is now under its control, and according to Lord Hardinge's view, is responsible to the cabinet, and nominally, to the Queen. He is the constitutional organ through which the Queen communicates with the army; as the connecting link with the prerogative he carries out all his orders in the name of the Queen. On the field he has the supreme command of the army; all orders which are issued from the commander-in-chief's office are addressed by the adjutant-general to the respective commands. To the adjutant-general's office has been transferred the supervision of the actual provisioning and equipment of the troops.

Up to the present the English army has not been a consolidated whole; in time of peace, army corps, divisions, and brigades do not exist. The kingdom is, indeed, apportioned into several districts, which serve rather to facilitate authority than for purposes,

The generals on home service, comprising the "home staff," are appointed as commanding officers over the several districts, England and Wales being divided into five districts, Scotland and the Channel Islands into three; and Ireland, forming a chief district, with five sub-divisions. The greater colonies have, in like manner, their foreign staffs. Sydney Herbert says of the British army:—"We have not possessed an army, in the true sense of the word, since 1815. We have only had troops for police and colonial service; what we call an English army is only an assemblage of regiments we have companies well drilled, and

that is all; there are chief commands, which, before they were in the Crimea, had never seen a brigade assembled, excepting, perhaps, in Dublin and in the East Indies."* Since the Crimean war there has been much improvement in many respects. The camp of Aldershott is particularly calculated to educe a spirit of greater unity in the British army.

The military hierarchy consists of field-marshals, generals, lieutenants-general, majors-general, brigadiers-general, colonels, lieutenants-colonel, majors, captains, lieutenants, cornets, second-lieutenants, and ensigns, who have actual rank as officers. According to the Estimates of the Army Services for 1862-3, the numbers of the land forces voted were:—

Cavalry.	Officers.	Non-commissioned Officers.	Rank & File.	All Ranks.	Horses.
Royal Horse Artillery	77	126	1,730	1,933	1,348
Life Guards & Horse Guards	99	189	1,029	1,317	825
Cavalry of the Line	583	985	9,248	10,816	6,801
Infantry.					
Royal Artillery	854	1,852	16,295	19,001	8,226
Royal Engineers.....	416	407	3,742	4,565	120
Military Train	106	198	1,524	1,828	996
Foot Guards	260	446	5,600	6,306	.....
Infantry of the Line	3,831	6,987	76,500	87,318	.....
Army Hospital Corps	2	207	713	922	.....
Commissariat Staff Corps...	.....	87	472	559	.....
West India Regiments	208	267	3,200	3,675	.....
Colonial Corps	244	402	4,742	5,388	800
Total Regimental Establishments	6,680	12,153	124,795	143,648	14,116
Staff, etc.....	1,354	378	90	1,822	
	8,034	12,531	124,885	145,450	14,116

Add—Total force on the East Indian Establishment, including Depots in Great Britain 83,523
Total of Her Majesty's Forces 228,973

The army of native troops is variously computed from 180,000 to 250,000 men.

With consent of Parliament, the Queen may also take foreign troops into pay, as, up to the present, has always been the case in all European wars in which England has been engaged since the accession of William III. When, in 1794, Hessian troops

* Gneist, i. 406.

were landed at the Isle of Wight, the question was raised, as to whether the crown, without consent of parliament, might bring such troops into the country. Pitt contended that it involved no danger so long as the king was not provided with money to pay them.* Parliament sided with the ministry against the two motions brought forward by Grey, declaring such a mode of proceeding unlawful, and in contravention of the "Bill of Rights." The motions were defeated, respectively, by a majority of 184 against 85, and 170 against 40. According to this memorable precedent, the government might henceforth, without consent of parliament, introduce foreign, as well as native-born Indian troops, into England.†

* Archenholz, *Brit. Annal.* xii. 73. † Bowyer, 497.

CHAPTER VIII.

THE NAVY.

The Navy a Permanent Institution.—Penal Code.—Marines.—Military Wills.—Privileges in case of Debt.—Impressment.—No Purchase.—Precedence.

THE Navy has always been popular in England, and has not, as in the case of the army, ever had to contend with the national distrust. Since the last century* it has become a permanent institution, and is not merely allowed on sufferance, and renewed from year to year. Since the treaty of Aix-la-Chapelle, the Navy has possessed a fixed penal code, wherein the respective offences are fully detailed, the limitation and determination whereof is not left to the crown.† Since 22 and 23 Vict. c. 123, a new penal code for the Navy is in force. The marines are under the same code while on board; on land, however, they are subject to the "Mutiny Act" annually passed. Corporal punishment may, however, on an order of the captain, and without any further proceeding, be carried out as a means of enforcing discipline.‡ Sailors enjoy the privilege of making wills with fewer formalities. No seaman can be arrested on board his ship for debts under £20. In all other respects, however, the crews are completely subject to the civil law.

Whether impressment, the practical consequence of the general liability to serve at sea, was ever legal has been greatly contested. No statute ever introduced it; the statute 2 Rich. II. c. 4, merely speaks of it as a custom and the undoubted prerogative of the crown. Impressment of sailors has not been abolished, but since 5 and 6 Will. IV. c. 24, has been practically laid aside by voluntary service.

The purchase system does not obtain in the Navy, "seniority," as a rule, determines the promotion. The following is the order of precedence in the Navy:—admiral, vice-admiral, rear-admiral, captain, commodore, lieutenant. In 1862, 76,000sailors, marines, and coast-guards were voted by Parliament.

* 22 Geo. II., c. 23; 19 Geo. III. c 17; and 10 and 11 Vict. c. 59.

† Bl. i., 420.

‡ Bowyer, 503.

BOOK IV.

The State Church.

CHAPTER I.

THE POLITICAL POSITION OF THE STATE CHURCH AND ITS CLERGY.

Character of the English Reformation.—Premunire.—Internal Reformation.—Henry VIII. Supported by the Gentry.—The Catholic Element in the English Church.—Thirty-nine Articles.—Comparison of the English with the "Catholic" Church.—Divorce.—Canning and the Pope.—The Sovereign's supremacy.—The "Catholic" Church Unrecognised.—"Titles" Bill.—Ecclesiastical Power of Parliament.—Political Character of the English Church.—Parties in the Church.—Puseyites.—Cardinal Wiseman Respecting the Same.—Unpopularity of the Church.—Exclusiveness of the Clergy.

THE English State Church regards itself as the rightful successor of the Roman Catholic Church.* Like the Roman Church she is exclusive, and, considering herself a church "Catholic," is unable, as a matter of course, to recognize any other religious community in juxtaposition as a Church.† The English Reformation should be mainly regarded as a sundering of the English provinces of the Church from the great Mother-Church in Rome. The haughty sentiment of the Englishman, fancying for himself, as far as may be, a national God of his own, a Deity providing for the affairs of other nations by the way merely, was loth to endure that a foreign prince beyond the realm should, in concerns spiritual, exercise any jurisdiction whatever, a jurisdiction based, furthermore, upon foreign law. Singularly unacquainted with English history must he be who is not aware that the struggle for liberties, civil and political as well as religious, has been most closely connected with resistance to the influence of the Papacy.‡ With this intent it was enacted by the statute 27 Edw. III., that the punishment of such as appealed to the Papal court should be imprisonment during the king's pleasure; and a forfeiture of lands,

* In an act of 1838, regulating the canons of the Episcopal Church in Scotland, she is styled "The Episcopal Church in Scotland, as a branch of the Holy and Apostolic Church of Christ."

† Canon 8 of 1603, "Whoever shall hereafter affirm, that the Church of England by law established is not a true Apostolic Church teaching and maintaining the doctrine of the Apostles; let him be excommunicated *ipso facto*."

‡ *Parl. Rem.* v 88."

goods, and chattels was incurred by such as did not appear before the king and his council, or in his chancery, or before the justices of either bench, to answer in their proper persons for the contempt done in that behalf.* In the like spirit the celebrated statute of "*præmunire*" was passed in the reign of Richard II. to punish those who should appeal to Rome. Bulls in contravention of statutes might not be brought into the kingdom; in the year 1427, the Pope's collector was obliged by the privy council to find bail for having delivered such bulls.† In like manner the king's council promised, in 1428, to protect the Archbishop of Canterbury, who had been misrepresented at Rome, against all the decrees of the Holy Father.‡ It was hence but a sequence of the range of English history that Henry VIII. abolished the right of appeal to Rome, and, inasmuch as he submitted the ecclesiastical courts to the sway of the sovereign, he simply secularised them. By the assumption of supreme judicial power, and by the control which the king arrogated over the jurisdiction of the bishops and archbishops he became, in fact, and in view of the law, the chief head of the Church

The Reformation in England partook of none of the characteristics that marked that of Germany, which was a thing of national growth developed by an inner religious impulse; this internal reformation first began in England under Elizabeth and the Stuarts, by an energizing of the puritanic elements.
in England.

Violently as Henry VIII. carried out the Reformation, they who pretend that it was developed out of the sullen humour of a despot are completely at fault. Henry VIII.'s material power was too narrowed for such an issue; the avarice of the gentry who despoiled the rich monasteries contributed substantially thereto, by upholding the king in his first grand usurpation. The clergy would also appear to have offered but feeble resistance. The breach with Rome, as has been intimated, was one to which the course of events had for centuries been tending.

All the English sovereigns, whilst severing from the Roman Church, strove, on the other hand, to maintain as much as possible the internal organization of the Catholic Church as an instrument of their authority. Henry VIII. proscribed, it is true, the up-

* Palgrave, *The King's Council*, 39.
† *Proceedings and Ordinances*, iii. 268.
‡ Ibid. iii. 301.

holders of the *jurisdiction of Rome, but of the doctrines of the* Catholic Church he preserved as many as he possibly could.* By the same statute (25 Henry VIII. c. 19—21) which sets aside the jurisdiction of the Pope, he enacted that all the existing Canons and Ordinances which are not in opposition to the laws and customs of the realm and to the prerogatives of the king, are to remain in force until it shall be otherwise determined. The royal power was thus able to preserve the old historic position of the Church in a great measure. In no other land has there been maintained more of the actual conditions of the Middle Ages; no where has the spiritual power bound itself up in faster union with the temporal than in England.† "I should like the popedom dearly," said James I., "because it possesses so much power over *intelligencies, if the Pope did not at the same time acquire power* over kings."‡ The same king, in 1604, replied to the Presbyterians in answer to their demands directed against Episcopacy, "No bishops, no king."

Hence the doctrines of the English Church, together with her rites, so far as they have not been modified by the legislature and parliament of the sovereign, are in perfect parity with the doctrines and rites of the Catholic Church. The modifications were introduced with intent to remove the pretended errors of the Catholic Church, for, says the 19th Article, "As the Church of Jerusalem, Alexandria, and Antioch have erred, not only in their manner of ceremonies, but also in matters of Faith, so also *may* the Church of Rome have erred." The infallibility of the church *is indeed thereby indirectly denied.*

The settled principles of the English Church are contained in Thirty-nine Articles, adopted in 1562 by a convocation held in the reign of Elizabeth, and in the constitutions and canons of 1603. The book of canons, however, not having been confirmed by Act of parliament, it has been several times adjudged in the courts of Westminster Hall that they bind only the clergy, the laity not being represented in Convocation (James I.). By the assent of parliament (13 Eliz. c. 12) the Thirty-nine Articles were made enactments of State; heresy, therefore, became a crime, for which the temporal power had to provide. The "Act of Uni-

§ Robertson and Prescott, *Hist. Ch.* . i. 427.

* Lingard, *Hist. of Eng* vi 205.

† Ranke, *Englisches Gchichte*, Preface, page v.

formity" forbids all changes in matters of belief otherwise than by the king in parliament. As an instrument of the spiritual and temporal penal power, the "Act of Supremacy" (1 Eliz. c. 1) provides that these Thirty-nine Articles be carried out by a new court called the "Court of High Commission," consisting of twelve bishops and thirty-two privy councillors, laymen, and other ecclesiastics appointed under the Great Seal.

The opposition in doctrinal matters between the English and the Catholic Churches since the time of Edward VI. obtains principally in the following points:* — The liturgy of the Catholic Church is in Latin; that of the English Church in the vernacular. The veneration of images, of saints, and of the blessed Virgin is prohibited in England. The infallibility of the English Church cannot, however, be logically maintained on the ground of the Thirty-nine Articles. Auricular confession is not abolished, but has only fallen out of use. In regard to transubstantiation the English Church denies the Real Presence of Christ in the Lord's Supper.

In England celibacy is only enforced in the case of fellows of colleges, who on marrying have to relinquish their fellowship. In regard to the sacrament, the Thirty-nine Articles retain only Baptism and the Lord's Supper.† With respect to marriage, however, the principles of the canon-law alone were, down to 1857 (20, 21 Vic. c. 85), conformed to; divorce, *à vinculo matrimonii*, though never held permissible, had frequently, prior to 1857, been granted by "Act of Parliament;" a separation, *a mensa et thoro* alone was held allowable; the separation, therefore, of the parties by the legislature was merely a declaration of "nullity" in the canonical sense. Even as in the Catholic Church itself, where, by reason of the absence of some needful requirement, the union had been invalid from the commencement, separation was, in such cases, held permissible. Such separation took place only in relation to marriages which had actually been contracted, but never applied to the case of bigamy; separation was further granted when one of the parties on entering the marriage state was actually suffering from impotence or lunacy, and also on the ground of close relationship.‡

* It was apparently in one of the debates (on the Relief of Protestant Dissenters, 1772,) that Lord Chatham ventured to describe the Church of England as being "popish in her liturgy, Calvinistic in her Articles, and Armenian in her clergy."—*Lord Mahon's Hist.* c. xlix.

† Burns iii., 545.

‡ Burns ii., 500.

In practice, however, bills for separation, or rather bills for dissolution of marriage, were grantable in case of adultery. In 1857 after a protracted struggle a really judicial separation of marriage in the Protestant sense, was contrived; in lieu of the Divorce *a mensa et thoro*, the court may now decree a judicial separation on the ground of adultery, cruelty, or desertion without cause for two years and upwards. The court may also decree a dissolution of marriage on the ground of adultery, where the husband is petitioner, and on the ground of adultery, coupled with cruelty or desertion, where the petition is by the wife. Even now, however, marriage with a deceased wife's sister is forbidden, on grounds purely canonical. The bill tending to procure a relaxation of this rule has, up to the present, been rejected in the Lords; last year, however, it was thrown out in the Commons.

The main result of the English Reformation has been, accordingly, the substitution of the jurisdiction of the sovereign in things spiritual. The Thirty-seventh Article declares that the Bishop of Rome has no jurisdiction in this realm of England. The Pope is only acknowledged in England as the "Bishop of Rome." When Canning was minister of foreign affairs, the Pope then reigning despatched to him a brief announcing to the king his elevation to the Pontificate.

Canning, on consulting the Attorney-General and Solicitor-General, received for answer the following opinion:—

"If the Bishop of Rome were recognized as Pope, and, consequently, as a ruler in any official document, whereby the recognition of the jurisdiction of such ruler would be implied, an indirect acknowledgment of the assumed extent of such jurisdiction would be involved. If the Secretary for Foreign Affairs were to enter into correspondence with the Pope or his secretary, he would run the risk of incurring the penalties of præmunire, on account of the recognition of the jurisdiction of Rome obtaining in England."*

On the other hand, the Pope only knows of a 'Kingdom of England,' Of the 'United Kingdom of Great Britain and Ireland,' the Pope, officially, knows nothing whatever, seeing that the two Acts of union, in the absence of all diplomatic intercourse, have failed to be notified to him.

By 26 Hen. VIII. c. 1, the king was to be the chief head of

* Burns iii., 145.

the Church of England, and with the "Imperial Crown" was to be united not only all jurisdiction, but also all authority and prerogative of the chief head of such church. 1 Eliz. c. 1, stat. 16, confirms this statute, and likewise, in express terms, the abolition of the jurisdiction of any foreign prince whatsoever in England, in other words, of the Pope.* By aid of these statutes the king acquired all the rights which the Pope had previously possessed,† and since that period the sovereign exercises the jurisdiction by means of delegates. With his former powers in relation to church matters we have already become acquainted. Since the reign of Edward VI. to the king pertain all pious foundations, colleges, and chaplainries founded for the benefit of the clergy.

Since the sovereign assumed the full power of the Pope the English Church has regarded herself as truly "Catholic;" but as there cannot be *two* "Catholic" churches, the Church of England, as a matter of course, is incapable of recognizing by her side the Roman Catholic Church, as being endowed with any legal entity. The Church of England recognizes, however, the Holy orders of the Catholic Church, whilst refusing to acknowledge the ordination of all other churches. The Catholics are "emancipated" it is true, but the Catholic Church, as an institution, is completely ignored. When, in 1850, the Pope nominated a number of bishops, who were partly to hold their sees in spots where ancient episcopal sees had flourished, there arose a mighty "No popery" cry, people seeing herein a trenching upon the jurisdiction of the sovereign. The consequence was the "Ecclesiastical Tithes" Bill, which threatened Catholic bishops with penalties in the event of their styling themselves "bishops" of the dioceses of any English bishop, or of any district subject to them. There happened, however, what Mr. Roebuck, on 7th February, 1851, had predicted in the Commons,‡ Cardinal Wiseman styled himself not "Archbishop of Westminster," since that would have rendered him liable, but "Archbishop in Westminster," and thereby avoided the statute. The Thirty-nine Articles, and all the other ecclesiastical statutes which the Tudors enacted, came into being with the consent of parliament, but there was no material restriction of the kingly power herein; for it is well known how very supple the parliaments were in matters of—Faith. The Stuarts, who would not allow the

* Bowyer, 179.
† Walter, *Kirchenrecht*, § 179.
‡ *Annual Register*, 1851, p. 13.

temporal sword to be wielded by Parliament, were still less inclined to subordinate the spiritual sword to the control of that assembly, and the Church exhibited herself as the fitting instrument of absolutism. Henry VIII. had already depicted it as a body wholly separated from the State; both State and Church were to uphold each other mutually, but not to transgress their limits.*

The two revolutions, which annihilated the rule of the Stuarts, brought the church also under the sway of parliamentary government. The dignitaries of the church are themselves members of a great political corporation, and, as such, bound up with the parliamentary government. The hereditary aristocracy looks on the church as its domain; it grants out, by the agency of the cabinet, all the places in the gift of the Crown, and both in the chapters and in the bishops' sees has its members and partisans combined into one serried phalanx. The church has consequently become a thoroughly mundane and political institution, and cannot any longer assert for itself an existence apart from the State. The decline of "Convocation," or the "Spiritual Parliament," is the forced consequence of the subordination of the church to the external regimen. A conflict between Church and State is, accordingly, not very possible now-a-days in England.† A slight rift, resulting from the pressure of the times, has shown itself of late years; the right of divorce no longer taking its stand upon canonical ground, clergymen have the option of refusing to marry persons who have been divorced; no clergyman *can*, however, *prevent any one of his colleagues from* celebrating such a union. Persons who have been divorced have, withal, in case of difficulties being raised, the option of going before the Registrar, and celebrating in his presence a "civil" marriage.‡

In the bosom of the English Church itself, there is the strife of party, its members being divided into the "high church," the "broad church," and the "low church." These parties have also been styled the "attitudinarians," the "latitudinarians and the "platitudinarians." The distinctions between them are not, however, readily appreciable; of so subtle and dialectic cast are they, that only the initiated can rightly enter into them.

* Bowyer, 180.

† The "non-jurors" and the jacobinical opposition of the clergy, down to 1745, constituted merely the opposition of a political party, which belonged in great measure to the body of the clergy. Since the battle of Culloden the ecclesiastical body has become of good Hanoverian temper.

‡ Korr's Bl. 1857, 255.

One party moves methodically within the prescribed formulæ and opinions, accepting every passage in the Bible, whether historical or doctrinal, as an immediate out-pouring of the Holy Ghost; nay, holds even the Thirty-nine Articles as quasi-inspired; while another ventures on rational explanations, or risks new interpretations and views. In how dangerous a position the latter stands is evidenced by the recent prosecution of the authors of *Essays and Reviews*.

The project of rendering the English Church, apart from the jurisdiction of the Pope, as much as possible like the Catholic Church, is rendered more and more apparent since the time of Archbishop Laud. "There is a danger," writes Lord John Russell, in 1850, to the Bishop of Durham,* "which troubles me more than the jurisdiction of any foreign prince; clergymen of our own church, who have subscribed to the Thirty-nine Articles, and have acknowledged the supremacy of the Queen in entirely straightforward language, have been the most eager to lead their flocks step by step into the abyss. The veneration of saints, the infallibility of the church, the superstitious use of the sign of the cross, the intoning of the liturgy, whereby the words there written become unrecognizable, auricular confession, the giving of penance and absolution, all these are things which have been accounted recommendable by clergymen of the church." This movement, nicknamed "Puseyite" from its chief upholder Professor Pusey, of Oxford, is regarded by Cardinal Wiseman as a return to Catholicism. "*It is impossible,*" *says his Eminence,* "to read the writings of the Oxford theologians, and especially to follow them up chronologically, without perceiving a daily increasing approach to our holy church, both in dogmas as well as in sentiments. Our saints, our Popes, have become to them by degrees more dear; our practices, our church offices, yea, our entire liturgy, are in their eyes precious inheritances, more precious, far, than to many of us. Whole parishes have taken the leaven, and it ferments; and, to spots where one might least expect it, it is brought by mysterious ways."†

So long as this movement, which has not by a long way attained its highest level, does not extend to the jurisdiction, the Thirty-nine Articles are not menaced with any real danger, and the

* *Annual Register*, p. 199. † Bucher, 177.

slumberous calm which has endured since George II. between State and Church is not likely to be sorely troubled.*

* The popularity of the English High Church is by no means great amongst the lower classes; it was indeed but the exaggeration of a Radical, making political capital, when Sir Francis Burdett, in 1825, affirmed, "The Anglican prelates have no other motive than their personal interest, they themselves have no religion, but they make of religion an instrument to maintain their rule." Unnumbered thousands in England utter the same language. The Anglican Church is verily a church for well-to-do folks; for the common people the poor curate indeed has a heart, but the same cannot be affirmed of the higher clergy. Hence the profound indifferentism prevailing among the poorer dwellers in towns, as to matters of religious moment. We further adduce the opinion of a liberal-minded Catholic which no one who has studied the system of the English hierarchy will deem too harsh. (Franz Schulte, *das Englische Parlament*, 121). "The Anglican prince of the church readily inscribes his name for £100 in a newspaper subscription list for the distribution of the Bible in Germany and other foreign parts, or for the founding of a diocese, without diocesans, at Jerusalem. But it lies beyond the compass of his charge to trouble himself about the spiritual destitution prevailing in the precincts of his own Palace. Whosoever would be the better for his spiritual blessings and his worldly favour, should forswear the supremacy of the Pope, subscribe the Thirty-nine Articles, adopt conservative principles in matters ecclesiastical and political, and—behave respectably; the Anglican would fain wear a fine-spun coat, possess a Bible and Liturgy resplendent with golden clasps, and be able to pay as high a price as possible for his Sunday-sittings at church. His religion must be expensive, in conformity with the universal English maxim, 'That which costs nothing is worth nothing.' The upholders of the ruling church consist, accordingly, in the main, of the higher and lower nobility, of the gentry or respectable middle class, having landed and other property, and of rich merchants; in a word, of those chiefly who can invite the clergyman to their table and whom he can in turn invite. Such are the pillars whereon the superstructure of the State-Church rests."

CHAPTER II.

PRIVILEGES OF THE CLERGY.

No immunity from Ordinary Jurisdiction.—Benefit of Clergy.—Exceptions.—Branding.—Extraordinary Punishments.—Worldly Offices.—Horne Tooke's Act.—No Obligation to Honorary Offices.—Legal Process against Clergymen.

SINCE the reign of Henry VII. ecclesiastics are amenable to the ordinary courts in cases of felony and conspiracy to murder.* They have now no longer any immunity from the ordinary jurisdiction, save in matters of discipline; so long as common offences were imputed, the bishops might reclaim any ecclesiastics who had been charged with any crime, cite them before their own tribunal, and there impose spiritual penalties. Thence originated a very important privilege which tended to soften the harshness of penal legislation. Bishops also reclaimed laymen who had been sentenced to death, on pretext that they were clerics. At a later period, however, the privilege of "reclaiming" ceased, and "benefit of clergy" could, subsequently, only be taken advantage of before the civil judge. The privilege was to be prayed for in express terms, otherwise the ordinary punishment fell upon the party found guilty. The form in which the benefit was prayed for was this:—The accused knelt down and entreated the judge to grant the "benefit of clergy;" the court thereupon decided whether he was a cleric, and this simply from the fact of the judge's testifying whether the accused could read or not ("*legit ut clericus*").† The passage that he had ordinarily to read was from the Psalms, usually the verse "Miserere mei Deus," which in popular language was styled "the neck-verse." Jack Cade says, alluding to this legal custom, to Lord Say (II. Part, *Henry VI.* Act iv., Scene 7), "Thou hast appointed justices of the peace to call poor men before them about matters that they were not able to answer, and, because they could not read, thou hast hanged them." From this benefit all persons were excluded who, by reason of their condition, could not have been

* Pauli v., 544.

† Burns, E. L. I. 185.

ecclesiastics, such as Jews, heretics, Mohammedans, women, the blind, and the lame. After the revolution of 1688, it was extended (by 3—4 William and Mary c. 9) to women, and by 5 Anne c. 6 to all persons who prayed for it, whether they could read or not. Down to the time of the Stuarts it was open to laymen to plead this benefit several times, and it might also be prayed for at any moment. In the reign of Elizabeth a case occurred where one who was condemned to death prayed for it while under the gallows and with success. From that time forth laymen could only claim the benefit once ;* clergymen, on the other hand, as often as they were accused.† At an early period already this benefit was practically disallowed in the case of high treason. A statute of Henry VII. withheld it from soldiers who had abandoned the royal service without license.‡ It remained in existence even down to our own century in cases of manslaughter, bigamy, greater and petty larceny ; but the benefit was rendered almost ineffectual in many cases by reason of manifold restrictions. Henry VII. enacted that everyone who received "benefit of clergy" should be branded on the left thumb with an "M" for manslaughter, and with an "F" for other felonies.§ Other exceptional punishments were superadded. After a statute of William III. had prohibited branding on the back, the statute 5 Anne c. 6 abolished it entirely, substituting imprisonment in the house of correction from six months up to two years.‖ Ordained clergymen never could be branded.¶ Under George I. seven years' transportation was introduced, as an extraordinary punishment, in case the privilege was taken advantage of, until a statute of the year 1827, 7—8 George IV. c. 27, 28, entirely abolished "benefit of clergy."

In the case of Lord Cardigan, however, doubts arose as to whether "benefit of clergy" was abolished in regard to proceedings taken against a peer before the Upper House. The doubt was removed by 4—5 Vict. c. 22, which enacted that peers can no longer avail themselves of any such privilege of law.**

In the middle ages the clergy of England filled a great number of civil offices. From St. Thomas à Beckot down to Wolsey the

* Schmalz, *Staatsverfassung Gross Britanniens*, p. 170.

† Burns, iii. 348.

‡ Crabb, 434.

§ "He should stand in fear of fire, being burnt i' the hand for stealing of sheep."—Shakespeare's *Henry VI.*, Part ii. Act iv. Scene 2.

‖ Crabb, 562.

¶ Burns iii., 348.

** Kerr's Bl. Edit., 1857, Vol i. 407.

chancellors were chiefly clerics; nor were they prohibited from undertaking other offices. In the middle ages, they appeared also as members of the Commons, to mediate respecting the taxation of the clergy. They were first forbidden to sit as members in the Commons by 41 George III. c. 63, the so-called "Horne Tooke Act;" for, notwithstanding the ancient custom which had prevailed through many centuries, this celebrated democratic clergyman appeared in 1801 as member for Old Sarum.* The statute passed in consequence of this excluded ordained clergymen from parliament once for all, whether really officiating clergymen or not.† Although clergymen may enter upon functions not otherwise forbidden, they are not bound to undertake honorary offices, and cannot, especially, be summoned as jurymen.

Legal process against clergymen only issues with regard to their non-ecclesiastical property.‡ While clergymen are officiating, or are on their way to church, or returning thence, they cannot be arrested for debt.§ The practice of ecclesiastical taxation was discontinued in 1664; from this time the clergy have been taxed at the same rate and in the same manner with the laity. Having relinquished the right of self-taxation, they are subject to those burthens which exist by the common law,‖ for the taxes imposed by parliament have effect as self-imposed taxes; and, as clergymen vote on election of members of parliament, they are regarded as consenting to the taxes.

Pursuit of commerce and trade, and of agriculture partaking of the nature of trade, is disallowed in the case of clergymen.¶

* The representatives for this were said to be more in number than the constituents, and on one occasion, Lord Camelford, the owner, threatened to return his negro servant.

† Hansard, P. D. iii. Ser. xxvi. vol. 760.

‡ Burns, iii. 352.

§ Bowyer, 377.

‖ Burns, iii. 352.

¶ Ib. iii. 365.

CHAPTER III.

THE ARCHBISHOPS AND BISHOPS.

Archbishops.—The Archbishop of Canterbury.—Of York.—Episcopal Election.—Bishops not Peers.—Suffragan Bishops.—Ecclesiastical Commission.—Church Estate Commissioners.—Church Building Commission.

A PROVINCE is the legal district of an archbishop; there are in England two archbishops, viz., of Canterbury and York, and two similarly named provinces. The archbishop is the chief of the clergy in a whole province, and has inspection of the clergy of that province. As archbishop he has appellate jurisdiction, and as bishop of his diocese a court of original jurisdiction. Upon a writ from the sovereign, he summons the Convocation of his province. When an episcopal see falls vacant, the crown has the *custody of the temporalities*; *the archbishop*, as *guardian of the* spiritualities, executes all ecclesiastical jurisdiction therein.

When an archbishopric is vacant, the "dean and chapter" are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation. Archbishops have the right of deprivation, that is, of suspending bishops from their functions.* The Archbishop of Canterbury† is the primate and metropolitan of all England; there are twenty bishops subordinate to him. The Bishop of London is his provincial dean; of Winchester, his chancellor; of Lincoln (formerly) his vice-chancellor; of Salisbury, his precentor; of Worcester, his chaplain; and the Bishop of Rochester bore the cross before him—in former times. He is the first peer of the realm, and has precedence over all government functionaries, and the entire clergy. In rank he comes immediately after the princes of the blood. He is privileged to have *eight chaplains, whereas a duke may only have six at most.* His title is "Grace and most Reverend father in God." He subscribes himself, "By Divine Providence, Archbishop," whereas other bishops only write, "By Divine permission." When speaking of him and the Archbishop of York, the wonted form of expression employed is, "He is enthroned," whereas of the other bishops merely,

* Burns, i. 230. † Ib., i. 196.

"They are installed." He crowns the kings and queens regnant. As regards marriage, he has power to grant a special license in lieu of the publication of banns. Whosoever applies to Rome for a dispensation, becomes liable to the penalty of "premunire."

The second ecclesiastic in the realm is the Archbishop of York. The style and title, with the privilege of having chaplains, is possessed in common with the Archbishop of Canterbury. On the other hand, he is only "primate of England," and in order of rank comes after the Lord Chancellor. He has the privilege of crowning the queen consort, and is her perpetual chaplain.*

Archbishops and bishops are, as a matter of form, chosen by the deans and chapters of the cathedral churches, but in fact are nominated by the sovereign.† In the event of a vacancy occurring, the sovereign issues to the chapter, leave to elect "*congé d'élire,*" conformably with 25 Henry VIII. c. 20. In the respective writing, however, the person whom the sovereign wishes to have elected is pointed out. If the dean and chapter delay their election above twelve days, the nomination devolves to the king, who may by letters patent appoint such person as he pleases.‡ The sovereign afterwards notifies the nomination or election which has taken place to the archbishop of the province if it be a bishop that is chosen, and, in case of the election of an archbishop, to the other archbishop and two bishops, or to four bishops, requiring them to confirm, invest, and consecrate the person so elected, after which the bishop elect shall sue to the king for his temporalties, and take the prescribed oaths. Whosoever opposes herein the orders of the sovereign, incurs the penalties of premuniro. Besides becoming vacant by death, the sees of bishops and archbishops are avoided as well by crime as by resignation. A bishop can only resign into the hands of the archbishop, and the archbishop himself into the hands of the sovereign. The title of a bishop is "Right Reverend Father in God," and he ranks after a secretary of state; if the latter be a bishop; otherwise, after marquises' younger sons. All bishops,§ as soon as they have

* Burns, i. 197.

† As to the nature of the election of the bishops, and the obligation of the dean and chapter to elect the nominee of the crown, vide *The Queen and Archbishop of Cant.*, ii. Q. B. 483.

‡ Burns, i. 198.

§ The Bishop of Sodor and Man is in no case a lord spiritual. He exercises the same spiritual powers, and possesses the same privileges as the other spiritual lords, except that of voting in the upper house, where he is allowed a seat, but does not vote, because he does not hold his barony of the sovereign, as of the Crown of England, but as of the sovereignty of Man.

taken the proscribed oath to the sovereign, have the right to sit as "lords spiritual" in the House of Lords; but the bishop last elected for the time being is excluded from that dignity, save in the case of the Bishops of London, Durham, and Winchester. They are not accounted "peers," and, if indicted for felony, are subject to the ordinary courts. In the middle ages they would, in the event of their submitting themselves to the jurisdiction of the peers, have withdrawn themselves thereby from their special spiritual jurisdiction.* By 26 Hen. VIII. c. 14, suffragan bishops acting as assistants to the other bishops, but being mere titular bishops, received determinate sees; the sovereign chose them from two candidates presented to him by the rightful bishop or archbishop; they had just so much jurisdiction as the bishop or archbishop thought fit to concede.† This institution has now fallen into desuetude.‡

With a view to equalize the territory, functions, and income of the bishops and the clergy at large, a special commission was appointed by 6 and 7 Will. IV. c. 77. The "ecclesiastical commissioners," by 3 and 4 Vict. c. 113, are,—all the bishops of England and Wales, all the chief justices, the deans of St. Paul's, Westminster, and Canterbury, four laymen summoned by the queen, and three laymen named by the Archbishop of Canterbury. They must all be members of the Church of England. The current business is now managed by a special committee ("the Church Estates Commissioners"). The queen nominates to this committee one clerical and one lay member; a third member being appointed by the Archbishop of Canterbury. These three members are responsible for the entire body, which has the power of conjoining two other members; the whole of the five members being again subject to be released by their constituents. All proposals for a change affecting the entire body, or the committee itself, must be approved by the privy council, and be submitted to Parliament, but merely "for their information." The committee of five is further empowered to decide respecting valid sales, purchases, and leases.

Since 1818 there exists a "Church-building Commission;" this "commission for building new churches" consists of the two archbishops, the lord chancellor, the Speaker of the Commons, several of the leading ministers, and others.

* Burns, i. 224. † Burns, i. 218. ‡ Bowyer, 75.

CHAPTER IV.

THE CLERGY AT LARGE.

The "Chapter."—Rights thereof.—Parsons.—Vicars.—Curates.—Patronage.—Archdeacons.—Rural Deans.

All the bishops, excepting Sodor and Man, have a chapter of their own, at the head whereof is a dean, who ranks immediately after the bishop, and constitutes, in certain cases, a "corporation sole." Since 3 and 4 Vict. c. 113, the queen nominates all deans by letters patent under the great seal. The canons of the chapter are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other. The "Dean and Chapter" constitute a jural person in regard to the property ecclesiastical.

The chapter nominally elects the bishops, and, together with the dean, has to give its assent to many acts of the bishop, such as the granting of leases and nomination to various offices.*

England is distributed into two hundred extra-parochial places, and a vast number of parishes (*see* Book vi. Pt. ii. c. 1). In every parish there is a parish church, presided over by a rector, who holds the living. Whoever is in full possession of all the rights of such parish church is called "parson" (*personæ ecclesiæ*), and constitutes a jural person. During his life he has the freehold of the parsonage, the glebe-lands, the tithes, and other dues. Occasionally these dues are "appropriated;" that is, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living. Such corporation appoints a vicar, to whom the spiritual duty belongs, in the same manner as in parsonages not appropriated, to the rector.

The patronage (*advocatio, advowson*) is ranked under the head of real property.† Advowsons are either *appendant* or *in gross*; *appendant* when annexed to the possession of a manor, and will pass by a grant of the manor only, without adding any other word. But when the advowson has been once separated from the property of the manor, it is called *advowson in gross*. The owner of the advowson is invested with the same privileges as in other Christian

* E. Law, ii., 178. † Burns i., 5 a.

lands. When an alien purchases a right of presentation, the crown shall present; if a catholic, it is exercised by either university in turn. Since 1835 the rights of presentation of corporate towns has been abolished. Besides the rights of presentation pertaining to the queen, the lord chancellor, the Prince of Wales, the higher clergy, and the chapters, there are 3850 peers, peeresses, baronets, parsons, gentlemen and gentlewomen, in the enjoyment of such patronage.* How very intimately the Church Established is bound up with the governing class may, from this simple fact alone, be readily apprehended.

The bishop has the right to refuse any one presented by the patron when such person is "excommunicated," or a "bastard," an "outlaw," an "alien," a "minor," an "illiterate" person, a "heretic," or a "schismatic." The patron has, however, a right of action in the law courts. Since 1 and 2 Vict. c. 106, it is only permissible to hold two benefices, the churches of which are within three miles of one another, and the annual value of one of which does not exceed £100. On the ground of felony, immorality, or errors in doctrine against the Thirty-nine Articles, or "Book of Common Prayer," a clergyman may be "suspended." To curates a stipend, ranging from £80 to £150, may, where deemed needful, now be assigned by the bishop. By recent reforms the mischief of allowing non-resident rectors to hold the living and get poor curates to officiate in their stead has been, in a great measure, restrained. The number of curates has sunk in consequence from 4000 in the year 1835, to 1800 in the year 1854.† The visitation and inspection of a diocese is conducted by the archdeacon, who is generally nominated by the bishop. His jurisdiction is frequently based upon custom and usage, and was formerly not always uniform, but varied in different dioceses; but now all archdeacons throughout England and Wales are to have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding (6 and 7 Will. IV. c. 77, sect. 19). His assistant judge is styled "official." The archdeacon does not sit in person in the court.‡ Rural deans are very ancient officers of the church; they are the deputies of the bishop, and are appointed to inspect the conduct of the clergy and to inquire into and report dilapidations. They had almost grown out of use, but recently the office has, in many instances, been revived (3 and 4 Vict. c. 113).

* Gneist i., 548. † Gneist i., 544—547. ‡ Burns i., 95.

CHAPTER V.

CONVOCATION.

Clergymen formerly in the Commons.—Taxation by Convocation.—Convocation of Canterbury;—of York.—Decay of Convocation.—Burke touching Convocation.—Last Year's Sitting.

UNDER the Plantagenets the clergy who were not bishops were summoned to parliament whenever the king required their attendance for money purposes.* Occasionally the convocation was conjoined to the parliament;† the two assemblies were, however, separated in order of time. The writ of summons of the clergy to parliament was directed to the archbishops and all the bishops; the summons to convocation now issues from the sovereign to the two archbishops only. In the middle ages convocation enjoyed the right of imposing taxes upon the clergy, which was, however, exercised under ratification of parliament;‡ thus, before the war with France, convocation voted money for the war which Henry V. was beginning.§ Since 1664 this right of self-taxation has been abolished.‖

Each province has its own convocation; both convocations are summoned coincidently with parliament. The summons of the sovereign to the archbishop has in view the summoning of all bishops, deans, and archdeacons of cathedral and collegiate churches; thereupon the archbishop issues his writ of election; from each cathedral or collegiate church a proctor is sent, and from the lower clergy of each diocese, two proctors are also deputed. In the province of Canterbury the bishops sit in the Upper House under the presidency of the archbishop. In the Lower House there are twenty-two deans, fifty-four archdeacons, twenty-four proctors of the chapters, and forty-four proctors for the lower clergy assembled.

* Burns, i., 95.

† *dus tenendi Parliamentum.* Edi-, p. 5.

‡ Pauli, iv., 671.

§ Burns, E. L., ii., 26.

‖ *Ib.* p. 28.

wood ipsi pro quolibet decanatu et archidecanatu Angliæ per ipsos decanatus et archidiaconatus eligi facerent duos peritos et idoneos procuratores de proprio archidiaconatu ad veniendum et interessendum ad parliamentum." (Anno 1279.)

The convocation of the province of York seems never to have been of any importance whatever.*

This convocation, like that of the province of Canterbury, also consists of two houses; of recent years, however, of one only, the bishops and proctors sitting in one house.† The members of both convocations enjoyed the same privileges from arrest as members of Parliament.

The decline of convocation began from the moment when it surrendered the right of taxation, and when the clergy exercised, like other commoners, the right of voting at elections to parliament. From that time the convocations have exercised no synodal act whatever. They have, however, since 1700 been summoned annually, together with parliament, and have still the right to act as provincial councils whenever the queen may deem it expedient.‡

In the reign of Anne the Upper House of the province of Canterbury came into conflict with the Lower House touching the rebaptism of dissenters, and convocation made strenuous efforts to establish itself anew as a spiritual joint-parliament. In 1717 the entire convocation itself came into conflict with the state Government, and was, in consequence, adjourned; since that period down to the present time it has not had any special business to attend to. As Burke says,—"It is now called for form only. It sits for the purpose of making some polite ecclesiastical compliments to the sovereign; and, when that grace is said, retires and is heard of no more. It is, however, a part of the constitution, and may be called out into act and energy, whenever there is occasion; and whenever those who conjure up that spirit, will choose to abide the consequences."§ Convocation has always, down to the present time, after the discharge of business, been adjourned, *pro formâ*, until the speech from the throne arrives; but the said speech never does arrive, not even when convocation again resumes business.

In 1851 Lord Redesdale attempted, by a motion in the House of Lords, to galvanize convocation, but the Archbishop of Canterbury himself lifted an opposing voice. Certain alterations [illegible] the service and ceremonies in the Church of [illegible] become highly requisite, convocation was last year summoned to

* Hallam, *Cons. Hist.* iii., 324.
† Albany Fonblanque, "*How we are Governed.*" (Lond., 1859; p. 92.)
‡ Burns, E. L., ii., 30.
§ Letter to the Sheriffs of Bristol.

effect such alterations. Touching the proceedings of last year's convocation, the newspapers have afforded the following information:—

The convocation of Canterbury assembled on the 14th of March; a deputation of the Lower House complained to the Upper House of the book entitled "Essays and Reviews;" six clergymen were implicated as the authors, and had attacked in the same the infallibility of the Bible-text.

The Lower House was then allowed to name a committee, and to prepare extracts from the heretical book, reporting thereon to the Upper House. On the same day the Lower House debated concerning a petition to the Queen as to a reform of the Book of Common Prayer, without arriving at any result.

The day after, the Lower House referred a petition to the Upper House, praying that the bishops might oppose in Parliament the passing of a bill allowing marriage with a deceased wife's sister. The prolocutor thereupon adjourned the house till the 14th of May of this year. The Lower House has, since then, on expiry of the adjournment, delivered its sentence condemnatory of the "Essays and Reviews."

The Upper House of the province of York having assembled at the same time, delivered an address of condolence to the Queen, relative to the decease of the Duchess of Kent. The Lower House was then required to constitute a petition-committee with intent to obtain leave from the Queen that the revision of the 29th canon might be taken into consideration. The Lower House received the address of the Upper House. Numerous petitions were presented, among which was one respecting the admission of laymen to convocation.

CHAPTER VI.

THE UNIVERSITIES.

The Universities more Ancient than the Colleges.—Merton College.—Autonomy of the Colleges.—Exclusiveness of All Souls'.—Stringent Discipline.—Oxford.—The Chancellor.—The Vice-Chancellor.—Congregation.—Convocation.—Constitution of Cambridge.—Durham.—London University.

THE universities are more ancient than the colleges. So far back as 1244 Oxford received from Henry III. its charter, and a chancellor of its own. The colleges have been founded for the most part by private persons for the maintenance of fellows, and for the training of theologians. The oldest college in Oxford is Merton. In 1427 Lincoln College was established by the Bishop of Lincoln, and was then founded for the purpose of uprooting the doctrines of Wycliffe. In 1438 "All Souls'" was founded, and in 1457 "Magdalen."*

The colleges are autonomic corporations, and are only connected with the university through their members. The fellows lead a monastic kind of life, but of a very comfortable type; besides free residence and board, receiving a liberal yearly stipend. Upon marriage, or the acceptance of an ecclesiastical charge, the fellowship lapses. The appointment to a fellowship of a college in Oxford and Cambridge takes place, generally speaking, by election. Every undergraduate must belong to some college. The colleges, however, are not bound to receive undergraduates. All Souls', for instance, has shown a complete spirit of exclusiveness against the admission of undergraduates.

Lectures are delivered in special edifices apart from the colleges. Generally speaking, the undergraduates are trained like the scholars in our gymnasia. They must always wear the official costume, and after nine o'clock in the evening cannot, without special permission, leave their respective colleges. For the better control of the students, the university exercises police authority

* Crabb, 330.

from nine in the evening until six in the morning. That it should be the strict duty of the fellows and undergraduates to attend "chapel" is a matter of course, considering the ecclesiastical character of the universities of Oxford and Cambridge. Of late years, parliament has effected the first breach in these two bulwarks of the church, inasmuch as,—admittedly by a violation of the rights of corporations,—it has ordered the admission of dissenters.

Oxford possesses nineteen colleges and five halls, presided over by their respective "Head." The university has always been governed by statutes of its own making, which in 1629 were digested into a code, "Corpus Statutorum Universitatis Oxoniensis," and confirmed by charter of Charles I. in 1635. Except on points where modern exigencies have compelled amendment or abrogation, they continue to be in force. The style of the Corporation is, "The Chancellor, Masters, and Scholars of the University of Oxford." The Chancellor holds his office for life, is usually a nobleman of distinction who has been a member of the university, is elected by the members of convocation, and attends only on extraordinary occasions. The Vice-chancellor, the highest resident officer, is annually nominated by the chancellor from the heads of colleges, but of late has generally held office by re-appointment for four years. He convenes all courts and meetings, enforces the laws, punishes delinquents, licenses taverns in the city, and is a magistrate for Oxford, Oxfordshire, and Berkshire. He appoints four deputies, or pro-vice-chancellors from the heads of colleges, *who exercise his power when he is unwell or necessarily absent* from the university.

The High Steward is appointed by the chancellor, and approved by convocation; he is always a nobleman, and holds his office for life; he assists the chancellor, vice-chancellor, and proctors in the execution of their respective duties. If required by the chancellor, he hears and determines capital causes affecting members of the university, and, either personally or by deputy, holds the university Court-leet at the appointment of the chancellor and vice-chancellor. The proctors are two masters of arts of at least four years' standing, and not more than ten; they are chosen out of the several colleges by turns. They are the immediate guardians of the laws of the university, and in all respects acting magistrates. The whole corporate business of the university is transacted in two distinct assemblies, called the House of Congregation and the

House of Convocation. The former consists of doctors of every faculty resident in the University, heads of colleges and halls, professors, public lecturers, masters of schools, public examiners, the deans and censors of colleges, and masters of arts of above one year's standing,—all of whom are called regents. The House of Congregation occupies itself almost exclusively with the passing of graces and dispensations and the granting of degrees. The House of Convocation consists of all the same members as the former, of masters of arts in their first year, and of persons who have been regents, and retain their names on the books, but have retired from the university. It transacts all important business, and exercises power in all matters connected with the affairs or interests of the university; subject, however, to some marked restrictions in the department of legislation. In both houses the chancellor or vice-chancellor singly, and the two proctors jointly, have an absolute veto in all proceedings except elections; but against even a small majority of votes, they have allowed it to fall into nearly as complete a desuetude as the royal veto upon the proceedings of Parliament. A weekly court of record is held by the vice-chancellor for the recovery of debts within the limits of the university; and a weekly meeting, composed of the vice-chancellor, the proctors and the heads of houses, is held for deliberation on all matters affecting the liberties and privileges of the University, and for consultation respecting the due observance of statutes and customs. The two representatives of the University in Parliament are chosen by the vice-chancellor, the doctors, and the regent and non-regent masters in convocation.

The colleges are corporate bodies belonging to the class called "eleemosynary," and are quite distinct from the Corporation of the University.

Of the seventeen colleges, halls, or societies which form the University of Cambridge, each is a body corporate, and ruled by its own particular statutes, but each is also subject to general laws, which regulate the practice of the confederate body as a University. The senate takes cognizance of the whole business of the University; it is composed of all the Masters of Arts and the doctors in divinity, civil law, and physic, having their names upon the college-boards, holding any university office, or resident in the town.

The Senate is divided into two classes, or houses: Masters of

Arts of less than five years' standing, and doctors of less than two, compose the regent, or Upper House;—the remainder constitute the non-regent, or Lower House. Doctors of more than two years' standing are privileged to vote with either house. The right of electing the two members of Parliament is vested in the doctors and masters of arts who have their names on the boards of their respective colleges. A meeting of the senate is called the congregation. Besides the two houses of the senate, a council called the caput is chosen annually, by which every university *grace* must be unanimously approved before it can be introduced to the senate.

The constitution of Cambridge has been newly regulated by a statute 29th of July, 1856, 19 and 20 Vict. c. 88. The governing body consists of a "council or senate," comprising the chancellor, vice chancellor, four heads of colleges, four professors, and eight other members, who must not be either "heads" or professors. The Queen has power to introduce, through the Privy Council, new statutes for the colleges and the university. The colleges enjoy, however, the right of petition against their introduction. All the statutes must be laid before Parliament. If one or other of the two Houses does not issue an address within forty days, the Queen can thereupon carry out the statutes.

Down to 1832 there were in England but two ancient universities. In that year a university for the study of theology was founded in Durham. The bishop of the diocese is the "visitor," and the dean the "warden." It is now attended chiefly by the sons of wealthy farmers.

The London University was founded by royal charter on 28th November, 1836. It is empowered to confer the degrees of master of arts, doctor of laws, and medicine, and science.

There are two colleges in direct relation with it, viz., University and King's College. The fellows and the chancellor are nominated by the Queen; the vice-chancellor is elected by the senate.*

* Gneist, i. 350.

BOOK V.

The Judicature.

CHAPTER I.

CHARACTERISTICS OF THE ENGLISH JUDICIAL SYSTEM.

No "Conflict of Jurisdiction."—Separation of Justice from its Administration.—Inter-dependence of Public and Private Law.—Inns of Court.—Legal Tact.—Practical Education.—Law Students.—Promotion not merely by Favour.—Independence of the Judges.—The Judicature and Parliament.—Superintendence over the Ecclesiastical Courts.—The Braintree Case.—Contempts of Court.—No Corporate Character.—Dignity of the Judges.—Coke at the Trials of Raleigh and Essex.—Judges during the Last Century.—The Judicial Organization in relation to Public Law.—Jury.—Courts of the Common Law.—Equity Courts.—Courts of Record and not of Record.

WITHIN the compass of the judicial authority is to be found the wide contrast that prevails between the modern constitution of England and the actual condition of things on the continent; the contentment of the nation at large may thus be accounted for, there being a wondrous charm in the maxim, "Where there is a wrong there is a remedy,"* no debatable question of law being ever withdrawn from the scrutiny of the courts.

The judicial authority possessed by certain special boards and by the Home Secretary is of recent origin; although the general principle of submitting every question in dispute to the superior jurisdiction of the courts of law is imperilled thereby, it is not, as yet obscured: as the head of this department changes with the ministry, he is only able to exercise arbitrary jurisdiction in a few solitary cases. The distinction between the judicial and special government functionaries is so generally recognised, that from it originates the division into "judicial" and "ministerial" offices. The English lawyer knows but little of the subtle distinctions which foreign jurists are wont to interweave with legal questions, or of the difference between "private" and "public" law.

The education of the English jurist begins in the "Inns of Court," which exercise the right of admitting persons to practise at the bar; no method of obtaining the rank of barrister exists but that of becoming enrolled as a student in one or other of those Inns. They were founded at the time when efforts were made in Oxford to acclimatize Canon and Roman law in England, and

* Bucher, 213.

were styled by Fortescue* and Coke† "juridical universities." Formerly the sons of the nobility frequented them for the purpose of studying law theoretically; they are now chiefly attended by persons who intend to practise.‡ The "Inns of Chancery" were formerly in connection with, and in subordination to the Inns of Court, but no relation now exists between them. The Inns of Court are independent institutions, and, as a rule, are accessible to every one. According to the parliamentary report of 1855, they are not corporations, but "voluntary associations." "The original institution of the Inns of Court nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies which for ages have submitted to governments in the same manner as that of other seminaries of learning. In every instance their conduct is subject to the control of the judges as visitors. From the first traces of their existence to this day, no example can be found of an interposition by the courts of Westminster Hall, proceeding according to the general law of the land; but the judges have acted as in a domestic forum. The ancient and usual redress is by appeal to the judges."§ Their revenues are derived from the contributions of the members and the rents of their vast property. The benchers or seniors are intrusted with the general management and direction of the Inn and its revenues. It is by the vote of the benchers that persons are called to the bar; if a person who has been admitted a student is refused his call, an appeal lies to the judges as visitors. Every member, prior to his call, must keep his terms, extending over three years, and either pass an examination or attend the lectures of two of the readers during one whole year. For the conduct of the legal examinations a council of legal education has been appointed, consisting of benchers belonging to all the four Inns. An examination is held three times every year, just prior to the commencement of Hilary, Trinity, and Michaelmas Terms. To the most distinguished student at each of these examinations the council awards a studentship of fifty guineas per annum for a period of three years; certificates of honour are awarded of the first, second, and third class, if the requisite proficiency be obtained. Every student, on entering his name for examination, is

* C. 49.
† 3 *Rep.*, pref.
‡ 1 Bl. 23—25.
§ Lord Mansfield.

obliged to state whether he is a candidate for honours or for the ordinary pass; candidates for the latter are subjected to a less rigid examination.

The student of the Common Law almost ignores the study of the Civil Law. Bracton and Fortescue warned their countrymen against the "foreign" law as being the groundwork of despotism, strongly urging that, according to the Roman law, whatever seemed good to the reigning prince was right, *Quod principi placuit*, whereas, by the English law, the sovereign himself was subject to the law.

The English law-student leads an existence wholly untrammelled, being merely subject to the general regulations of his "Inn;" he has no occasion to court the approval or favour of barrister or bencher, studies as much, or as little as he likes, and employs his time just as it may suit him.

Benchers have the absolute and irresponsible power of punishing a barrister guilty of misconduct, by either admonishing or rebuking him, by prohibiting him from dining in Hall, or even by "*disbarring*" *him*.

From the barristers are selected the judges. As a general rule, a barrister can only attain to the judicial dignity after achieving reputation in his profession. A certain amount of patronage is naturally brought to bear, but party-politicians are so far agreed as that the higher judicial posts shall only be assigned to lawyers of ability and repute; and, it must be confessed, that the English judges have hitherto shown themselves as truly worthy of their high position.

Since the Revolution of 1688, the judges of the Common Law Courts are only removable on an address from both Houses of Parliament. They hold office, not as formerly, *durante bene placito*, but *quamdiu bene se gesserint*, and their salaries are ascertained and established. It is treason to kill a superior judge, and it is a highly penal offence to assault or threaten him. They are protected in the upright discharge of their duties by being indemnified from answering for the consequence of the judgments given by them.

Corruption and abuse of their office are punishable with dismissal, penalties, and imprisonment. Since 1 Geo. III. c. 23, their commission no longer expires by the demise of the sovereign; nor is their confirmation in office any longer necessary. Receiving neither "Orders" nor titles in connection with their office, and betaking themselves, proverbially, but once in their lives to court, to return

thanks for their nomination, the judges are, as may be inferred, tolerably removed from the influence of the reigning authority. In contemplation of law they are protected against all encroachments of the sovereign and the ministers in the administration of justice. When the Star Chamber was abolished, the statute 16 Charles I. c. 10, enacted that neither the King nor Privy Council by writs, orders, or the like, should exercise any jurisdiction saving through the ordinary courts of law. Every judge, since the middle ages, takes the following oath:—

"That he will serve the Queen, and indifferently administer justice to all men, without respect of persons, take no bribe, give no counsel where he is a party, nor deny right to any, though the Queen, or any other, by letters, or by express words, command the contrary, etc.; and in default of duty, to be answerable to the Queen in body, land, and goods." The chief justice further adds, "that in case illegal writs should come to him he would point the same out to the Queen, and, despite the foresaid writs, will continue to administer justice." As there is in England no minister of justice, the courts themselves cannot, as occurs elsewhere, receive reminders, promptings, and questionable encomia. Hallam contends that the judges are not entirely beyond the influence of the crown;* the hope of further advancement, the flattery of the government and the ministers being still likely to bias them.† As elderly, and peace-loving men they are ever, as a matter of course, on the side of the ruling power. Lord Brougham‡ proposes that no subordinate judge should ever be made chief-justice. It might be expedient to forbid the promotion of the stipendiary judges in towns and counties to the dignity of judges of the superior courts, taking the latter, as a matter of course, from among the barristers; otherwise, the facile promotion of judges, with the attendant evils exhibited by the continent, might not be in England a phantom evil only.

The recently-created county court judges and police magistrates in towns, hold office during good behaviour.

Conflict of jurisdiction between the courts and the government departments is not possible, the courts alone having to de-

* *Const. Hist.* iii., 262.

† Jefferies himself, when the Court had no interest, was an upright judge. A judge under the influence of Government may be honest enough in the decision of private causes, yet a traitor to the public."—Junius, *First Letter to the Printer of the Public Advertiser.*

‡ *Brit. Const.* 358.

termine the limits of their own competency. As the executive functionaries of internal government are subject to the judicial, the superior court is ever able to control the acts of all these subordinates. An actual conflict of jurisdiction can only arise in England between the courts of law and the Parliament, as will be shown when treating at large of the Parliament.

On the other hand, a conflict touching the administration of justice is quite possible, as justices of the peace, judges of the county courts, and police magistrates may occasionally exceed their power. There are, besides, ecclesiastical and other courts which determine according to the Roman and Canon law; the common-law courts have, however, the right of survey, determining the limits of their jurisdiction, and preventing their judges and officers from exceeding their powers. The common-law judges have further reserved the interpretation of every act of Parliament referring to these courts.*

A very interesting insight into this kind of conflict of jurisdiction is afforded by the celebrated Braintree case.† The parish church of Braintree being very much out of repair, a monition issued from the Consistorial Court of London, commanding the churchwardens to summon a vestry for a specified day and hour, and ordering the parishioners then to attend and make a church-rate. A vestry having been convened, a rate was proposed and seconded; an amendment, in effect "that no rate be granted," was moved and seconded, and, on a show of hands, carried. The majority of the parishioners, who had negatived the granting a rate, having quitted the vestry, the churchwardens in the minority continued to remain in the vestry, and re-proposed and carried the necessary rate. The legality of the rate thus made was argued in the Consistorial Court of London, before Dr. Lushington, who *decided that the rate was invalid. From this decision an appeal* was prosecuted in the Arches Court, and the Dean of Arches, reversing the decision of Dr. Lushington, held that the rate was a legal and valid church-rate. The decision of the Arches Court was brought under the consideration of the Court of Queen's Bench upon motion for a writ of prohibition restraining the judge of the Arches Court, the churchwardens of Braintree, and all other persons from proceeding in the matter of the rate. The Queen's Bench decided that the rate was well made, and refused

* Bl., i., 84.

† Toulmin Smith, 50, 75, 594.

the writ of prohibition. A writ of error was brought on the judgment in prohibition, and the Court of Exchequer Chamber affirmed the decision of the Queen's Bench. Upon further appeal to the House of Lords that judgment was reversed, and it is now finally settled that the minority of the vestry have no power to bind the majority, and that a church-rate at common law can be legally imposed only by a majority of the parishioners duly convoked and assembled in vestry for that purpose.

The Court of Queen's Bench exercises arbitrary punitive power against those who are guilty of a "contempt of court." The punishment of such "contempt" is resorted to especially when royal writs have not been complied with. Such contempts are especially visited with punishment as violations of the commands of the superior departments. "Contempt" is, further, every illegal practice of justices of the peace, sheriffs, and magistrates, or breach of trust on the part of executors, persons holding office, governors of prisons, barristers, attorneys; finally, disobedience of jurymen, non-appearance, and disobedience of witnesses. Deviating from all rules of English procedure, the accused can only clear himself on oath of the charge of contempt and not by means of a jury. It is visited with fines, imprisonment, and occasionally with degrading punishments.* The amount of the fine, and duration of punishment, entirely depend on the will of the court; as the punishment is often resorted to for the purpose of compelling the performance of certain acts, long terms of imprisonments may frequently occur, even when the act cannot for the time being be performed by the individual whom it is sought to constrain.

When the Queen's Bench, in the name of the Queen, issues a writ of "mandamus," that is, a command which may be addressed to the highest officers of state, and to inferior courts, and corporations, or special functionaries, requiring them to do some particular thing therein specified, which appertains to their office and duty, a return is permissible, setting forth the grounds for the writ not having been complied with. Should the grounds set forth be open to question, a jury may be called to determine the facts. In the event of a favourable verdict being obtained, the party suing may obtain damages. If the return made be either insufficient in law, or false in fact, there then issues a peremptory

* Bowyer.

mandamus, to which no other return will be admitted, but a certificate of perfect obedience and due execution of the writ.

The English judge is not protected as regards the public at large, by any corporate constitution of the court. In states not endowed with liberty something may be said in favour of such corporate character of the judicial body, and especially that the weak are thereby safe guarded; it cannot be gainsaid, however, that at times the weak are wofully enough sheltered. In England, on the other hand, the judge acts singly in presence of the public, and such isolation insures the amplest security against arbitrary dealing. Whenever several judges determine a matter in common, the majority decides, but each individual judge gives the grounds of his judgment in the light of day.* In like manner when the law lords exercise their appellate jurisdiction, the common law judges deliver their opinion one after the other in open session; but sometimes present a joint opinion.† The opinion of the judges is only given at the request of the House of Lords, and by way of information.

The dignified manner of conducting law proceedings tends to create a deep impression. The judges do not sit in resplendent chambers; the localities which serve as law courts at Westminster have not an imposing aspect; but the rich official costume of the judges, and the wigs and gowns of the barristers are calculated to establish a salutary restraint between the judge, the parties interested, and the public. This outward dignity is ordinarily combined with great calm and gentleness on the part of the judge, and with an utter absence of all prejudice as against the accused in the conduct of the proceedings. Of browbeating on the part of the presiding judge and high-sounding invectives launched by the public prosecutor against the accused, there is in England no trace.‡

This has not always been the case, however, especially in times of political excitement and persecution. In the indictment against

* Bucher, *Parlamentarismus*. *Ann. Reg.*, 1852, p. 369, Miller *v.* Salomons.

† *Vide* the Bridgewater Case, *Ann. Reg.*, 1853, p. 296.

‡ Lord Campbell's address to the jury in Palmer's case:—"The case is now in your hands; and, unless upon the part of the prosecution a clear conviction has been brought to your minds of the guilt of the prisoner, it is your duty to acquit him. You are not to proceed, even upon a strong suspicion; there must be the strongest conviction in your minds that he was guilty of this offence; and if there be any reasonable doubt remaining in your minds, you will give him the benefit of that doubt."—*Ann Reg.*, 1856, vol. xcviii., 526.

On Bernard's trial the Attorney-General said: "If there be any doubt with respect to the guilt of the accused, you must acquit him."—*Ann. Reg.*, 1858, p. 318.

Sir Walter Raleigh, Sir Edward Coke began his speech for the prosecution with these words:—"Thou art the lowest and most abominable traitor that has ever lived; I am at a loss for words to mark out thy viper-like treason; I will prove that never a more detestable viper lived in the world than thou. Thou art a monster, thou hast an English face, but a Spanish heart; thou viper, I thou thee, thou traitor."* Coke behaved in the same way towards Essex. The cruel taunts with which Jeffreys harried his victims are but too well known.† Since the Revolution of 1688 prosecutors and judges alike have exhibited a becoming moderation. Somers, when solicitor-general in 1691, declared it unseemly that the representative of the Crown should strive to depict a crime as worse than it really was, and to paint it in a false light.‡ In the first half of the 18th century, however, the judges appear not to have been very considerate towards people of the lower class, as is shown by Fielding, who has portrayed the manners of his century, and in regard to the condition of things in his own country has not indulged his inventive faculty.§

If we reflect upon the legal system in relation to the general well-being, we cannot too highly appreciate the protection extended to all primary, civil, political, and corporate rights, the courts being empowered to penetrate into every sphere of public law; neither "conflict of jurisdiction," nor special privileges accorded to individuals, can ever bar the way. The true limits of the judicature are constituted, in fact, by Parliament; where the two powers come into collision, the judicature, as a rule, has mainly achieved the victory. Dwelling in the full centre of public life, the English judge is no mere pedantic bureaucrat, but in the fullest sense of the term, a magistrate of a great republic. Notwithstanding its defects, the criminal jurisprudence of England has shown itself ever the chief upholder of liberty. On two memorable occasions—the trial of the Bishops, and of Horne Tooke—twelve good men and true, have rebuked reaction and despotism,

* *State Trials.*

† D'Israeli, *Curios. Lit.*, iii.

‡ Macaulay, *Hist. of Eng.*, vol. i.

§ "The itinerant Judge Page, addressing one accused of stealing a horse, thus expresses himself:—'Well, you fellow, what have you to say? don't stand "humming and hawing," but speak out.' The fellow said he had found the horse. 'Ay,' answered the judge, 'thou art a lucky fellow, I have travelled the circuit these forty years, and never found a horse in my life; but I will tell thee what, friend, thou wast more lucky than thou didst know of, for thou didst not only find the horse, but a halter, too, I promise thee.'"—*Tom Jones.*

uttering the warning voice—"Thus far shalt thou go, and no further."

The difficulties which surround the English Chancery Court will be treated of further on, but even the common law courts are not by any means in a position to secure a speedy and cheap administration of justice.

If we scrutinize the structure of the legal system in relation to the courts which administer the law, we find first of all, an antagonism prevailing between the common law courts, and those which decide, as the Court of Chancery, on other principles. The courts of the common law are chiefly the law courts of Westminster, the new county courts, the courts of the justices of the peace and town magistrates. The courts not deciding by the common law are the ecclesiastical courts, the admiralty court, military courts, and the courts of equity. The courts of the common law at Westminster exercise authority over courts of inferior jurisdiction, as the county courts. The courts of equity are subject to the appellate jurisdiction of the Lords.

The determination of a question of fact by means of a jury, and public and oral procedure, is common to all the courts of law. The other courts cannot summon a jury, but may require the courts of law to have matters of fact determined.*

The courts of law are further divided into courts of record, and not of record. A court of record is that where the acts and judicial proceedings are enrolled in parchment, which rolls are called the records of the court, and are of such high authority that their truth is not to be called in question. For it is a settled rule, that a party cannot be received to aver as error in fact, a matter contrary to the record. If the existence of a record be denied it shall be tried by nothing but itself, that is, upon bare inspection, whether there be any such record or no. Every court of record has authority to fine and imprison for contempt of its authority. Stringent enactments protect these records against any attempt at erasure. There are four superior courts of record—the Chancery Court, so far as it is a court of equity, and the three courts of law at Westminster. Since 1 and 2 Vict. c. 94, the Master of the Rolls is the keeper of the records.

* By the 21 and 22 Vict. c. 27, the Court of Chancery is now empowered to cause damages to be assessed, or any question of fact arising in any suit or proceeding, to be tried before the court itself with a jury.

CHAPTER II.

THE COURTS OF LAW AT WESTMINSTER.

Personal presence of the King in the Courts.—Curia Regis.—The Court of Exchequer.—Itinerant Judges.—Their Commissions.—Nisi Prius.—Queen's Bench.—Crown Side.—Plea Side.—Court of Common Pleas.—Court of Exchequer—Court of Exchequer Chamber—Court of Criminal Appeal.

All jurisdiction proceeds from the king. In contemplation of law he is present in all the courts, and, for several centuries, presided over them; it is, however, no longer practicable for sovereigns to give judgment in person. It is related of Edward IV., that he presided in the King's Bench for three days successively, though only with a view to learn.* James I. was informed by the judges that he had the right to preside in the court but not to express his opinion. Coke contends, that an actual intervention of the sovereign in the deliberation of the courts would be illegal.† The chief court of the realm in Norman times was the Curia Regis, or Aula Regis, which was the supreme court of justice in the kingdom; it was likewise the groundwork of the English upper house. Of this court the sovereign himself was the judge, assisted by the grand justiciary of England, who, in his absence, acted as his deputy, and by the other great officers of state. By means of this court, which followed the king everywhere, he administered justice and matters relating to revenue.

The inconveniences of this system, although diminished by the appointment, in the reign of Henry II., of justices in eyre, were so great, that they occasioned the insertion of a clause in Magna Charta, "Communia placita non sequantur curiam nostram, sed teneantur in aliquo certo loco." The result of this clause was the erection of the "Court of Common" Pleas at Westminster. Common pleas, or suits between party and party in which the interests of the crown were not affected, instead of being carried

* Dr. Henry, *Hist. of Great Britain*, vol. v., 382.

† Bl. iii. 41. 2 *Inst.* 46.

on wherever the Curia Regis happened to be, were determined in the Court of Common Pleas at Westminster. The Curia Regis still continued to follow the king's person, and to decide the causes in which the crown was interested. Edward I., styled "the English Justinian," recast the *entire system of judicature*. He left the Court of Common Pleas in possession of the civil business of the kingdom, consigned the exclusive management of revenue matters to the Court of Exchequer, while the remnant of the jurisdiction of the Aula Regis was entrusted to the King's Bench. Up to the 11 Geo. IV. and 1 Will. IV. c. 70, an appeal lay to the King's Bench by writ of error from the Courts of Common Pleas and Exchequer. By means of certain fictions, the Courts of King's Bench and Exchequer obtained a jurisdiction in actions between subject and subject, co-extensive with that of the Common Pleas. By the 2 Will. IV. c. 29 this jurisdiction was recognized and confirmed, while the fictions by which it had been obtained were abolished. From these courts of law the special jurisdiction of the chancellor, supplying and relieving against the common law, was detached, as a "court of equity." The three courts of law sit separately at the present day at Westminster. Each court formerly possessed four judges, but that number was increased to five, by 1 Will. IV. c. 70.

These fifteen judges are at the same time itinerant judges, and from the time of the Plantagenets, and for the public convenience, determine matters of civil procedure in the provinces. For this purpose England and Wales has been apportioned into eight circuits (the Home, Midland, Oxford, Norfolk, North Wales, South Wales, Western and Northern circuits); during the vacations preceding the Easter and Michaelmas sittings at Westminster, after Hilary and Trinity terms, the judges go their half-yearly circuits, two being usually appointed for each circuit. As London and Middlesex are in proximity to the common law courts, they are not included in the circuit division; one judge always remains in London. In Lancaster and York assizes are likewise held about Christmas. Every judge is accompanied by his marshal as private secretary.

The purpose of these circuits is to determine the causes of action which have arisen in the various counties, and to effect a delivery of the jails. So long as the justices in eyre are in any *place, the authority of the local magistrates is suspended, as they*

have with them concurrent jurisdiction. The itinerant judges receive several commissions: 1st. A commission of the peace; 2nd. A commission of oyer and terminer, which is only given to two judges collectively (Breve de transgressione ad audiendum et terminandum), and is extended to the senior barristers. It is granted under the great seal, and empowers the judges to sit in judgment on all matters concerning treason, felony, robbery, murder, and crimes in general.* For London there is a special court of oyer and terminer, the "Central Criminal Court." 3rd. The commission of jail delivery, empowering the judges to try and to deliver every prisoner who shall be in jail when the judges arrive at the circuit, whenever or by whomsoever indicted, or for whatever crime committed. Thereby twice every year all the prisons are actually cleared. Occasionally extraordinary commissions of jail delivery, and of oyer and terminer, are issued.† A 4th commission enables them to hold assizes; this is the most ancient portion of their functions. During the middle ages it authorized them to determine matters of the gravest import, and a large range of cases, such as disturbances of possession which had been effected with violence (assizes of novel disseisin), and disputes touching the claims of an heir in matters of realty (mort d'ancestor). From the assizes held in regard to such contentious matters, the itinerant judges received the name of "assize judges," and their courts that of "courts of assize;" the towns in which they were held were called "towns of assize."

The statute of Westminster, 13 Edw. I. c. 30, allowed the judges to determine matters of a minor nature within their circuits, and with that intent introduced half-yearly assizes. The judges received a 5th commission of "nisi prius." By a writ called "venire facias," a sheriff was formerly required to impanel a jury at Westminster on a fixed day for the determination of any matter; but after 13 Edw. I. c. 30, the writ of venire was altered, and instead of ordering the sheriff to bring the jurors to the court at Westminster, he was ordered to bring them to Westminster on a certain day—"*Nisi prius*"—unless before that day the justices of assize came into the county, for then the statute rendered it his duty to return the jury, not to the court, but before the justices of assize. Hence judges are said to sit at *Nisi prius*.‡

* Bl. iv. 269. Crabb, 175.
† Bowyer, 389.
‡ Bl. iii. 353.

These nisi prius courts are held by a single judge in conjunction with a jury, the jury having merely to determine questions of fact. The nisi prius court generally confines its jurisdiction to civil suits of a simple nature, where the question of fact and not the question of law is in dispute, in contradistinction to the "Crown Court," which passes judgment on prisoners, and to the decisions at bar or in banco, where the judge, together with his colleagues at Westminster, determine important questions of law.* As a rule, then, only civil actions of a more important and difficult nature are determined at Westminster.† The judges hold such nisi prius sittings also at Westminster and Guildhall for London and Middlesex. A new duty is now assigned to the judges of assize; by 20 and 21 Vict. c. 77, s. 17, a petition for restitution of conjugal rights or for judicial separation under that Act may be made by either a husband or wife to the judge of assize at the assizes held for the county in which the husband or wife reside or last resided together. The plaintiff in any personal action may commence his suit in either of the three superior courts at Westminster.

The Queen's Bench, as successor of the old "Aula Regis," takes rank as the highest court of the common law. Under Cromwell it was called "The Upper Bench." It consists of a chief justice and four puisne judges. The chief justice is the supreme judge of the common law. Since 1806 he has no longer a seat in the cabinet. These five judges are the highest "conservators of the peace." The lord chief justice of the Queen's Bench is the principal coroner in the kingdom, and may, if he pleases, exercise the jurisdiction of a coroner in any part of the realm. The Queen's Bench possesses at this day the criminal jurisdiction of the ancient "Aula Regis," and also a superintending power over all the inferior tribunals in the kingdom, commanding them by a prerogative writ of *mandamus* to perform what the law requires; by writ of *prohibition* to abstain from what it prohibits; removing their proceedings into itself by *certiorari*; and reversing them by writ of error or false judgment.‡ The right of issuing writs of *habeas corpus* pertains to all the courts of law, as well as to the Lord Chancellor. This court takes cognizance

* Kerr's Blackstone, 1857, vol. iii., 378.

† Crabb, 174. As to the import of Nisi Prius, *vide* the outline of an action at law. App. to *Holthouse's Law Dict.* 441.

‡ Smith's *Action at Law.*

both of civil and criminal matters; of the one on the "Plea," and of the other on the "Crown" side of the court. The powers of its judges are described by Bracton; in that they are judges, "capitales, generales, perpetui, et majores a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores."

The sovereign might, until 19 and 20 Vict. c. 74 (repealing 13 Edw. I. c. 41, art. Super Charters) command the King's Bench still to accompany his person; and, on one occasion, Edward I. commanded the Court of King's Bench to follow him to Scotland, and it actually sat there for some time at Roxburgh.*

This court acquired jurisdiction over purely civil causes by a series of fictions; for the Queen's Bench declared that a person in the custody of its marshal was before it for every purpose; and as actions of trespass were considered to be still within its jurisdiction, being of a criminal nature, and a fine payable to the crown by the defendant, the plaintiff was permitted to issue a writ charging the defendant with a trespass, which, being then a cause for which a man might be arrested, he was taken and committed to the Marshalsea, and, being once there, the plaintiff might declare against him for any cause of action.†

The Court of Common Pleas, or "Court of Common Bench," consists of a chief justice, and four puisne judges. Conformably with Magna Charta, it must be held at Westminster. It has no penal jurisdiction, but is the chief civil court, having, at its first establishment, exclusive jurisdiction in personal actions. This court has also a special cognizance of real actions, which were all abolished by the 3 and 4 Will. c. 27, except writ of right of dower, dower, and quare impedit. By the Common Law Procedure Act of 1860, these actions are to be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action. The plaintiff, however, must endorse on the writ an intention to declare in dower, or quare impedit, as the case may be. The certificates of acknowledgment by married women, under the Act for the Abolition of Fines and Recoveries (3 and 4 Will. IV., c. 74), with the affidavits verifying them, are filed as records in this court.‡ It is also the court of appeal from the decisions of revising barristers.

* Smith's *Action at Law.*
† *Ibid.*
‡ Broom's *Commentaries*, p. 42.

The Court of Exchequer consists of a chief baron and four barons. Until 5 Vict. c. 5, the same jurisdiction was exercised, and the same system of redress pursued on the equity side of the Exchequer as in the Court of Chancery, save only in respect of some few matters peculiar to each tribunal.*

It still retains a peculiar and exclusive cognizance of matters of revenue, *e. g.*, of complaints arising out of alleged infringements of the laws regulating the customs and excise; of matters involving the payment of stamp or other duties to government; or where, on any issue raised between private parties, the title of the crown is brought in question, or the interests of the revenue are threatened.†

As in the case of the Queen's Bench, this court also obtained jurisdiction in purely civil actions by means of a fiction. It permitted the plaintiff to state, in his writ and declaration, that he was a debtor to the king, and that, by reason of the defendant's conduct, he was the less able to pay his debts; although, in the *majority of cases*, these averments were wholly false, the court would not allow them to be traversed. This fiction is now dispensed with, and the Court of Exchequer is an ordinary civil court in actions of a personal nature.

The Court of Exchequer Chamber is the appeal court in civil matters. By statute 1 Will. IV. c. 70, error upon any judgment of the Queen's Bench, Common Pleas, or Exchequer, can be brought only before the judges, or judges and barons, as the case may be, of the other two courts in the Exchequer Chamber. That on error from the Exchequer, the appeal will be heard before the judges of the Common Pleas and Queen's Bench. By the Common Law Procedure Act of 1854, s. 68—74, an action of mandamus is given to compel the performance of certain duties, in the fulfilment of which the plaintiff is personally interested.‡ The Court of Queen's Bench has decided that an action of mandamus will only lie where formerly the court would have granted the prerogative writ of mandamus. It would seem that an action of mandamus can only be brought for the performance of a public duty in which the plaintiff is personally interested. From the Court of Exchequer Chamber error again lies to the House of Lords, whose decision is final.

* *Ibid*, p. 30.
† Broom's *Commentaries*, p. 42.
‡ Benson *v.* Paul, 6 E. and B., 278; Norris *v.* Irish and Co., 8 E. & B., 512.

In the Exchequer Chamber also sits the newly created Court of Criminal Appeal. This must consist of at least five common law judges, including either a chief justice or a chief baron. Occasionally, also, all the judges sit as a Court of Appeal. At the trial at the Assizes or Quarter Sessions, the court is now empowered, by 11 and 12 Vict. c. 78, to reserve for the Court of Criminal Appeal any question of law which it finds too difficult for its determination. The question is stated in the form of a special case for the consideration of the judges of the Court of Appeal.

CHAPTER III.

THE ANCIENT MINOR LOCAL COURTS.

Local Courts.—Court of Pié Poudre.—Jurisdiction of the Cinque Ports.—Court of Chivalry.—Stannary Court.—Marshalsea and Palace Court.

THE great centralization of the civil jurisdiction necessitated, at an early period, a recurrence to the co-operation of the local courts. The civil jurisdiction of the sheriff which here anciently prevailed, and the civil and penal jurisdiction of justices of the peace, will be described when treating of local government.

There existed, at an early period, a number of subordinate courts which have now declined, or been abolished, but which should not be passed over in completing our sketch of the English judicial system.

1. The Court of Pié Poudre (*Curia pedis pulverisati*), so called because they were held in the summer time, and the respective parties came there with travel-stained shoon. It exercised summary jurisdiction in regard to the police of the markets and of trade. As a court of jurisdiction it is now obsolete.*

2. The special jurisdiction of the Cinque Ports (Dover, Sandwich, Romney, Hastings, and Hythe, to which Winchelsea and Rye have been added), was conducted by the mayor and jurats. The ordinary writs of the sovereign had no validity herein.† By the 18 and 19 Vict. c 48, the cinque ports have lost their civil jurisdiction.

3. The old Knights' Court, or Court of Chivalry, is obsolete. It was held by the lord high constable, and determined concerning injuries to life and limb on occasion of jousts and tournaments. Since the time of Strafford, the office and jurisdiction of lord high constable has fallen into decay.‡

4. The Stannary Court of Devonshire and Cornwall (called also the Cornwall Parliament) is still in existence.§ It is founded on an ancient privilege granted to the workers in the tin-mines,

* Cowel, *Law Dict.*
† Bl. ii. 79.
‡ Bowyer, 328.
§ Smollett's *Hist. of Eng.*, 1748.

to sue and be sued in their own court, that they may not be drawn from their business by attending their law-suits in other courts. In matters which concern land, life, and limb, it has no jurisdiction. It is a court of record, and is held before a judge called "the vice-warden."* From this court appeal lies to the lord warden himself, assisted by two or more assessors, members of the Judicial Committee of the Privy Council, or judges of the High Court of Chancery or Court of Common Law at Westminster; and from the lord warden a final appeal to the Judicial Committee. The jurisdiction of this court has been newly regulated by 11 and 12 Vict. c. 83, and 18 and 19 Vict. c. 32.

5. The Court of Marshalsea formerly held plea of all trespasses committed within verge of "the Court," where one of the parties was of the Royal Household; and of all debts and contracts, where both were of that establishment.

6. The Palace Court at Westminster held plea of all personal actions arising within twelve miles of the Palace at Whitehall. Both these courts were abolished by 12 and 13 Vict. c. 101.

* Bl. iii., 79, 80; Kerr's Blackstone, vol. iii., 85.

CHAPTER IV.

THE NEWLY CREATED COURTS.

Divorce Court.—Earlier Legislation concerning Marriage.—Court of Probate.—Wills formerly in the Ecclesiastical Courts.—Administration.—Custody of Wills.—Secularization of the Laws concerning Wills.—Central Criminal Court.—Extent of its Jurisdiction.

1. THE Court of Divorce and matrimonial causes was established by 20 and 21 Vict. c. 85. Matrimonial causes had previously pertained to the Ecclesiastical and to the Temporal courts. Prior to this act there were two kinds of divorce, the one *a vinculo matrimonii*, the other *a mensâ et thoro*; the divorce *a vinculo* was founded on certain canonical disabilities, and could be obtained from the Ecclesiastical Court; by the sentence the marriage was declared unlawful *ab initio*; the issue, if any, became bastards, and the parties could contract another marriage. Divorce *a mensâ et thoro* was granted where the marriage was lawful *ab initio*, but for some matters which had since occurred it became improper for the parties to live together; as, where the husband was guilty of gross cruelty, or either of the parties had committed adultery. For any case, supervenient upon the marriage, divorce *a vinculo* could not be obtained, yet, in the case of adultery it was frequently granted by private Act of Parliament. This mode of procedure was, of course, so expensive, that only wealthy parties could take advantage of it.

The new Divorce Act provides in lieu of the divorce *a mensâ et thoro* a decree of judicial separation, on the petition of either husband or wife. This decree may be obtained on the ground of adultery or cruelty, or desertion without cause for two years and upwards. A dissolution of the marriage may be procured on the petition of either husband or wife, upon the ground, where the husband is petitioner, that since the marriage, his wife has been guilty of adultery; where the wife is the petitioner, that her husband has, since the marriage, been guilty of incestuous adultery, or bigamy with adultery, or rape, or adultery, coupled

with cruelty. By 22 and 23 Vict. c. 60, in addition to the judges appointed by the Act of 1856,* all the judges, for the time being, of the Court of Queen's Bench, Common Pleas, and Exchequer, respectively, are made judges of the Divorce Court.

The judge of the Court of Probate is styled the Judge Ordinary, and by 20 and 21 Vict. c. 85, was empowered, either alone, or with one or more of the judges of the said court, to hear and determine all matters falling within its jurisdiction, except petitions for the dissolving of, or annulling marriages, and applications for new trials of issues before a jury. These excepted cases are to be heard and determined by three or more of the judges for the said court, of whom the Judge Ordinary shall be one. By the 22 and 23 Vict. c. 60, it is enacted that the Judge Ordinary shall have precedence in the said court next after the Lord Chief Baron of the Exchequer. By 23 and 24 Vict., c. 144, the Judge Ordinary may now alone hear and determine all matters arising within the Court, which formerly could only have been heard and determined before the full court. If deemed expedient the Judge Ordinary may call in the assistance of one of the other judges of the court; he may also, when he thinks it expedient, direct that any such matters, aforesaid, shall be heard before the full court. When exercising the jurisdiction given by this Act, an appeal lies to the full court from the decision of the Judge Ordinary, within fourteen days from the pronouncing thereof. Every decree for a divorce shall, in the first instance, be a decree *Nisi*, not to be made absolute till after the expiration of not less than three months from the pronouncing thereof. During that period any person is at liberty to show cause why the said decree should not be made absolute, by reason of the same having been obtained by collusion, or by reason of material facts not having been brought before the court. Either party dissatisfied with the decision of the court on any petition for dissolution of marriage, or for nullity of marriage may, within three months from the pronouncing thereof, appeal therefrom to the House of Lords, if Parliament be sitting; or, if Parliament be not sitting at the end of such three months, then within fourteen days next after its meeting. The

* By this Act the Lord Chancellor, the Lord Chief Justice of the Queen's Bench, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Senior Puisne Judge for the time being, in each of the three last-mentioned courts, and the Judge Ordinary, were appointed Judges of the Divorce Court (20 and 21 Vict. c. 85, s. 8).

Divorce Court is empowered, by 22 and 23 Vict. c. 60, to regulate the allowance to be made for the children, and also, on divorce being decreed, to take measures for their benefit, and consign them to the guardianship of the Court of Chancery.

In the year 1861 there were 187 petitions filed in the Divorce Court for dissolution of marriage, and 49 for judicial separation; 249 judgments were given in the year, but, unfortunately, the return omits to state their nature, so that it is not possible to determine in how many cases man and wife were put asunder. The applications for dissolution of marriage were 244 in 1858, 211 in 1859, 210 in 1860, and 187 in 1861.

2. In the year 1857, jurisdiction, in respect of wills, was withdrawn from the Ecclesiastical Courts, and by 20 and 21 Vict. c. 77, transferred to a new "temporal" court—"the Court of Probate." That the Ecclessiastical Courts should so long have had the control of matters testamentary, was based on historical grounds. To these courts, during the middle ages, were transferred all questions of law relating to matters of religion and conscience.* They received jurisdiction over wills on the ground that their exact accomplishment was a matter of conscience and duty; and further, because under every will the Church ordinarily obtained some benefaction.† The Councils of the Church had repeatedly recommended orphans, widows, and other helpless persons to the protection of the bishops. As the Lord Chancellor was generally an ecclesiastic, he received concurrent jurisdiction with the Ecclesiastical Courts in matters testamentary. The ecclesiastical jurisdiction could only, as a matter of course, extend to the personal property, for the real property, by reason of the feudal bond, was withdrawn from free disposition by will. The power of bequeathing did not extend originally to all a man's personal estate. It appears from Glanville, who wrote in the reign of Henry II., that a man's goods were to be divided into three equal parts, one third passed to his heirs or lineal descendants, another to his wife, and of the rest he could dispose by his will; the shares of the wife and children were called their reasonable parts. If he did not make such a disposition he was said to die intestate, and the king became entitled; afterwards the Crown granted the goods of an intestate to the "Ordinary," who was, generally speaking, the

* Walter, *Kirchenrecht*, sec. 189.

† C. iii. 6, 17, X. *de testam* (3, 26.) Richter, *Kirchenrecht*, sec. 357.

bishop of the diocese, and he was bound to distribute the intestate's goods in charity to the poor, or to pious uses. Having thus the administration of an intestate's effects, he acquired jurisdiction in the matter of wills, as it was thought just and necessary to prove to the satisfaction of the Ordinary, the will whereby his right to the administration should be ousted. By 13 Ed. I. c. 19, it was enacted that the Ordinary should pay the debts of the intestates, so far as the goods would extend; the residue, however, after payment of debts still remained in the hands of the Ordinary, to be applied in the manner he should think best; and, therefore, by 31 Ed. III., c. 11, the Ordinary was bound, on intestacy, to depute the administration to the next of kin of the deceased to whom "letters of administration," were granted.

The Ecclesiastical Courts thus gradually obtained the "Probate" of wills, the granting of "administration," and the decision of questions relative to legacies wherein they had concurrent jurisdiction with the Court of Chancery. From the Consistory and Prerogative Courts and Court of Arches appeal lay to the Privy Council. The custody of wills is now committed to the Court of Probate.

Testamentary legislation has now become secularised by the "act to amend the law relating to probates and letters of administration in England." A judge of similar rank with the puisne judges of the Common Law Courts, and who is likewise judge of matrimonial causes, presides over this court, which is a "court of record." On him depends the probate of wills and the granting of administration. Questions touching the validity of wills likewise pertain to this court, which can have disputed matters of fact determined by means of a jury. As subordinate officers there are a principal registrar, three registrars, two record-keepers, and a sealer; forty sub-districts, managed respectively, by a district-registrar, having the custody of wills, and power to allow probate, serve to decentralize the system. In disputed matters, under £300, it is open to the parties interested to recur either to the Court of Probate or to the County Court. From the latter, appeal lies to the Court of Probate. The judge of this court may transfer matters of trifling import to the County Court for decision, appeal lies from the Court of Probate to the House of Lords.

The old Common Law, by which a testator could only dispose

of one-third of his personal goods, has been long since abolished, and a man may devise the whole of his chattels as freely as he formerly could his third part. By the 32 Henry VIII. c. 1, owners of land were empowered to give, by will, the whole of their lands held in free and common socage, and two-thirds of their lands held by knight-service; but, as by the 12 Chas. I. c. 24, military tenures were abolished, a testator has since been enabled to dispose of the whole of his lands; and the execution of a will of land, and a will of personalty is now precisely the same. Every will must be signed in the presence of, and attested by, two witnesses.

3. The Insolvency Court has now ceased to exist, as the distinction between insolvency and bankruptcy is no longer recognised by the English law.

4. The Central Criminal Court for London was established by 4 and 5 Will. IV. c. 36. To this court the following receive commissions:—the Lord Mayor, who, in all commissions of *oyer* and *terminer* and jail-delivery in London, according to the privileges of the city, is to preside there, but never pronounce sentence; the Lord Chancellor; the Lord Keeper of the Great Seal; the fifteen judges at Westminster; the Judge of the Admiralty Court; the Dean of Arches; the aldermen; the Recorder; the Common-Serjeant, and the judges of the Sheriffs's Court at London, and since 5 Vict. c. 5, the Vice-Chancellors. Under the commission, may also be included other persons who have been either Lord Chancellor, Lord Keeper of the Great Seal, or judges at Westminster; these judges have a commission of *oyer* and *terminer* and jail-delivery, and, in consequence thereof, may pass sentence in regard to all offences and crimes committed in London or Middlesex, and certain portions of Essex, Kent, and Surrey, and also for felonies and misdemeanours committed on the high seas. The court is further empowered to summon before it, all matters which are actually being proceeded with before justices of the peace and police magistrates. The district comprises a circuit of ten English miles round St. Paul's. By 19 and 20 Vict. c. 16, persons charged with offences committed out of the jurisdiction of the circuit may, nevertheless, be ordered by the Queen's Bench to be there tried if it shall appear to the latter court expedient so to do. A trial on an indictment which would, in the ordinary course, be held in the Central Criminal Court may, by

writ of *certiorari*, be removed into the Queen's Bench, when that court deems it expedient. The court sits twelve times a year at the commencement of every month.*

'5. Since 1846 the civil jurisdiction has, by means of the new County Courts, been decentralized to a certain extent by 9 and 10 Vict. c. 95, and 13 and 14 Vict. c. 61, and 19 and 20 Vict. c. 108. For this purpose England and Wales have been apportioned into certain districts for the purpose of holding courts therein, the districts being divided in unequal numbers amongst the sixty County Court judges. By 21 and 22 Vict., c. 74, the Lord Chancellor has power to alter and re-distribute the districts of the courts. Until Parliament shall otherwise direct, the judges are not to exceed sixty in number; two persons may be appointed the judges of one or more districts.

These judges are chosen from among barristers of seven years' standing, who must, however, relinquish their practice; they are appointed by the Lord Chancellor, the Home Secretary co-operating in the nomination; though appointed for life, the Lord Chancellor may, on the ground of misbehaviour or incapacity dismiss them. They are subject to the directions of the Lord Chancellor in so far as these are not contrary to law. They receive a salary ranging from £1200 to £1500, and the registrars, who must be attornies-at-law, have salaries which range from £120, where the annual number of plaints does not exceed 200, with an additional £5 for every additional twenty-five plaints.

The court has jurisdiction in all personal actions where the debt or damage claimed is not more than £50; but not, except by agreement of the parties in any action of ejectment, or any action in which the title to hereditaments, or to any toll or franchise is in question, nor in any action for malicious prosecution, libel or slander, seduction, or breach of promise of marriage. If the object of the suit amounts in value to more than £5, the plaintiff or defendant may require a jury of five to be summoned. In actions under £5 the judge may, in his discretion, on application of either of the parties, order that the action be tried by a jury. By 19 and 20 Vict. c. 108, if both plaintiff and defendant agree that the court shall have power to try the action, if it be one which may be brought in a superior court, the court will have

* Bowyer, 331.

jurisdiction; and even when the subject matter exceeds in value £50. The jurisdiction of the court also extends to the recovery of any demand not exceeding £50, which is the whole or part of the unliquidated balance of a partnership account, or the amount of a distributive share under an intestacy, or of any legacy under a will.

By section 3 of the new Bankruptcy Act, the judge of every County Court is to have, and exercise within his district the jurisdiction and authority of the Commissioners of the District Court of Bankruptcy.

By 22 and 23 Vict. c. 57, imprisonment on account of small debts can only take place when the debtor has acted fraudulently.

The Crown can also render cases of fraud upon the revenue, in regard to matters amounting to £100, and questions touching the payment of succession-duty amounting to £50, determinable in these courts.

They hear and determine disputes arising in the management of friendly societies. Finally, the superior courts uphold them in cases of arrest and legal process. The fees payable in these courts are very low, judging by the ordinary English scale.

If either party be dissatisfied with the direction of the court in point of law, or upon the admission or rejection of any evidence in actions where the sum sought to be recovered is above £20, he may appeal to any of the superior courts of Common Law. The action of replevin was formerly commenced in the Sheriff's Court, but now, by 9 and 10 Vict., c. 95, all actions of replevin are to be brought in one of the new County Courts. By 19 and 20 Vict. c. 108, the powers of the Sheriff with respect to the action of replevin, ceased, and the Registrar of the County Court is empowered to grant replevins. The plaintiff may now commence his action either in the County Court or in any of the superior courts.

CHAPTER V.

BARRISTERS AND ATTORNEYS.

Barristers.—Esprit de Corps.—Special Pleaders.—Conveyancers.—Attorneys.—Solicitors.—Notaries.—Doctors' Commons.

Barristers (*Apprenticii ad legem*) are admitted, after a considerable degree of study, or, at least, of standing in the Inns of Court, to plead in all the courts. A barrister may be appointed serjeant-at-law,* which only takes place when the barrister has obtained a somewhat extensive practice. The dignity of serjeant-at-law, in Fortescue's time, could only be attained after sixteen years' standing; but no precise time is now necessary to qualify them. The serjeants still constitute a smaller Inn, to which the Judges of the Courts of Law at Westminster are always admitted before being advanced to the Bench, in consideration of which they address the serjeants with the appellation of "Brother."† In 1856, the number of serjeants-at-law amounted only to 28, out of 3816 barristers.‡ Their privilege of pleading exclusively in the Court of Common Pleas has been recently abolished.

From the degree of barristers, or serjeants-at-law, some are usually selected to be Her Majesty's Counsel. The first invested with the dignity was Sir Francis Bacon, who was made so *honoris causa*, without either patent or fee. The first of the modern order (who are sworn servants of the crown, with a standing salary) was Sir Francis North, afterwards Lord Keeper to Charles II. These counsel must not be employed in any cause against the crown without special licence.

Barristers, or serjeants, are known by the general name of "Counsel." A strong *esprit de corps* and gentlemanly feeling prevails amongst them. "The people of this country daily intrust their dearest interests, their lives, their liberties, their characters, their memories, to our keeping and protection, and it is of the last importance to them that they should be satisfied that the degree of barrister-at-law involves a certificate of honour

* As to the privileges and nature of the degree of serjeant-at-law, *vide* the learned treatise, *Serviens ad legem*, the contents of which were compiled by Mr. E. Griffith, late Master of the Common Pleas, for the use of Sir Thomas Wild.

† Bowyer, 330.

‡ Gneist, i. 503.

and of character."* A counsel can maintain no action for his fees, which are given, not as a salary, but as a gratuity. The compensation is not made to depend on the event of the cause, and as the barrister cannot demand it without doing wrong to his reputation, it is expected that all fees should be paid when the briefs are delivered.

The position of the barrister is intimately allied with the public life of England. From the fact of very few lawyers shining in Parliament, Royer Collard came to the conclusion that "plus on est avocat, moins on est sénateur."†

To encourage due freedom of speech, it has been held that a counsel is not answerable for any matter by him spoken relative to the cause in hand; he is not liable to an action for words of slander, if they are pertinent to the subject-matter of discussion; nor can an action be maintained against him for negligence or unskilfulness.

"Pleadings" of a complicated nature are prepared by special pleaders, who are not called to the bar, and cannot, therefore, appear in court.

"Conveyancers" are those who employ themselves solely in the preparation of deeds or assurances of property.

Counsel receive "instructions" from attorneys, with whom alone the public comes directly into contact. The lucrative portion of legal business is almost wholly under their control. In 1856 there were in London 2993 attorneys, and in the provinces 6686.‡ Since 4 Hen. IV. c. 18, they must be enrolled attorneys of one of the superior courts, and, before admission, must pass an examination; and none are "admitted" excepting those who are of good repute and sufficient learning, and who have taken the required oath. By 6 and 7 Vict. c. 73, the Common Law Judges and the Master of the Rolls are appointed their examiners. In the Equity Courts, attorneys are known by the name of "solicitors." They are educated in a purely business-like manner, and are essentially business men. A certificate from a civil or equity judge allows them to practise in all the courts. From the fact of unworthy individuals having occasionally insinuated themselves into their ranks, they have of late years been subjected to stricter

* Sergeant Shee, in the case of Hudson *v.* Slade.

† Royer Collard, *Lettres sur la Cour de la Chancellerie*, Paris, 1830.

‡ Gneist, i. 508.

discipline and control. The Common Law Judges may, after summary hearing, strike them off the rolls for fraud, corruption, for mistakes committed in regard to the clear precepts of law, and for offences against ordinary plain-dealing. Attorneys cannot plead before the courts of law, but they may before the county courts, justices of the peace, and in the police courts. Since 22 and 23 Vict. c. 6, they have the right of pleading before the Admiralty Court equally with serjeants, barristers, and solicitors. They prepare the greater part of the briefs, conduct the ordinary proceedings connected with suits, and act as notaries and agents.

There are, moreover, special notaries-public, who authenticate deeds and writings, but principally in mercantile affairs, as to make protests of bills of exchange, etc. They must have studied for seven years with some established notary, and receive their nomination from the first "official" of the Archbishop of Canterbury, "the Master of Faculties."

Proctors in the Ecclesiastical Courts discharge duties similar to those of solicitors and attorneys in other courts. In order to entitle a person to be admitted a proctor to practise in the Court of Arches, it is required that he shall have served a clerkship of seven years, under articles, with one of the thirty-four senior proctors, who must be of five years' standing. The aspirant is then admitted a notary by a faculty from the Archbishop of Canterbury; a petition being presented, signed by three advocates and three proctors, that the party applying has served the full *term; thereupon the Archbishop issues his fiat, and a commission* is directed to the Dean of the Arches, by whom the party is admitted under the title of supernumerary.

"The College of Doctors of Laws exercent in the Ecclesiastical and Admiralty Courts," incorporated in 1768, consists of those Doctors of Laws who, having regularly taken that degree in either of the Universities of Oxford or Cambridge, have been admitted advocates in pursuance of the rescript of the Archbishop of Canterbury, and have been elected Fellows of the College in the manner prescribed by the Charter. "After a year of silence, during which they are supposed to learn the practice of the Courts, they become exclusively qualified to perform all the functions of an advocate in their own tribunals, and may, indeed, be heard in any of the Queen's Courts."*

* Bowyer, 330.

CHAPTER VI.

CROWN PROSECUTIONS AND PROCEEDINGS.

Mutual Warranty.—Indictment.—Scotch System.—Law Officers,—Attorney-General,—Solicitor-General.—Grand Jury.—Attempts to Set it Aside.—Petty Jury.—Juror-List.—The Old Witness Jury.—Trial Jury.—Question of Fact and Question of Law—No Inquisitorial Procedure.—Treason Laws.—Safeguards in the event of Prosecution for Treason.

THE Saxon polity was based upon the principle of mutual warranty for the maintenance of the peace; every community being bound to prosecute the peace-breaker, and a section of the members of such community to convict or acquit the party accused. The conservator of the peace was the sovereign himself. The Norman kings and the Plantagenets imparted fresh energy to this obligation of the counties and municipalities to maintain the peace; whoever allowed common offenders of a certain class, and especially thieves, to escape, or failed to denounce certain crimes, was liable to punishment.

This great principle, that every single member of the community is bound to take measures for the preservation of right and law, rendered the organization of a special class of criminal prosecutors wholly superfluous.*

So with the local governments, which are empowered to act, as being delegated by the sovereign. In the case of public crimes, whoever comes forward as prosecutor is regarded as representing the sovereign, and this principle of public prosecution, by means of private persons, is one of the main foundations of the self-government system while endued with vitality; the old system was found all-sufficing.

The duty of denouncing and bearing witness is, consequently, more widely spread in England than in any other country, every-

* "Aut certus apparet accusator aut non. Si nullus apparet certus accusator sed fama solummodo publica accusat . . . deinde autem per multas et varias inquisitiones et interrogationes, coram justiciis (sed per juratos) faciendas inquiretur rei veritas"—*Glanvilla de Legibus Angliæ*, lib. xiv., c 1

one who is guilty of a concealment of treason* or felony† being liable to punishment.

A recent instance has sufficiently demonstrated that even the son is bound to bear witness against his own father.' The prosecution of the offender is facilitated by the authority of the magistrate, who binds over the informer and police officials to prosecute and give evidence before the grand jury. The person giving information there appears as witness to the charge, and counsel are appointed to conduct the prosecution. Since 1846, certain costs and expenses are secured out of the Government funds.

There lies an *indirect obligation to prosecute, in the fact, that* no one can bring a civil action arising out of a felony before the criminal prosecution has been proceeded with.‡ The informant occasionally comes to a compromise with a wealthy offender. All these mischiefs, however, are not of so urgent a nature as to necessitate the introduction of a state system for the prosecution of all crimes, a measure, the perilous consequences of which, few Englishmen should overlook.§

'But even' Lord Brougham and Lord Campbell, the upholders of the organization prevailing on the continent, have expressed themselves energetically against a system which should be made to depend on the change of parties, and should be armed with a complete monopoly of prosecution. They merely contend for the adoption of a public prosecutor after the Scotch mode of procedure; although, in troublous times, it has been found to afford less security than the English system. In Scotland, the sheriff names for each district a procurator-fiscal; in the larger towns he

* Bl. iv., 119, *et seq.*

† Felony is every species of crime which, at Common Law, entailed the forfeiture of lands and chattels.

‡ Gneist, ii., 416.

§ NOTE OF THE GERMAN AUTHOR TO THE ENGLISH EDITION.—The public prosecutor—Staatsanwalt—is in Prussia an official subordinate to the Minister of Justice. Save in certain slight misdemeanors no one has a right to institute proceedings against a criminal. Every one wishful to denounce a crime must apply to the public prosecutor; if the latter refuse to allow the prosecution, he may address himself to the superior prosecutor at the *Court of Appeal, and next to the minister.* Should the minister refuse the prosecution there is no remedy. On the other hand, every public prosecutor is obliged to obey the orders of his superiors, he is subject to dismissal at any moment, and may be placed on half-pay by order of the Minister of Justice; in times of political re-action this system has, in the highest degree, been a weapon of party Government. Great criminals, in high office, have remained unprosecuted. The smallest public offence committed by one of the opposition has been prosecuted with the utmost rigour. Englishmen should be on their guard against introducing an institution which is regarded by us as wholly incompatible with civil liberty.

is elected; above him are the Lord-Advocate and his representative. *Private prosecution is permitted but rarely*, as the state-prosecutors in Scotland have no need to withhold the right to prosecute out of "higher considerations."

The Crown also has the right of prosecuting crimes and offences by its law-officers, who usually proceed by way of indictment. Those law-officers who, together with the Lord-Advocate, change with the cabinet, are:—

I. The Attorney-General, who exhibits informations and prosecutes for the Crown in matters criminal of a serious nature. He is ordinarily represented by a barrister. In cases of a minor nature in which the crown is interested, such as riot, libel, defamation of the ministers, etc., he may proceed, without intervention of the grand jury, by way of "criminal information." He and his special substitute—II. the Solicitor-General—give their assent to the granting of charters, municipal rights, and patents. For decisions based upon the Canon and Roman laws there is appointed—III.—a Queen's Advocate.

In Scotland the chief law-officer of the Crown is the Lord-Advocate, together with whom is the Solicitor-General. An Attorney and Solicitor-General are also appointed for Ireland. The law-officers of the Crown, both for England, Scotland, and Ireland *generally* have seats in Parliament, and *change* with the ministry.

The determination of *questions of fact* at the trial of all crimes and the majority of offences, and the determination of claims for damages in all civil suits, *results*, in England, from a section of the community, viz., the jury. The prosecution of a crime still takes place on the ground of the old folkmote, for a statute of Ethelred decreed, that twelve thanes should bring the wrong-doers before the trial-court.* The prosecution of an offender is either on a previous finding of the fact by an inquest or grand jury, or, without such previous finding; a presentment, properly speaking, is the notice taken by the grand jury of any offence, from their own knowledge or observation, without any bill of indictment laid before them. An indictment is a written accusation, of one or more persons, of a crime or misdemeanour, preferred to, and presented upon oath, by a grand jury. The

* Hallam, *M. A.* ii, 386.

presiding judge generally delivers to the grand jury a charge instructing them in the nature of their inquiry, and directing them in their treatment of the more difficult cases; the grand jury then withdraw and return the indictments which are preferred to them in the name of the Queen, but, at the suit of any private prosecutor; evidence is given on behalf of the prosecution only, the grand jury being appointed not to determine the guilt of the accused, but whether there is such a *prima facie* case as will justify the putting of the accused on his defence.*

The attorney of the prosecution is regarded in this court as the King's serjeant, *that is as representing the sovereign.*† If the prosecutor have no attorney, an officer of the court—on the circuits, a "clerk of indictments;" and at the quarter sessions, the "clerk of the peace,"—draws up the bill of indictment.

The grand jury is constituted at the Quarter Sessions, out of the same elements as those from which the petty jury is formed. At courts of oyer and terminer and jail delivery their qualification is not absolutely defined by law; they ought to be freeholders, but to what amount is uncertain; however, they are usually gentlemen of the best figure in the county.‡ By law, only the resident freeholders of the county are to be summoned to the grand jury. It is usual to select them from among the justices of the peace and men of the best standing. The grand jury consists of twelve at the least, but not more than twenty-three, persons, and, after a summary hearing of the grounds of the charge, must make the bill of indictment their own, that is, "find a true bill." Then only can the proceedings be allowed before the petty jury.

The existence of the grand jury, as an institution, has been threatened in England, especially in London. The leading organs of the press have urged the abolition of such "mediæval blunders." It would be difficult to estimate the consequences which might result from such an attempt. The reasoning of modern English legislators is very instructive in this particular. In London, self-government, so far as justices of the peace are concerned, has disappeared; their functions, with the exception of the city, being now discharged by stipendiary magistrates. A bill recently

* Stephen's *Blackstone*, vol. iv, 421, 422.

† Biener.

‡ *Stephen's Blackstone*, vol. iv., 422.

before parliament proposed the withdrawal of the grand jury from London. The Home Secretary supported the bill, on the ground that, as in London duly qualified assistant-judges had been nominated, the grand jury had become superfluous! This reasoning would not apply where persons are committed to trial by justices of the peace, who often commit upon the slightest possible evidence, and persons so committed might, without the intervention of the grand jury be imperilled, by being put immediately upon their trial. It would, on the whole, be better to preserve the grand jury, as one deviation from the principles of freedom would *speedily involve another*.

The petty jury is summoned, in England, for the determination of all matters in dispute, for coroners' inquests, the assessment of damages, and in cases of expropriation.* The jurors are either common or special jurors, and are returned by the sheriff in London and Middlesex in obedience to a precept issued by a judge; in the country, in obedience to a precept issued by the Judges of Assize. The qualifications of jurymen are regulated by the stat. 6 Geo. IV. c. 50, which directs that every man between the ages of 21 and 60 who shall have £10 a-year in land and tenements of freehold, copyhold, or customary tenure, or in rents, issuing out of such tenements in fee-simple, fee-tail, or for life; or £20 a-year in leasehold, held for 21 years or any longer term, or any term determinable upon a life or lives, or being a householder, shall be rated to the poor-rate, or, in Middlesex, to the house-duty, on a value of not less than £30, shall be qualified and liable to serve on juries in the superior courts at Westminster and in all courts of assize, *nisi prius*, etc., such issue being triable in the county where he resides.†

No person who is not a natural-born subject of the king is qualified to serve on juries, excepting *de medietate linguæ*. A person who has been attainted of treason or felony, or convicted of any infamous crime, is not qualified.

The special jurors are selected from the special jurors'-list kept by the sheriff, consisting of all persons described as of the degree of esquire or upwards, or a banker or merchant.

From the duty to serve on the jury the following are exempt:—peers, judges, practising barristers and solicitors, coro-

* Bowyer, 428. † Smith's *Action-at-Law*, 128.

ners, jailors, clergymen of the Established Church, of the Catholic Church, and ministers of registered dissenting chapels, officers not on half-pay, physicians, surgeons, apothecaries, servants of the royal household, pilots, officers in the customs, excise, and post-office, and members of the House of Commons attending Parliament

In the first week of July the county clerk issues a requisition to the high constables to get the jury-list prepared. The constables require the churchwardens and overseers of the poor to prepare full general lists by the 1st of September. The justices of the peace examine these lists in a special district sitting, the names of all qualified jurors are then transferred to the juror-book, and the sheriff receives the complete lists transmitted. To every circuit he deputes from forty-eight to seventy-two, and for the Quarter Sessions at least twenty-four jurymen: if a foreigner is prosecuted, one half of the jury should consist of foreigners.

Originally trial by jury was only a trial by witnesses; the jurymen did not examine into the credibility of the evidence as at present, for no evidence was produced before them, they were themselves the witnesses, and their verdict rested upon their own private knowledge, and upon their personal acquaintance with the parties and the merits of the cause.

What the country knew the country testified. The sheriff selected the persons who happened to be best cognizant of the facts. The jurors, accordingly, were summoned from the neighbourhood in which the cause of action had arisen. In criminal cases, the jury upon whom the culprit cast himself for his deliverance were still more witnesses, who gave their verdict according to their knowledge of the offence, or in conformity with the opinion entertained respecting the character of the accused. According to the later law the knowledge of the guilt or innocence of the accused is to be established by the evidence, whether oral or written, adduced before the jury.*

The jury in former times were liable to be attainted if in a civil action they delivered a wrong verdict. It was supposed that if a wrong verdict was given the jury must have been influenced by corrupt motives, and the unsuccessful party was allowed to serve out a writ of attaint, by virtue of which, twenty-four jurymen were

* Palgrave, *The King's Council.*

summoned to determine the validity of the first verdict; the evidence on the second trial was the same as on the first. If the result of the second trial was a verdict contrary to that of the first, the latter was set aside, and the jurymen who pronounced it lost all civil rights and became perpetually infamous, forfeited all their goods and the profits of their lands; were themselves imprisoned, their wives and children driven out of doors, their houses razed, and their lands wasted. This writ fell into disuse about the reign of Elizabeth, and the practice of granting a new trial on application to the court was substituted for it. This writ was not formally abolished until 6 Geo. IV. c. 50!! Such is the dilatoriness with which all legal reforms are, in this country, effected! The first reported instance of a motion for a new trial was in the year 1665.

The common law judges, since the 16th century, have been agreed in this, that in all suits questions of fact are to be determined by the jury; questions of law by the judge; *ad quæstionem facti non respondent judices, ad quæstionem legis non respondent juratores.* Where then the questions at issue between the litigating parties, is one of fact merely, *quæstio facti,* such issue must be determined by the jury; but if, as frequently happens, it is *quæstio juris,* this may either be decided by the judge at *nisi prius,* or may be raised and argued before the court, *in banco,* on demurrer, special verdict, or special case.* In criminal trials the guilt or innocence of the accused is left entirely in the hands of the jury, the judge declaring what the law is as applied to the particular case. The verdict of the jury in such cases is compounded of the facts and the law. This right of the jury to return a general verdict on a criminal trial was denied them on indictments for libel. A practice had grown up, since 1730, of confining the juries, in cases of libel, to finding simply the facts of publication and the innendoes, the court reserving to itself the determination of the libellous character of the published matter. This continued to be the doctrine of the courts until 1792, when Mr. Fox's Libel Bill† was passed, by which it is enacted that, on the trial of an indictment, or information for publishing any libel, the jury may, on the plea of "Not guilty" pleaded, return a general verdict of guilty or not guilty, and shall not be required

* Broom's *Legal Maxims*, 100. † 32 Geo. III. c. 60.

to find the defendant guilty merely on the proof of the publication of the libel and the sense ascribed to the same. Forsyth says, "that the jury have the power but not the right to give *their verdict against the legal explanation of the judge.*"

Star-chambers and high commissions have implanted a sufficient detestation of inquisitorial tribunals in the breasts of Englishmen. The brutalities of a Jeffreys have shown what result is to be looked for when the judge assumes the part of an inquisitor. The prisoner in England is not as in France and other countries, subjected to examination, nor is he placed in the power of men who, by torture and ill-treatment extract confessions which subsequent events prove to be untruthful. If at a preliminary inquiry the accused should volunteer a statement, the magistrate generally informs him that he is not bound to say anything which may criminate himself. The criminal jurisprudence of England might be improved by allowing the accused to offer himself as a witness in his own defence, which at the present he cannot do. In the political trials under the Tudors and Stuarts, prisoners were not allowed to appear by counsel, although they might have legal assistance in points of law; the examination of witnesses was conducted in secret, and the depositions of the witnesses were only read at the hearing, as upon the trial of Essex and Raleigh. The wise and noble principle that no one should be forced to convict himself was, at length, triumphantly inaugurated.*

By the statute 25 Ed. III. c. 2, it was enacted, that two witnesses should be required to convict a prisoner of high treason. By 7 Will. III. c. 3, both witnesses must testify to the same overt act of treason, or one to one overt act, and the other to another overt act of the same species of treason. The overt acts of treason should be expressly laid in the indictment, for evidence of overt acts not so laid, cannot be admitted. It was also provided that, the accused might make defence by counsel, not exceeding *two; and, likewise, granted the admittance, in favour of the accused*, of the evidence of witnesses examined upon oath.

By more recent statutes 39 and 40 Geo. III. c. 93; and 5 and 6 Vict. c. 51, not only must the accused be furnished, ten days before the hearing, with a copy of the indictment and a list of the witnesses and jury, with the indication of their residence

* "A prohibition shall go to 'Court Christian,' if they compel a man to be a witness against himself."—4 Le. 19 Pl. 301, 32 Eliz.

and respective calling, but those documents shall be delivered over to him in the presence of two witnesses. Until 6 and 7 Will. IV. c. 114, no counsel was allowed a prisoner on his trial upon the general issue in any felony; but by that act, all persons tried for felony may make defence by counsel.

By the 7 Will. III. c. 3 no person shall be prosecuted for treason but within three years after the commission of the offence, except in the case of a designed assassination of the sovereign. The Statutes of Treason of Ed. III. and Ed. VI. failed to protect the subject by reason of the unscrupulous constructions put upon those statutes by the judges. The statutes passed after the Revolution went far to remedy this defect*—at all events, trial by jury and unrestrained cross-examination conducted before judges, who are limited by strict rules of evidence, afford more ample guarantees than are afforded by the superior courts of justice on the continent. In all other trials, besides those for high treason, the English judge is likewise bound by a settled theory of evidence, thus, no one can be convicted for perjury by the testimony of one witness only.

* Hallam, *C. H.* iii., 225.

CHAPTER VII.

THE CHANCELLOR AND THE EQUITY COURTS.

Meaning of Equity.—The Confessor of the Sovereign.—Contest between Lord Chancellor Ellesmere and Lord Coke.—Selden regarding Equity.—Lord Redesdale's Opinion.—Great Power of the Lord Chancellor.—Compass of his Functions.—Jurisdiction according to Common Law.—Extent of Equity Jurisdiction.—Jurisdiction of the Chancellor by Reason of Certain Statutes.—Delegated Jurisdiction.—Arbitrary Power of the Chancellor.—Proceedings in the Chancery Courts.—Cumbrous Mode of Procedure.—Lord Eldon.—The Chancellor and Party Government.—Pious Foundations.—Masters in Chancery.—Vice-chancellors.—Matters of *Trivial Import Excluded*.

THE equity courts occupy themselves with questions of law in which the common law courts are not competent,* and have jurisdiction in cases where a plain, adequate, and complete remedy cannot be had in the common law courts; the remedy must be plain, for if it be doubtful and obscure at law, equity will assert a jurisdiction; it must be adequate, for if at law it fall short of what the parties are entitled to, that founds a jurisdiction in equity; and it must be complete, that is, it must attain the full end and justice of the case, and must reach the whole mischief, and secure the right of the party present and future, otherwise equity will interpose and give relief.† The separation of the law courts from those of equity is peculiar to England; America has not adopted the division, although it is advantageous for the elucidation of the legal opinions of the law courts.

In the times of the Normans the first chaplain of the king was, as a rule, his personal secretary (*Cancellarius Regis*). It was, indeed, an honorary office, although a portion of the fines levied by the king came to the chancellor; he is styled "the King's Confessor," "Keeper of the King's conscience." All matters in dispute which the sovereign, as the highest prætorian power, had to determine, were gradually transferred to him; he thus became a very important personage in the realm. Under Henry II. John of Salisbury, in a poetical letter addressed to St. Thomas à Becket describes the chancellor as a functionary who can soften the rigour of law, and by reason of his prætorian power amend what

* Brougham, *Const.*, 335. † Story, *Treatise on Equity*.

was obsolete and hurtful.* Associated with the chancellor were certain discreet and honest clerks; being of the clergy, they were styled and addressed "Magistri," (Masters in Chancery), which title clung to their successors.†

It appears, at least as far back as King Edgar, that the kings of England exercised a power of moderating the *summum jus* arising from the rigour of the law. In the time of Edward I., and afterwards, this power was exercised on express petition to the king, and the chancellor usually assisted the king. Sometimes in the absence of the king these petitions were referred to the chancellor alone, till at length the jurisdiction was regularly delegated to him,‡ Edward III. decreeing that all appeals in matters of law and grace should go through the chancellor.§ The bill, it may be observed, still retains the form and language of a petition. On the back of every appeal addressed to him, the Lord Chancellor wrote a short answer.‖

This official, who under the Tudors lost his ecclesiastical character, acquired his extensive power only after prolonged struggles. At the end of the fourteenth century we find great complaints made by the commons touching the Court of Chancery, especially on account of the short interval of summons with a threat of penalty (*subpœna*).

The famous contest between Lord Coke and Lord Chancellor Ellesmere in the year 1616 is well known, whereby the equity courts achieved the maintenance of their independent jurisdiction.¶ Selden thus quaintly attacked the uncertainty of equity in his day:—"Equity is a roguish thing; for law we have a measure, and know what to trust to,—equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure a chancellor's foot. What an un-

* Quærendus Regni tibi Cancellarius Anglia
Primus sollicita monte petendus erit
Hic est, qui Regni leges cancellat iniquas,
Et mandata pii Principis æqua facit.
Quid obest populo vel moribus est iniquum.
Quidquid id est per eum desinit esse.
Crabb, 97.

† Palgrave, *The King's Council*, 14.

‡ Wynne's *Eunomus*, 3rd. Dial., 566, edit., 1822.

§ Volumus quod quelibet negotia tam communalem legem regni nostri Anglie, quam gratiam nostram specialem concernencia penes nosmetipsos habens ex nunc prosequenda eadem negocia videlicet, negocia ad communem legem penes venerabilem virum electum Cantuarensem confirmatum Cancellarium nostrum per ipsum expedienda et alia negocia de gracia nostra concedenda penes eundem Cancellarium soudilectum clericum, nostrum custodem sigilli nostri privati.

‖ Pauli iii., 664.

¶ Bl. iii., 67.

certain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same with the chancellor's conscience."

On the other hand, Lord Redesdale contends that the equity courts *have no discretionary power*. "There are," he says, "certain principles on which courts of equity act which are very well settled. The cases which occur in these courts are various, but they are decided on fixed principles. Courts of equity have in this respect no more discretionary power than courts of law."* Be this as it may, in no country of the world is there an official to be found invested with such tremendous powers, or so little hemmed in by legal checks and restraints as the Lord Chancellor of England. To begin with, he is Prolocutor of the House of Lords by prescription; in such capacity he need not be a peer, but in that event cannot take part in the debates, nor give his vote; generally speaking, however, the Lord Chancellor is created a peer of the realm soon after his appointment. He is ex-officio a member of the privy council and of the cabinet, and has gradually had transferred to him, as the highest judicial officer of the realm, certain powers approaching those of a continental minister of justice; he nominates the common law judges, the justices of the peace, and county court judges, subject to the approval of the Queen. He may dismiss justices of the peace, county court judges, and coroners in case of incapacity or improper behaviour; he is empowered to lay down regulations for the county court judges, and to map out anew the respective districts. He issues writs for the summoning of parliament, and from his court issue all commissions under the great seal, which is styled by Coke the 'key of the realm' (*Clavis Regni*). The Lord Chancellor may, further, of his own accord issue writs of *habeas corpus* during vacation time, hence it is said, "his court stands always open." By reason of his earlier character as ecclesiastic and confessor, the patronage of all the Crown livings under the value of £20 has been retained by him. He is chief guardian of the realm and visitor in right of the Crown of all hospitals and colleges of royal foundation, and has the general superintendence of all charitable uses in the kingdom. He is the general guardian of all infants, idiots, and lunatics. Subordinate to him are the Commissioners in Lunacy, who once a year have to lay before the Lord Chancellor a report upon the

*Bowyer, 37.

lunatic asylums throughout the kingdom. Finally, the Lord Chancellor is the first judge of the House of Lords, and presides over it when it exercises appellate jurisdiction. Previously to attaining jurisdiction in matters of equity, he possessed a jurisdiction at common law. The Lord Chancellor had jurisdiction to hold pleas of *scire facias*, to repeal the Queen's letters patent, when made against law or upon untrue suggestions, and to hold plea of petitions, etc. In this ordinary or legal court is kept the *Officina Justitiæ*, out of which all writs that pass under the great seal are issued; as, for instance, the writ of error at common law.* Here also suits against the sovereign, as a private person, are allowed, for as the sovereign cannot do any wrong, the keeper of his conscience has to redress all errors in law committed by the sovereign. Should a question arise upon matters of fact, the lord chancellor may direct an issue to be tried at law.† As to its equity jurisdiction, Coke‡ indicates three things, which in the court of equity are wont to be tried.

1. Covin (*Covina*), that is a fraudulent contract to the injury of one of the parties, provided no remedy is to be had in the ordinary courts.

2. Infractions of law resulting from accident.

3. Breaches of trust and confidence, which constitute so important a branch of chancery jurisdiction.

A statutory jurisdiction of the Chancery Court is also mentioned. This exists in regard to all those matters wherein parliament has assigned jurisdiction to the court. The authority which the Court of Chancery exercises in the administration of the property of idiots and lunatics is termed "jurisdiction by delegation."

Only equity jurisdiction, and that which is acquired by force of delegationis of importance. This jurisdiction is often of a peculiar kind, in the carrying out of wills in favour of pious foundations. The court has not unfrequently made venturesome interpretations; a Jew, for instance, bequeathed £1200 to make a provision for candidates to the office of Rabbi, to enable them to study the Holy Scriptures. The lord chancellor (Eldon) decreed, however, that the money should be made over to the Foundling Hospital, on the ground of the statute prohibiting legacies for "superstitious uses,"

* Bl., iii., 422. † Madock's *Chancery Pract.*, p. 6. ‡ *Inst.*, iv, 84.

The Court of Chancery also frequently avoids the statutes;* thus, the case of Russell *v.* Russell, in which it was decided that a mere deposit of title deeds by a debtor for the purpose of securing a sum of money, gave his creditor, in whose hands they were placed, an interest in the land to which they related, in effect repealed part of the Statute of Frauds. Lord Eldon says in so many words that he must not repeal the statute further than it has been repealed by his predecessors. The judges in the Court of Chancery have indeed assumed to themselves powers of legislation wholly inconsistent with their subordinate position. This absolutism of the court is increased by the absence of sufficient legal expedients. Appeal may indeed be made to the House of Lords, but in the Lords the Lord Chancellor is again the presiding judge of appeal, and is naturally little inclined to revise his own decrees.

Formerly the evidence of witnesses for the hearing of a cause in the Court of Chancery was taken by examination upon written interrogatories. By 15 and 16 Vict. c. 86, however, it was enacted that this mode of examining witnesses should be abolished, with a proviso that the Court might, if it should think fit, order particular witnesses (whether within or without the jurisdiction of the court), to be examined upon interrogatories in the mode formerly practised. The above Act substituted oral examination before one of the examiners of the court, or the production of evidence upon affidavit. As the mode prescribed by the Act was found unsatisfactory, commissioners were appointed to inquire into the matter, and the Lord Chancellor was empowered by 23 and 24 Vict. c. 128, to make rules and orders for carrying their recommendation into effect. By orders thus made in any cause in which issue is joined, the plaintiff or defendant may apply to a judge in chambers, for an order that the evidence may be taken *viva voce* at the hearing of the cause. It is no longer competent, save as aforesaid, to the plaintiff or defendant to require the evidence in chief to be taken orally, but each party is at liberty to verify his case, either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses *ex parte* before one of the examiners of the court. Notwithstanding these rules, the parties may agree that the examination and cross-examination of any witnesses shall be oral.

It may be readily conceived that a mode of procedure which

* Gans. Kritische Zeitschrift für Rechtswissenschaft des Auslandes.

deviates so widely from that ordinarily followed should have tended to bring equity jurisdiction into disfavour, coupled as it is with a limited number of judges and defective legal remedies in Chancery matters. The protracted style of business is found more wearisome, from the fact that the first judge, during seven months in the year, has to act as speaker in the House of Lords, that he has a seat in the cabinet, and a mass of other business to attend to.

If, in addition, the office falls to the keeping of such a man as Lord Eldon, who was invested therewith for twenty-five years, it is but natural that equity jurisdiction should be regarded as the universal curse of the land.* Lord Eldon was indeed an erudité, but most irresolute lawyer, who never vouchsafed much attention to the argument of counsel, and seldom arrived at a decision without interminable doubting.† His dilatoriness and irresolution might be accounted for by the perilous seeking after analogies in which he indulged, contributing to protract all suits in his court so indefinitely that the unfortunate suitors were driven to despair.‡ He was, moreover, for a certain period, the only law-lord in the House of Peers; hence the sad prospect was open to the parties of appealing from Lord Eldon badly instructed to Lord Eldon better instructed.§

Although the Lord Chancellor only determines in civil suits, it seems to many minds, not without danger that so high a judicial functionary should change with every party, thereby exposing the practice of the court to still further fluctuation. On resigning office, the Chancellor continues in his quality of peer a member of the superior court of appeal. The statute 43 Eliz. c. 4, enacted that inquiries concerning the administration of pious foundations should be conducted by at least four commissioners appointed by the Lord Chancellor, in conjunction with a jury,‖ but supervision on the part of the Lord Chancellor through accumulation of

* Royer Collard, *Lettres sur la Cour de la Chancellerie*, p. 52.

† Brougham, *Statesmen.*

‡ Hughes, *Hist. Eng.*, c. 64.

§ "Having had doubts upon this will for twenty years, there can be no use in taking more time to consider it."—Lord Eldon, *vide Earl of Radnor, v. Shafto*, 11 *Vesey*, 453. "If any satirist, desirous of exciting the public mind to fury by exposing a vicious administration of justice had put such language as this into the mouth of a judge, would it not have been condemned for its extravagance? Add to this a system contrived for chicane and procrastination, and the reader may form some notion of what 'practical' England endured with patience while Lord Eldon presided over the Court of Chancery."—*Phillimore on Jurisprudence*, p. 8.

‖ Toulmin Smith, 277.

business; was found wholly insufficient. In the reign of George III. intermediate departments were established, with a view to remedy the acknowledged want.

In the year 1853 by the Charitable Trusts Bill, for foundations not belonging to Catholics, a Board of Superintendence was constituted, consisting of the Lord President of the Council, certain of the ministers having a seat in the commons, and several legal functionaries. This Board is empowered to revise the administration of all pious foundations, to issue regulations, and if the object of the foundations be no longer realisable, to convert them to some other purpose. The trustees are bound to lay a yearly account before the clerk of the county court. To the county courts has been transferred the supervision of all pious foundations under the value of £30. Amongst the subordinate officials of the Court of Chancery should be mentioned the masters in chancery, who have, however, been pensioned off. They assisted the chancellor to draw up the decrees, examined witnesses, and were bound to be present at all criminal proceedings in the Upper House. They held appointment during good behaviour.

The great centralization of the Chancery jurisdiction has, by degrees, rendered it necessary to transfer certain business to subordinate courts. These are:—1. The Roll's Court, or court of the Master of the Rolls, who ranks next to the Chief Justice of the Queen's Bench. He is chief keeper of the records of the kingdom, in which capacity he is keeper of the rolls of the Chancery, and of patents passed under the great seal; he nominates the acting deputy-keeper of the records. His decrees are to be signed by the Lord Chancellor, and appeal lies from the Rolls (3 Geo. III. c. 30; 3 and 4 Will. IV. c. 94).

In 1813 a Vice-chancellor of England was appointed, Sir Thomas Plumer, the Attorney-General being preferred to that office.* In 1841, on the abolition of the equity jurisdiction of the Court of Exchequer, two more Vice-Chancellors were appointed, each of whom, like the Master of the Rolls, sits separately from the Lord Chancellor. Every Vice-Chancellor must, before appointment, have practised fifteen years as counsel. By virtue of his office he is a member of the Privy Council. A further addition has been made to the equity judges in the appointment

* 53 Geo. III. c. 24.

of two judges called the Lords Justices of the Court of Appeal in Chancery. This court consists of the Lord Chancellor, together with three judges, and enjoys all the jurisdiction exercised by the Lord Chancellor himself without any prejudice, however, to his right to sit, as formerly, alone. Appeals from the decision of the Vice-chancellors and the Master of the Rolls may be heard before this court. The Lords Justices also entertain appeals from the Court of Bankruptcy. The jurisdiction of this appeal court may be exercised not only by the full body but by either of its judges, together with the Lord Chancellor, or, by both the judges apart from the Lord Chancellor; an ultimate appeal to the House of Lords still exists. On a requisition from the Lord Chancellor a judge of the law courts may also be conjoined.

These measures have materially contributed to the reform of equity procedure, inasmuch as the Lord Chancellor, by reason of the increased number of the judges, only decides upon matters of greater moment. The Court of Chancery never occupies itself with matters of trifling import.

In all cases of bankruptcy a commission of bankruptcy from the Lord Chancellor used to issue. Afterwards, the proceedings were commenced by issuing at the instance of a creditor or the trader, a *fiat* signed by the Lord Chancellor, and addressed to the Court of Bankruptcy in London, or in a country district, authorizing the proceedings to be taken in such court. But instead of a *fiat*, the course is now by petition filed by the creditor, or the trader, in such court, without previous application to the Lord Chancellor. The Court of Bankruptcy is a court of law and equity, and also a court of record. The Court of Bankruptcy now exercises all the jurisdiction, powers, and authorities possessed by the Court for the Relief of Insolvent Debtors. At present there are five commissioners of the Court of Bankruptcy; upon any vacancy in the office of commissioner, it is not to be filled up until, by reason of such vacancy, the number of the commissioners is reduced to less than three, whereupon her Majesty, by commission under the great seal, may appoint a barrister-at-law, of not less than twelve years' standing at the bar in England, to fill such vacancy. The court has superintendence and control in all matters of bankruptcy, and is empowered to hear and determine all matters relating to the disposition of the estate of the bankrupt, the acts of the assignees, and all matters arising

between these latter and the creditors.* The distinction between trader and non-trader has been abolished, and all debtors whether traders or not are subject to the provisions of the bankrupt acts, but no debtor who is not a trader shall be adjudged bankrupt unless he shall, with intent to defeat or delay his creditors, depart the realm, or, being out of the realm shall, with such intent, remain abroad, or, with such intent, make any fraudulent conveyance of his real or personal estate, or any part thereof.

Any trader is liable to become bankrupt if he depart the realm, or, being out of the realm, shall remain abroad, or absent himself, or begin to keep his house, or suffer himself to be taken in execution for any debt not due, or make any fraudulent disposition of his property.

Every trader or non-trader may make himself a bankrupt by filing a declaration that he is unable to meet his engagements, provided a petition for adjudication of bankruptcy be filed by, or against him, within two months from the filing of such declaration.

* 24 and 25 Vict c. 134.

CHAPTER VIII.

MILITARY COURTS.

Judge-Advocate-General.—Deputy.—General Courts-Martial.—Courts of Honour.—Standing Courts.—Courts of Inquiry.

The military jurisdiction extends merely to offences against discipline on the part of soldiers and officers. The Judge-advocate-general presides over the military court. He changes with the ministry, and generally has a seat in the Lower House. He is assisted by a Deputy-judge-advocate-general; their functions consist in instituting prosecutions in the name of the Queen, and presenting reports to the Queen respecting sentences of the military courts. The ordinary military courts, which try cases of mutiny and desertion, are the general courts-martial, which are empowered to pass sentence on officers and privates; at the final trial, at least thirteen members must be present, and the majority determines. In case of a capital sentence a majority of two-thirds is necessary. This court is held under authority of the Queen or of the commander-in-chief. The Queen has the right of ratification in all cases of judgment pronounced; an appeal from a court-martial is to the Queen in person. Should sentence of transportation be pronounced, the condemned can only be transported under an order from a common law judge.

General courts-martial are also empowered to determine questions of honour amongst officers.

The petty standing-courts of the regiments, districts, and garrisons, can only pass sentence of imprisonment for thirty days.

Courts of "Inquiry" have merely the task of collecting matters of fact, and cannot examine witnesses on oath. On the ground of communications from those courts the crown availing itself of its right, in cases of grave import, may dismiss officers from the service.*

* Gneist, i., 416.

CHAPTER IX.

ECCLESIASTICAL COURTS.

(Curiæ Christianitatis.)

Premunire.—Supreme Ecclesiastical Jurisdiction in the Sovereign.—Archdeacon's Court.—Consistory Court.—Court of Arches.—Prerogative Court.—Court of Discipline.—Appeal.—Judicial Committee of the Privy Council.—Prohibition.—Lay Judges.—Jurisdiction of these Courts.—Penance.—Excommunication—The Temporal Arm.—Admiralty Court.—Prize Court.—Appeal from these Courts.

THE spiritual and temporal courts were severed by William the Conqueror, and the respective charters were ratified by Richard II. The spiritual and ecclesiastical jurisdiction during the middle ages in England, was the subject of muchdispute. It was especially mooted whether Englishmen might appeal out of the realm to Rome, which mode of appeal the parliament strongly opposed, and passed the celebrated statute "Premunire" (16 Rich. II. c. 5). It enacted that whoever should bring any plaint or suit concerning the king, his crown, his prerogative, or realm before the court of Rome, or any other court not royal, should forfeit the king's protection. It further provided that, if any clerk gave effect to any sentence of excommunication emanating from Rome, the king should withdraw from him the enjoyment of his temporalities until the matter was remedied. Premunire was also incurred by procuring a bull from Rome, thereby restricting the jurisdiction of the royal courts.* The Pope reprobated this statute as execrable, characterizing its adoption in parliament as "foedum et turpe facinus." The statute of Edward IV., however, extended the penalties of premunire to all the ecclesiastical courts in the event of

* Burns, *Ec. Law.*, ii. 37; Crabb, 320.

"Lord Cardinal! the King's further pleasure is,
Because all those things you have done *of late*
By your power legatine, within this kingdom,
Fall into the compass of a *premunire*;
That, therefore, such a writ be sued against you,
To forfeit all your goods, lands, tenements,
Chattels, and whatsoever; and to be
Out of the King's protection. This is my charge."
Shakespeare's Hen. VIII., Act 3, s. 2.

their interfering in matters temporal. Endeavours were thus made, according to Coke, to insure protection against courts not affording the safeguards of the courts of common law, since they passed sentence without a jury, and examined the accused on oath. Since the Reformation the appeal to Rome having been made over to the sovereign by 24 Henry VIII. c. 12., the king became recognised as supreme judge and fountain-head of ecclesiastical jurisdiction.

The spiritual courts still existing are :—

1. The Archdeacon's Court. It is held before the archdeacon, or in his absence by a judge delegate, called his "official," from whom, since 24 Henry VIII. c. xii., appeal lies to the Bishop's Court; as the jurisdiction of the archdeacon originally emanated from the bishop by delegation, the above-mentioned statute of Henry VIII. infringed a leading principle of the canon law, "that no one shall appeal to himself."* It is open to the parties to apply to the Archdeacon's Court or direct to the Bishop's Court. The powers of this court have been greatly limited by the new Court of Probate.

2. The Consistory Court of every diocesan-bishop is held in the cathedral, either by the bishop's chancellor or his commissary, acting as judge. He has jurisdiction in all ecclesiastical causes arising within the diocese, but only so far as it is delegated by the bishop, who may always reserve certain cases for his special decision. The chancellor combines the functions of vicar-general and official in his own person.

3. The Court of Arches, so called because it was formerly held in the Church of St. Mary-*le-Bow* (*Sancta Maria de arcubus*). It now sits at Doctor's Commons like all the principal ecclesiastical courts. The "Dean of Arches" was originally merely a judge over thirteen London parishes, which are under the direct jurisdiction of the Archbishop of Canterbury, combining, however, with this office that of the principal "official" of the archbishop. He is also delegate judge of appeal of the province of Canterbury.† His jurisdiction in testamentary matters has now been transferred to the Court of Probate.

The Court of Peculiars is a branch of, and annexed to, the Court of Arches, and has jurisdiction over all those parishes dispersed

* "Ne ab eisdem seipsos appellatio interponi videatur, c. 8, de appellationibus in 6to, ii. 15.

† Bowyer, 267.

through the province of Canterbury, in the midst of other dioceses which are exempted from the ordinary jurisdiction, and subject to the metropolitan only.*

4. The Prerogative Court has been abolished by the new statute creating the Court of Probate.

5. By 3 and 4 Vict. c. 85, a Court of Discipline has been established for the trial of clerks in holy orders who have committed offences against the ecclesiastical laws, or have given scandal. The bishop of the diocese where the offence has been committed, may issue a commission to five persons, of whom one shall be his Vicar-General, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry into the grounds of the charge or report. They are to carry on the inquiry in public, unless, on the special request of the party accused, they shall think fit that the same, or any part thereof, shall be private. If the Commissioners report that there is sufficient *prima facie* ground for instituting further proceedings, articles are drawn up and signed by an advocate of Doctors' Commons, which are to be filed, together with copies of the depositions, in the registry of the bishop of the diocese where the accused holds preferment. The accused has to reply in secret sitting before the bishop. Should he be unable to clear himself, or fail to appear, the bishop, with three assessors, to be by him nominated, one of whom must be an advocate of five years' standing, is to proceed to try the cause and determine the same, and to pronounce sentence according to the ecclesiastical law. Appeal lies from the bishop to the archbishop of his province, and from the latter to the Queen in council.

As appeal to Rome drew down the penalty of premunire by 24 Hen. VIII. c. 12, secs. 2, 4, the statute, accordingly, regulated the order of appeal.

1. From the archdeacon, or his official, to the bishop, and, *non per saltum*, to the archbishop.

2. On a matter, commenced in the first instance before the archdeacon of the Archbishop of Canterbury appeal lies to the Court of Arches, and thence to the archbishop.

3. If commenced in the first instance before the bishop, the archbishop and his court constituted a further court of appeal.

4. If the archbishop and his court were first appealed to, no further appeal could formerly have been made; 25 Hen. VIII.

* Bowyer, 371.

s. 4, c. 19, however, introduced the appeal to the King in Chancery, whereupon a commission under the great seal was issued to several delegates to determine the matter. If the king himself were a party, appeal would lie not to this court of delegates, but to all the bishops in the Upper House of Convocation.*

The statutes 2 and 3 Will. IV. c. 92, and 3 and 4 Will. IV. c. 41, now constitute "the judicial committee of the Privy Council" as the supreme ecclesiastical court of appeal.†

The English canon law recognises the writs of prohibition of the common law courts. Writs of prohibition issue from the Queen's Bench, and occasionally from the Court of Chancery, the Common Pleas, and Exchequer. To indicate the relation of the temporal to the spiritual power, Blackstone recurs to the simile of paternal authority. "It is true they are sometimes obliged to use a parental authority in correcting the excesses of these inferior courts and keeping them within the legal bounds; but, on the other hand, they afforded them a parental assistance in repressing the insolence of contumacious delinquents, and rescuing their jurisdiction from that contempt which, for want of sufficient compulsive power, would be sure to attend it."‡

The judges of the ecclesiastical courts since a statute 37 Henry VIII. are usually laymen, who are doctors of the Roman and canon law, but derive their power, by delegation, from the ecclesiastical dignitary by whom they are appointed. The course of procedure in these courts is a mixture of the canon and Roman law process by *written depositions and oral examination*. The decrees are drawn up in writing.§ No jury is summoned by these courts; but an oath may, if deemed expedient, be administered to the accused and the suitor. Should a matter of common law jurisdiction come before the ecclesiastical courts incidentally, it must be treated by the ecclesiastical judge according to ordinary procedure. These courts had formerly jurisdiction in matters relating to tithes. By 6 and 7 Will. IV. they still determine matters pecuniary, arising from the withholding of ecclesiastical matters relating to tithes, &c., dilapidations, or "waste." They may also require churchwardens to carry out repairs, and can excommunicate refractory parishioners for non-payment of rates. In suits for a specified sum of money and for damages they have no jurisdic-

* Burns, i. 230.
† *Ibid.* 64.
‡ Bl. iii., 103.
§ Burns, ii. 48.

tion, but may entertain a claim for indemnity.* In matters spiritual the ecclesiastical courts can only carry out their sentences by spiritual remedies. In all other cases, especially in matters of a criminal nature, the temporal arm must give support. By 13 Edw. I. stat. 4, these courts were empowered to apply spiritual penalties to cases of libel and slander. The spiritual court only intervened where the defamation was of a spiritual nature, as where contumelious words, such as "adulterer," etc., were employed. The power of inflicting penalties in cases of defamation and brawling has been withdrawn by later enactments, unless these offences have been committed by clerks, or persons ecclesiastical. The spiritual penalties to which laymen are subjected consist in "penance," which, in the case of certain crimes is to be carried out after the ancient observance as "*amende honorable.*" In offences of a minor nature a milder form of penance is applied: a pecuniary penalty being substituted for the actual penance, with the consent of the bishop or his court. Should the condemned party refuse to do penance, he is excommunicated. In cases of contempt against the ecclesiastical courts, minor excommunication was formerly incurred, the ecclesiastical judges passing sentence of exclusion from the Church and from the sacrament; not a very terrible privation, it must be owned, in the case of Catholics or Dissenters.† The major excommunication entailed severe political and civil consequences. It not only excluded from the community of the faithful, but rendered the person excommunicated incapable of discharging any office. By 53 Geo. III. c. 27, imprisonment for six months was substituted. By 2 and 3 Will. IV. c. 93, new rules in regard to excommunication, incurred on the ground of contempt, were introduced.‡ The execution of the sentence of imprisonment pertains to the Court of Chancery, a writ *de excommunicato capiendo*, being issued at the instance of the ecclesiastical court, in consequence whereof the person inculpated is consigned to prison.

The Court of Admiralty was established by Edward III. and is held in Doctors' Commons by the Lord High Admiral of England, or his deputy, who is called the Judge of the Admiralty. Like all the ecclesiastical courts it is not a court of record, and its proceedings are according to the method of the civil law.

* Burns, i. 388 *d. e.* ii. 50. † Burns, iii. 241 ‡ Burns, ii. 243.

Since 3 and 4 Vict. c. 65, s. 11, 13, it may have a question of fact determined by a judge of the common law in conjunction with a jury. Wherever offences had taken place on the high seas, the Court of Admiralty had jurisdiction to try it according to the civil law. By the statute 28 Hen. VIII. c. 15, however, it was enacted that such offences should be tried by commissioners of *oyer* and *terminer* under the king's great seal, and that the proceedings should be conducted according to the common law. By the 4 and 5 Will. IV. c. 36, s. 22, where offenders are committed to, or detained in, the jail of Newgate for any offence triable by the Admiralty jurisdiction, the Central Criminal Court is empowered to inquire of, hear, and determine any offences committed on the high seas. As Instance Court, this court decides upon cases of bottomry, disputes between part-owners of ships, or concerning mariner's wages, and salvage. In time of war it receives a special commission, and then sits as a prize court, "to proceed upon all manner of captures, seizures, prizes, and reprisals, of ships and goods, which are or shall be taken, and to hear and determine according to the courts of the Admiralty and the law of nations." Appeal lies to the Admiralty from the prize courts in America and the other colonies.

Formerly from the Admiralty Court appeal lay to the Court of Chancery; it now lies to the judicial committee of the Privy Council.*

Bowyer, 283.

CHAPTER X.

UNIVERSITY COURTS.

The Disciplinary Power of the Heads and Governors.—Chancellor's Court.—Manifold Appeal Court of the Lord High Steward.

THE heads and governors of colleges have merely a disciplinary, but no special, penal power over the fellows and students. The university jurisdiction, since the time of Richard II., has been exercised in the next place by the chancellor's court, which enjoys the sole jurisdiction, in exclusion of the Queen's Courts, over all civil actions and suits whatsoever, excepting where a right of freehold is concerned, and all injuries and trespasses against the peace,* mayhem and felony excepted.

When a scholar or privileged person is one of the parties, the University Courts are able to try and determine, either according to the common law, or according to their own local custom. They carry on their processes in a course much conformed to the civil law. The vice-chancellor, his deputy or assessor, is the judge of the chancellor's court. From his sentence an appeal lies to the delegates appointed by the congregation; thence to other delegates of the house of convocation; and if they all three concur in the same sentence it is final. But if there be any discordance in any of the three sentences, an appeal lies in the last resort to judge's delegates appointed by the Crown under the great seal in Chancery.

In cases of treason, felony, and high misdemeanors the court of the lord high steward sits in judgment; its functions have, however, fortunately not been called into requisition for the last 100 years. The lord high steward is nominated by the chancellor of the university, and confirmed by the Lord Chancellor; he is only empowered to call any matter before him after an ordinary grand jury has found a true bill. A petty jury is composed of six graduates and six freeholders.

* Crabb, 330.

CHAPTER XI.

THE HOUSE OF LORDS AS A COURT OF JURISDICTION.

Origin of the Appellate Jurisdiction.—Advice of the Judges.—Difference between matters of Law and Equity.—All Peers a Right to Vote.—O'Connell's Prosecution.—The Lord Chancellor the only Necessary Judge.—Jurisdiction over Peers.—Lord High Steward's Court.

THE peers of the realm, when summoned to parliament, were the counsellors and coadjutors of the king in the functions of government; they redressed grievances, both private and public, and whatever their origin; they thus acquired a judicial and executive authority. At the commencement of every session petitions were presented to the Lords asking the redress of injuries and of the abuse of power. These petitions were generally referred to the court whence relief ordinarily was to be sought, the house itself seldom interfering except when a redress could not be obtained from the ordinary tribunal. Only one instance occurs between the 4 Hen. IV. and 43 Eliz. in which the house entered upon any petition in the *nature of an original writ*. The *appellate jurisdiction* of the House of Lords seems to have been as ancient as that which they exercised upon original petitions. During the 15th century, however, this jurisdiction seems to have fallen into disuse: but about 1580, writs of error were entertained from the Court of Queen's Bench, and, at the present day, to the right of the House of Lords to determine in the last resort upon writs of error from the courts of common law, no objection could be sustained. The House of Lords, after much opposition, succeeded in establishing another branch of their ultimate jurisdiction, that of hearing appeals from the courts of equity. It would seem that the Lords did not entertain petitions of appeal before the reign of Charles I. From that time they became frequent, and although the House of Commons stoutly excepted to such jurisdiction, it is now placed beyond dispute.* The highest legal functionaries attend the sittings of the House of Lords when their advice is required.

At the beginning of every session, the judges in Westminster

* Hallam's *Const. Hist.* 17—24.

receive a writ of summons, *ad tractandum et consilium impendendum*, but not *ad consentiendum*. The following are named in the commission: the justices of the Queen's Bench and Common Pleas; such of the barons of the Exchequer as have the degree of the coif,* the Master of the Rolls, and such of the serjeants as are queen's counsel. Requisition is no longer made to the secretaries of state, to the attorney and solicitor-general, as these functionaries generally have a seat in the commons. The personages invited sit on the woolsack by the side of the Lord Chancellor, but can neither sit nor vote in the house itself. The judges are asked for their advice.

The House of Lords is the court of appeal for the three law courts at Westminster, for the Scottish and Irish courts since the union, and for the Court of Chancery.

Every peer has the right to sit in the appeal court,† but only on two occasions have the "peers at large" voted; those who are not "law lords" usually withdrawing. An attempt of the peers at large to decide in the appeal court was made in the O'Connell case. Seven judges had given their opinion for the maintenance of the sentence, and two in the contrary sense. "Some of the peers, seeing the decision likely to go in favour of O'Connell, were eager to vote instead of leaving the matter, as was just and decorous in an intricate question of legality, to the law lords; but Lord Wharncliffe interposed to support the dignity of the house as a court of appeal, and induced the lay lords to retire without voting. The Earl of Verulam was the first who retired behind the woolsack, and all the lay lords present followed. Five peers remained; Lord Denman, Lord Cottenham, and Lord Campbell voted that the judgment of the court below should be reversed. Lord Brougham and the Chancellor voted the other way."‡

The presence of three judges renders the appeal court capable of sitting; no law lord is, however, bound to appear in the court; in reality, therefore, it is the Lord Chancellor who is the necessary judge of appeal; for it is a mere accident when other peers, not law lords, are actually present in the house. From the revolution of 1688 until Somers entered the House of Lords, no law lords ever sat in the first chamber.§ From 1818 to 1827 it was only Lord Chancellor Eldon who sat as law lord; he gave judg-

* Bowyer, 84.
† Brougham, *Const*, 256.
‡ Miss Martineau, ii. 573.
§ May, *Const. Hist.*, i. 242.

ment with two lay lords.* The impression created by the fact of judges devoid of legal knowledge having to attend the public hearings where they are allowed consultative votes, but dare not give utterance to their opinion, who while away the time with reading pamphlets and papers, is but little calculated to inspire respect or awe.† It may readily be imagined that during Lord Eldon's time, appeal from the Chancery Court—that is, from Lord Eldon himself—did not often take place.‡ In 1812 the lords had still lying before them matters relating back to 1793.§

The Upper House, *in pleno*, "the Court of our Lady the Queen in Parliament," is furthermore a court of first and final appeal whenever a peer of the realm, the wife of a peer, or peeresses "in their own right," the queen-consort, king-consort, or prince-consort, are accused of treason or felony. It is necessary to distinguish as to whether parliament is assembled or not; in the former case, the Lord High Steward, who sits under the royal canopy with the honorary rank of duke, and robed in ermine, assumes the presidency; such is also the case when the Lower House impeaches a peer or commoner before this highest court of judicature. The Lord High Steward, whose office was formerly hereditary or held at least during lifetime (*dum bene se gesserit*), but who is now especially nominated for each case, is, during such proceedings, only provisional prolocutor. In the affair of Warren Hastings the House of Lords declared itself bound by the ordinary rules of evidence. Questions of fact and questions of law are not, however, separated in this court. Every peer gives his opinion upon his honour—the majority determining the case in point. It has been a matter of some controversy, whether bishops have a right to sit in the court to try indictments of treason and misprision. The canons of the Council of Toledo enjoined that bishops were not to concur in any capital sentence, and such has been unquestionably the valid observance in England from that period. A bill of attainder has always been regarded in the light of a law; and bishops have, in the event of such a case arising, recorded their votes when it did not extend to a capital sentence. It is assumed, however, that they are excluded from sitting and voting in trials, on the ground that a peer can only be tried by peers,

* Brougham, *Const.*, 323.
† Royer Collard, *Lettres sur la cour de la Chancellerie*, 136.
‡ Brougham, *Const.*, 360.
§ Ruttimann, *Engl. Civil Process*, 226.

and that bishops, although lords of parliament, are not peers of the realm,* and are not themselves tried by the House of Lords.† On trials for capital offences they withdraw voluntarily from the court, but enter a formal protest declaring their right to stay.‡

Should parliament not be sitting, peers or peeresses would be tried for treason or felony by the court of the Lord High Steward. The state functionary appointed is actually the judge, and delivers his sentence after a jury, composed at least of twenty-three peers, have, by a bare majority, given in their verdict upon the question of fact. Formerly the Lord High Steward might summon this jury when he pleased; since 7 Will. III. c. 3, all the temporal peers are to be invited to act as jurors. Against its sentences no legal remedy exists.

* By a standing order of the House of Lords, "Bishops are only Lords of Parliament but not peers, for they are not of tryal by nobility."

† Bl. iv. 264.

‡ Bowyer, 325.

BOOK VI.

Local Administrative Government.

INTRODUCTION.

Self-government System.—Honorary Offices.—Local Rating.—Compass of English Self-government.—Local Magistrates.—Right of Nomination and Election.—Justices of Peace.—Lord Lieutenant.—Sheriff.—Coroner.—Home Secretary's Ultimate Jurisdiction.—Centralization and Self-government not Opposed.—No Recognised Distinction between Town and Country.—"Village," "Town," "City."—Corporations.—Towns without Corporate Rights.—Size of Parishes.—No "Peasant Villages."—No "Patrimonial Rights."—Aristocratic Nature of the Older Self-government.—Modern Self-government.—Elected Bureaucracy.—Parishes.—Increasing Bureaucratic Control.—Old and New Self-government.

THE English self-government system possesses two striking features; all offices not purely subordinate are, as a rule, merely honorary, and are furthermore discharged by the gentry and the chief members of the middle classes. The powers of such self-government are almost restricted to the levying of the local rates, which the gentry themselves bear in great measure, the Home Secretary merely affording assistance to the Local Police Fund. As compared with the great expenditure of the local administration, the outlay of the home department is of a very limited kind. The local government is made over mainly to officials, who within the compass of their functions possess full judicial authority, and determine according to fixed principles of law and procedure after due summary proceedings held in open court and under survey of the superior courts.

As all justice emanates from the sovereign, these functionaries, likewise, are generally appointed by the Crown; the principle of election having, in the lapse of centuries, become the modest exception from this rule. Popular election is still allowed, however, in the case of coroners, conformably with the common law, and with statute law in the case of town-councillors; formerly also with respect to these latter, on the ground of "prescription." The principle of nomination by the sovereign is only restricted in relation to institutions of common law origin, and to those which existed prior to the Municipal Corporation Act. By the introduction of this latter measure, the principle of election in the construction of the new local boards has obtained the ascendancy.

The chief officer of the local self-government is the justice of the peace, who is a judicial functionary invested with extensive powers. The lord-lieutenant combines with his other functions those of justice of the peace, but his civil functions are insignificant in comparison; the power of the sheriff, formerly so wide-reaching, has been surrendered in many respects to the justices of the peace.

The judicial authority of all local functionaries being regarded as delegated from the sovereign, the Court of Queen's Bench, unless otherwise provided, can withdraw all suits from the local courts, and determine the same by its own superior jurisdiction. Any individual not prevented by want of means from availing himself of such costly remedy may thus protect himself against the arbitrary dealing or encroachments of local magistrates.

The elective boards created since the Municipal Corporation Act, have no judicial authority; against their judgments the ordinary courts of law may either be invoked, or their powers be controlled by the ultimate jurisdiction of the Home Secretary. From the resolutions of corporations, likewise, recurrence may be made, either to this ultimate authority, or to the remedies afforded by the law-courts. The local boards possess merely the right of self-government and self-taxation. An absolute severance of such boards from the central authority would be wholly incompatible with the power of parliament, and averse from the spirit of common law, according to which *all* power emanates from the sovereign; *centralization and self-government have hence from remote* times gone hand in hand in this country; the two conceptions are not antagonistic; bureaucracy, however, and self-government are the opposing principles which now stand strongly arrayed against each other in modern England.

To the English communal administration a distinction between "town" and "country" is unknown. A village is "a small assemblage of houses less than a town or city, and inhabited chiefly by farmers and other labouring people. It is said that a village is distinguished from a town by the want of a market."* A town "is any number of houses to which belongs a regular market, and

* The Saxons did not settle down in villages, but in separate homesteads. "In ancient times the divisions were often of great extent occasionally embracing entire districts, not unfrequently like to the tithings, and comprising several villages in their circuit."—*Bluntschli, Deutsches Privatrecht*, 121.

which is not a city or the see of a bishop." The term "*city*," as has lately been determined, is not identical with a bishop's see, but *oftentimes a mere* honorary title of a larger town.

"City," "town," and "village" are, therefore, only distinguishable by the larger or smaller aggregation of houses which they comprise, but in contemplation of law there is no clear demarcation between them.* Cities, towns, or villages are of themselves merely social aggregations which, equally with the solitary "vill" and ancient "manor" are enclosed in the range of the county administration, and subject to the county officials. From the general county administration, certain places are, however, exempt, either from the fact of their constituting independent "counties," or because they possess corporate rights, and exercise a limited jurisdiction; subordinate, however, to the appellate jurisdiction of the county.

Localities thus privileged are "municipal corporations." Places which, socially considered, are villages merely, may enjoy municipal corporate rights; whereas, large towns may dispense with them. Chippenham, with its 1100 inhabitants, has an ordinary town constitution; the Tower Hamlets, with 540,000 inhabitants, Marylebone, with 371,000, and Greenwich with 106,000, are simply parliamentary boroughs, having, in regard to their administration, a legal entity either as single parishes only, or merely in relation to the individual parishes contained within them, and are devoid of independent jurisdiction.

As a town, need not by reason of the extent of space it covers, have a local organization; so is it with a locality in general—the mere fact of its consisting of an assemblage of houses does not in anywise necessitate the existence of a governing body.

The existence of *purely local and village communities* has always been foreign to the conception of the English law, for *village communities, as comprising merely a group of houses* placed in juxta-position, have never existed in England. A village, *according to its extent assimilates to a parish, and if it possess* the other requirements, is a parish and police district. But even as a village may comprise two police districts, so may it contain

* "Habitations when thrown into rows, streets, crescents, squares, etc. form villages, towns, and cities." *Results of the Census of Great Britain in* 1851, by Ed. Cheshire, p. 25. According to Coke a town in the legal sense is a place which is neither a city nor borough. A hamlet is a small appendage to a town.

several parishes.' Contrariwise, a parish may consist of several villages, for even from Anglo-Saxon times, the ascending pyramid of municipal and state government is constituted not from the individual district, but out of the family groups of the freemen. "Peasant" villages are of rare occurrence in England; the villages of the present day especially, are not simply inhabited by agriculturists; we meet with journeymen of every kind, beer-shop keepers, farm-labourers, artificers, side by side with farmers and householders cultivating their own land. Idyllic though the English villages appear in favoured spots, especially where farming and cattle-breeding flourish, from the manufacturing districts, the village, with its pastoral character, is entirely banished.*

Local government has preserved its character from Saxon times, it exists chiefly by districts; corporate municipalities comprise within their circuit, districts more or less isolated.

Seignorial rights, territorial and "patrimonial" jurisdiction, have, for long centuries disappeared. The lord of the manor has occasionally a right of nominating certain subaltern functionaries, who are, however, equally with the other county officials, subject to the justices of the peace and the sheriffs. On the other hand, the influence exercised by the greater landowners in certain counties and municipalities is of a prominent character; but in view of law such influence is never sanctioned. In describing the English self-government system, it seems expedient to compare the period anterior and subsequent to the Municipal Corporation Act. The communal system previous to this act was of a profoundly aristocratic character; in the county, the landed gentry held exclusive sway; in the towns and parishes the administration had everywhere been gradually surrendered to the control of petty cliques, the great body of the citizens having no share in the municipal government. The number of salaried functionaries was, however, very limited, and nearly all the offices of the town-administration were purely honorary. The duties of the local administration consisted chiefly in the maintenance of public security, the control of licenses, and the care of the poor; the latter obligation being everywhere incumbent on the parish and the county officials, but never the affair of the municipality.

The reform of the municipal system has resulted in the greater

* Gneist, ii., 611.

or less accumulation of petty local governing bodies in the parish. Since 1834 the care of the poor has ceased to be an affair of these small local bodies, being now made over to larger Unions, and centralized by means of a special department. So with the sanitary control and the levying of rates for the requirements of the public health. These newer interests and duties of the local government have everywhere called into being local boards, diversely constituted. The municipal administration of towns remains, as heretofore, disconnected from the poor-law administration.

Wherever the older self-government has fallen into decay, and the municipal life has grown torpid, parliament has interfered and substituted bureaucratic rule.. The principle of popular election is, however, allowed full play in the parish, which appears as the chief electoral body. Having lost its oligarchic character the parish has merged into a community of the resident rate-payers, who exercise their rights, irrespective of their religious creed. Wherever church-rates have lost their primal significance, especially as regards the parishes newly founded, a severance of the "spiritual" functions of the parish from the "temporal" has been effected. Parish vestries are hence to be met with, endowed with functions simply "spiritual," although forming coincidently part *of a greater whole, or the parish political.*

The ancient oligarchic town constitutions have likewise fallen *a sacrifice to the new system,* which is, for many reasons, calculated to call into being a crowd of salaried functionaries.

By self-government the modern middle class in England understands a share in the right of election and having special functions of the local government carried out by means of "paid" officials. The ancient self-government system, on the contrary, consisted in discharging certain honorary offices as a municipal duty.* Between electors and elected there is no inter-dependence, the new officials constituting, for the most part, governmental boards, which conduct their proceedings beyond the ken of the public. The share in the elections is of a limited kind, the votes mainly centreing in small coteries; the new local boards have become thereby discredited, and mischiefs have sprung up which are not ascribed to the want of self-action on the part of the community,

* The old ideal of a governing body was a concentration of the force of all the individuals of the community in the hands of certain of its members, in order to the accomplishment of what could be best accomplished by systematic co-operation.—Mill, *Dissert.*, vol. i., 432.

but merely tend to excite a cry for a more wide-spread bureaucracy. The system of the old and new self-government are almost everywhere in direct antagonism. To the principles of the old self-government still correspond the office of the sheriff, justice of the peace, and lord-lieutenant, the coroner, the jury, and in the lower range the fast-expiring office of constable. The new self-government is represented by the poor-law unions, town municipalities, local boards of health, the central poor-law board, and the modern police system.

First Part.

SELF-GOVERNMENT BEFORE THE MUNICIPAL CORPORATION ACT.

CHAPTER I.

THE COUNTY AND ITS SUB-DIVISIONS.

Counties.—Tythings.—Frank-Pledge.—Hundreds.—Alterations in Norman Times. —Parishes.— Police Districts.—Counties-Palatine.—Chester.—Durham.—Lancaster —Counties-Corporate.

THE counties are divisions dating from Saxon times, their origin being erroneously ascribed to Alfred the Great. They were either kingdoms of the heptarchy, such as Kent, Sussex, and Surrey; or divisions thereof previously existing, corresponding with the diocesan division,* and known by the name of "shires." It seems probable that the realm was originally divided into counties, with a view to the convenient administration of justice, the judicial business of the kingdom having formerly been chiefly dispatched in the local court, held in each different county before the sheriff as its principal officer.

Prior to the conquest there were political provincial bodies, holding half-yearly, at Easter and Michaelmas, in each county, an assembly (gemote) of the wise men (wittigston), the bishop and ealdorman presiding. The shiregereva (sheriff) was merely an assistant, but subsequently became a co-president, and finally the principal officer. The thanes (thegen) or service-men of the sovereign were present at these assemblies; the surrounding townships were represented by their "gereven" and four freeholders. The county assembly determined matters in dispute between the several districts; the shiregereva levied, probably,

* Lappenberg, *Englische Geschichte*, i. 185.

with the assent of this assembly, the local rates, and imposed penalties for offences;* appeal lay thence to the sovereign.

The counties were, according to some writers, apportioned by Alfred the Great—though, in fact, this occurred much earlier—into hundreds, and these again into tithings, ten families at least of freeholders constituting a tithing, or fribourg. The division was made numerically. Even previously to such division the tithing was a social community, either possessing its political and administrative organization, or comprising a part of the community at large. The individual localities were thus brought into closer connexion with the general body. These divisions gave rise to a system of mutual warranty and obligation to maintain order and security in each district, and to prosecute offenders.† Hence the law of "Frank Pledge," the original intent of which was to view the frank pledges, or freemen within the liberty, and its main purpose, to inculcate more fully the principle of reciprocal responsibility on the part of each family, community, and town. Every head of a house was responsible for his family, slaves, and guests. There were two kinds of frank pledge, "manorial" and "collective;" in the former the land-holder was the fixed "borg" (bail) for the appearance of his vassals, or those resident within his jurisdiction, whenever their presence was required. The collective warranty (freho borg) consisted in an association of free peasants, comprising at least ten persons; priests did not belong to such associations, but every layman not possessed of a freehold of a certain extent, was bound to place himself either under the warranty of his lord, or enter into a collective pledge; whoever was not a great thane, and thus exempted from the frank pledge, or whoever did not belong to a tithing was under ban, and might be slain with impunity. The head of a collective pledge was called heofod. The freho borg gave earnest for the payment of "weregild," whenever incurred by any member of the pledge. If there were no family the king might be required to pay the werogild for any co-pledgeor who had been slain.‡ In the promotion of a suit the chief of the tithing§ had to give security for the appearance of the accused, otherwise he was imprisoned;

* Lappenberg, i. 585.

† Palgrave, *Essay on the Authority of the King's Council*, 7.

‡ Rogge, *Ueber das Gerichtswesen der Germanen*, p. 60.

§ Called also tything-man, head-borg, and borse-holder.

in case of the flight of the accused, the tithing of the freho borg gave security to clear itself by the assistance of members of other communities, if not otherwise capable of doing so.

This collective pledging was the ordinary rule in England. It existed in Shropshire, Northumberland, and certain boroughs of Mercia, in an irregular form. Here it was simply the social community and the borough which afforded the pledge for the inhabitants of the entire district. Every locality which gave shelter to any man not inscribed in the pledge-list, or not otherwise exempted, incurred a penalty.*

By a law of Canute, every male on attaining the age of twelve was to be enrolled in a tithing, hundred, or shire.† In Bracton's time freeholders were emancipated from the duty of formal frank-pledge and the institution fell wholly into decay towards the close of the Plantagenet sway. On the other hand, the obligations incumbent on every locality for the joint preservation of the peace remained in force. It was still the duty both of the district as well as of individuals to prosecute for common crimes therein committed; this principle has continued in force even to the present day.‡

Canutes' law decreed "that whosoever allowed a thief to escape without raising a cry (*hutesium et clamorem*, hue and cry), should suffer the punishment of the criminal, unless he cleared himself from the suspicion of having been an accessory of the thief."§ By the common law every one is punishable who seeing a murder or robbery committed, fails to pursue the criminal, or omits raising the hue and cry. An injured person against whom a felony has been committed, or who has been assaulted, or threatened with robbery, might require the next constable ("tithing-man," 'horse-holder") to raise the hue and cry. The community was bound to pursue the wrong door. If the constable or the community failed to comply, they were both punishable; the material point in the case of hue and cry, was the pursuit, while the deed was fresh. By statute the duty of raising hue and cry was further extended to other offences.‖ Hue and cry is, however, now abolished.

A district affording one hundred men for the protection and

* Anstey, *Guide to the History of the Laws and Constitution of England*, p 120. Hallam, *Middle Ages*, ii. 291.

† Hallam, *Ibid.*

‡ "She had even broken the law, in refusing to prosecute a highwayman who had robbed her."—Fielding, *Tom Jones*.

§ Crabb, 41.

‖ Coke, *Inst.*, III. c. 2.: "The life of hue and cry is fresh suit."

counsel of a hundredor was a "hundred," or an aggregation of ten tythings. A free family affording one man was called "mansio."* In the north, hundreds were called "wapentakes," in several places also "wards," and it appears that these districts, both as regards their extent and the number of the members did not assimilate. The hundred-man (centenarius), later on the "alderman" and, in Norman times, the "bailiff," or constable, held the "court of the hundred," but the shiregereva alone had the right to proclaim the sittings of the court.

After the conquest the county organization continued, but instead of the old Saxon communal head-man, a royal officer was substituted as sheriff, under the name of "vicecomes, or bailiff;" (see Chapter II. of this part). He hold annually in the county and each hundred a court, at which the crown and feudatory vassals of the sovereign were present, the minor vassals however only in the character of assistants.† The technical expression for this court is "the sheriff's tourn and leet." In these leets of the hundred all those bound by the jurisdiction of the county had to follow the sheriff; in exempt districts, appertaining chiefly to the church, the jurisdiction of the hundred was occasionally farmed out to bailiffs.‡ These county and hundred courts were the courts *for all classes of the community.*

In the times of the Plantagenets from the county and hundred courts, was built up the institution of jury courts, to which only a section of the hundred was summoned for the settlement of any question of fact.

To the non-judicial business of the shire-assembly pertained the taking of the oath of allegiance, the levying of rates, and, subsequently, the election of the knights to represent the county in parliament; this latter function, as well as that of the election of coroner and verderor, or forester, has remained.

From the Plantagenet period the jurisdiction of the county assembly and its participation in the administration completely declined; the county from the time of Edward III. was governed in a purely aristocratic manner.

The tithings retained their character after the conquest, so far as they constituted parishes, towns, or vills; in each parish there

* Lappenberg, i. 584.

† Regis judices sunt barones comitatûs qui liberas in eis terras habent, *Leges Henrici*, i. c. 20.)

‡ *Chronicles of Jocelin of Brakelond*, p. 41.

was a court leet of the parishioners, which was a criminal court for offences of a minor nature. A law of Henry VIII. enjoined the court leet to prosecute heretics.* Originally those court leets elected the constables; the right of election was subsequently transferred to a section of the parish, viz., the vestry; but Sir Thomas Smith affirmed that the constables were, as a rule, chosen in the court leet every three or four years, at the good pleasure of the parishioners.† Every resident in a parish was bound under penalty to appear at the court leet. Those courts were empowered to pass valid bye-laws;‡ where such court leets still exist the positive obligation to appear there is still in force.§ Besides the administration of the highways, the court leet occupied itself with all communal matters. The decay of this institution is intimately connected with the disappearance of the smaller freeholders. On the other hand, the development of vestries of an exclusive and oligarchic type has ruined the communal system; nothing has been substituted for the court leets, and hence parliament in its cumbrous fashion, has to provide by occasional legislation, for the necessary local requirements.

There are two classes of counties—the "counties palatine" and towns which comprise special "counties." The counties palatine were formerly three in number—Durham, Chester, and Lancaster;‖ the first two deduced their right from time immemorial. The palatinate of Lancaster was founded by Edward III. All three had this in common; the three counts palatine, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, exercised royal authority (*regalem potestatem*) like the king in his palace. They were empowered also to exercise the right of pardon in cases of murder, treason, and felony. The earldom of Chester was, however, under Henry III., united with the crown, and the palatine jurisdiction of Durham which was vested, until recently, in the Bishop of Durham for the time being, is now taken from him by 6 and 7 Will. IV. c. 19, and vested as a separate franchise and royalty in the crown. A local royal court, "the court of pleas in Durham," still exists, which by an Act of the present reign is assimilated in its procedure with the courts at Westminster. The duchy of Lancaster was the property of Henry Bolingbroke when

* Toulmin Smith, 615.
† *Angliæ Descriptio*, 228.
‡ Toulmin Smith, 47, 48.
§ Toulmin Smith, 216.
‖ Bowyer, 35.

he dethroned Richard II. and assumed the title of King Henry IV. By a parliamentary act the succession to the duchy was to remain to him and his heirs, as if he had not attained the royal dignity. In the reign of Edward IV. this duchy, on the attainder of Henry VI., was declared to have become forfeited to the crown, and an act was passed to incorporate the duchy of Lancaster, to continue the county palatine, and to make the same parcel of the duchy, and to vest the whole in Edward IV. and his heirs, kings of England. Henry VII., however, obtained an act vesting the inheritance of the whole duchy in the king and his heirs, separate from the possession of the crown, as Henry IV. had held it. The county has its own chancery court holden by the Chancellor of the Palatinate or his deputy. To this court belong matters relating to certain large sections of ground in London surrounding the city of Westminster. As Lancaster has its own chancellor, the writs of the Lord Chancellor of England have no force within that district. The assize judges sit in Lancaster by force of a special commission under the seal of the chancery of the duchy. These judges constitute also the court of pleas at Lancaster. The procedure in these courts assimilates with that followed at Westminster.

"Counties corporate" are cities and towns which, with their district, constitute an independent "county." The officials of the counties surrounding these town-districts possess no official power within their circuit. Such corporate towns are London, York, and Bristol.

CHAPTER II.

THE SHERIFF AND HIS SUBORDINATES.

Nomination of Sheriff.—Official Powers.—Under-Sheriff.—Deputy-Sheriff.

UNDER the Normans the sheriff, or royal provost was the highest crown official in the county; he was invested with military command in time of war, administered the royal domains, was chief officer of the revenue, and exercised legal jurisdiction. As revenue official, he was bound to appear twice annually in the exchequer. In Saxon times, the sheriffs were, as a rule, chosen by the county courts; after the conquest, sheriffs received office either by royal nomination or by election. By 28 Edward I. c. 8, it is apparent that the office was in certain counties hereditary. The Earl of Thanet was hereditary sheriff of Westmoreland till his death in 1849.* In Durham, down to 1836, the bishop exercised the duties. The city of London has also the shrievalty of Middlesex vested in it by charter. 9 Edward II. stat. 2, abolished the popular right of election; even prior to the reign of this sovereign the sheriff might have been displaced at any moment; in the year 1170, for instance, many sheriffs were ousted. By virtue of several old statutes sheriffs are to continue in their office no longer than a year; but a sheriff may be appointed *durante bene placito*, and so is the form of the royal writ; therefore, until a new sheriff be named his office cannot be determined. No one that has served the office for a year can be compelled to serve again within three years after, if there be other sufficient person in the county.

The statute 23 Henry VI. enacted, that on the morrow of All

* This office may descend to and be executed by a female; for Anne, Countess of Pembroke, had the office of hereditary sheriff of Westmoreland, and exercised it in person. At the assize at Appleby she sat with the judges on the bench. Harg. *Co. Litt.*, 326.

Souls', yearly, the sheriff's should be appointed by the sovereign for each county. Only Huntingdon and Cambridge possess at the present day one and the same sheriff. The judges, together with the other great officers and privy councillors, now meet in the exchequer on the morrow of St. Martin yearly, and then and there the judges propose three persons to be reported, if approved of, to the Queen. Ordinarily commoners only are put forward as candidates. On the third of February, in the ensuing year, a *pro formâ* sitting of the privy council takes place, where the sheriffs are pricked or nominated by the sovereign; such candidates only being selected as the ministry has previously chosen. When the crown, in case of urgency, for instance in the time of a plague, avoiding the presentation of a list, nominates independently a so-called "pocket-sheriff," this is not regarded as contravening the law. This right of the crown was, however, contested by the judges under Henry VI.; and only in the reign of Elizabeth has the case of such a nomination occurred without such previous presentation. If a sheriff die in office, the appointment of another is the mere act of the crown. A pocket sheriff is, however, usually appointed, in case a vacancy should occur during the course of the official year.

The discharge of the office is, in general, compulsory upon the party chosen; and if he refuse to serve, having no legal exemption, he is liable to indictment or information. No person shall be assigned for sheriff unless he have sufficient lands within the county to answer the crown and the people. This is the only qualification for the office.* In his bailiwick he is the king's bailiff, and is bound to take heed lest the crown be despoiled of its royalties, and to lay an embargo on chattels, wrecks, etc., which are either without an owner or heir, or which have been confiscated. His official powers are partly of a judicial, partly of a ministerial nature; in the former capacity, writs may be directed to him for the trials of issue out of the inferior courts where the debt or demand does not exceed £20; he has also judicial power in the assessment of damages under writs of inquiry, on interlocutory judgments; his criminal jurisdiction in pleas of the crown (*placita coronæ*), having been withdrawn by Magna Charta. There has remained to him a petty penal authority which he shares with

* Stephen's *Blackstone*, ii. 634.

the justices of the peace. Through the abolition of the old county-courts he has furthermore lost his authority to determine suits of a minor nature. In civil causes he is to arrest and take bail; when the cause comes to trial he must summon and return a jury; when it is determined he must see the judgment carried into execution. He is liable to an action for the negligence or improper discharge of his duty, at the suit of the party grieved. In criminal matters also, he arrests and imprisons, returns the jury, has the safe keeping of the delinquent and executes the sentence of the court, though it extend to death itself.

In case of repeated disturbance of possession a special writ may be issued to him to determine jointly with a jury the damage, and to seize the intruder and imprison him by the body. On the ground of private acts a sheriff frequently determines with the aid of a jury respecting indemnification to be made in cases of expropriation. As keeper of the queen's peace, both by common law and special commission, he is the first man in the county and superior in rank to any nobleman therein during his office. He is bound to execute all civil and criminal processes issuing out of the superior courts; and, in this respect, is considered as an officer of these courts. He is bound to pursue murderers and other great felons, and may require all the commoners of his county above fifteen years of age to render him assistance (*posse comitatûs*). Fines and recognizances forfeited to the crown are received by him and accounted for. He superintends the election of knights of the shire and coroners, and proclaims outlawries and the like. On the expiration of his office he has to deliver to his successor a correct list of all prisoners in his custody, and of all unexecuted process.

By 3 and 4 Will. IV. c. 42, every sheriff is bound to appoint a sufficient deputy, having an office within a mile of Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting all rules and orders made as to the execution of any process or writ addressed to the sheriff. The under-sheriff is ordinarily an attorney, and usually performs all the duties of the office. He acts in the name of the sheriff, and, together with the bailiffs, enters into sureties for the due execution of the duties, and hence is called "bound bailiff;" which name, says Blackstone, "the common people have corrupted into a much more homely appellation." The sheriff is

held civilly responsible for all acts done or omitted by his servants, among whom jailors also are classed; should they suffer any person committed to them by lawful warrant to escape, the sheriff shall answer it to the crown if it be a criminal matter, or, in a civil case, to the party injured.

CHAPTER III.

THE CORONER.

Election of the Coroner.—The Coroner.—Assistant and Representative of the Sheriff.—Coroner's Inquest.—Coroner's Jury.—Responsibility of the Coroner.—Political Importance of the Office.—Subordination to Justices of the Peace.

THE office of coroner (*coronator*) was originally administered as being delegated by the sovereign; at a later period the coroner was chosen by the freeholders in the county-court; it is now the only substantially elective office of the county. Coroners are chosen for life, but may be removed by being made sheriff, which is an office incompatible with the other. The office continues on demise of the crown. There are particular coroners for every county; usually four, but sometimes six and sometimes fewer. By 7 and 8 Vict. c. 92, they may be appointed for districts within counties, instead of for the county at large. To municipal corporations the right is generally granted of having a special coroner. Since Richard I. a coroner has been ordinarily a commoner, now a days attorneys and surgeons are frequently chosen for the office, and it is undertaken on account of the fees attached.

A coroner, in the absence of the sheriff, is bound to act as his substitute in executing process; he is also a conservator of the Queen's peace,* and becomes a magistrate by virtue of his appointment, having power to cause felons to be apprehended. When in any civil suit exception can be taken to the sheriff for suspicion of partiality, or that he is interested, or of kindred to either plaintiff or defendant, the process must then be awarded to the coroner. His chief duty consists in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. He is bound to intervene wherever the causes of death are doubtful or suspicious, and inquire concerning shipwrecks, and certify whether wreck or not; also as to *treasure-trove*, who were the finders and where it is; as to the causes of

* Toulmin Smith, 372.

fires and similar mischances. The inquisition must be found with the concurrence of at least twelve of the jury, which is ordinarily composed of fifteen or sixteen jurymen. The inquisition must be held *super visum corporis*, for if the body be not found the coroner cannot sit, except by virtue of a special commission issued for the purpose. The proceedings before the coroner take place usually in open court; if the jury declare that a suspicion of procuring the death attaches to any particular person, the coroner may by special warrant commit him to prison. In such case the verdict acts exactly like a specfied chargo, but does not exclude the preferring an indictment before the grand jury.* The coroner may also take bail, and, since 22 and 23 Vict. c. 33, even in cases of manslaughter. The coroner is personally responsible and formerly was bound to give security; the concealment of felonies is punishable by fine and imprisonment for a year. In the absence of due property-qualification, the treasurer of the county gives security against any possible money penalties. The coroner may also, on petition of the freeholders, be dismissed by the Lord Chancellor for neglect of office, extortion, or misbehaviour, and also on the ground of age or incapacity.*

The office of coroner is more ancient than that of justice of the peace, and was originally of greater importance. Coroners have, however, to a certain extent been placed under the supervision of justices of the peace, inasmuch as the latter have to revise the fees, and to examine whether a coroner's inquest was called for. The official authority of coroners has thus been greatly curtailed, hence they do not interfere in many cases where their ancient duty required, for the common law directed that whenever any unusual death occurred the coroner should intervene, whether suspicion of a crime attached or not.† He is especially bound to hold inquest whenever anyone dies in a workhouse, prison, or hospital. By this means alone, in 1853, certain illegal and violent practices in a Birmingham prison were brought to light.‡ Interference on the part of justices of the peace has gone to such a pass, that on the 17th January, 1857, a coroner's jury in Cheltenham unanimously declared that the control which justices of peace assumed over the exercise of the lawful power of the

* Gneist, i. 32.
† Toulmin Smith, 375.
‡ Toulmin Smith, 376.

coroner was calculated to diminish protection to the lives of the inhabitants of this country, which the full accomplishment of the duties of the ancient office of coroner affords.* The ministry, also, with a view to restrain the great influence of the coroner, has of late years occasionally recommended candidates of their own to the electors.†

* Toulmin Smith, 378.

† Bucher, 234.

CHAPTER IV.

THE LORD-LIEUTENANT.

Nomination.—Removal.—Preservation of the Peace.—Militia.

THE military portion of the sheriff's office has, since the time of the Tudors, been transferred to the lord-lieutenant, who is a permanent honorary officer in the county, appointed by the Crown for the managing of the standing militia in the county, and all military matters therein.

Lords-lieutenants are supposed to have been introduced about the reign of Henry VIII. They are mentioned as known officers in the 4 and 5 Philip and Mary, c. 3, though they had not been long in use. Camden speaks of them in the time of Queen Elizabeth as extraordinary magistrates, constituted only in the time of great danger. Others, again, contend that the office of lord-lieutenant was first created in the third year of Edward the VI. in consequence of the many disturbances in several counties by the followers of the old religion against the new establishment.*

The lords-lieutenant are appointed by the Queen, under the great seal, those nominated being always actual supporters of the ruling party-government, and are generally of the principal nobility and best interest in the county. They virtually hold office for life; in view of law, however, only during the royal pleasure. Under the Bute ministry three lords-lieutenant, in 1780 two, in 1798 one, in 1819 and 1832 one, were deprived of their office on the ground of opposition to the government, or through mere disfavour.† The office being purely honorary the adherents of an opposition have no need to redoubt dismissal. The lord-lieutenant is the chief conservator of peace in the county, and usually keeper of the records (*custos rotulorum*). In this capacity he preserves all the records of the quarter sessions, and nominates, likewise, the "clerk of the peace."

* 2 Steph. Bl. 593.

† May, *Const. Hist.* i., 20, 46.

He is chiefly, however, commander of the county militia and armed yeomanry. He appoints, also, as his representative, the deputy-lieutenant, the officers of the militia, and the adjutants, whom he ordinarily takes from among justices of the peace. In his character as military representative of the sovereign he is in permanent connection with the state government.*

* Gneist, ii, 55.

CHAPTER V.

JUSTICE OF THE PEACE.

Importance of the Office.—Nomination.—Qualification.—Expiry of Office.—Compass of Functions.—Quorum.—Jurisdiction.—Summary Procedure.

ENGLAND will be governed in an aristocratic spirit, yet in a manner wholly free, so long as a certain measure of governing power, and a large extent of the administration of criminal law, is in the hands of independent gentlemen who dispense justice within their district, not according to the mere directions of a governing minister, but in conformity with law and statute—so long as the educated class make it the aim and purpose of their life, to serve the state without burthening the budget, and salaried officials do not oust justices of the peace. With reason does Lord Coke say of the office—"That if it is admistered in a fitting manner the whole of Christendom has not its equal." Legal tact and an uniform spirit of justice, prevent it from lapsing into a mere weapon in the hands of a governing class. The coarse and ignorant gentry of the 17th and 18th centuries, it must be owned, frequently abused the powers entrusted to them.* Such abuses still occasionally occur, but the refined education of the higher classes, the publicity of procedure, the sentiment of justice, which pervades the general mind, affords a far different guarantee from that which is offered by the "patrimonial jurisdiction" elsewhere prevailing. This office does not exist for the mere advantage of the land-holding class; it was summoned into life when the Plantagenets were sufficiently strong, by means of good internal administration, to uphold the royal power against the feudal aristocracy. The Queen's majesty is, by her office and dignity royal, the chief conservator of the peace within all her dominions, and may give authority to any other to see the peace

* In matters of high importance, particularly in cases relating to game, the justice was not always attentive to these admonitions of his clerk; for, indeed, in executing the laws under that head, many justices of peace suppose they have a large discretionary power, by virtue of which, under the notion of searching for and taking away engines for the destruction of game, they often commit trespasses, and sometimes felony, at their pleasure.—Fielding, *Tom Jones*.

kept, and to punish such as break it. The Lord Chancellor, Lord Treasurer, Lord High Steward, Earl Marshal, the Lord High Constable, and all justices of the Queen's Bench, by virtue of their office, and the Master of the Rolls by prescription, are general conservators of the peace throughout the whole kingdom. The coroners and sheriffs, in their county, and constables and tything men, within their respective jurisdictions, are also conservators of the peace. Finally, by virtue of their office, the Archbishop of York, and the Bishops of Durham and Ely.

The office was originally acquired, for the most part, by the election of the county freeholders, occasionally also by prescription; sometimes even as appendant to an estate. The right of election by the inhabitants of the county was abolished by 1 Edw. III., c. 16; the nomination has since proceeded from the sovereign.

It was ordained by statute, 18 Edw. III., that *two* or *three* of the best reputation in each county should be assigned to be keepers of the peace; but these being found too few for the purpose, it was provided by 34 Edw. III. c. 1, that one lord and three or four of the most worthy men in the county, with some learned in the law should be made justices in every county.

They were to be residents in the county for which they were named (2 Hen. V. stat. 1, c. 4, and stat. 2, c. 1), and by 13 Rich. II. c. 7, were to be the most substantial knights, esquires, and gentlemen in the same. By 14 Rich. II. c. 11 the number in each county was restrained to eight; but this is now disregarded. The qualification of £20 annual income introduced by 18 Hen. VI. c. 2 was considerably augmented by 18 Geo. II. c. 20. Since then no one can become justice of the peace who has not in possession and for his own benefit an estate, either legal or equitable, of freehold, copyhold, or customary tenure, in fee, for life, or such terms of years as in the Act specified, of the clear yearly value of £100, or a reversion or remainder expectant upon such lease as in the Act mentioned, with reserved rents of the clear yearly value of £300 per annum. Practising attorneys, solicitors, and proctors are excluded from the office. A property qualification is not required in the case of—(1) peers and lords of parliament, their sons and heirs; (2) the sons and heirs of any one possessing £600 yearly income; in other words, the former qualification of a commoner eligible to parliament; (3) the mem-

bers of the privy council; (4) the judges of the Common Pleas and Court of Exchequer; (5) the solicitor and attorney-general; (6) the judges in corporate towns; (7) the vice-chancellors of the universities and heads of colleges.

The position of justice of the peace serves as the initiation preparatory to all public functions; every man of family hastens to get named to the office, which is not of a political or party nature, and is granted by the sovereign, on the proposal of the Lord Chancellor, by commission under the great seal. The sovereign can nominate as many justices of the peace as may be deemed expedient. The office subsists during the pleasure of the crown, and is determinable by demise of the crown, but since the reign of Anne may hold over for six months afterwards. If the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus*, or to swear to his qualification afresh; nor, by reason of any new commission to take the oaths more than once in the same reign.

A justice of the peace may be dismissed by express writ under the great seal, or by accession of the office of coroner, or of sheriff during the year of shrievalty. A writ of *supersedeas* merely induces suspension of the commission, which by a writ *de procedendo* may be revived. When a new commission is granted, those not specially named therein are excluded.

The power, office, and duty of a justice of the peace depend on his commission. They are deputed to administer justice and do right by way of judgment; to keep the Queen's peace, and punish such as break it; to quell riots and affrays, to take securities for the peace, and apprehend and commit felons and other inferior criminals. They grant beer and trading licenses, assess the county-rates in general or quarter sessions, and direct their collection; appoint the overseers of the poor, inspectors of highways, and the lower police-officials. Under the system anterior to the poor-law their powers were very extensive. Edward III. granted them the right not only to apprehend all felons, but also the power of trying felonies in conjunction with a jury whenever specially commissioned. It was formerly customary to appoint only a select number of justices eminent for their skill and discretion to be of the *quorum*, the words of the commission running thus:—"Quorum aliquem vestrum, A. B. C. D., etc. unum esse volumus." The practice now is to advance almost all of them to that

dignity, the skill and discretion being taken to exist; the "learned in the law" are in great measure supplanted. By special statutes the judicial authority of justices of the peace has been gradually extended. A right to appeal from decisions of individual justices or their special session to the quarter sessions formerly existed, and thence a further right of appeal lay to the courts of law. It is open to every one, in case there be valid grounds for suspecting that the justices of the peace are partial or unduly influenced, to apply for a writ of *certiorari* to the Queen's Bench.*

Blackstone complains greatly of the summary jurisdiction of justices of the peace, whereby on the ground of special statutes they may proceed without a jury, a jurisdiction which extends moreover to a great number of offences.† He says,‡ "The burthensome increase of the business of a justice of the peace discourages many gentlemen of rank and character from acting in the commission. This trust, when slighted by gentlemen, falls, of course, into the hands of those who are not so, but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment."‡ The fears foreshadowed by Blackstone have been realised in many instances; the Municipal Corporation Act of 1835 has released the gentry from dispensing justice, substituting salaried police magistrates.

Justices of the peace who have not studied law practically are amply provided with legal literature to meet their want of knowledge.§

* Bl. iv., 320.
† Bl. iv., 280.
‡ Bl. iv., 282.
§ "The justice declined executing his office, as he said he had no clerk present, and no book about justice business, and that he could not carry all the law in his head."—Fielding, *Tom Jones*.

CHAPTER VI.

LEGISLATION FOR THE POOR, PREVIOUS TO THE POOR LAWS OF 1834.

Pauper System under the Plantagenets.—Under the Tudors.—Disappearance of Small Landholders.—Spoliation of the Monasteries.—Enactments of Edward VI. —Poor Laws of Elizabeth.—Parish to Afford Maintenance.—Overseers of the Poor.—Destruction of Cottages.—Blackstone's Opinion concerning the Poor Laws.

The law of settlement has been already described; its rigours become explicable on considering that the charge of the poor was made a burthen upon a small communal district, in other words, the parish, and that everyone who was bound to pay the rates naturally strove to shift the burthen from his own shoulders.

Party-spirit in England has invested history with its own colours, thus rendering it almost impossible to explain the sudden appearance, under the Tudors, of a proletarian class. To investigate at large the English pauper system is beyond our purpose, we must rest satisfied with collecting the necessary data bearing upon pauper legislation, adducing incidentally the opinions of men of different parties as to the origin of pauperism. Till the reformation there had been no temporal legislation in England in relation to the poor; they were supported by the Church, the monasteries, and the sovereign, as well as by means of voluntary gifts. The Church enjoined every clerk, under pain of excommunication, to give from his superfluity to the poor; laymen were earnestly urged to act in like manner.* A canon of 1281 (9 Edw. I.) directed that non-resident rectors should provide for the wants of the poorer parishioners. An old ordinance, preserved in the "Mirror of Justice," enjoined that the poor should be maintained by the rector of the church, out of the tithes contributed, "that no man die of default of sustenance." The council of Oxford further decreed that bishops should keep an almoner, as "praying and reading sufficeth not for a bishop." The sovereign also had

* Pashley, 149.

his almoner, styled occasionally "Lord Almoner," and this office of "king's almoner" is even still retained.

These regulations continued till Edward III. Every baron maintained his serfs and villeins, just as the planter now-a-days does his negroes. How far the churches and monasteries complied with the obligation it is not easy to determine. Prior to the reformation, clerks were frequently urged to realize their duty, a proof that they occasionally disregarded the injunctions. It cannot be gainsaid, however, that the support afforded to the poor by the Church was very considerable. Great private charity likewise generally prevailed during the middle ages.* On the disappearance of the Plantagenet race, the social aspect of England was transformed; the serfs, dating from the 14th century, were mainly emancipated, and, relinquishing feudal protection and maintenance on the part of the lord,† had henceforth to support themselves under most stringent compulsion on the side of the law. The wars of the Roses, which convulsed the whole kingdom, further increased the number of the poor.‡ Even under the house of Lancaster it had been found needful to forbid beggars to pursue their calling beyond the districts for which they had received an express license.§ Begging students were bound to have a certificate from the chancellor of their university, otherwise they might be punished as "vagabonds."‖

Fortescue had, withal, under the house of Lancaster, gloried in the fact that in no land were there so many small landowners as in England, thus seeking to account for the general well-being. This source of prosperity was, however, dried up from the time of Tudor sway, inasmuch as the absorption of the smaller holdings had become more general. Under Henry VII. a vast extent of land, on which dwellings had previously stood, was changed into pasturage. Vainly did the sovereigns and far-sighted patriots strive to forestal the reckless endeavours of the now landed oligarchy. In the year 1597, Francis Bacon introduced a motion in the lower house against park and meadow inclosures, against the laying waste of towns, and the homes of the peasantry, and converting the land into pasturage. He complained "that poors had

* Stowe, the historian, who could not endure his neighbour, Thomas Cromwell, recounts, notwithstanding, that 200 poor were fed daily in Cromwell's house.—Froude, i. 43.

† Miss Martineau, i.
‡ Pashley, 165.
§ Pauli, v. 654.
‖ Crabb, 322.

inclosed great grounds, pulled down even whole towns, and converted them to sheep-pastures."*

The violent and ruthless carrying out of the Reformation added largely to the growth of pauperism; with rapacious swoop, Henry VIII. despoiled all the monasteries and abbeys; if such universal spoliation be not regarded as the sole cause of the increasing pauperism,† at any rate it powerfully contributed to augment the proletarian class.‡ Burnet, in his "History of the Reformation," affirms that Henry VIII., by the plunder of ecclesiastical property, accumulated the clear yearly value of £1,131,607. 6*s.* 4*d.* Others compute the amount at £1,600,000. These estates were sold at an undervalue to his prime favourites among the gentry, the hangers-on about the court, or to individuals subservient to the king in parliament.§

"But now," says Selden, (assuredly an unsuspicious witness) "that all the abbaies, with their lands, goods, and impropred parsonages be in temporal men's hands, I do not tell that one half-penie worth of almes, or any other profit, cometh unto the people of those parishes. Your pretence of putting down abbeys, was to amend what was amiss in them. But se now how it that was amisse is amended, for all the godly pretence. It is amended even as the devil amended his dame's leggo (as it is in the proverb) when he should have set it right, he bracke it right in pieces. The monks gave to little almesse. But now where xx. pound was given yerely too the poore, in more than in c. places in Ingoland, is not one mealles meat given. This is a faire amendment!"‖

Under the Tudors the length and breadth of the land was traversed by beggars and vagabonds; the discovery of America had lowered the value of money, and the monks, driven out from their monasteries, were everywhere forced into connection with the vagrant-class. Against these mischiefs sanguinary enactments were launched for the purpose of ensuring protection. The first laws of the Tudors against sturdy beggars and vagabonds were issued prior to the Reformation,¶ an indication that the evil had already become sufficiently great. The first statute of Henry VIII.** directing beggars to be kept within their districts, and

* Pashley, 213.

† Froude, i. 74.

‡ Miss Martineau, vol. v,

§ The plunder has been valued at upwards of £80,000,000 sterling.—*St. John on the Land Revenues of the Crown*, 68.

‖ *Opera Omnia*, iii. 1839.

¶ 2 Hen. VII. c. 2 (1495) and 19 Hen. VII. c. 12 (1503-4).

** 22 Hen. VIII. c. 12, An Act concerning the punishment of Beggars and Vagabonds.

ordering vagabonds to be whipped, was passed in the year 1531.

The admittedly baneful results of the Reformation in relation to the pauper system, rendered more powerful remedies necessary. An act concerning the punishment of beggars and vagabonds (27 Hen. VIII. c. 25) first imposed on towns and parishes the obligation of keeping their poor; at the same time such sturdy beggars were to be punished with whipping, cropping of the ears, and, in case of relapse, by the gallows. The statute of Edward VI. (1 Edw. VI. c. 4) exceeds everything in horror and cruelty. Any one convicted of vagrancy was to be branded with a "V," and made over to the informer as a slave for the term of two years, the master being only required to afford him bread and water; if he absented himself more than fourteen days, he was to be again branded and became a slave for ever; should such a slave escape he might be gibbeted.* Power was granted to justices of the peace to track out any such offender, and on being captured, if not reclaimed by the owner, to assign him as a slave to the district where he was born, previously branding him with an "S." Such outcast was always to go in fetters and bonds; if the officials of the district allowed him to wander about idle they were punishable. After the lapse of a few years this statute, as being incapable of being carried out from its sheer atrocity, was modified.

Elizabeth directed her efforts to stem the evil by two several enactments.* Ecclesiastical censures and compulsory taxation for the raising of alms from refractory parishioners were ordered. By a later statute, closely approximating in spirit to the socialistic doctrine of the "*droit du travail*,"† it was enacted that in every place which possessed a corporation, the latter should deliver wool, flax, iron, and other raw material, to the overseers of the poor, to be worked up by the paupers, "so that other poore needy persons, willing to work, may be set on work."‡ Artizans unable to work were to remain in the parish where they were born, or had resided for three years.§ Finally, the chief poor-law was inaugurated by Elizabeth in 1601, making the care of the poor a fixed burthen

* 5 Eliz. c. 3, (1562—3); and 14 Eliz. c. 5, (1572.)

† 18 Eliz. c. 3, (1575.)

‡ Art. 21 of the Déclaration des droits de l'homme (1793). "La société doit la subsistence aux citoyens malheureux, soit en leur procurant du travail, soit en assurant les moyens d'exister à ceux qui sont hors de l'état de travailler."

§ 14 Eliz. c. 5.

upon the parish. This statute, 43 Eliz. c. 2, endured 233 years without alteration, and became, year by year, more oppressive.

By this statute, parishes were to levy a poor-rate, by means whereof such as were incapable of working were to be supported, and raw material was to be provided, which those who were able to labour were to work up. In conjunction with the churchwardens, hitherto charged with the care of the poor, overseers were introduced, to be nominated yearly, in Easter-week, by two justices dwelling near the parish. Where the parish was too large, a special body might be constituted for each district or village comprised within such parish. A right to propose a candidate in the event of such election was generally conceded to the parish or to the vestry; the right of election by the parish was, however, expressly disacknowledged.*

Under the Stuarts the overseers, who were invested with almost absolute power, committed multifarious acts of knavery. They were, in consequence, during the reign of William III., placed under the surveillance of the justices of peace. Overseers were empowered to imprison persons refusing to work, and to apprentice pauper children; to levy the poor-rate, and collect the arrears, having, likewise, a material share in the expenditure of the rate. The residents in a district could not vote the amount of rate to be levied, and had merely the right of appeal to the quarter sessions, to which were also referred appeals against the regulations of the overseers, and against resolutions adopted by churchwardens in relation to the poor. A malicious refusal on the part of an overseer to afford relief, or any abuse of office, might be prosecuted criminally.

Elizabeth's endeavour to check poverty was not successful; under the Stuarts it spread more widely through the land. At the close of the 17th century from £600,000 to £840,000 poors' rate was levied; and relief afforded to from 250,000 to 300,000 poor, or to about one twenty-fourth of the population. The consequences were the baneful law of settlement, and as a result of this law, a still more vehement razzia against the small occupiers. In the 17th century there were still 160,000 of the latter, comprising, with their families, one-seventh of the population; in the 18th century they had almost disappeared.†

As the number of the needy increased, heavier burthens were

* Gneist. ii., 614. † Pashley, 251.

imposed, and the powers of the justices of peace to compel relief were made more ample. Parishes were allowed to rent or take on lease, workhouses, where necessitous persons capable of working might be immured. These abodes, in conjunction with the hardships of the law of settlement, rendered the lot of the English poor during the last century anything but enviable. To be poor became a crime; the land was filled with poor-houses, constructed like houses of correction, and which went by the name employed in Germany to designate reformatory prisons, viz., "work-houses."* "In practice, the office of an overseer of the poor seems to be understood to be this: to keep an extraordinary look-out to prevent persons coming to inhabit without certificates, and to fly to the justices to remove them; and if a man brings a certificate, then to caution all the inhabitants not to let him a farm of £10 a-year, and to take care to keep him out of all parish offices; to warn them if they will hire servants to hire them half-yearly, or by the month, by the week, or by the day, rather than by any way that shall give them a settlement. The true function of the landlord, on the other hand, is to pull down cottages; to drive out as many inhabitants and admit as few as possibly he can—that is, to depopulate the parish in order to lessen the poor rate."†

Not only the landlord but the residents in the parish found themselves forced, by reason of the stringent poor-law, to raze all hovels in their neighbourhood; on every hand open war was waged against the cottages, which were often bought up by landlords for the purpose of being pulled down, thereby destroying a place of settlement for the humble and the needy.‡ Landed estates gradually became more extended, and the number of petty land-holders daily diminished.§ Cultivable land was transformed into meadows and parks, thereby converting the free-labourer into a mere proletarian.‖ The farm-labourer, hunted from his cottage-home, felt induced, in consequence of the development of industrial undertakings, to betake himself to the towns,

* Schlosser, vi, 851.

† Dr. Burn's *Hist. of the Poor Laws*, 211.

‡ Young, *The Farmer's letter to the People of England*, pp. 288-9.

§ Pashley, 249.

‖ "The man of wealth and pride
Takes up a space that many poor supplied,
Space for his lakes, his park's extended bounds,
Space for his horses, equipage and hounds;
His seat, where solitary sports are seen,
Indignant spurns the cottage from the green;
Where then, ah! where shall poverty reside,
To 'scape the pressure of contiguous pride?"

Goldsmith, *Deserted Village*.

and strive, by accommodating his skill, to eke out a scant existence.

To the law of settlement, the destruction of the abodes of the poor, and the accumulation of landed estates, have we to attribute the fact that the town population in England so vastly outweighs that of the country. In 1841 from fifty-nine to sixty per cent. of the entire population of England dwelt in towns.* Unable to gain a livelihood in the country, the farm-labourer had betaken himself to the town as a mere artizan; but even there he was persecuted by the dominant gentry; first, by the law of settlement, and next from the fact that the gentry, down to 1846, by means of the bread-tax, made the very bread he earned in the town harder to procure. The condemnatory sentence which the great commentator of English law has launched against the legislative measures for the poor will serve as a fitting termination to the dreary subject:—"Notwithstanding the pains that have been taken about them, they still remain very imperfect and inadequate for the purposes they are designed for, a fate that has generally attended most of our statute laws where they have not the foundation of the common law to build on. There is not a more necessary or more certain maxim in the frame and constitution of society, than that every individual must contribute his share in order to the well-being of the community; and surely they must be very deficient in sound policy who suffer one half of the parish to continue idle, dissolute, and unemployed, and at length are amazed to find that the industry of the other half is not able to maintain the whole."†

* Meidinger, p. 7. † Blackstone, i, 365.

CHAPTER VII.

SURVEYORS OF HIGHWAYS.

Their Nomination.—Powers.—Highway Rate.—Turnpike Roads.

HIGHWAYS are public roads which every subject has a right to use. They either exist by prescription, by the authority of local acts, or by dedication to the use of the public. The liability to keep highways in repair, in whatever way they may have first originated, is of common right, incumbent, generally, upon the parishes in which they lie. In some cases it attaches by prescription to particular townships or other divisions of parishes, and, occasionally, to private individuals, *ratione tenuræ*.

The parish is bound to keep the roads which traverse it in good order; whereas since 22 Hen. VIII. c. 5, the repairing of bridges has been transferred from the parish to the county. Since 2 and 3 Philip and Mary, c. 8, special surveyors have been appointed. They were originally selected by the churchwardens and constables of the parish, and subsequently were appointed by two neighbouring justices of the peace, at special sessions holden for the highways. The burthen of constructing the roads was formerly discharged in kind; gradually, however, money payments were substituted. The highway-rate is levied upon the same principle and is chargeable on the same property as the poor-rate. The rate is to be made and signed by the surveyor, who keeps the accounts, which may be examined at all reasonable times by the rated inhabitants, without fee or reward. The yearly account is laid before the vestry, and passed and examined by justices of the peace.* The surveyors of highways are elected annually since 5 and 6 Will. IV. c. 50, by the inhabitants, in vestry assembled. If they omit to elect, the justices may appoint, under the regulations prescribed by that act. The surveyors are bound to keep the roads in good order.

Turnpike-roads are constructed by private companies, empowered by certain local acts of parliament, called Turnpike Acts,

* 3 Step. *Com.*, 233.

to levy tolls according to a fixed tariff. These roads, dating from the last century, are managed by trustees or commissioners. The justices of the peace in any district interested are, *ipso jure*, trustees. The special sessions of the justices of the peace exercising a right of supervision both in regard to the roads and the employés; from their decisions appeal lies to the quarter sessions. Any parish, county, or other party bound to repair a road or bridge, and neglecting the duty is liable at common law to an indictment.

CHAPTER VIII.

CONSTABLES.

High Constables.—Petty Constables.—Official Duties.—Nomination of Petty Constables.—Special Constables.

The constable was originally a civil and a military administrative functionary. The statute of Winchester, 13 Edw. I. st. ii., c. 6, directs that in each hundred two constables shall have supervision of the arms and crossbows of the residents. These were the high constables chosen by the court-leet of the franchise or hundred over which they presided, or, in the absence of any such court-leet, to be appointed by the justices at their special sessions. The authority appointing might also dismiss them; they have supervision over all the petty constables, and are, in a certain measure, responsible for their acts.* Their office is purely ministerial; in such character they are the head functionaries of their district and guardians of the peace. They were charged, formerly, with the collection of the county-rates. They are bound to appear at the special sessions of their district, and to make a report at the quarter sessions.†

The petty constables are the ancient head-men of the tithing. The statute of Winchester ordered them to give assistance to the high constables, to keep watch and ward within their jurisdiction,‡ and to preserve the peace. In certain localities the office of head borough and tithing man is held separately from that of constable; as a rule, however, the constable is the head-man of the district; "where there is a constable, there is a township." The office towards the close of the middle ages had almost everywhere subsided to the level of a mere police functionary.

Each parish must have at least one constable; every resident in such parish is bound to discharge the office for one whole year, the

* Blackstone, i., 355.

† Gneist, ii., 49.

‡ "*Ward* (*custodia*) is chiefly applied to the day-time, in order to apprehend rioters and robbers on the highways. *Watch* is applicable to the night only, being called among our Teutonic ancestors *wacht*, and begins at the time when ward ends."

nobility and almost the whole of the gentry being released from such obligation. Any person appointed to the office of constable may serve either in person or by substitute. Every parish, if the vestry so resolve, may have constables appointed with a salary payable out of the poor rate.

The official duties of petty constables are the watch and ward of the parish, the duty of watching generally referring to the night-time; the high constable may, however, appoint special night watchmen. The petty constables are subject to the orders of the justices of the peace; they may arrest persons *in flagranti*, as well as suspected persons, if there be reasonable ground for suspecting that a felony has been committed; they may also break into suspected houses, for the prevention of felonies or the pursuit of felons.* Their principal duty is the preservation of the peace and the service of summonses and execution of the warrants of justices of the peace; in regard to the latter the petty constable enjoys certain protections similar to those conferred on the justices themselves. Thus an action cannot be brought against him for what he does as constable, after the expiration of six months from the commission of the act.†

If an action be brought against a constable for anything done in obedience to the warrant of a justice of the peace, a demand in writing of the perusal and copy of the warrant, signed by the plaintiff or his attorney must, by 24 George II. c. 44, s. 6, be made or left at his usual place of abode; the effect of which is, that if such perusal and copy be not granted within six days, the plaintiff *may commence his action against the constable alone; but*, if it be granted within six days, he cannot sue the constable without joining the justice who made the warrant as a co-defendant; and then the mere production and proof of the warrant at the trial will entitle the constable to a verdict, notwithstanding any defect of jurisdiction in the magistrate.‡ "Of the extent of the power of constables, considering what manner of men are, for the most part, put into the office, it is, perhaps, very well that they are generally kept in ignorance."§

Constables are generally appointed by two justices of the peace at special sessions, provided no court-leet or lord of the manor has the right of nomination; but even in the latter case they are sub-

* Bl. i 351.
† Step. Bl. ii, 659.
‡ Smith's *Action at Law*, 51, 52.
§ Bl. i., 356.

ject to the justices of the peace, who may annul the nomination and displace them.*

The general obligation on every Englishman to maintain the peace and prosecute criminals has been newly regulated by 1 and 2 Will. IV. c. 41, and 5 and 6 Will. IV. c. 43: when in any district a credible witness avers upon oath that there is reason to fear a riot or a felony in the neighbourhood, or that the ordinary officers are insufficient, any two justices of the peace may appoint as many special constables as they deem expedient. Station and rank in such case are no grounds of exemption; ordinarily speaking the ruling gentry have known how to protect themselves against the commotions of the populace by suitable nomination of special constables.†

* 5 and 6 Vict. c. 109.

† In the year 1848 Louis Napoleon acted as special constable in London.

CHAPTER IX.

THE TOWN CORPORATIONS.

Meaning of "City."—Roman Towns.—Saxon Towns.—Fee-farm.—Guilds.—Identity of Guilds with Town Corporations.—English and Belgian Towns.—Towns under the Tudors.—Corporate and Non-Corporate Towns.—Bye-Laws.—Counties Corporate.—Corruption of Town Corporations.—Extent of the Powers of Corporations.—Opinions relative to the Older Town Constitutions.

In the introductory chapter of the present book we have shown that a town in its social aspect need not be a town politically considered. The word "city" itself in nowise indicates a town community; it is merely a title of honour. Cowell in his Law Lexicon says "that a city is a town 'ORDINARILY' possessing an episcopal seat and a cathedral church." Westminster had a bishop only in the reign of Henry VIII., and yet it is a city. It was resolved by the Council of 1072 to remove episcopal seats out of the cities; a striking proof, accordingly, that the term city does *not necessarily involve the establishment therein of an episcopal see.** A borough is a place which sends a representative to parliament; socially considered, it may be smaller than a village.

The Romans founded in Britain nine town colonies,† amongst which London, Colchester, Lincoln, Chester, Gloucester, and Bath are still of great importance; Verulam (St. Alban's) has, however, subsided into the condition of a neat country town. These towns (*Civitates*) were organised on a Roman type, and, like other Roman towns governed by aristocratic decurions. In like manner, analogously to the Roman guilds, workmen's guilds (*collegia fabrorum*) were established, with special rites and "mysteries." A ruined temple of Pallas and Neptune at Chichester perpetuates the importance and reverential zeal of a guild (or *collegium fabrorum*) which had founded and consecrated it.‡ When Coke derived the word "*mysterium*," craft, from "*maistre*," magisterium, he assuredly overlooked the religious associations which

* Bucher, *Parlamentarismus*, p. 56. See also Gneist, ii., 559. Blackstone, Coke, and Bowyer are against the opinion that a city is always an episcopal seat See also, Christian's *Blackstone*, i., 114.

† Gibbon, *Decline and Fall.*

‡ Anstey, 58.

the crafts originally formed amongst the Romans, and subsequently, amongst the Saxons.*

The Saxons were not a people given to the founding of towns; the British and Roman population of the town-colonies probably incurred the fate of the other Britons. So far as they were spared they were reduced to the condition of subjects and vassals. The towns themselves were brought under the domination of some Saxon thane, who levied imposts at his own good pleasure. Those towns which existed in Saxon times were either settlements of vassals on the church lands or on the estates of the temporal lords.

The government of the Saxon towns was democratic, as with all Saxon communal organizations. As a rule, at the head of any such larger aggregation of enclosed houses, which was regarded as a hundred, was placed, an alderman or borough-reve, whose authority was occasionally limited by a royal officer, the "wye," "port," or "burg-reve." These functionaries collected for the king a rent which however was frequently granted, either to the neighbouring thane or feudal lord.†

In Norman times in lieu of a borough-reve, a bailiff nominated by the king was substituted, who later on was usually styled "mayor." By charters from the king or lord of the manor, the soil and the town revenues were frequently granted to the towns in fee-farm, on condition that the burgesses should render a yearly rent, and should especially pay the rent punctually to the Exchequer or to the lord of the manor.‡ Generally speaking, there was coupled with such grant a special, but limited jurisdiction, and the right to elect the functionaries. The towns were chiefly inhabited by freed-men; a serf who resided for a year and a day in any town became free.

The burgesses, called also "citizens," and "townsmen," enjoyed personal freedom from toll, in any place where such toll existed, in conjunction with other privileges, oftentimes of an important nature, since arbitrary taxation had been abolished by Magna Charta, and the feudal system had declined. The quality of burgess gave a claim to be initiated into the guilds

* Coke, *Inst.* ii., 668.

† Lappenberg, i., 608; Hallam, *M.A.* iii., 22.

‡ In Spain the *fueros* of the towns were generally contracts which the founder of the town concluded with the colonists. Lemcke, *Geschichte Spaniens* ii., 419. In Portugal places which had distinguished themselves in war obtained the right, by means of charters (Behetria), of choosing their governors. *Schafer Geschichte Portugals*, part i.

existing in the town. The towns usually possessed their own court-leet; whosoever gave service in this court, that is, bore "lot," or paid dues, that is, "scot," (Saxon "scat," a part) was regarded politically as a full burgess. Burgess-ship was acquired by birth, by apprenticeship, and marriage. From the time of Richard the Lion Heart, charters were accorded to many towns. The democratic became thereby transmuted into an oligarchic element by the transference of the government to the "guilds," or associations of thriving burgesses. The Roman guilds had disappeared, and were followed by others of a Pagan-Saxon origin, which at first were simply meetings for purposes of special sacrifices. Christianity reputed these as "devils' guilds," but, as with so many other heathen customs, was fain at last to effect a reconciliation. In the place of sacrifices, banquets were held in common, in edifices specially set apart (*domus convivii*, *domus gildonæ*, guild-hall).*

In larger localities the several guilds† were united into a larger association, where the representatives of the tythings deliberated in common, both on the concerns of the guilds, and of the respective locality.‡ Doomsday Book mentions three guilds as existing in and about Canterbury; at the time it was compiled, several guilds existed in London, dating, as it would appear, from the days of King Athelstan.§

Whenever the kings confided to the existing guilds the government of the town, and granted to them, as representatives of the town community, charters with jurisdiction, they probably did but confirm an actual condition of things already existing in many spots.

The recognition of the burgesses of a town as an independent body, or the recognition and confirmation of their guild rights, was for many centuries one and the same thing.‖ The *statuta gildæ* of Berwick, of the year 1284, which, although at the period Scottish, had still social and political relations assimilating with those of English towns, demonstrate this fact most clearly. This statute is a complete town constitution undersigned by the mayor of the town of Berwick-upon-Tweed, and the notables thereof.¶

* Lappenberg, i. 608.

† From the Saxon "guildan;" from "gildare," to pay a tribute.

‡ Wilda, *das Gildenwesen im Mittelalter*, 217.

§ *Ibid.* 245.

‖ *Ibid.* 146.

¶ Howard, *Traités sur les coutumes Anglo-Normandes*, ii. 467—487.

The workmen's guilds,* fashioned on the guilds of the burgesses, speedily entered into opposition with the aristocratic town government. Towards the middle of the 15th century, according to Madox,† the custom of placing entire towns under guild constitutions ceased; in lieu of the word "guild," the form "*communitas perpetua et corporata*" came into vogue. The change is to be accounted for by the increased number of the small burgesses, who succeeded in obtaining a share in the municipal system, and likewise by the favour shown to towns by the revolutionary house of York.‡

The main characteristic of nearly all the town constitutions remained aristocratic, their end and aim being to provide for the general security and common benefit. Under Tudor sway the towns were made use of as an instrument whereby to strengthen the royal power in parliament; to several was granted the privilege of returning members, and many towns even at that date were rotten boroughs. In the reigns of Edward VI., Mary, and Elizabeth, sixty-three boroughs, which neither previously nor subsequently have been represented, were allowed to return members to parliament. To those boroughs which obtained the right of being represented in parliament, a royal charter was usually granted, by virtue whereof they received a corporation. To the Tudors this was quite an immaterial matter, provided they could succeed in securing subservient members in parliament; but as they were not likely to procure such members from the town democracies, the charters which the Tudors granted, whenever not based on guild representation of an exclusive kind, created oligarchical governing bodies.

From the reign of Henry VI. a distinction was made in granting charters with, or without, corporate rights. The latter guaranteed merely a town constitution; the former not only accorded the right to hold property, but granted to the corporate body the right of jural persons. By a clause of incorporation towns received a special title and powers to acquire, *in perpetuum*, property both real and personal; conjointly with the rights of corporation, a special jurisdiction was usually conferred. If the charter contained a non-intromittant clause, the concurrent jurisdiction of the county was excluded.

* Wilda, 250.
† Madox, *Firma Burgi*, 26.
‡ Wilda, 253.

Although rights of incorporation are now granted to guilds, companies, or other associations, a town is never incorporated *as such*, but only certain associations and certain departments therein. The town itself formerly constituting, like a hundred with its court-leet, a mere political community governed without corporate rights, ceasing, by reason of the charters granted, to be a political combination, became a mere social aggregation. The political body, constituted by the act of corporation, and which simply serves as the ground-work of the corporation, consists of a mayor, or bailiff, aldermen, and common councilmen; at times also of certain wealthy citizens, who, under a certain style or title,—*ex. gr.* "The Mayor and Burgesses of——,"—form the corporation, and manage the municipal business. In relation to such oligarchy, the mass of the burgesses was nothing but a "*misera contribuens plebs*;" wherever the charter did not create such an oligarchy, the aristocratic current of the period, or the arbitrary pressure of the government effected the mischief. Under the shadow of such oligarchic rule, numerous honorary "freemen" gradually insinuated themselves into the towns, without being subjected to any municipal burthens whatsoever. Ultimately a small governing body, with or without aristocratic organization, usurped the enjoyment of the municipal property, and shut out the great mass of the tax-payers from the town government and privileges. Just as every parish, and every political aggregation, the town officials, conjointly with the right of incorporation, received the privilege of issuing bye-laws.* Whereas this privilege in the parish and in the county had fallen into desuetude, it was newly established in favour of corporate towns; the bye-laws of the latter being binding even on third parties, provided they are not in contravention of law, *non contra leges, non irrationabiles*. All town enactments in restraint of trade were accounted illegal. The rules of workmen's guilds were always to be ratified by the sovereign. In the year 1180, in London alone, not less than fifteen guilds were fined for having passed bye-laws without the royal ratification.† Henry VII. insisted anew on the necessity of the royal ratification, and transferred the exercise of this prerogative to the lord chancellor (19 Hen. VII. c. 7). The regulations of every corporation, to have binding force, were to be examined by

* Vincke, 72.

† Wilda, 250.

the lord chancellor, lord high treasurer, or judges of the King's Bench or Common Pleas.* The parliament was not more graciously inclined towards the autonomic legislation of the towns and boroughs than the Plantagenets, Tudors, or Stuarts. The practice of the courts has likewise stringently controlled the exercise of the privilege of passing bye-laws, excepting where held by prescription, the proof thereof to be deducible from the time of Richard I.

Charters of incorporation frequently grant police administration and direction for the maintenance of the peace, apart from that of the county; in such case, however, the corporations remain subject to the right of appeal to the quarter sessions, and are subordinate to the sheriff. Eighteen towns (eleven English cities and five boroughs, with two towns in Wales) constitute special "counties corporate," the town functionaries administering the office of sheriff.

Under Charles II. the remains of the old popular elements were everywhere eliminated from the town constitutions, which latter were replaced by "governing charters," by which it was sought to control all municipal operations. Most of the new order of charters gave to small councils—of express royal appointment and indissoluble self-elective powers—the privilege of local government, and even, in many cases, of election of parliamentary representatives.† Informations, *quo warranto*, were, in Charles's reign, brought against several corporations, and a still greater number voluntarily surrendered their privileges: the judges had decided that the misuse of power in a corporation incurred a sentence of forfeiture; and as there were few corporations that had duly exercised their power in every respect, they were placed at the mercy of the crown. The corporations, in place of their old, received new charters, granting constitutions of an oligarchic type, and reserving to the crown the first appointment of those *who were to form the governing part of the corporation*. After the revolution a bill was introduced, restoring the corporations to their former privileges, into which the Whigs, to secure their power, endeavoured to introduce a clause excluding from municipal offices of trust, for the space of seven years, all who had acted or even concurred in surrendering the charters. "The royal and

* Crabb, 426.

† Miss Martineau, ii. 237.

aristocratic power over the commonalty was not overthrown even by the revolution; for subsequent charters were framed upon the models of those of the Charleses and Jameses; and the charters of George III. do not differ in this respect from those granted in the worst period of the history of these boroughs."* "The evil of municipal corruption had become well nigh intolerable for a long course of years. The corporate officers elected and re-elected themselves and each other for ever; the trust funds which should have healed the sick, and sheltered the old, and instructed the young, were employed in bribing a depraved class of electors; the functionaries made the constituency, and the constituency in return appointed the functionaries; so that if a sufficient number of corrupt and indolent men could be got into league, they could do what they pleased with the powers and funds of the borough. To those who felt that the welfare of a nation depends on its public and private virtue, who saw that the private vice of a community was found to be in substantial accordance with its municipal corruption, and who looked back through this avenue of history so as to perceive how low our people had sunk from the municipal freedom and purity of long preceding ages, it was consolatory to read the bold exposure made by the commissioners who had been appointed to inquire into the giant abuses. They report: "Even where these institutions exist in their least imperfect form, and are most rightfully administered, they are inadequate to the wants of the present state of society. In their actual condition, where not productive of evil, they exist, in a great majority of instances, for no purpose of general utility. The perversion of municipal institutions to political ends has occasioned the sacrifice of local interests to party purposes, which have been frequently pursued through the corruption and demoralization of the electoral bodies. There prevails among the inhabitants of a great majority of the incorporated towns a general and, in our opinion, a just dissatisfaction with their municipal institutions, a distrust of the self-elected municipal councils, whose powers are subjected to no popular control, and whose acts and proceedings being secret, are unchecked by the influence of public opinion; a distrust of the municipal magistracy, tainting with suspicion the local administration of justice, and often accompanied by contempt

* Miss Martineau, ii. 237.

of the persons by whom the law is administered; a discontent under the burthens of local taxation, while revenues that ought to be applied for the public advantage are diverted from their legitimate use, and are sometimes wastefully bestowed for the benefit of individuals, sometimes squandered for purposes injurious to the character and morals of the people. We therefore feel it to be our duty to represent to your majesty that the existing municipal corporations of England and Wales neither possess nor deserve the confidence and respect of your majesty's subjects, and that a thorough reform must be effected before they can become useful and efficient instruments of local government."

"The opposition was incalculable, and might have been supposed unmanageable; the means of getting up such opposition lay mainly in the hands of those whose corruption was to be exposed, and whose gains were to be abolished. In the worst towns there was the strongest body of corrupt or bigotted officials who held the worst portion of the inhabitants under their control, while *those who most desired reform were precisely those who were* least in a position to make themselves heard. The noble-minded operative who had refused £50 for his vote was borne down by the noisy tipsy freeman, whose "loyalty" was very profitable to him. "The benevolent and painstaking quiet citizen, who strongly suspected that the funds of an orphan girls' school went to support a brothel, or who could never obtain admission to a charity trust, because it was supposed that he would remonstrate against the frequent banquets at the expense of the trust; the peaceable dissenter, who found himself put aside in times of public danger, because the loyal corporation, charged him with wishing to burn down the cathedral; the unexceptionable tradesman, who found himself cut out by the idle and unskilful, because they had corporation connection—such men as these had no chance of being heard against the sharp and unscrupulous lawyers, the pompous aldermen, the rabble of venal voters, and the compact body of town contractors, who clamoured, as for life, for the maintenance of things as they were. What could the plaints of the sick, and the aged, and the orphan, and the indignation of the disinterested, and the protest of the excluded, and the appeal of the obscure, do amidst the hubbub of desperate wrong-doers and exasperated haters of change? Hitherto they could do nothing but complain; but now they might hope, and they could speak. In every cor-

porate town sat men sent on purpose to hear all that could be told. *Great was the consternation at first, and fiercer grew the* threats and clamour, every day, from the highest to the lowest."* But despite the turbulence of opposition and the clash of "vested interests," the flagrant abuses and corruption were to be swept away; and, by a recurrence to the true old municipal principle of election, ancient rights were to be restored, ancient charities renovated, schools and asylums were to rise again, and coffers be filled with money restored to the purposes of the needy, and our country planted over with little republics where the citizens would henceforth be trained to political thought and public virtue.†

* Miss Martineau, ii. 238. † *Ibid.* 245.

CHAPTER X.

LONDON.

Old Charters.—Democracy.—Hustings.—Court of Conscience.—Corporation of the City.—Assize-Court of London.—Parliamentary Legislation.—Old London Police

The Roman city Londinium received, probably under the Saxons, the right of choosing its own magistrates.* Prior to the conquest, London was apportioned into "wards," which were allied to the city in the same way as hundreds to the county. The most ancient Norman magistrate of London, to our knowledge, was the "Port-reve." In 1180 the town received its first mayor, in the person of Henry Fitz-Alwyn, an ancestor of the Beaumont family; he received his nomination from the crown, and continued in office twenty-four years. In 1199 John allowed the town to choose its sheriffs, and by a charter in 1215 further permitted that it should freely choose its *mayors annually*.†

The town attained a specially democratic character despite its many Norman aristocratic names, the citizens achieving at an early period great opulence: it was the abode of prosperity and material comfort. In reference to this, Hallam opines that the nickname "Cockney," banteringly applied to Londoners, is not improbably derived from "Cocayne," the name of a fabled land, intended to imply a kind of Utopia.‡

Henry III. afforded fresh testimony to the importance of London, by allowing the town to choose the sheriff for the county of Middlesex.

The oldest local court in London is that of "The Hustings," apparently so called from its being held within a building at a time when other courts were held in the open air. The royal court-reve, or bailiff, formerly presided;§ later on, the mayor recorder, and sheriffs. The county court of the city of London bears this name, and is held in the Guildhall. In the court of hustings, certain documents are enrolled, outlawries proclaimed,

* Hallam, *M. A.*, ii. 219.
† Maitland's *Hist. of London*, 74-76.
‡ Hallam, *M. A.*, ii. 224.
§ Lappenberg, i. 614.

etc., and the elections of officers and parliamentary representatives take place.* Of late years all the polling-booths throughout the land have thence been called "hustings." The "Courts of Conscience," constituted by act of parliament in the city of London, for the recovery of small debts, examined in a summary way and without jury, by the oath of the parties or other witnesses, and made such order therein as is consonant to equity and good conscience. There was also a "Court of Requests" of the king in person, which was virtually abolished by 16 Char. I. c. 10; those were tribunals of a special jurisdiction for the recovery of small demands, and have been superseded by the county courts.

The Tudors, dreading the expanding growth of London, launched prohibitory enactments against building new houses within three miles of the town, on the plea that the town was already too large. Nothing however, not even the great fire (1666), availed to prevent its development. Thus gradually did the city become the nucleus of a colossal town-district or extensive social aggregation, having legally but little coherence. In 1725 (11 Geo. I. c. 18) the city received its present aristocratic corporation which gave to the citizens a prominent share in all the corporate functions, because the ruling class was not in a position otherwise to curb the democratic and refractory spirit of the population. The common council is chosen by the guilds as formerly, but the body of aldermen elected for life, and the Lord Mayor still elected annually, acquired a right of vetoing the resolutions passed by the common council. The jurisdiction of the city extends into Southwark; but in consequence of the absence of the "non-intromittant" clause does not exclude the jurisdiction of the county of Surrey. To the city pertains, likewise, the police control of the Thames.

The gigantic town of London, has gradually extended into four counties (Middlesex, Surrey, Kent, and Essex), and consists of the city of London, the city of Westminster, the parliamentary boroughs of Southwark, Finsbury, Marylebone, and the Tower Hamlets, and innumerable other small communities composing a parish, but having no town organization. The want of a legal coherence in this extensive agglomeration of houses, and the actual aggregation of so many localities, which, taken *en bloc*, pass by the name of "London," has necessitated the interference of parliament, and, from the absence of

* Bl. iii. 80.

local boards, frequent occasion has been afforded to legislate for the exigencies of the over-grown capital. At the close of the 18th century London possessed many organizations in common.

The institution of justice of the peace being no longer adapted for a vast communal district devoid of legal unity, London has received, exclusive of the city, a number of stipendiary magistrates. Local acts for paving and sewerage throughout the whole of London, have been granted by parliament. In the reign of Anne (9 Anne, c. 23) a general regulation concerning hackney coaches was issued, and a general order relative to fires and buildings has been in existence since the great fire.

At the beginning of the century London at large was in a deplorable condition in regard to its police administration. "If," says a report of the lower house, "a foreign jurist had examined the condition of the capital in relation to the crimes committed and the organization of its police, and, without portraying the circumstances which accounted for such organization, had described the purpose for which it seemed intended, he would probably have arrived at the conclusion that the system had been contrived by a corporation of professed thieves, in order to get by robbery a living out of the community." The capital was apportioned into small districts, having sub-divisions, each independent of the other, each with sufficient local interest to generate permanent petty jealousies and passions, yet so far liberated from any general control as to prevent all common improvement and unity of action. A parliamentary report of 1838, describing the condition of the old London police, proves that never had there been, previously, any properly devised system. The police was only called into action when great crimes had been perpetrated, and the main protection against the perpetration of crimes was sought to be attained by fulminating ruthless and extraordinary punishments. In 1816 a Middlesex magistrate, examined before a committee of the Commons, alleged that in the "flash-cribs," "shades," and "infernals," the police and the thieves might be seen carousing amicably together. When a crime had been committed, for the discovery of which a reward of some £40 had been offered, the police, allured by the reward, thought it worth while to bestir themselves. The mischief had, indeed, grown rampant, but its removal entailed the destruction of a goodly portion of old Saxon law, and led to the introduction of a police system fashioned on the continental model.

CHAPTER XI.

FRANCHISES.

Courts-Leet.—Liberties.—Courts-Baron.—Franchises.

The right of having a court-leet was granted to lords of manors, and to monasteries, by way of franchise, to avoid the inconvenience entailed on such as were bound by the jurisdiction of following the sheriff's "tourn" through every district. The jurisdiction of the courts-leet began, from the Lancastrian period, to be mainly transferred to the quarter sessions,* and, by reason of the extended powers of the justice of the peace, fell into decay. At the present day they are only met with exceptionally, and now merely decide smaller offences by the common law, and exercise other petty jurisdiction. The lord of the manor, a town magistrate, or a leading man in the district conducts the business, but always under survey of the superior courts.

All the male inhabitants of the district, up to the age of sixty, with the exception of clergymen and peers, are bound to attend the court. The earlier franchises or liberties have mostly retained the mere right of summoning a bailiff for the transaction of subordinate legal business, such as writs, and summonses to the sheriff, nominating him to the office. A seignorial and patrimonial jurisdiction has long ceased to exist in England.†

The most striking difference between the franchise and the special district of the sheriff consists in this—the sheriff invites the bailiff of the franchise and does not order him directly to undertake specified official duties, but a well-known statute of Westminster allows the sheriff, in the event of the bailiff failing to obey, to have his orders carried out directly in the district of the franchise. Should a non-resident bailiff be appointed in a franchise the sheriff is empowered to dismiss him by writ.‡

The court-baron can only be regarded as an insignificant relic of seignorial jurisdiction;§ it existed in every manor-house

* Bowyer, p. 336.
† Gneist, ii., 23.
‡ *Ibid.*, ii., 141.
§ Vincke, 74.

of the realm. The court-baron, of which the freeholders are the judges, differs from the customary court of the copyholders, though usually held at the same time. Formerly* the court-baron was a court for litigious matters, and occupied itself with personal actions of trifling import, up to £2. Of the customary court the steward of the manor was the judge. The copyholders constituted the jury.† This jurisdiction is almost obsolete.‡

* Bowyer, 241.
† Bl., iu, 33.
‡ Bowyer, 241.

Second Part.

SELF-GOVERNMENT SINCE THE MUNICIPAL CORPORATION ACT.

CHAPTER I.

COMPARISON OF THE OLD AND NEW SYSTEMS OF SELF-GOVERNMENT.

The County.—Justices of the Peace.—New Departments.—Appeal.—New Police.

In the modern organization the "county" is still the chief administrative district, the lord lieutenant and the sheriff having mainly retained their former functions; the latter, however, has almost entirely lost his jurisdiction in civil matters.

The justices of the peace, so far as their criminal jurisdiction has not been curtailed, have retained their old official powers. Their power to levy rates has been increased in proportion to the increased exigencies of the internal administration. An assembly of the freeholders of the county is held as formerly, for the election of coroners and knights of the shire.

On the other hand, within the county, unions and boards exist, based on a new principle of election, and mainly constituted according to classified electoral rights. These are principally the poor-law "unions," the local boards of health, the London general board of health, and corporate towns, now governed by councillors and aldermen duly elected.

These new unions and boards are, for the most part, connected with the county only through the medium of the rates; the control of the president of the poor law board and the home secretary is of recent growth. They have power to issue regulations in matters relating to the poor and police. In all that concerns sanitary control an administrative, but not a judicial, right of appeal is permitted, but only to the home secretary. The inter-

ference of the central government with the administration of the local boards is sanctioned by enactment. The jurisdiction in towns has been mainly withdrawn from the local gentry; stipendiary magistrates being almost everywhere substituted. The towns are likewise controlled in the expenditure of their revenues.

The police system is no longer dependent on the municipality, but is a government concern. A systematically organized police, controlled by the home secretary by means of "regulations," but which still remains directly subjected to the local boards, has been substituted for the old constabulary.

Flagrant abuses have been removed in the town corporations; with much of the bad uprooted, a great deal that was good has been destroyed; much that is beneficial has been incorporated with a great deal that is crude; for instance, the growth of the "special" departments and the ultimate authority of the home secretary, which is generally regarded with disfavour.

CHAPTER II.

THE PARISH.

Vill and Town identical with Parish.—The Parish a Temporal Association.—Maintains a Political Significance.—Parishioners.—The Vestry.—Select Vestry.—Open Vestry.—General Vestries Act.—Sturges Bourne's Act.—Hobhouse's Act.—Churchwardens.—Church Rates.—Their Mode of Collection.—Church-rate System in its Decline.—Parishes "Spiritual."—Modern Importance of Parishes.

THE original division into vills and towns is not merely administrative; it indicates the political grouping of the existing social communities, and is more ancient than the division into counties and hundreds. Vills and towns existed prior to the introduction of Christianity; when the latter spread abroad through the land, the divisions of the church communities naturally included the social and municipal divisions already existing. A parish accordingly became, as a rule, identical with the temporal community, tything, or town.* When the division into counties, hundreds, and tythings was effected, several towns and vills were grouped in one tything; many towns and vills have, however, from the very beginning possessed the distinctive character of a tything.

As churches were established conformably with the exigencies of the respective localities, it often happened that one church was common to several villages. Even as larger towns embraced several tythings, so with the parishes, they were either identical with a town comprising a tything, or with a larger tything consisting of several small vills.†

"A parish may comprise three villages," says Chief Justice Hale; "*the parish A may, e.g., contain the villages A, B, C; this* is especially the case when in each there are three several constables, but if the constable of A has supervision over the district of B, C, there is only a village or vill in the legal sense."‡ In the north, on account of the sparse population, the parishes were of great extent and usually one and the same with a large township.§ Even at the present day, large localities like St. Pancras,

* Toulmin Smith, 15, 16, 21, 24.
† *Ibid.*, 15.
‡ Toulmin Smith, 120.
§ *Ibid.*, 34.

Marylebone, and Paddington are undivided parishes; whereas there are more than seven hundred parishes* not possessing more than fifty inhabitants.† The "parish"‡ is not then merely the official district of a parson, but from time immemorial has been reputed likewise a "temporal" community: a division of the community into "spiritual" and "temporal" is withal greatly opposed to the spirit of simple expediency, which characterizes all Saxon institutions.§ This "temporal" character of the parish renders it therefore apparent why there are occasionally parishes possessing *two* parish churches.‖ The interdependence of the civil and the spiritual community in the parish has been recognized in express terms by 10 Anne, c. 20. If a new church be deemed necessary, the parish may be apportioned not only for "spiritual," but for civil purposes into as many sub-divisions as there are churches. Where two parish churches exist, this arises from the fact of the civil not having agreed to the sub-division of the "spiritual" community.¶

The "parish," either in conjunction with, or in addition to the social "village," has, accordingly, ever been the groundwork of local municipal administration in England; according as the municipal system declined the parish organization coincidently fell away. Yet never has a period existed when large districts, such as those comprised in many English parishes, were destitute of local administration; hence the parish has never entirely lost its civil character.

By the common law every landowner or leaseholder in a parish is a parishioner; residence alone and not a mere payment of the levies of the parish conferring the rights.** Every parishioner has the right to appear at the vestry, and is subject to "scot and lot;" that is, is bound to undertake whatever personal services are assigned to him by the community, and to bear his share in the rates imposed.†† Any one failing to acquit himself of his obligations is deprived of the advantages afforded by the local vestry. In its character as an ecclesiastical body the parish vestry from time immemorial has contributed to the repairs of the church,

* Toulmin Smith, 35.

† Gneist, i. 637.

‡ Blackstone says a parish is that circuit of ground which is committed to the charge of one parson, a vicar, or other minister, having care of souls therein.—1 Stop. *Bl.* 116.

§ Toulmin Smith, 16.

‖ *Ibid.*, 40.

¶ *Ibid.*, 39.

** *Ibid.*, 472, 478.

†† *Ibid.*, 474, 475.

and to other spiritual purposes by the medium of the church rate.

Any one illegally excluded from the convention or meeting* of the parishioners had, during the middle ages, a remedy by way of indictment. The meeting took place on the Sunday, and was usually held in the sacristy or "vestry." The election of the parish functionaries, the levying of rates and the settlement of bye-laws were here conducted. The functionaries were originally civil officials. Lord Chief Baron Hale affirmed of churchwardens, "That they were lay corporations."† They are now admittedly subjected to the supervision of the spiritual courts, whereas overseers of the poor have always been lay functionaries.

The Reformation should be regarded as the main turning-point of self-government in the parish. The church, especially under the Stuarts, had become the domain of the upstart aristocracy, and was not favourably inclined to the democratic element which was rife among the parishioners. The increased parish burthens entailed by Elizabeth's poor law, and the disappearance of the small freeholders should further be taken into account.‡ Since the canons of 1603 minor committees of the vestry had been selected, from which the clergy endeavoured to constitute an oligarchy amongst the parishioners. Spelman in his pamphlet "De Sepulturâ," published in the year 1641, mentions that those oligarchic usurpations had already endured thirty years, and characterized the new select vestries as the result of spiritual machinations.§ Custom, the decisions of the courts, and parliamentary enactments, rendered general a practice which was in harmony with the universal bias given to English society from the Stuart period.

"General" and "open" vestries still continued for the election of the churchwardens and levying of church-rates. The whole body of the parishioners, as in former times, appeared at these vestries, having equal right of voting. By means of the select vestry, endeavours were made from the commencement of this century, to effect a reform of the laws affecting the poor, by first reforming the vestry itself.

Two acts (58 Geo. III. c. 69, and 59 Geo. III. c. 85) were

* Toulmin Smith, 51, 52.
† *Ibid.*, 81.
‡ Toulmin Smith, 238.
§ *Ibid.*, 239.

passed; the "General Vestries Act" and the supplementary act of the following year, providing that all meetings of the vestry should be announced three days previous to being held.* In the absence of the parson, rector, or vicar, a chairman should be appointed, only those belonging to the vestry being empowered to vote, the chairman to have a casting vote, and sign the minutes of the proceedings. They also contain provisions as to the right of voting, which is adjusted upon a certain scale, having relation to the amount in which the voter is assessed to the relief of the poor. Vestries otherwise constituted, whether by special act or custom, are not subject to its provisions. London and Southwark are likewise exempted from its operation.

"Sturges Bourne's Act" (59 Geo. III. c. 12), which introduced further reforms, was not to apply to places governed by special acts or customs, or to Wales. It allows the inhabitants of any parish to commit the management of its poor to a committee of the parishioners appointed for the purpose, and called a "select" vestry, to whose orders the overseers are bound to conform; such select vestry to consist of from five to twenty substantial housekeepers or occupiers, elected by the vestry at large, and also of the parson, churchwardens, and overseers.

The act passed under William IV. (1 and 2 Will. IV. c. 60), Hobhouse's Act, applies to those places only where special statutes and customs do not otherwise provide; where such older organizations exist, the mode of election on the nomination of vestrymen is modified. It has no application to parishes not forming part of a city or town, and not having more than 800 rate-payers; and the adoption of its arrangements is in no case compulsory, no parish being subject to them, unless it voluntarily consent to place itself under the act. In larger parishes, on motion of fifty householders, it may be put to the vote whether this act shall be adopted. Under this act the select vestries, according to the size of the locality, comprise from twelve to one hundred and twenty members; the local parson (and, where there are several parsons, one of them) and the churchwardens are *ex officio* members. The sittings of the vestry are not to be held in the church. Besides the vestrymen, five auditors of accounts are annually elected; the functions of a vestryman cannot be united with those of auditor; the election in

* Burns, i. 415.

either case takes place by ballot, one-third of the vestrymen annually resign office, their proceedings are recorded in a book open to the inspection of all the ratepayers, but they are not otherwise public. This act has only been adopted in a few localities, but a classification of electors by the General Vestries' Act, and the mechanism of election by Hobhouse's Act have become regulative for all the later vestry organizations.

Since the introduction of the modern legislation for the poor, the spiritual, and civil character of the parish run sometimes parallel, but occasionally the two elements intermingle.

The parson, rector, or vicar, is still the chairman of the open vestry, which, in many places, likewise elects the churchwardens. The latter, since the decline of their civil functions in the vestry, have retained scarcely anything but spiritual functions. Yet, consistently with the spirit of old English law, the office of churchwarden should be regarded as of a purely civil nature, for there is no law excluding even a Jew from the office. Jews have actually been summoned by the vestry to undertake the functions.* Spiritually considered, the duty of the churchwardens is to keep the fabric in good repair, and to take care of the goods belonging to the church; such as the organ, bells, and parish books; to enforce proper and orderly behaviour within the church and churchyard. They are bound to see that the Sunday is kept holy; and are entrusted with the making collections, and expenditure of the church-rates. It is also part of their office, unless other persons are appointed by the ordinary, to have the care of the benefice during its vacancy, or while it is under sequestration for the debts of the incumbent. If churchwardens waste the goods of the church, or be guilty of other misbehaviour, they are liable to removal. They are taken in favour of the church, to be, for some purposes, a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish.† The spiritual courts can compel them to produce their accounts, but are not empowered to examine the same.

They are sometimes appointed by the minister, sometimes by the parish in vestry assembled, sometimes by both together, as custom directs. But where there is no custom, the election must

* Burns, i. 410.

† Step. *Bl.* vol. iv. 40, 41.

be according to the canons, which direct that they shall be chosen by joint consent of the minister and the parishioners, if it may be, but if they cannot agree, then the minister is to choose one and the parishioners another. They are to be chosen annually in Easter week, and are generally two in number; when chosen they are obliged to serve, and are sworn to execute the office faithfully. Dissenters and Catholics have the right to vote at the vestry. Peers of the realm, members of parliament, Roman Catholic priests, Dissenting ministers and teachers, barristers, attornies, physicians, surgeons, apothecaries, aldermen, and persons living out of the parish, unless they occupy a house of trade there, are exempted from the office.

The church-rates have materially waned with the decline of the parish vestry, which was so intimately connected with the church system. The vestry is the most ancient taxing body in the kingdom,* and is first mentioned under Edward III. The church-rate serves for the purpose of maintaining and improving the church, and is grounded neither on the common nor statute law, but merely on the bye-laws of individual parishes.† The bishop cannot tax the residents in his diocese, and the spiritual courts have *only the right to impose ecclesiastical censures on the* churchwardens, to compel the latter to cause the needful repairs to be made in the church. To defray the expenses of the church, rates are to be made by the parishioners at large, that is, by the majority of those that are present at a vestry duly summoned for the purpose by the churchwardens. Should no one attend, the churchwardens may then levy a church-rate according to their own estimate. The rates are charged on all land and houses in the parish; are levied on the occupiers, and are recoverable (if the arrears do not exceed £10) before two justices of the peace, otherwise, in the ecclesiastical courts. Church-rates are not paid from royal property, ecclesiastical property, or by the patron; share-holders in railways and canals are subject alike to the church-rate and the poor-rate.

By special statute, Quakers, but not Jews, Dissenters or Catholics, are enabled to get reimbursed through the justices of the peace for any church-rates which they may have paid. As general exceptions would completely destroy the scheme of the

* Burns, i. 371. † Toulmin Smith, 585-6.

parish, which is compounded of the spiritual and temporal concerns of the community, any one refusing to pay church-rates is proceeded against before the ecclesiastical courts, which merely determine whether the church-rate was properly made, and whether there was ground for levying.* The ecclesiastical court cannot condemn any parishioner to the payment of a specified amount of rate, but has merely the right to punish the refractory individual with excommunication, which now means slight imprisonment. As the obligation to pay the church-rate arises out of the power derived from the common law of making bye-laws, the amount of rate can only be sued for before the courts of the common law.

By reason of the large number of Dissenters, who frequently constitute the majority in a parish, this rate has gradually declined, for where Dissenters, Jews, and Catholics are in the majority, it is scarcely conceivable that a resolution for the levying of a rate should meet with acceptance. Since 1837, 5000 parishes have rejected the church-rate.† Within the last few years the motion is annually brought forward in parliament for the abolition of church-rates; hitherto, however, without a successful result.

The separation of the spiritual functions of the parish from the temporal has been completely effected by the New Church-building and New Parish Act (1856), whereby in all the newly-created spiritual districts and parishes select vestries are abolished. The open vestry consists of the body of pew-holders, and has only to concern itself with spiritual matters, and with the levying of the church-rate.‡ The civil parish, since the introduction of the new poor-law, has become the groundwork whereon the superstructure of modern self-government is erected. From this are derived the representatives of the poor-law unions, and of the numerous other recently introduced municipal bodies.

The highway rate is still a parish rate raised from landed property, houses, and tithes. Churches, meeting-houses, schools, museums, and royal edifices, are not subject to this rate. It is not a burthen upon the land, as the person succeeding to the possession is not bound for any arrears of his predecessor. It is imposed by the surveyors of highways for those parishes in which the repairs of the roads are deemed necessary.

* Burns, i. 387.
† Gneist, ii. 90.
‡ Toulmin Smith, 66.

The right of the parish to make bye-laws for its own administration has been acknowledged in the celebrated Braintree case.* The statute 3 and 4 Will. IV. c. 90, makes provisions for lighting and "watching" in the parish. Individual parishes may adopt them, or several parishes be consolidated in one union; the statute may also be introduced into one part of a parish. In the event of the adoption of the provisions of this Act, inspectors are appointed for carrying them into effect. The inspectors of several parishes may combine into one body. Later laws have limited the operation both of this act and the provisions for lighting on the part of the parish.† Where no other local authorities exist, the inspectors carry out the provisions of the Nuisance Removal Act of 1855. The parish and its functionaries, in the absence of other public boards, is authorized to establish baths and washhouses.

A single authority, or administrative board, having all the functions of the parish under its control, no longer exists, constituted, that is, on the broad plan of a town common council. There is a mass of functionaries in the parish, severally attending to some special business, but having otherwise scarcely any connection. Whatever does not fall within the compass of certain legally defined functions, is accordingly ignored both by the parish officials and the vestry.

The parish is therefore no longer a community acting for itself, and entering upon all communal concerns.‡

The more ancient subordinate officials of the parish, as the parish clerk, vestry clerk, and sexton, are still under spiritual supervision. Their duties are too familiarly known to require description.

* Toulmin Smith, 50. "Bye" means in Saxon, "an inhabited place." "Bye-law," consequently, "a local statute."

† Toulmin Smith, 140.

‡ According to the common law, the scope of parish administration was much wider than at the present day. During the middle ages the administration of the parish embraced the entire communal system. Toulmin Smith's learned treatise, *The Parish*, treats the whole subject exhaustively, and is worthy of being consulted.

CHAPTER III.

POOR-LAW UNIONS.

Gilbert's Act.—Sturges Bourne's Act.—New Poor Law.—Poor-law Board.—General Orders.—Poor-law Unions.—Board of Guardians.—Overseers of the Poor.—Subordinate functionaries.—Workhouses.—Poor Schools.—Poor Rate.—Scotland.

In 1833 a commission was appointed to inquire into the poor-law system in England, which had been characterized as the political gangrene of the kingdom. The persons to whom that task was confided exposed the evils of the existing system with great ability and effect, and from the views which they succeeded in impressing upon parliament emanated the important statute commonly called the Poor-law Amendment Act (4 and 5 Will. IV. c. 76), generalizing two previous statutes. One, "Gilbert's Act" (22 Geo. III. c. 83), had previously allowed the consolidation of several parishes into one union, and the establishment of common workhouses, for the more convenient accommodation, maintenance, and employment of paupers. The other, "Sturges Bourne's Act," allowed of the election of salaried overseers of the poor by the ratepayers of the parish.

By the statute of 1834 the administration of the parochial funds, and the management of the poor throughout the country, were placed under the control of a central board, called "The Poor-law Commissioners," empowered to make such regulations as they thought proper for the guidance of the parochial authorities, and to consolidate several parishes into one union, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes. The Poor-law Board is empowered to issue general rules which have binding force fourteen days after being notified to the home secretary and parliament. Such general rules promulgated by this commission, must be under the seal of the body, and under the hands of a quorum, of whom the president must be one; any such rule may be disallowed by her Majesty in council. The parties

interested by writ of *certiorari* may likewise impugn the rules before the Court of Queen's Bench. A general order of 26th July, 1847, is at present regulative for the administration. The commissioners, when they deem it desirable, may direct that the relief of the poor in any parish shall be administered by a board of guardians, to be elected by the owners of property and rate-payers in such parish, in the manner particularized in the Act.*

The Unions established according to the statute of 1834 amounted in 1858 to the number of 628, on a population of 16,628,399 inhabitants; 20 district unions, with 319 parishes and 15 individual parishes, are administered according to local acts, representing 2,079,291 inhabitants. By "Gilbert's Act," 12 unions and 2 individual parishes, with 173,520 inhabitants. Finally, under the act 43 Eliz. c. 2, 85 parishes or boroughs, with 81,669 inhabitants.

The city, with 108 parishes, now forms one *union;* 14 unions of other portions of the town comprise several parishes; 12 larger parishes in like manner comprise many unions, and 11 parishes have retained the old administration, in conformity with local acts.†

Though the Poor-law Board may form unions at discretion, it can neither dissolve nor enlarge a union without consent of the majority of the guardians.

The members of the board of guardians are elected in the individual parishes; each parish or township with a poor administration of its own, elects annually at least one guardian residing in the district. The guardians may be re-elected. The salaried officials of the poor administration are not eligible. Parishes containing over 20,000 souls may, for purposes of the election, be apportioned into wards, each of which must comprise at least 400 houses. Any one who has been rated to the poor in a union for one year is an elector; whoever is rated at £50 ground rent, leasehold or rent, has one vote, every £50 extra giving one more vote; the maximum for a single person amounting to six.‡

An authority to vote for other persons can only be held by one elector in favour of four. Disputes touching the election of guardians are determined by the Poor-law Board; a writ of *certiorari* is, however, admissible. The entire system of election

* Toulmin Smith, 168.
† Gneist, ii. 667.
‡ 7 and 8 Vict. c. 101.

is cumbersome, and the votes are completely in the hands of petty cliques.*

To assimilate the poor rate in a union, the guardians may, under sanction of the commissioners, determine to consider the union as a single parish for the purpose of settlement and rating, as well as of relief and management.

A board of guardians is a *quasi* corporate body; the justices of the district are *ex officio* members; the sittings of the district boards are held at least every fourteen days, and are not open to the public, an illiberality on the part of the legislature which we meet with in nearly all the newer organizations, and which withhold from the citizens a due share in the municipal system. The body of guardians is presided over by an elected chairman; and for the despatch of business, special committees may be appointed. Individual boards of guardians are bound to conform to the instructions of the central Poor-law Board. Disputes touching the law of settlement and charges for the poor, may, if the parties agree, be determined by the Poor-law Board instead of the quarter sessions, or the common law courts.†

The powers granted to "assistant" overseers, who are salaried officers, have rendered the office of the overseer almost of an honorary nature, and have overborne functions of the actual overseers. The unpaid overseers are appointed by the justices of the peace, and the right of the parish to interpose any voice in their nomination is set aside by statute. In every locality there must be at least two, and at most four such functionaries. Every parishioner rated to the poor is qualified for the office. Peers, judges, clergymen, and the higher officials, are released from performing such functions. Any other duly qualified parishioner refusing to be elected is liable for misdemeanor. If the parishioners are dissatisfied with the election they may appeal to the quarter sessions.

It is incumbent on these overseers and the salaried assistant overseers or relieving officers, to claim and collect the money for the maintenance of the poor. The duty of administering relief belongs generally and, in the first instance, exclusively to the overseer. In cases of sudden and urgent necessity, any overseer is empowered and required by law, whether the applicant for relief

* Toulmin Smith, 171. † Gneist, ii. 663, 668.

is settled in the parish or not, to give such temporary relief as the case may require, but not in money. To the overseer also belongs the duty of making out the juror-list, and entering objections in respect thereof. He has, further, to co-operate in preparing the electoral lists, and in tracking out brothels and gaming-houses. By 7 and 8 Vict. c. 112, and 17 and 18 Vict. c. 104, overseers are empowered to bind as apprentices such children of the poor as are suited for the navy;* they are subordinated to the board of guardians and to the justices of the peace; should they refuse to obey they may be fined.

The Poor-law Board has introduced a crowd of salaried functionaries, who are appointed for life by the board of guardians; among whom are auditors of accounts, collectors, clerks, treasurers, district medical officers, and salaried workhouse officials. In 1844-5 there were as many as 8290 such officials. A board of guardians may suspend the subordinate officials, subject to the ratification of the Poor-law Board.†

The old principle of the former legislation that "every parish should bear the charge of its own poor," has been retained, excepting in those unions where the poor rate is apportioned throughout the entire union, without reference to the component parishes.

By 11 and 12 Vict. c. 111, it is provided that no person can be removed from a parish in which he has resided for five years next before the application for a warrant for his removal. The time passed in prison, or in military or naval service under her Majesty, or as in-pensioner in Greenwich or Chelsea hospitals; or in confinement in lunatic asylums, or as patient in a hospital, or during which relief from any parish shall be received, is to be excluded from the computation of the five years.‡

Whoever applies for relief is required to go into the workhouse. Each union possesses at least one workhouse. The several workhouses of a union belong to the latter and not to the respective parishes in which they are situate. Inside the workhouse the separation of the sexes is rigidly adhered to. The young also are separated from the adult, the old and decrepit from the healthy. This separation of man and wife, and of parents and children seems very harsh, and has been severely stigmatized both in parliament and the press. Bitter complaints have also been made on

* Toulmin Smith, 154.
† Gneist, ii. 694.
‡ Gneist, ii. 702.

the ground that permission to go out should be so seldom accorded; that the labour for the men should be of so severe a character, consisting chiefly in the breaking of stones; that the food is oftentimes of bad quality, and the clothing more like a uniform, etc. For the little children there is a special department, or "nursery," placed under the direction of matrons, and for the elder children a play-ground in the open air.* Any one refusing to work may be committed to jail, or to the House of Correction.

To obtain admission into the workhouse a written order of the board of guardians is needful. Any one entering the workhouse is free to leave within the first twenty-four hours. A hospital or dispensary, an asylum for lunatics, and a lying-in institution† are usually attached to every workhouse. It is at once equally shocking to every principle of reason, and every feeling of humanity, that all these varied forms of wretchedness should be thus crowded together into one common abode; that no attempt should be made by law to classify them, and to provide appropriate places for the relief of each.

In the year 1839 houseless poor and vagrants, or "tramps," were first received into special quarters, or houses, for a single night, an evening meal being allotted and breakfast on the day ensuing. A throng of idlers and vagabonds was speedily drawn together, who regularly wandered over the country in all directions, getting received into the workhouses, and fed, and exacting it even as a right. The number has increased year by year, and the overseers have often recognized the same faces returning within short intervals.

Special district asylums for the houseless poor are now provided,‡ where the police may insist on the casual poor being admitted, who may there be detained until four hours after breakfast on the day following their admission. A report published by parliament in 1848, shows that this arrangement has been productive of evil results.§

* Meidinger, 570, 571.

† *Ibid.*, 590, 591. Pashley, 365.

‡ 7 and 8 Vict. c. 106.

§ The report of the master of the workhouse at Stockport, near Manchester (5th Feb., 1848), states—"The majority of the tramps halting here run about the country and return at regular intervals of two or six months to get board and lodging; their behaviour grows more violent, rough, and disorderly every year." Andrew Doyle, touching several counties in North Wales and the west of England (second report of the board, p. 99), reports, that he had examined many vagrants who, from their youth upward had led a life of vagrancy, and found themselves in direct antagonism with society at large.

In the report of Loughborough workhouse it is stated that in the year 1847,

Out-door relief now constitutes the exception, being only granted to those actually unable to work. Parents are also allowed out-door relief in order to get their children received in pauper schools.

Several district unions may now form a larger poor-school union, at the head of which is placed a board of management and trustees, chosen by the respective board of guardians. The trustees place over the institution, with consent of the bishop and clergy, the schoolmasters and other functionaries. In 1858 there were 37,240 children receiving instruction in this way. Of recent years special schoolhouses have been erected for the children of paupers living in the workhouse.*

By the old poor-law, justices of the peace might compel the children of persons receiving public relief to be apprenticed, or to go into service; this latter power still continues, but the obligation to receive such pauper children as apprentices, or into service, in consideration of a small premium, has been abolished by 7 and 8 Vict. c. 101. Girls, up to the age of twenty-one, and boys, to the age of twenty, may thus be disposed of without their wishes being consulted.† The indentures for apprentices and those

4022 vagrants were received, 2338 being English, 1527 Irish, and 157 Scotch; their maintenance had become very burdensome to the parish, which exhibited very great dissatisfaction in consequence.

According to the City of London union report, there were in 1839 only 356 tramps received in London.

In 1840 the number amounted to 2,403,
„ 1841..... „ ..... „ 11,203,
„ 1842..... „ ..... „ 26,713,
„ 1843..... „ ... ... „ 43,575,
„ 1844..... „ ..... „ 41,743,

involving a yearly expenditure of £4416. These charges, as well as those for the workhouse and parochial schools, were apportioned amongst the householders by the board of guardians.

St. Martins-in-the-Fields union workhouse reports: "Previous to the year 1839 there were only a few casual poor having no fixed abode.

In 1839 we received... 767 tramps,
„ 1840..... „ ..... 1,376 „
„ 1846..... „ ..... 6,308 „
„ 1847..... „ ..... 11,574 „

including women and children."

The Monmouth union reports that the tramps usually wandered about in "troops scattering themselves by day to beg, and re-assembling at night in the nearest union workhouse. Many of them behaved riotously and with violence, smashing the windows, etc., and had to *be reduced to reason or turned out by* the police; they usually arrived late in the evening, so as to avoid work; any one *arriving in the daytime having to render* assistance in the workhouse. The demoralization had thereby spread from county to county, not a few bringing with them real maladies, fevers, and eruptions."

* Gneist, ii., 711.

† "Peter had heard there were in London then—
Still have they being—workhouse-clearing men;
Who, undisturbed by feeling, just or kind,
Would parish boys to needy tradesmen bind;
They, in their want, a trifling sum would take,
And toiling slaves of piteous orphans make."

—Vide *The Borough*, by George Crabbe, p. 64.

entering into service, were formerly determined by justices of the peace; the guardians of the poor now make the arrangement.

All the charges of the poor administration are paid out of the poor-rate; other requirements connected with the poor administration are also met from the proceeds of the same rate. The collection of the poor-rate serves as a guiding-line for the collection of other municipal rates.* The poor's-rate varies greatly according to the locality.

Many wealthy parishes, in which there are but few poor, contribute but little, whereas poorer parishes, especially in London, are rated very high. In the hop districts of Kent the poor-rate is very burdensome, and can with difficulty be collected. The average amount of poor-rate per head of the population of England and Wales in 1846-7, was 6*s.* 1½*d.*, in 1848-9, 7*s.* 10*d.* (in 1811, 13*s.* 1*d.*), in the pound.†

According to a statement made by Sir G. C. Lewis, in the House of Commons, 15th March, 1849, in the years 1839 up to 1842, the following parishes paid in the pound—

2,308	parishes	. . . .	6*d.* to 1*s.*
5,549	,,	. . . .	1*s.* ,, 2*s.*
3,135	,,	. . . .	2*s.* ,, 3*s.*
1,277	,,	. . . .	3*s.* ,, 4*s.*
858	,,	. . . .	4*s.* ,, 7*s.*
13,127	,,	average payment, 1*s.* 7*d.* in £1.	

The payment of the salaried officials in 1847 absorbed 6 per cent. of the rate.‡ By 3 and 4 Will. IV. c. 90, unions may be formed out of several parishes, for the purpose of lighting and watching; the expenses for the lighting being leviable by a separate rate on the property of those who are subject to the poor-rate.

The poor-rate, as well as every other municipal rate, is computed by the churchwardens and overseers of the poor, at a fair and equal pound rate. The levy is made proportionately to the requirements of an interval of time, ranging from one month to a year. When a parish is too poor to allow of a rate being levied, another parish in the hundred is conjoined at quarter sessions, on two justices of the peace signifying their approval. The poor-rate

* Gneist, ii., 93.
† Meidinger, 579.
‡ Meidinger, 881.

list is to be fixed, by the Sunday next ensuing, to the church-doors of the parish. On the ground of the poverty of any person rated, two justices of the peace, with consent of the overseers of the poor, may, by an order, abate the rate. The rate is due as soon as imposed. If neither appeal nor payment be made, two justices of the peace, after a summary hearing, may direct an execution; appeals for amendment of the rate, since 6 and 7 Will. IV. c. 96, are heard at special sessions, or, as formerly, directly at the quarter sessions. The Queen's Bench may, in urgent cases, bring the matter before it by a writ of *certiorari*. All functionaries charged with the administration of the rate have to produce their accounts at a public sitting.*

The number of persons receiving relief in England does not afford any standard whereby to compute the number of the needy. In England one in twelve receives relief; in France, one in five; in Belgium, one in six. It should be borne in mind, however, that in Catholic countries the body of the clergy and the monasteries, as a matter of pure obligation and duty, are more or less open-handed in affording assistance to the poor, whereas, in the case of the workhouses in England, the terrorizing system is in the ascendant. The English pauper is oftentimes reduced to the last extremity before he enters an establishment, on crossing whose threshold the ties of family are rent in twain. The number of persons in England seeking relief is, on this account, less than elsewhere; this does not, however, demonstrate that the new poor law of 1834 is a triumphant success.

In Scotland, up to the year 1845, the old system of voluntary donations for the relief of the poor continued in force; the supervision of the poor having been assigned to the schoolmasters, who were generally more fully acquainted with the condition of the poor in their district than guardians and overseers elsewhere. By the new Scotch poor-law (4th August, 1845) the poor laws previously obtaining were abolished, and a "Board of Supervision for the Relief of the Poor in Scotland" was appointed, consisting of the lord provosts of Edinburgh and Glasgow, the solicitor-general for Scotland, the sheriffs, and three members nominated by the government. These latter, receiving a special salary, hold two general assemblies annually, and send in to Government a statement of accounts.

* Gneist, ii., 93.

* For every poor district in Scotland there is a board of guardians, chosen by the vestries, which levies the poor-rate under control of the board of supervision. This rate serves for the relief of the poor, the erection of poor-houses and infirmaries, and for the payment of the overseers, who exercise the powers formerly discharged by the schoolmasters, being indeed frequently chosen from their number.*

* Meidinger, 670.

CHAPTER IV.

OTHER MUNICIPAL BOARDS FOR PURPOSES OF PUBLIC HEALTH.

Defective Supervision in Regard to the General Health.—Commission of Sewers.—Towns Improvement Commissions.—Sanitary Boards.—Local Government Act.—Independence of the Several Boards.

NEITHER municipal corporations nor justices of peace have anything to do with the general provisions relating to the public well-being, excepting that justices of peace have occasional powers in regard to the poor administration. So long as the public spirit was swayed by the principle of the older communal liberty, proceedings by way of indictment and interference on the part of the parish authorities sufficed for the maintenance of sanitary measures. On the decline of municipal life these expedients proved inefficient; the ruling gentry were compelled to avow an interdependence with the poorer classes of the population, when burdensome poor-rates, wide-spread epidemics, and criminal statistics had forced the fact home; the legislature saw itself compelled to interfere, and thereby gave extended impulse, as it must be owned, to bureaucratic centralization.* In the year 1848 a number of Consolidation acts were issued, the clauses of special local acts for sanitary purposes being thereby generalized.

Many enactments were passed for the laying out of burying-places† and the closing of those in use; for the erection of gas-works, baths, and wash-houses, to be built either by the boroughs or

* The government inspectors in 1833 visited in the lower part of Manchester 687 streets and lanes, 352 whereof, over one-half, were reeking with puddles, dirt, and *filth of every kind*. The houses were, for the most part, damp, dirty, neglected, and without ventilation; 2221 were without a convenience! In Parliament-street and passage, for 380 inhabitants there was but one convenience, situated in a very narrow alley, the odour and exhalation from which must have been a source of infection.

† The Home Secretary may order cemeteries to be closed. In London especially the churchyards are removed from the town. Relative to the overcrowding and horrible condition of the latter in London, the "Report on a general scheme for an extramural sepulture, *presented to both houses of parliament in* 1850" gives detailed information. According to this Report from six to eight, and sometimes twelve bodies were placed one above the other, although the law required an intervening space of two feet, and the wells in the neighbourhood were found troubled and unsavoury. In summer, especially, the exhalations were so overpowering that the inhabitants of the neighbouring houses were obliged to close their windows.

the parishes. These measures of improvement led to the formation of new boards, or to the transmutation of those already in existence, either as independent boards, or in conjunction with other municipal boards, amongst which may be enumerated:—

I. The Commissioners of Sewers. These functionaries existed under the old system; by 3 and 4 Will. IV. c. 2, and 11 and 12 Vict. c. 15, they are to be elected from the body of resident ratepayers; they impose rates, and in matters relating to sewers constitute a court, which, in exceptional circumstances, may summon a jury.*

II. Two acts of the present reign empower parishes to establish baths and wash-houses; a committee of ratepayers is chosen by the vestry, composed of three to seven members, and constituting a corporation.† By resolution of the vestry, subject to the approval of the Home Secretary, the act may be brought into operation.‡

III. By the Town Improvements Clauses Act (10 and 11 Vict. c. 34), the necessary improvements of paving and lighting, etc. are carried out either with the co-operation of the existing municipal boards, or by special commissions. In places where no municipal corporation exists, the mode of election adopted in nominating guardians of the poor is to be resorted to whenever commissioners under this act are to be elected, 10 and 11 Vict. c. 16. Larger districts may be apportioned into wards, and the commissioners are empowered to issue bye-laws; appeals relative to illegal or excessive rating are addressed to the quarter sessions.§

IV. The Diseases Prevention Act (18 and 19 Vict. c. 116) enacts, that when any formidable epidemic, endemic, or contagious disease appears to be threatened in any part of the kingdom, the Lords of the Privy Council may, by order, direct the act to be put in force; and the general Board of Health may issue directions as it may think fit for interment; for visitations from house to house, and for the removal of nuisances.

By the "Nuisances Removal Act" (18 and 19 Vict. c. 121), the "local authority" established in each place for its execution is empowered to examine premises complained of, to inspect articles of food exposed for sale, and to obtain an order from two justices

* Gneist, ii., 733.
† T. Smith, 250.
‡ Gneist, ii., 735.
§ *Ibid.* ii., 738.

of the peace in petty sessions for the abatement of any nuisance, or the destruction of any article of food which the justice may deem unfit for human consumption.

By the Public Health Act (11 and 12 Vict. c. 63) it is provided that upon petition of not less than one-tenth of the inhabitants rated to the poor in any place, or whenever the number of deaths in not less than seven years in that place has annually exceeded on an average the proportion of 23 to 1000 of the population, the general Board of Health may, after due inquiry instituted, direct the act to be applied either by an order in council, or by a provisional order of the board, to be confirmed by an act of parliament. In corporate boroughs the town-council of the borough is constituted the local Board of Health, and is charged with carrying into effect the provisions of the act. As regards other places, the local Board of Health is to be elected by the owners and ratepayers, with power to appoint officers charged with various duties in relation to sewers, drains, removal of nuisances, regulation of slaughter-houses, inspection of common lodging-houses, control over streets, water, and gas-works. The local Board of Health may also provide public walks or pleasure-grounds, and make representation to the general board in regard to burial-grounds, churchyards, or vaults which may be in a state dangerous to the public health. The expenses are to be covered by local rates, levied on the occupiers of property rated to the poor. The sanitary guardians are elected according to the same class electoral system which is conformed to in the case of guardians of the poor.

One-third of the members of the board is re-elected annually; the election is centred in the hands of petty cliques, and the entire administration is bureaucratic. In matters relating to the rates imposed, appeal lies to the quarter sessions; this act, however, extends the right of appeal to the Home Secretary, to whom alone appeal lies in regard to the adoption of the act, the invalidity of the vote by the local vestry which carried its adoption, and further in regard to compulsory summoning of private individuals for the payment of the expenditure incurred. The Home Secretary is made exclusive judge of appeal in important questions relating to property, and has power to issue binding orders, to approve bye-laws, and sanction the adoption of a loan.

These several boards, to which the new metropolitan boards

must now be added, act in their respective departments almost independently. To what results this often leads, and what confusion the want of a unity of administration, sometimes embracing the entire municipal system may entail, is evidenced by the following terrible but striking example.

"In September, 1854, the inhabitants of Golden Square and the vicinity, by reason of a frightful outbreak of cholera, which in three days carried off 100 persons in one small street, became aware that the Commissioners of Sewers had opened up an old churchyard dating from the time of the plague. No one, of course, was responsible; the district boards were perfectly aware that the place had been a churchyard during the plague, but had nothing to do with the construction of the sewer, and it was not the business of the general board to trouble itself about knowing what was to be met with in the course of the excavations."*

* Bucher, *Parlamentarismus*, 243.

CHAPTER V.

TOWN CORPORATIONS SINCE 1835.

Towns in which Corporations have been Introduced.—Justices of the Peace in Towns.—Recorder.—Town Council.—Mayor and Aldermen.—Town Officials.—Police-rates.—Supervision of the Financial Administration.

THE Municipal Corporation Act of 1835* has been introduced into about 200 towns. The number of boroughs included under the Bill was 178, of which 93 were parliamentary boroughs.

The census of 1851, gave for England and Wales 580 cities, boroughs, and municipal towns, with 8,990,809 inhabitants, whereas besides these there were other localities resembling towns, comprising 8,936,800 inhabitants.† Of these 580 localities, 163 were parliamentary and municipal boroughs, having a town corporation, and returning members to parliament; 39 having a town corporation, but returning no members to parliament (municipal boroughs); 103 returning members to parliament, but having no town corporation (parliamentary boroughs), amongst which—

The Tower Hamlets .	contained	539,111	inhabitants,
Marylebone	„	370,957	„
Finsbury	„	323,772	„
Lambeth	„	251,345	„
The City of Westminster	„	241,611	„
Greenwich	„	105,784	„

275 boroughs were unrepresented, either from the fact of there never having been a town corporation, or from its having ceased to exist. 18 towns constitute "counties corporate;" these are the eleven cities of London, York, Chester, Bristol, Canterbury, Exeter, Gloucester, Lichfield, Lincoln, Norwich, and Worcester; the five boroughs of Kingston upon Hull, Nottingham, Newcastle upon Tyne, Poole, and Southampton, and the two Welsh towns, Carmarthen and Haverfordwest. These counties corporate have their own sheriffs, coroners, and militia. Most of these

* 5 and 6 Will. IV. c. 76.

† Gneist, ii. 521, 523—5.

have since been united with the counties which encompass them, for the purpose of parliamentary elections, losing thereby their own representation.

Before 1835, 285 localities had only nominal corporate rights. In many of these, municipal corporations had long ceased to exist. Of the town corporations, the City, and other places retained their ancient corporate condition; of these, in 1851, 24 were still in existence, with a corporation in full activity. The new town organization was subsequently extended to about 20 towns, such as Liverpool, Manchester, Birmingham, Leeds, and Bristol. In the reformed boroughs there were, in 1851, 4,325,269 souls; more than one half of the town populations, including the inhabitants of the City of London (127,869 inhabitants), live accordingly either under the ancient corporate system, or without any town corporation whatever.

The new town organization extends the right of election to the taxpayers; the freemen,* indeed, retain their rights, but they can no longer be obtained either by gift or purchase; as fast as the freemen die out, the electors will consist only of those created by the new act. The town government exercises local police jurisdiction, and, by later enactments, in many localities directs the lighting of the streets, the water supply, and the carrying out of sanitary regulations. 128 towns obtained forthwith the right of having the commission of the peace exercised by town magistrates; other towns only obtained such commission on representing that they needed the appointment of one or more police magistrates; the Queen, however, henceforth nominates. The mayor, on his election, becomes a magistrate during his year of office and the year succeeding. Stipendiary magistrates, on the proposal of the town councillors, may be nominated by the crown from among barristers of five years' standing. Such magistrate can neither sit in parliament nor hold any municipal office. In the event of his being prevented by illness, or otherwise, from discharging his functions, he may appoint a barrister of five years' standing to act as deputy. By a recent statute, 21 and 22 Vict. c. 73, a single

* Before this Act the title of burgess (or the freedom, as it was called,) was generally acquired by birth, marriage, or servitude, that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman. It might also have been obtained by gift or purchase.—*First Rep. of Commissioners.*

stipendiary magistrate may decide in all such cases where the law otherwise requires two justices of the peace.

The town magistrates, whether salaried or not, have not, generally speaking, the right to assist at the jail delivery at quarter sessions. If the jurisdiction of the county be not expressly excluded by the non-intromittant clause it has concurrent jurisdiction therein; from the decisions of the town magistrates, appeal always lies to the quarter sessions; the Queen can, however, on petition of the council of any borough, erect a separate court of quarter sessions to be holden there. If the application is granted, the crown appoints a recorder who is the sole judge of such court of quarter sessions. In matters of administration pertaining to the town boards he is not authorized to decide, and still less in matters relating to the granting of licenses and the levying of rates, which concern the quarter sessions.

The town government is managed by a council, and in the more restricted sense by the mayor and aldermen. The councillors are elected by the burgesses, and the mayor and aldermen by the council, one third of the latter quit office annually, but those resigning are eligible.

Every person who is a male of full age, not an alien, nor having received within the last twelve months parochial relief, who on the last day of August in any year shall have occupied any house, warehouse, or shop, within the borough during that year, and the whole of the two preceding years, and during such occupation shall also have been an inhabitant householder within the borough, or within seven miles thereof, and shall during such time have been rated in respect of such premises, to all rates for relief of the poor, and have paid all such rates, and all borough rates in respect of the same premises, excepting those payable for the last six calendar months—is entitled to vote on the election of town councillors.

On the 5th September every year, the overseers of the poor make up the burgess-roll, which, between the 1st and 15th October, is revised by the mayor and two assessors. On the 9th of November the mayor, aldermen, and common councilmen are elected. The mayor is in office for one year, but may, on the termination thereof, be re-elected. He presides in the common council, and is a justice of the peace for two years successively. If the place be represented in parliament, he is likewise during

his term of office the returning officer. Aldermen are elected for six years from the body of town councillors.* Every three years one-half retirés; upon emergency they represent the mayor, but in reality are merely members of the town council, holding a more prominent position.† They take their share in the business of the administrative committees, but do not constitute a magisterial body. The mayor, aldermen, and common councilmen form the "corporation." There is no interference or ratification on the part of the government; in the event of an election, if the admission to office of any one duly elected be withstood, the Queen's Bench intervenes by writ of *mandamus*. If an individual has been illegally admitted, he may be removed by a writ of *quo warranto*.

The common council meets once a quarter (and oftener, if due notice be given) for transacting the general business of the borough. At any meeting where two-thirds at least of the whole attend, the council may make bye-laws for the good rule and government of the borough; the mayor, or presiding member, has a casting vote. When the paving and lighting pertain to the town, the council issues definitive orders, and has also the right to make orders for the prevention and removal of nuisances, and the imposition of fines and imprisonment extending to one month, in regard to which the council may proceed summarily. The council may appoint a town-clerk and a treasurer—neither of whom is to be a member of the council; the former is appointed during pleasure, and must be a lawyer. The town may appoint as many salaried officers as it likes, and ample use is made of the privilege. The auditors of accounts are elected annually by the body of burgesses; and if the borough have a separate court of quarter sessions, a coroner and a clerk of the peace are appointed. Where the town business is not transacted by salaried functionaries, it is attended to by committees consisting chiefly of the aldermen. In every town there is a watch committee for the police administration, presided over by the mayor. Every town, as a rule, has its own salaried police, which may also be introduced where no town corporation exists. Any town is empowered to have lunatic asylums, houses of correction, and prisons of its own. Since 13 and 14 Vict. c. 35, public libraries and museums may be introduced into boroughs, under control of the town council.

* *In the City of London aldermen are elected for life.*

† *Kerr, Blackstone, ed. 1857, i. 525.*

The accounts shall at all times be open to inspection, and regularly audited and printed for the use of the ratepayers; the surplus, if any, shall be expended for the public benefit of the inhabitants. The town boards have also the privilege of levying for municipal purposes a borough rate, which is now assimilated to the county rate, and can only be imposed when a deficiency is to be made good. The town corporations are empowered to sue and be sued. Charitable institutions are no longer administered by the town, but by special trustees appointed by the Lord Chancellor. In their financial administration the towns are controlled by the state government, having to transmit annually to the home secretary reports of their expenditure, to be laid before both houses of parliament. It is provided, also, that generally, and subject to certain exceptions, the council shall not sell or mortgage the land or public stock of the borough or demise them for more than a certain term. Bye-laws do not come into force until forty days after the passing thereof; and a copy is to be transmitted to the secretary of state. Within said forty days the Queen in privy council can set aside any bye-laws or separate clauses thereof. On petition of the inhabitants residing in a district addressed to the privy council, the Queen may grant a corporation to localities not hitherto incorporated.

CHAPTER VI.

THE METROPOLIS AND ITS PRESENT CORPORATION.

Police Courts.—Metropolitan Police.—Board of Works.—City Corporation.—Survey of the Corporation at large.

THE vast agglomeration of communities constituting modern London, and comprising nearly 3,000,000 of inhabitants, or more than one-seventh of the entire population of England and Wales, does not possess a corporation in common. Certain institutions, however, originating out of necessity, have been established, which, to a certain extent, are of general application throughout the metropolis.

I. Towards the close of the last century, it became apparent that the powers of justices of the peace were inadequate for the requirements of the metropolis. With the exception of the City, London was accordingly divided into twenty-three district courts, presided over by as many stipendiary magistrates, barristers of seven years' standing being appointed. These magistrates hold office during good behaviour, and, like stipendiary magistrates in other towns, are invested with judicial but not ministerial authority; they have also power to punish constables for infractions of duty.

II. The unsatisfactory condition of the London police induced Sir R. Peel, in 1829, to inaugurate, under the "Metropolitan Police Act," a system modelled on that of the continent. At the head of this body is placed a chief commissioner, with two assistant commissioners nominated by the home secretary, and constituting the sole central police board for the entire metropolis, with the exception of the City. To cover the charges incidental, a police-rate may be imposed on the entire police district, the Treasury bearing one-third of the expenses. The City has its own commissioner appointed by the common council, under approval of the home secretary. The commissioners have co-ordinate jurisdiction with the magistrates, appoint the subordinates, and have the privilege of proposing persons for the higher posts;

they suspend policemen from their functions, have the right of supervision over cabs and carriages, and issue regulations relative to the traffic in markets and streets. Outside the city there are 5807 police officers under a superintendent inspector. A mere penalty of £5, or one month's imprisonment, is inflicted in case of resistance to or assault committed on policemen; this mild system has, however, been found to answer completely in London.*

III. By the "Act for the better Local Management of the Metropolis,"† a permanent central board has been constituted, termed "The Metropolitan Board of Works." The members are chosen from the district boards of works and from the city boards; it is presided over by a chairman, with a salary ranging from £1500 to £2000. The board superintends the repairs and erection of all public buildings, the paving, lighting, sewerage, and laying-out of streets, and carries out improvements generally. By means of bye-laws it may likewise inflict penalties ranging up to £2, and, with the consent of the home secretary, may effect expropriations. In matters relating to charges or penalties imposed, appeal lies to the quarter sessions. The local board of works of the parish and the district boards have analogous functions; parishes having over 2000 registered householders are apportioned by the commissioners into wards; in each parish there is an auditor of accounts as well as a special board chosen by ballot. Every ratepayer who has resided in the parish one year previous to the election is entitled to vote. One-third of those elected retires annually. The individual boards consist of 18 to 120 members; many parishes constitute but one district—the governing body being chosen from the several parish boards. The subordinate bodies can only raise loans with consent of the metropolitan board; they are empowered to pass bye-laws, but appeal lies from their decisions to the Metropolitan Board of Works, which, in such event, appoints a committee of inquiry.‡

IV. The fire-engine system is an affair that concerns the parish; the same holds good with regard to London at large. The general inadequacy of the system, especially as to the metropolis, induced the great insurance companies, as far back as 1820, to help themselves in right English fashion. Fire-engines were

* Gneist, ii. 444.
† 18 and 19 Vict. c. 120.
‡ Statutes at large, 1855.

constructed which might be depended on, but as each company generally acted for itself alone and with its own employés, little real advantage resulted from the new arrangement; unity of purpose and energy of action were wholly wanting. A better organization, ably devised and manfully carried out, was ultimately achieved by Mr. Braidwood, whose heroic death in the discharge of his perilous duties is fresh in every memory. The respective companies had placed their engines and firemen under his control, and although he had but a small brigade, consisting of 120 men, at his disposal, he achieved great things. This organization, however, does not in any way depend on the government; the only "official" fire-engines are those of the parish, whose efficiency cannot be taken into account.

V. Certain modifications have been introduced into the city of London corporation by the Municipal Corporation Act. The corporation is based on the old trade companies. By birth in the city, apprenticeship, and purchase, the privileges of a "freeman"* are obtained. Several trades can only be exercised in the city by becoming a member of a company. Twelve companies bear the title "honourable;" in each company there is a select body styled "the livery." By payment of a certain sum any one may become a liveryman excepting in the companies of apothecaries, cloth-workers, and stationers. A citizen is termed a "freeman," and, unless he has received the honorary "freedom of the city," may be compelled to take up the livery. The fact of being a member of a livery merely grants a title to the rights of burgess, which are attained on payment of certain fees. A freeman is not subject to impressment, may discharge the office of a broker, and enjoys other small advantages. Freemen and liverymen form the "court of common-hall," which body proposes two candidates for the office of lord mayor, elects the sheriffs, the city chamberlain, the auditors of accounts, and other functionaries: the aldermen are *ex officio* members.

Any freeman or householder rated at £10 may vote for members to the common council and the body of aldermen; for the election of the members of the council the electors record their votes in the twenty-six wards of the city, annually, and for an

* Although the term *Baron* as well as *Peer* has been by common usage appropriated to the lords of parliament, yet anciently it was used to signify any freeman whatsoever. The freemen of the City of London, York, and other places, are often styled "barons" by the old historians.

alderman whenever a vacancy occurs; the aldermen who preside over the respective wards are elected for life. The lord mayor is elected annually on 29th September by the aldermen. The following is the mode of conducting the election. The lord mayor, recorder, aldermen, sheriffs, and other city officers, being in their respective situations, in the place where the court of hustings is usually held, the town-clerk dictates to the common-crier the usual proclamation. The recorder then advances towards the front of the hustings, and informs the persons of the livery who are assembled, *that they, of old custom, know the cause of their assembly* and meeting together, is for the purpose of returning two fit and able persons to the lord mayor and aldermen, for one of them to be chosen lord mayor for the year ensuing. The course then is: the actual lord mayor, recorder, and aldermen retire to an inner chamber and there remain, with the doors closed, until the result of the show of hands be brought to them, leaving the common-serjeant, the sheriffs, the town-clerk, and other city officers on the hustings to carry on the proceedings. The common-serjeant then states shortly to the livery, to the effect of what the recorder has before said, and to put them in mind of the order to be observed in the nomination; namely, that he will have to read over to them the names of those aldermen who have served the office of sheriff, and have not served the office of lord mayor; after which the names will be put separately to them by the common-crier, and then they will be required to hold up their hands to show upon which two of the said aldermen their nomination may fall, *and these two are to be then returned to the mayor* and aldermen to select from. It is then open to any voter to propose for the office a properly qualified candidate, and the nomination proceeds. It is customary to exhibit the names of the several aldermen on a board, as they are respectively named, in order to insure the names being known; and a show of hands being taken, the sheriffs declare the two names on which the majority has fallen. The aldermen finally select the mayor, their choice being usually determined according to the seniority of the candidates. The election of sheriffs often gives rise to a severe contest between two or more candidates—the election, by reason of the number of voters, often extending over many days. The voting takes place in public. The lord mayor presides over the court of common-hall and the body of aldermen; he is the

first justice of the peace, head of the city militia, justice of the criminal court of the Old Bailey, and honorary member of the Central Criminal Court. Two sheriffs are elected annually for the city, and constitute "the sheriff for Middlesex." The sheriff's court of London is still concerned with the settlement of civil disputes of an unimportant character. Coroners for London and Southwark are elected for life. As recorder of the city, a distinguished barrister is appointed by the body of aldermen, and is only removable by the courts of law; he is a judge of the Central Criminal Court, and presides in the mayor's court. The chamberlain is elected for life by the court of common-hall.

The aldermen may reject persons who are elected to their body; an appeal lies, however, to the Queen's Bench. Aldermen are justices of the peace, and two of them sit at the court held at the Guildhall. The common council has a determining voice respecting the administration of the city revenues, appointing standing committees for the purpose. In the several wards the aldermen, with the common councilmen of the district, constitute a special local board.

The city police is now organized like the police of the entire metropolis. The charges for its administration are raised by a police-rate. The city has no direct action on the poor administration, which is confided to twenty-seven poor-law unions. The paving, water supply, and cleansing of the streets are attended to by special boards. Such, in broad outlines, is the local government under which one-seventh of the British citizens are content to live.

CHAPTER VII.

THE COUNTY: ITS SUBDIVISIONS AND OFFICIALS.

Size of the Counties.—Divisions.—Prisons.—Lunatic Asylums.—County Rates.—Rates for Special Purposes.

The counties, by reason of their historic formation, are still unequally apportioned. Sussex contains 65, Dorset 43, Yorkshire 26, and Lancashire 6, hundreds. Since the Boundary Act (7 and 8 Vict. c. 61), the county boundaries may be re-arranged. The *county of York has long been divided into special districts* or ridings—a corruption of "trithings," or districts comprising three hundreds under a "trithing-reeve." The North, West, and East Ridings constitute special districts, both for the police and the militia. In Lincolnshire the divisions have only separate police *administration. From time immemorial, England has possessed* 40 and Wales 12 counties.

Since 9 Geo. IV. c. 43, the hundreds may be newly apportioned by the quarter sessions, and receive the name of divisions; they are police administrative districts. By 6 and 7 Will. IV. *c. 12, it is enacted that the divisions and poor-law unions shall be* conterminous.

The prisons belong to the sovereign; no prison can be erected without consent of the sovereign. The right of having a special prison is granted by way of franchise; but as far back as the *parliament of Marlebridge, seignorial prisons were forbidden.** 21 Vict. c. 22 abolished the remaining seven franchise prisons. Every county is now bound to maintain a jail and house of correction, which are inspected by the visiting justices of the peace deputed at the quarter sessions; the home secretary likewise *appointing five inspectors. The prison officials are appointed at* quarter sessions.

Counties and towns can be compelled to erect lunatic asylums in conformity with 16 and 17 Vict. c. 97. Justices of the peace constitute a committee of visitors, and are bound periodically to

* Coke, *Inst.*, ii. 705.

inquire into the condition of these asylums; the charges for their maintenance are to be paid by a rate levied on the county or borough.

Charges for the prosecution of criminals, for jails, courthouses, and the police, are paid out of the county rate, which is levied like the poor-rate, and is leviable even where no poor-rate exists. The churchwardens and overseers of the poor receive them from the high-constable of the hundred, and the latter from the collectors appointed by the justices of the peace. By 55 Geo. III. c. 51, justices of the peace at the quarter sessions may impose on counties, for all past and future legal purposes, similar and other rates. Since 7 and 8 Vict. c. 33, the board of guardians claim the rate from the county treasurer. The rates are imposed by justices of the peace in open court; they compel payment by warrant of distress, and are not bound to give in a statement of accounts. Such arrangements can only be accounted for on reflecting that justices of the peace pay the highest rates in the county.

CHAPTER VIII.

FUNCTIONS OF JUSTICES OF THE PEACE.

Appointment.—Conservators of the Peace.—Sureties for the Peace and for Good Behaviour.—Ministerial Authority.—Judicial.—Summary Jurisdiction.—Houses of Correction.—Preliminary Examination.—Disputes Relating to Arrears of Tithes.

"JUSTICES *of peace are judges of record, appointed by the* sovereign to be justices within certain limits for the conservation of the peace; and for the execution of divers things comprehended within their commission, and within divers statutes committed to their charge."* On the recommendation of the lord-lieutenant or other influential persons, *justices for counties, ridings, and* divisions are appointed by the crown, through the Lord Chancellor, from the class of well-informed country gentlemen of good means, who, by the dignity of their station and habits of business, are qualified to discharge efficiently the duties of this honourable office. Generally speaking, any country gentleman on attaining his majority, and making formal application to the lord-lieutenant, is appointed, in due course, justice of the peace, irrespective of the fact of his being "whig" or "tory." To the class of landed proprietors invested with the office, are added rich merchants retired from business, lawyers, clergyman, and capitalists.† They are usually appointed for the entire county, but in Yorkshire only for the riding, in Ely for the island, in Lincolnshire for the division, and in the franchises, *e. g.*, the "Cinque Ports," for the extent of the district.‡

On receiving the writ of "Dedimus potestatem," they are invested with official powers, and are authorized to bear the title of "justice of the peace;" their appointment is forthwith signified to the clerk of the peace, and the oath of "estate" is taken. Any person acting as justice without the property qualification, or without having taken the oath of estate, is liable to a penalty

* Dalton.
† Gneist, i. 644.
‡ Gneist, ii. 180.

of £100, recoverable by action. The oath of office is likewise taken, and the oaths of allegiance, supremacy, and abjuration, which latter are constituted into one form by 21 and 22 Vict. c. 48. In lieu of the sacramental test, a declaration is made conformably with 9 Geo. IV. c. 17, to the effect, that they will not employ their authority to the detriment of the Church Established.

According to a parliamentary return, there are about 18,000 justices, 8200 of whom, including the 1300 stipendary magistrates, are actively engaged in administering the arduous duties of the office. Hence it is apparent, that there is no lack of district courts to deal summarily with smaller offences.* Justices of the peace actively engaged, even when not of the quorum, have to provide for the maintenance of the peace, and in that intent, may resort to preventive measures, may order persons *in flagranti* to be arrested, and issue warrants of commitment; are bound to disperse riotous and unlawful assemblies, and keep the highways free from beggars and vagabonds. One justice, on complaint upon oath that, from threats used towards the complainant he fears that some person will do him a personal injury, may issue his warrant or summons if he thinks sureties ought to be given. "Upon the party being brought before a justice, the complaint is read over to him and he is asked, if he have any cause to show why he should not give the required sureties. The party complained of cannot be allowed to controvert the truth of the facts stated in the complaint; all he is allowed to do is, to show that the complaint is preferred from malice only, or explain any parts of the complaint that may be ambiguous."† Should the defendant refuse to enter into recognizances, or find sureties to keep the peace, or to be of good behaviour, he may be committed to prison, and there detained for twelve calendar months from the time of commitment. The amount of the recognizance is usually determined by the condition in life of the parties and the circumstances of the case. A liberate may be granted if, after committal, the party find sureties. As a rule the accused is only required to give bail to appear at the quarter sessions; in default of finding bail he is remanded to the quarter sessions next ensuing. On demise of the crown, the obligation

* Gneist, ii. 188.

† Archbold, vol. ii. 543.

to give bail determines. A superior court of law may, at the instance of the accused, dispense with the obligation to find bail. On proof of the conviction of the party bound by recognizance, of any offence which is a breach of the condition of such recognizance, the courts of general or quarter sessions may declare it estreated. Peers of the realm can only be held to bail by the Queen's Bench or Court of Chancery.*

Within the county for which they are justices, all justices of the peace are, *ex officio*, guardians of the poor and may, if so inclined, act as guardians. Two or more justices have the office of allowing the rate, which is an act merely ministerial, and hence they may sign separately. If the declaration at the foot be signed by the overseers, they are bound, and may even be compelled to sign it by writ of mandamus. If they direct payment of the rate, it may be levied immediately on the goods of the defaulter under a warrant of distress, and in default of distress, two or more justices may issue their commitment of the offender to the common jail or house of correction. The justices examine the accounts of overseers of the poor at the close of the official year; make orders for removal of the poor, previously taking evidence as to the settlement, but they cannot make an order out of the county for which they are acting, even though they be justices of the adjoining county as well as of that in which they act. Appeal lies to the quarter sessions, which may either confirm or annul the order of removal;† and in difficult cases may refer to a court of law "to grant a case." Should the quarter sessions have finally determined, there is no further remedy. In their ministerial capacity, justices receive information or complaints for indictable offences triable at quarter sessions or the assizes, and for offences determinable summarily. The proceedings in the matter of summary convictions have been newly regulated by 11 and 12 Vict. c. 43. In many cases the defendant may either elect to be tried *summarily by the justice of the peace, or, in the ordinary way, by* means of a jury. Where the statute does not otherwise provide, one or more justices can only impose a penalty of £5 or three months' imprisonment. They are empowered to remit, according to circumstances, one-half or one-third of the penalty, and, in matters of trifling import, to refrain from punishing altogether—

* Bl., iv. 251—254. † Bl., i. 364.

the principle, "de minimis non curat lex," having, from time immemorial, been a guiding principle in this country.

The complaint for an order, or information for an offence, upon which the justices have authority by law to make an order upon, or convict, the defendant is heard, tried, determined, and adjudged in open court. The party complained against is admitted to make his full answer and defence, and to have the witnesses examined and cross-examined by counsel or attorney, but if represented by attorney the defendant cannot himself be heard. Where the justice has determined summarily, appeal is allowable to the quarter sessions, unless excluded by the statute. Appeal never lies against an acquittal, the second judge being bound by the matter of fact as settled by the judge first determining. In matters relating to the rates, appeal lay formerly, *per saltum*, to a court of law, it is now in the option of the party objecting to appeal either to one of her Majesty's courts of record at Westminster, or to any court of general or quarter sessions.

The 11 and 12 Vict. c. 42 (Jervis's Act), entitled "An act to Facilitate the performance of the Duties of Justices of the Peace out of Sessions with respect to persons charged with Indictable Offences," regulates the procedure antecedent to, and on the preliminary examination and committal of accused persons for trial. The general rule is, that the offences must be inquired into in the county and district where they were committed, by justices of that county or district. An indictment may be preferred at the court having jurisdiction to try it, without previous investigation before justices. By 22 and 23 Vict. c. 17, no bill of indictment for perjury, subornation of perjury, conspiracy, obtaining money or other property by false pretences, keeping a gambling-house, or a disorderly house, shall be presented to, or found by any grand jury, unless the prosecutor, or other person presenting the indictment, has been bound by recognizance to prosecute or give evidence against the person accused of such offence. Any person may prefer the charge, but the informant or witness must know something of the facts of the case from his own knowledge. The practice is to take the information, by way of deposition, in the first person, setting forth the facts briefly. By 31 Eliz. c. 5, no one is admitted as prosecutor who, by reason of a felony committed, has become incompetent. If the party accused has not been taken *in flagranti*, the informant has ordinarily to make his deposition

on oath. The room or building in which the examinations and statements are taken, is not to be deemed an open court, and the justice may order that no person shall have access to the room or building, if it appear to him that the ends of justice will be best answered by so doing. If a *primâ facie* case is made out against the prisoner by witnesses entitled to credit, the justice has no discretion whether he will or not commit the accused for trial. The *nobile officium* of the judge always naturally induced the justice, when hearing a charge preferred, to warn the accused against making any statement which might tend to incriminate him in case of further proceedings. That which was, erewhile, a matter of feeling, has now been rendered obligatory by 11 and 12 Vict. c. 42. The accused party, should not be desired to plead, nor asked whether he is guilty or not guilty, but should be duly warned that what he says will be taken down in writing, and may be given in evidence against him upon his trial; that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to make any admission or confession of his guilt. If the evidence is insufficient the accused is discharged; if incomplete, he is remanded to a future day, or bailed. The period of remand is never to exceed eight clear days, and it is made by a warrant of commitment. If the remand be for a time not exceeding three clear days, the justices may verbally order the constable, in whose custody the accused party is, to bring him before them, even before the expiration of remand. Prosecutor and witnesses may be bound, under recognizance, to appear on the remand day; should the witnesses not appear, the recognizances would not be estreated. Witnesses disobeying the summons, or refusing to be examined, may be committed to the common jail or house of correction for seven days.

The jurisdiction of justices is ousted where property or the title to a corporeal or incorporeal hereditament is in question; if they intermeddle, action lies against them and the officers who execute their orders. Upon any forcible entry, however, or forcible detainer after entry into any lands, the justices have power to summon a jury to try the entry or detainer complained of, the judgment in ejectment being merely a recovery of the *possession*, without prejudice to the *right*, as it may afterwards appear even between the parties. Tithes which have not been

commuted for a rent-charge are recoverable before two justices in petty sessions; if not paid within twenty days after demand, by distress; in default of distress a commitment to prison for three calendar months without hard labour may be made out. The judicial functions of justices extend, further, to the hearing of complaints for wages due to servants in husbandry not exceeding £10, and to artificers, handicraftsmen, miners, pitmen, keelmen, and potters, not exceeding £5. On proof, they make an order for payment, and in case of refusal or non-payment, by a distress of the goods or chattels of the master. A justice may nominate referees in disputes between the masters and workmen in any trade or manufacture, or decide the dispute himself. Any seaman or apprentice may sue in a summary manner for any wages due not exceeding £50 over and above the costs of any proceeding for the recovery thereof, and every order made by the justices acting in or near the place at which the service has terminated, shall be final. They further adjudicate upon disputes between landlords and tenants, as to the fairness of parochial rates, and disputes between members and officers of building and friendly societies.

It is a general rule of great antiquity, that "no action will lie against a judge of record for any action done by him in the exercise of his judicial functions." "In the imperfection of human nature," says Lord Tenterden, "it is better that an individual should suffer a wrong than that the course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it." In cases where justices of the peace have either no jurisdiction or exceed their jurisdiction, they will be liable in damages to the party aggrieved. For an act within their jurisdiction no action will lie, unless the act complained of was done maliciously and without reasonable or probable cause. "If the act of the magistrate is done without jurisdiction, it is a trespass, if within the jurisdiction, the action rests upon the corruptness of motive, and to establish this, the act must be shown to be malicious."* By the 11 and 12 Vict. c. 44, intitled, "An act to Protect Justices of the Peace from Vexatious Actions for acts done by them in Execution of their Office," it is enacted that no action shall be

* Per Erle, J., Taylor v. Nesfield, 14 Ell., and Bl., 724.

commenced against a justice of the peace for anything done by him in the execution of his office, until one calendar month at least after a notice in writing of such intended action shall have been delivered to him. And no action can be brought against any justice of the peace unless the same be commenced within six calendar months next after the act complained of shall have been committed. Where a discretionary power has been given by any act of parliament, no action shall be brought by reason of the manner in which the justice shall have exercised his discretion in the execution of any such power. Whenever the powers vested in justices of the peace are exerted from corrupt or personal motives, they may be proceeded against by indictment and criminal information. "They are, indeed," says Chief Justice Abbott, "like any other subject of this kingdom, answerable to the law for the faithful and upright discharge of their trust and duties." But whenever they have been challenged on this head, either by way of indictment or criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which fear and favour may generally be included, or from mistake or error. In the former case alone they have become objects of punishment. To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake, belongs only to the despotic rule of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom."

CHAPTER IX.

SESSIONS OF THE PEACE.

Petty Sessions —Special.—General —General Quarter Sessions.—How Summoned.—Quarter Sessions a Court of Appeal.

A BENCH of magistrates or court of petty sessions is formed by the periodical meetings of justices of peace of boroughs, or of counties, ridings, or divisions, for the execution of those powers which are confided to them by their commission, or by charter, and by numerous statutes. Two or more justices meeting in the same place for the execution of some power vested in them by the law, constitute a petty session, which may be held on their mere private agreement, anywhere in the division, excepting where the statute giving cognizance of the offence requires that it be held at the "usual place." It is customary to hold petty sessions at one place only, on regularly appointed days of meeting, to *hear, try, and determine* those summary cases which are directed to be heard and determined "in petty sessions for the division." In counties the chief town of the division and the principal inn or town-hall, is used for the place of meeting. Where there are not proper places for holding the petty sessions, the borough or county may provide a proper building, the expenses to be paid out of the county-rate or borough-fund. The occasions for holding petty sessions are very numerous; but the most important is the bailing of persons accused of felony, which may be done after a full hearing of evidence on both sides, if there appear sufficient grounds for allowing bail. Although many cases of summary convictions may be heard by one justice only, where the concurrence of two justices is binding and conclusive, the judgment of one justice may be the subject of appeal to quarter sessions. "With regard to the power of the justices in sessions to originate convictions on penal statutes, the rule laid down by Holt, C. J., is, that if authority be given to two justices to do an act, and from that act there is no appeal, it may commence at the sessions, but if an appeal be given, it cannot

begin there."* The special sessions is a meeting of the justices of a division of a county, a riding, or a borough, holden on a particular occasion, for the execution of some given branch of their authority, after reasonable notice to all the justices resident within the division, etc., has been served personally or by post. Several special sessions are required by law, to be holden at stated periods as, for appointing overseers of the poor, on the 25th March, or within fourteen days after; for licensing ale-houses, between 20th August and 14th September, except where otherwise directed; and to appoint days for holding the special session for executing the purposes of the Highway Act. Four times a year the justices acting in every petty sessions' division hold a special session to hear appeal against poor-rates, and on some day after 24th March, and before 8th April in each year, they hold a special session for the appointment of parochial constables. Within the last seven days of September a special session is held for reviewing and allowing the list of persons qualified to serve on juries in each parish; and in July, and at any other time, for licensing persons to deal in game. In other cases, such as making orders for damage by rioters, and for expenses of special constables; for appointing high constables; granting theatre licenses, recovering contributions from overseers, the special sessions may be convened as the occasion may arise. A general sessions is a court of record holden before two or more justices, one being of the quorum, for execution of the general authority given by the commission of the peace, and by certain statutes, may be called by any *two* justices within the jurisdiction, one being of the quorum, or by the *custos rotulorum* and one justice, but not by one justice or by the *custos rotulorum* alone. The court of general quarter sessions is that kind of general sessions held under authority of the commission of the peace by two or more justices, one being of the quorum, at some place within the county, fixed by their precept, in the first full week after the 11th of October, 28th December, 31st March, and 24th June. The justices at the Epiphany Sessions are authorized to appoint two justices to fix them so as not to interfere with the Easter Assizes. It is a court of *oyer* and *terminer*, and a court of record.

By the 5 and 6 Vict. c. 38, entitled "An act to define the Jurisdiction of Justices in General and Quarter Sessions of the

* Paley *On Convictions*, 32.

Peace," reciting, that it is expedient, that the powers of justices in general and quarter sessions of the peace with respect to the trial of offences be better defined, it is enacted, that neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough shall, at any sessions of the peace, try any person for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas, or for misprision of treason, offences against the queen's title, prerogative, person, or government, or against either house of parliament; offences subject to the penalties of *premunire*, blasphemy and offences against religion; administering or taking unlawful oaths; perjury and subornation of perjury; forgery; unlawfully and maliciously setting fire to crops of corn, grain or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, furze, gorse, or fern; for bigamy and offences against the laws relating to marriage, abduction of women and girls; endeavouring to conceal the birth of a child; offences against any provisions of the laws relating to bankrupts and insolvents; composing, printing, or publishing blasphemous, seditious, or defamatory libels; bribery; unlawful combinations and conspiracies; stealing, injuring, or destroying records or documents belonging to any court of law or equity; stealing, destroying, or concealing wills or documents relating to the title of real estate, or to any interest in lands, tenements, and hereditaments.

By 14 and 15 Vict. c. 55, the general or quarter sessions holden in and for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark and the counties of Middlesex, Essex, Kent, and Surrey, are placed in the same position as to their jurisdiction to try prisoners at the general and quarter sessions of the county. The quarter sessions have power to try all indictable offences, whether at common law or created by statute, unless there is some special direction that an offence shall be heard and determined by another court.

As a court of appeal many other matters have been made cognizable by quarter sessions, pursuant to various statutes,*

* An appeal from the conviction of justices to the sessions is not a matter of common right, but of special provision. —*Paley On Convictions*, p. 295.

relating mainly to friendly societies, appointing inspectors of weights and measures, district surveyors of highways, the licensing and conduct of publicans, the settlement and maintenance of the poor, the accounts of overseers, and surveyors of the highways, bastardy, vagrancy, etc. Convictions and orders of magistrates are likewise often made the subject of appeal to the quarter sessions. The Highways Act and local acts relating to canals, etc., have empowered sheriffs to empanel juries at quarter sessions for the trial of questions concerning the stopping or diverting roads, compensation for damages by widening roads, taking water from mills, etc.*

* Dickenson, *Quarter Sessions.*

CHAPTER X.

COUNTY POLICE.

Constables.—Assault Committed upon.—Special Constables.

SINCE the disuse of the sheriff's tourn, the right of appointing chief constables has devolved upon the general body of the justices of the county, to be exercised in their quarter sessions. The chief constable may serve for more than one county, and appoint superintendents of divisions and petty constables, subject to the approval of the justices. The chief constable is bound to attend each quarter sessions and make quarterly reports and monthly returns of the disposition and number of the force, based on those transmitted by the superintendents of divisions.

By 5 & 6 Vict. c. 109, parishes are empowered to appoint one or more salaried constables, the allowance to be fixed by the quarter sessions, subject to the approval of the secretary of state. Justices in petty sessions assembled may grant an order on the overseers of the parish for the fees payable to the constable under the allowances settled by the quarter sessions, for the performance of any occasional duties, for which the payment is not by law charged upon the county rates. The production of the justices' order is sufficient to warrant the amount, when paid, being allowed in the overseer's accounts without further inquiry. A paid constable may be dismissed for misconduct by the justices of the division in petty sessions assembled. The chief and other constables are disqualified from voting at elections for members of parliament, are to exercise no other employment, and are exempt from serving on juries. The fees received by constables are to be paid over to the treasurer of the county in aid of the police rate.

By 19 & 20 Vict. c. 69, the chief and other constables are to have the like powers in boroughs as borough constables have in the county; but by 22 & 23 Vict. c. 32, they are not to be

required to act in boroughs having a separate police establishment, except in execution of warrants of justices of the county, or by order of the chief constable or superintendent.

The counties may be formed into police districts, each district paying its own constables. The justices at quarter sessions are authorized to make a police rate, to be levied and collected with the county rate. Station-houses and strong-rooms are to be provided, and the cost defrayed out of the police-rates, for which purpose money may be borrowed on the credit of such rates. On certificate of the secretary of state that an efficient police has been established in any county or borough, one-fourth of the charge for the payment and equipment of the force will be paid by the treasury, but not to any borough whose population does not exceed 5000, and not consolidated with the police of a county. The home secretary is empowered to issue binding rules for the management of the force; such rules are, however, to be laid before parliament for its information. The crown may appoint inspectors for inquiring into the state and efficiency of the police in counties and boroughs.

Upon oath of any credible witness that any tumult, riot, or felony has taken place, or is reasonably apprehended, and that the ordinary officers of the peace are not sufficient, two or more justices of any county, riding, or division may, by precept in writing, under their hands, appoint as many special constables as they may deem necessary. The secretary of state may direct the lord-lieutenant to cause special constables to be appointed, whether the persons are exempted or not. If no time be limited in the precept, they are to continue in office until their appointment is suspended. Any person appointed a special constable, and refusing to take the oath, or neglecting to appear at the time and place summoned to take the oath, is subject to a penalty, leviable by distress, and in default of distress, to imprisonment with or without hard labour for a term not exceeding one calendar month. Any one assaulting or resisting a constable whilst in the execution of his office, or promoting or encouraging any one to do so is liable to a penalty of £20, or imprisonment for one calendar month, with or without hard labour, or the offender may be indicted. On the other hand, every constable is responsible for his official acts, and may be proceeded against by way of in-

dictment. For infractions of law not of a graver nature, as well as for breaches of discipline, the constables are subject to the jurisdiction of the justices. For acts done, *bonâ fide* in the course of their duty, they are not made accountable, and are protected against vexatious proceedings.

BOOK VII.

The Parliament.

CHAPTER I.

HISTORICAL SURVEY.

Parliament the Highest Governing Body in the State.—Witenagemote.—Curiæ Regis.—Increasing Power thereof.—Magna Charta.—The Right to Refuse Taxes.—Deputies of the County.—Of Towns and Boroughs.—Separation into "Upper" and "Lower" House.—Decline of the Feudal Peerage.—Impotence of the Lower House under the Plantagenets.—Money Bills first to be Discussed in the Lower House.—The Sovereign's Right of Legislation.—Petitions.—Votes of "Want of Confidence."—The Advisers of the Sovereign removed on Parliamentary Motion.—King and Parliament united against Rome and the Clergy.—Opening of Parliament.—Mandates from Electors.—Liberum veto.—Weakness of Parliament under the Tudors.—*Conflicts of the two Houses under Elizabeth.*—No Liberty of Speech under Elizabeth.—Taxes not levied under the Tudors without consent of Parliament.—Opposition against Elizabeth.—Bill of Attainder.—James I. and *his Parliament.*—*Charles I.'s Conflict with his Parliaments.*—*Increased power of* Parliament under the Restoration.—"Revolution."—Bill of Rights.—Supremacy of Parliament.—Party Government.—Mutiny and Septennial Acts.—Impotence of the First Two Georges.—Attempt by George III. to strengthen the Prerogative.—Alterations in the Organization of Parliament since the Revolution.

THE "Parliament" of England—"the King, Lords, and Commons, assembled at Westminster"—is the highest governmental body of the realm.

The Anglo-Saxons possessed a great national council, witenagemote, or "assembly of the wise men," invested with the whole legislative power of the community, consisting of the most distinguished prelates, abbots, the aldermen of each county, and other noble and wise men of the kingdom. How they were elected is a matter of great obscurity. The king could make no law or impose any taxes without the consent of this great council, which William of Malmesbury defines, "generalis senatus et populi conventus et Edictum." The laws were enacted "Confirmatione populi," "populus terræ" having reference, most probably, to the proprietorship of land.* It is questionable whether the smaller

* "Each county being divided into descriptions of persons, one possessing the land as proprietors, and the other cultivating it as vassals, the privilege of attending the legislative assemblies, as well as having a share in the judiciary courts, was necessarily confined to the landholders. As land was the only original possession of our Saxon ancestors, this species of property alone could entitle them to the right of freemen."—Strutt's *Chron. of Eng.*, ii. 186, 187.

thanes formed part of this council. The towns, as such, were probably not "represented." The Saxons appear mainly to have enjoyed only a personal right of voting, and not to have been acquainted with the system of "delegation."*

The witenagemote, as well as the political rights of the Saxons, in great measure disappeared at the Conquest, after which no trace of a legislative assembly is to be met with. The "curia regis" of the Norman kings was a council destitute of legislative authority.† It ordinarily met during the court festivals, and was asked for "advice" touching the more important requirements of state. The king arbitrarily summoned to these court-assemblies whom he thought fit, the administration of justice being there attended to at the same time. These assemblies of the barons were held simultaneously with the spiritual synods.‡ The sovereign assumed a right to summon the prelates in respect of their lay fees alone, and the clergy claimed the right to be taxed as such, only of their own gift and in their separate and distinct conventions.§ The general council which Stephen summoned in 1136 consisted of the archbishops, fifteen bishops, the chancellor, three earls, two constables, two chamberlains, one dapifer, four butlers, and six barons. The smaller *tenentes in capite* seldom appeared, though owing suit to the king's court rendered the tenant one of the king's barons; first, because the burthen of personal appearance was deemed very oppressive, next, because the sovereign did not look upon them with favourable eyes, because of their dependence on the great barons.

On the disappearance of the powerful Norman princes these court assemblies gradually assumed importance; Henry II. frequently convoked them to deliberate on important concerns of state. By Magna Charta the special right of taxation and legislation on the part of the barons was first recognized, and London was not, without the sanction of the barons, to pay any aids. The barons were to give their assent to all unusual imposts, and to the commutation of feudal services into money payments. The greater barons, bishops, and archbishops were invited to the "curia regis" by writ under the great seal, and the *barones minores* were summoned *in corpore* by the sheriffs. A body of twenty-five

* Lappenberg, i. 577.
† Hallam, *M. A.*, ii. 322.
‡ Hallam, *M. A.*, iii. 4.
§ *Precedents and Councils of England*, Introd. xii.

barons, self-elective, among whom was the Lord Mayor of London, were to be "conservators" of the "Magna Charta." The barons made frequent use of their right to refuse subsidies, which were deemed mere voluntary contributions.

When King Henry III. (1237) alleged that he had expended a vast sum of money on occasion of the nuptials of his sister with the emperor, he received by way of answer that he had not consulted them about the nuptials, and could not punish them for his imprudence. In 1244 all subsidies were refused, and the king extorted one thousand five hundred marks from the city of London.*

Magna Charta was repeatedly violated in regard to the summoning of the barons; in 1255 they complained that many of them had not been summoned, and refused all subsidies. Simon de Montfort in 1265 summoned to his parliament twenty-three temporal peers, passing over the rest.

Previous to Magna Charta, the summoning of deputies from the class of the lower nobility antecedently to that of the "curia regis" had often occurred. In 1213 the whole body of knights was ordered to Oxford, but at the same time four knights from each county were specially summoned to confer with the king on certain matters. (Quatuor discretos milites de comitatu tuo (the sheriff's,) ad loquendum nobiscum de negotiis regni nostri.†) This proceeding seems to have been without precedent, and the first example of representation. Henry III. (1226) allowed four knights to be chosen from the class of knights in Lincolnshire to inquire into the complaints directed against the sheriff. (Militibus et probis hominibus .... quod quatuor de legalioribus et discretioribus militibus ex seipsis elegerint qui ad diem illumsint apud Lincoln', pro toto comitatu. Rot. Claus. 10 Hen. III. 13.) On 11th February, 1250, *two* knights were summoned from each county instead of the others. In 1265 Simon de Montfort, besides the twenty-three temporal barons, summoned two knights for some of the counties, four representatives for each of the Cinque Ports, and two citizens for York and Lincoln, and citizens and burgesses of the most legal, "probi," and discreet from the other boroughs of England. How far this was an innovation it is difficult to determine.‡ From this period dates the growth of parliamentary government.

In the time of Edward I. it became a standing custom to omit

* Hallam, *M. A.*, ii. 330.
† Palgrave, *Rise and Progress of the Brit. Com.*, Pauli, iv. 676.
‡ Pauli, iv. 476.

the smaller feudal owners, and to have deputies from that class elected from each county. The king might fix at will the number of such deputies. In 1295, Edward I., conformably with Simon de Montfort's precedent, summoned in like manner to parliament deputies from the boroughs and towns, "because there is nothing more just than that what concerns all should be authorized by all."* These deputies were chosen by the town corporations, and held meetings; their number was, however, continually fluctuating.† The lower clergy also were occasionally summoned to parliament for purposes of taxation. In the 23 Edw. I., writs were issued to the prelates and proceres as usual, but those to the archbishops and bishops contain a new clause, called, from its first word, the "*præmunientes*" clause, by which they are required to summon to parliament the inferior clergy, the priors, chapters, and archdeacons of their respective dioceses, with variations adapted to the state of the particular churches. The priors and archdeacons were to appear in person, the chapters by one, the other clergy by two fit procurators. The form, "*præmunientes*" was used in all subsequent writs whenever the king required the attendance of such a convention of the clergy for an aid in respect of their lay fees; but it was not always inserted, and the clergy assembled under this clause proved no necessary part of that assembly in parliament by which laws were to be made affecting the estate of the king, of the realm, and of the people. In the 34 Edw. I., the bishops, abbots, and *abbesses* were summoned "ad tractandum." But the writs to them, as well as to the earls and barons, admitted attendance by attornies sufficiently authorized instead of personal attendance. The procurators of the prelates were all of the inferior clergy, except in one instance, when a knight was returned as such.‡

It has been a very prevalent opinion that parliament was not divided into two houses at the first admission of the commons. If by this is only meant, that the commons did not occupy a separate chamber till some time in the reign of Edward III., the proposition, true or false, would be of little importance. They

* The authenticity of the statute of this king, "De tallagio non concedendo," is questioned by Pauli (iii. 189). It runs thus: —Nullum tallagium vel auxilium per nos vel hæredes nostros, in regno nostro ponatur seu levetur sine voluntate et assensu archiepiscoporum, episcoporum, comitatum, baronum, militum, burgensium et aliorum liberorum .... de regno nostro, c. iii. Nihil capiatur de certo nomine vel occasione malatot (maletot) de sacco-lanæ.

† Crabb, 277.

‡ *Precedents and Councils of England*, Introd. xv.

may have sat at the bottom of Westminster Hall, while the lords occupied the upper end. But that they were ever intermingled in voting appears inconsistent with likelihood and authority.* In all writs of summons, the commons are summoned "ad *consentiendum* his quæ de Communi Consilio Regni, Prelatorum, Magnatum et Procerum contigerit ordinari," and no treaty or conference between them and the lords and great men is ever mentioned. Hence it appears probable that the lords and commons never sat and *consulted together* as one house in the Parliament of England. It may be inferred that the houses were divided as they are at present, in the seventeenth of Edward III., if not earlier.†

Under the Plantagenets the barons continued to sit in the upper house merely as representing their feudal holdings; if they lost their manors and castles, they likewise lost the right of appearing in parliament. In the case of bishops, the fiction was admitted that they were to sit in the upper house by virtue of their succession to the several ancient baronies, which were regarded as being connected with their episcopal sees. Henry VI. also determined that the possession of the castle of Arundel should make the holder an earl; from the time of Richard II., however, and ultimately, by reason of the wars of the roses, the peerage gradually became a personal dignity. The proof of the possession of a feudal ownership was no longer needful.

The lower house remained as powerless as the upper in presence of the sovereign down to the usurpation of the house of Lancaster. There were not any boroughs having a settled right of representation. Edward III., on one occasion, nominated the deputies himself, and many towns received the right and subsequently lost it. The right was not generally regarded as an advantage, but rather as a burthen. After the commons had voted the subsidies they usually separated, the upper house being often prayed to afford information to the commons.‡

The right in the commons to grant the taxes was of a precarious nature. Edward III. levied a tax alleging that it had been voted by the prelates, earls, barons, and certain of the commons.

* Hallam, *M. A.*, iii. 37.

† The first particular mention of the separation of the commons from the lords occurs 1332, 6 Edw. III., at which time the commons appear to have had no regular speaker. —*Precedents and Councils of England*, Introd. xix, in notes.

‡ Crabb, 233.

In 1347 the lords alone authorized all subsidies.* From the time of the house of Lancaster, however, no impost was ever levied without the consent of the commons. In the year 1400 parliament began to make their grants dependent on a redress of grievances. In the reign of Henry IV. the commons first acquired the *right of originating money bills.* Under the Plantagenets it became an established principle that the king and the two houses of parliament in conjunction possessed, exclusively, the right of legislation. Laws were now declared to be made by the king at the request of the commons, and by the assent of the lords and prelates. Que le roy fait les lois par assent des pères et de la commune, et non pas les pères et la commune.† The Plantagenets always claimed for their "ordinances" the force of law without the sanction of parliament.‡ Thus Edward I., of his own good pleasure, introduced the English law into Wales. At the opening of each parliament proclamations were read out before the doors, whereby those who felt themselves aggrieved by any acts of the government, were urged to hand in their complaints to the commission, consisting of certain peers, bishops, and knights, nominated by the sovereign as "receivers and triers of petitions." This commission instructed the petitioners in the course to follow in prosecuting their claims, and assigned these plaints according to their nature, either to the respective courts, the privy council, or the exchequer.§

Whenever the commons brought an independent complaint before the king, it was couched in the most submissive form. "Nos pauvres communes prient et supplient par Dieu et en œuvre de charité."‖ If these petitions were given effect to by the king they received the force of law; if the sovereign merely received these petitions as the groundwork of new enactments, the judges drew up, independently, on the basis of such material, new statutes.¶ Certain petitions, in the reign of Edward III., may serve to throw light on the old parliamentary procedure.

"The commons pray that the chancellor and other functionaries named in the petition, on entry into office, shall confirm on oath the Magna Charta, and the laws of the land."

* Pauli, v., 660.
† *Yearbook*, 28 Edw. III.
‡ Crabb, 234.
§ Palgrave, *The King's Council*, 23.
‖ Crabb, 233. The Commons of the Portuguese Cortes pray for grace—"Pedir pro merce." Schäfer, *Geschichte Portugals*, part ii.
¶ Crabb, 238.

Answer. "Le roye le veult."

"*Further, that the justices of the peace should be the leading* men of the county, and that when one is displaced the knights of the shire should choose another, and that the justices of the peace might hold, at least four times in the year, their sittings; and that no justice of the peace should be dismissed otherwise than upon special order from the king, and after due inquiry."

Answer. "The first part of the petition is reasonable, and the king will provide that it be carried out."*

Under the Plantagenets the parliament began to control the government. In 1346 it complained that the king had appointed neither a chief justice, nor a lord chancellor, nor a treasurer, who administered office in harmony with the parliament.† But the king treated the lords harshly.‡ "They wanted to make him their slave; he would neither nominate nor remove, at their instance, any chancellor, chief justice, or treasurer." This right claimed by the parliament to offer counsel to the king in regard to his advisers and his policy, met with a very bold, outspoken defence in a political poem, in the time of the Mad Parliament.§ In 1369 an ordinance was made, at the instance of the parliament, that, "Whereas many women prosecute the suits of others in courts of justice, by way of maintenance, and to get profit thereby, which is displeasing to the king, he forbids any woman henceforth, and especially Alice Perrers, to do so, on pain of the said Alice forfeiting all her goods, and suffering banishment from the kingdom."‖ In the reign of Richard II. the commons, (October 22nd, 1378) before making a grant of money, required the king "to show them how the great sums given for the war had been expended." The king directed that some of his council should clearly show them receipts and expenses. The commons, having examined the roll, were well satisfied with the account, "as being honourable for the king and the kingdom; they there-

* Crabb, 348.

† "Eo quod sicut magnifici reges predecessores sui habuerunt Justiciarium nec Cancellarium habet por commune consilium regni prout deceret et expediret."—Matthæus Paris, *Historia Major*, 744.

‡ "Talis a domino rege profuit responsio illepida."—Mat. Par. 749.

§ "Igitur communitas regni consulatur,
Et quid universitas sentiat, sciatur,
Cui legos propriæ maxime sunt notæ,
Nec cunctí provinciæ sic sunt idiotæ,
Quia sciant plus cæteris regni sui moros,
Quos relinquunt posteris hii qui sunt priores;
Non omnis arctatio privat libertatem,
Nec omnis districtio tollit potestatem."

‖ Pauli, iv., 491.

upon agreed to a grant, and presented many petitions and requests. Early in the history of the parliament the commons acquired the right of inquiring into public abuses, and in the reign of Edward III. the commons accused and impeached the Lords Latimer and Nevil, with four merchants, for misdemeanour. The king, on occasions which called for the exercise of his prerogative, as in matters relating to peace and war, frequently sought the advice of parliament.* Complaints by the upper house against the councillors of the crown were, at this period, of very frequent occurrence. How fluctuating was the power of parliament under the domination of the Plantagenet kings is made apparent by the following (20 Rich. II. Feb. 2nd, 1397):—"The king sent for the lords, spiritual and temporal, and complained that the commons had entered upon matters not belonging to them, touching the king's regalia, and state, and the royal liberty, and commanded the chancellor to inform him fully as to this. The chancellor informed him that the commons complained of four alleged grievances; namely, that although there was a statute to the contrary, the sheriffs and escheators were continued in their offices beyond a year; that the Scottish marches were not well kept; that the statute against wearing great men's liveries was disregarded; and lastly, that the excessive charges of the king's household arising from the multitude of bishops and of ladies who were maintained at his cost ought to be diminished. The king thereupon declared to the lords that he was king of England by God's gift, and that such articles would interfere with the freedom of his crown. He was exceedingly wroth that the commons should interfere with his person or household, and directed that the speaker should give up the name of the person who presented a bill for this last article in the lower house.† The commons submissively made their excuses, knowing well that such things did not belong to them, and surrendered the proposer, Thomas Haxey, who was adjudged in parliament to suffer death as a traitor, but was reprieved on the intercession of the prelates."

The Reformation, as we have seen, was the result of principles which had been for a long while operating in England. The king and his servile parliament were at one in opposition to Rome and the clergy.‡ Even so far back as 1371 parliament required that

* Crabb, 284.
† Hallam, iii., *M. A.*, 75.
‡ Pauli, iii., 670.

the king should fill all the offices with laymen; the king did not oppose their wishes, and released many clergymen from important offices. In 1412 the king, on a motion of the parliament, dismissed four councillors, amongst whom was his confessor.*

Edward III. usually held a parliament every year, in three several sessions.† The counties palatine of Durham and Chester had their own parliament; Berwick always remained free from the parliamentary burthen, as the representation was then deemed.‡ Under Richard II. those elected deputies who remained at home without lawful excuse were punished;§ for the parliament was an obligatory convocation of the royal council. Each deputy, consequently, had to obtain licence from the king to remain away.‖

Burke's opinion¶ that the deputies are never bound by the instructions of their electors, is entirely erroneous. The members were furnished with full powers by the communes. And the writ to this day orders that the members shall be furnished with full *powers to decide for the communes; without which they were not* bound.** Under Elizabeth the commons, on refusing to allow the queen any supplies, alleged by way of excuse the limited nature of their mandate.†† The first emancipation from such mandate occurred under Henry VI.‡‡ At all events it cannot be assumed that the limitation of the right of election to the forty shilling freeholders was effected with the concurrence of the electors themselves. This was one of the first and most important acts of parliamentary supremacy. It showed, moreover, the increasing importance of the lower house, which Richard of Gloucester deemed so powerful that he defended before it, in 1460, the pretensions of the House of York.

To assume that in the parliaments of that period the resolutions were determined by a majority of votes, is in wide opposition to the *tenor of the parliamentary organization then prevailing.* So far as the respective "estates" had acquired a determining

* Pauli, v., 58.
† *Ibid.*, iv., 679.
‡ *Ibid.*, iv., 680.
§ Crabb, 319.
‖ *Ibid.*, 253.
¶ Burke (1774) to the electors of Bristol: — "Authoritative instructions, mandates issued, which the member is bound blindly and implicitly to obey, to *vote, and to argue for,* contrary to the clearest convictions of his judgment and *conscience, — these are things utterly* unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution."
** Anstey's *Laws and Const. of Eng.*, 172.
†† Disraeli, *Curiosities of Literature*, ii., 159.
‡‡ Anstey's *Guide*, 278.

voice, for instance, in matters bearing on taxation, every enactment was regarded as an agreement with the respective constituencies represented in the lower house. The commons style themselves, indeed, under Henry IV. "procurators and attorneys for the whole people;" but to bind the whole people, the latter must, in its several classes, be in full accord with the delegates. It may hence be safely assumed that the veto of any individual provincial deputy was effectual.* In like manner in the Cortes of Arragon the several members had to give their assent to any binding resolution.† In the republic of the United Netherlands, not only had all the states, but also all the several constituencies in the respective states, to give assent to a resolution of the states-general in order to make it binding upon all.‡ It is needless to call to mind the case of Poland, where the misuse of the *liberum veto* led to the overthrow of the state.§

The emancipation of the lower house from its constituents in regard to the powers and instructions given, was brought to its climax when this assembly, in the character of an independent, irresponsible body, began to make resolutions according to a majority of votes. Under the Tudors, in consequence of the extermination of the barons through the wars of the roses,‖ and likewise by reason of the occasional summoning of subservient boroughs, parliament became less powerful than under the house of Lancaster, or even than during the reigns of Edward III. and Richard II. Elizabeth increased the number of representatives by sixty; usually there were 250 knights and burgesses present in the lower house. The "commons" continued submissive to the newly created Tudor peers; thus, under Elizabeth, they granted on one occasion a subsidy at the wish of "their superiors," the lords. In 1598, the lower house complained, however, emphatically of the want of ceremony which the upper house observed towards the commons, and especially that a bill of the commons had been sent back with amendments by the upper house, not written upon "parchment," as was customary, but upon "paper."

* Bucher, 162, 163.

† *Forma de Celebrar Cortes en Aragon, por Geron. Martel*, p. 2.

‡ *Observations upon the United Provinces* Sir W. Temple's works, i. 115, 130.

§ Rousseau says, "Le liberum veto n'est pas un droit vicieux en lui-même, mais sitôt qu'il passe sa borne, il devient le plus dangereux des abus."—*Gouvernement de Pologne*, c. 9.

‖ Pauli, v. 65.

Liberty of speech was oftentimes interfered with by the Tudors. The speaker of the parliament summoned in 1593, received for answer to his request for liberty of speech, that it was granted, but "not to speak every one what he listeth, or what cometh into his brain to utter; their privilege was ay or no." "Wherefore, Mr. Speaker," continued the Lord Keeper Pickering, himself speaker in the parliament of 1588, "her majesty's pleasure is, that if you perceive any idle heads which will not stick to hazard their own estates, which will meddle with reforming the Church, and transforming the commonwealth, and do exhibit such wills to such purpose, that you receive them not, until they be viewed and considered by those who it is fitter should consider of such things, and can better judge of them." A deputy named Morrice, on motion of the crown, was arrested by the serjeant-at-arms, and kept in the Tower for years, on account of a bill against the jurisdiction of the clergy.

In 1576, Peter Wentworth complained in the house of commons of the queen's arbitrary encroachments on their privileges; he said "that the liberty of free speech had been violated in such ways that the house was well nigh losing it for ever; that endeavours were made to intimidate, by rumours that the queen likes or dislikes such a matter, beware what you do!" He pointed out the manner in which the house had been restrained from dealing in matters of religion, and passed severe strictures on the prelates. He said: "None is without fault, no, not our noble queen, but hath committed great and dangerous faults to herself." The commons, alarmed by this severe censure, sequestered their member, and a committee of all the privy councillors in the house was appointed to examine him. Wentworth refused to recognize their authority till assured that they sate, not as councillors, but as members of the house of commons. Upon the report of the committee he was sent to the Tower, and after having lain there a month, the queen remitted her displeasure towards him, and referred his enlargement to the house, who set him at liberty, after being reprimanded by the speaker. In 1571, the Lord Keeper Bacon admonished the commons not to mix in matters of state, which did not in anywise concern them. As previously shown, the Tudor rule was not absolute, the power of both houses of parliament to co-operate in the legislation being incontrovertible. Petitions had become "motions" of law, in other words, "bills,"

which the crown accepted or rejected, and thereby the legislative authority was completely transferred to king *and* parliament. When Henry VIII., by means of a servile parliament, obtained an enactment that the royal proclamations and ordinances should have the force of law a recognition of the right of parliament to co-operate in legislation was thereby involved. The right of the lower house to refuse and grant taxes was jealously guarded by the commons. Henry VIII. shrank back cowering in presence of the insurgent commonalty, on Wolsey's exacting a tax which had not been granted. This monarch and his daughter Elizabeth found themselves, accordingly, forced to take refuge in gifts, half-compulsory on their subjects, under the fair title of "benevolences," whenever they failed to obtain a concession of money.

In a despatch of the French ambassador, La Motte Fénélon (27th Oct. 1566), we find a very interesting description of the struggle which Elizabeth had to encounter before receiving subsidies from parliament.* "The controller of the royal household then required a subsidy from the lower house, alleging that the last wars had emptied the queen's treasury. A member of the lower house, a country gentleman, contended, however, that she had not been advised to undertake the war, and that before being occupied about new concessions of money, the receipts of the previous expenditure ought to be produced, to ascertain whether all had been duly expended; the debate lasted several days, and the members finally declared that they were charged by their constituents to grant nothing whatever before the question of the marriage and accession to the throne was settled; they declared to one of the leading privy councillors: 'We are expressly charged not to grant anything until the queen resolvedly answers that which we now ask; and we require you to inform her majesty of our intention, which is such as we are commanded to by all the towns and subjects of this kingdom, whose deputies we are. We further require an act or acknowledgement of our having delivered this remonstrance, that we may satisfy our respective towns and counties that we have performed our charge."

They alleged for an excuse that if they had omitted any part of this, *their heads would answer for it*.†

England's great poet also indicates how thoroughly the idea of

* D'Israeli, *Curiosities*, ii. 201. † *Ibid.*, ii. 159.

the grant of taxes by means of the parliament, had already penetrated into the life-blood of the nation.*

From Edward IV. the commons had received the right, on the trial of Clarence, to ratify "Bills of Attainder."†

The Stuarts had not the advantages of Henry VIII. and Elizabeth to place in the balance, in order to be able to play the part of the Tudors towards the commons. James I., however, as representative of theocratic absolutism, and of the idea of "the divinity that doth hedge a king," affirmed that all privileges of parliament were revocable concessions; the commons were accordingly in constant feud with this sovereign. In Nov., 1621, the parliament urged him to interfere against Austria, and not to marry his son to a Spanish princess. Against an order from the king forbidding them to interfere in such matters, the lower house protested, declaring it to be its special attribute to deliberate on all concerns of state, with free speech and personal liberty of the members. The king tore up the protest, and cast the opposing members into the Tower, but the commons did not afford him the means to oppress them. The king complained accordingly before the commons, in his grotesque fashion, "that they had always treated him in a niggardly way. I have piped and you have not danced, I have wept and you have not sighed; during eighteen years of peace you have given me but very little money."

The period of Charles I.'s government is of special importance, in regard to the settlement and ratification of many constitutional questions. The Petition of Right establishes, irrefragably, the illegality of taxation without the consent of parliament. In one of the conferences between the lords and the commons in respect to the Petition of Right, the lords observing what a prodigious weight of legal ability was arrayed on the side of the petition, very fairly determined to hear counsel for the

* "That's the wavering commons, for their love
Lies in their purses, and whose empties them
By so much fills their heart with deadly hate,
Wherein the king stands generally condemned."

Shakespere, Ric. II.

The insurrection against Wolsey is also thus described by Queen Katherine:

"This makes bold mouths;
Tongues spit their duty out; and cold hearts freeze
Allegiance in them; their curses now
Live where their prayers did, and it's come to pass
This tractable obedience is a slave
To each incensed will. I would your highness
Would give it quiet consideration, for
There is no primer baseness."

Henry VIII. Act. i. s. 2.

† Crabb, 422.

crown; one of these, Serjeant Ashley, having argued on behalf of the prerogative in a high tone, such as had been usual in the late reign, was ordered into custody; and the lords assured the other house that he had no authority from them for what he had said—a remarkable proof of the rapid growth of popular principles.* After a protracted arbitrary rule on the part of the sovereign, "the long parliament" assembled on 3rd November, 1640. Strafford, by Bill of Attainder initiated by the commons, was sentenced to death. The king found himself forced to sanction the bill; while continuing the conflict the lower house declared that only the commons represent the nation—the peers representing merely "personal rights." The king refused to sanction the requirements of the commons which aimed at establishing the ascendancy of the lower house, as it at present obtains, and the refusal resulted in a civil war which, by a fiction, the "king in parliament" conducted against the king in the royalist encampment. The Cromwellian supremacy effected a reform of the lower house, which first received full embodiment some 180 years later. The restoration did not reverse any of the more important constitutional principles established by the long parliament, and the exclusive right of legislation by the king in parliament has no longer been brought into question. From 1673 no new borough was summoned to parliament, and the crown had previously lost the privilege of granting at its good pleasure the right of election to new boroughs. The second parliament of Charles II.,† termed the "Second Long Parliament," was invested with the fullest display of modern parliamentary privilege. The third and fourth parliament of this king endeavoured to alter the succession to the throne by means of the "Exclusion Bill." The royal prerogative was already so weakened in relation to the parliament, that Charles II. was forced to concede that "abhorrers," or the petitioning opponents of the Exclusion Bill, might be arrested on an order from the parliament.

James II., without the consent of parliament, endeavoured by his so-called "dispensing power" to render the statutes against his co-religionists inoperative; the consequences of this and other arbitrary measures, were a conspiracy of the nobility, the intervention of the Stadtholder of Holland, the desertion of the troops,

* Hallam's, *Const. Hist.*, i. 390.

† The second parliament of Charles II. lasted from 1661 to 1678.

and the flight of James. By a "convention," consisting of the two houses of parliament, this flight was regarded as an "abdication;" the succession to the throne was changed, and placed upon new legal bases. "The lords and commons at Westminster assembled resolved," according to the declaration of rights, "that William and Mary, Prince and Princess of Orange, are to be King and Queen of England, and proclaimed as such." The declaration and Bill of Rights further assure the rights of parliament, inasmuch as—

1. The suspension of statutes by the king, and

2. The dispensing power of the king, are declared unlawful.

3. The king is reminded that no money is to be granted without assent of parliament.

4. No army to be maintained in times of peace without the consent of parliament.

5. Parliamentary elections to be henceforth free from royal influence.

6. That debates or proceedings in parliament ought not to be impeached in any court or place out of parliament.

7. Parliaments are to be held frequently.

To legalize this revolution the theory of an original contract between prince and people, and which James had broken, was set up.

As William was compelled to maintain himself in accord with the parliament as the king "elected," the actual supremacy of that body became very marked and distinct, inasmuch as the king was bound to rely upon the party dominant in parliament, and to unite its members into a select council; whereas the governmental council contained men of all parties, and was consequently unfitted for the carrying out of a rule which was to be supported by one party alone. Although the Act of Settlement condemns such cabinet government as unconstitutional, it was retained by the House of Hanover because the new dynasty could only yield itself up to the Whigs and rely upon them; the want of support which this dynasty had in the kingdom rendered the first two Georges completely dependent on the Whig oligarchy.

Parliamentary government was further confirmed by the Mutiny Act and the annual grant of the budget; by these two innovations the parliament rendered its annual summoning necessary; its power was finally established by the "Septennial Bill,"

whereby the representatives have been more than ever set free from their constituents, and the corporative spirit of the lower house has been strengthened. As the lower house was in great part the appanage of the ruling parties, the crown, whenever wishful of securing influence, had no resource left but to work upon parliament by means of bribery.

The efforts of George III. to strengthen the prerogative were not directed against the parliament; when, however, the latter, by means of Fox's great measure, "the East India Bill," armed itself for the struggle against corporate rights, the king succeeded in overthrowing the parliamentary families. Under the sway of a minister like Pitt, who, with a powerful accession of the nobility, and upheld by great events, governed the country for long years without check, the king eventually subsided into that native impotence which marked his ancestors. The power of parliament, in consequence of the American war, became limited, inasmuch as the right of the colonies to tax themselves was recognized, and the taxation of the colonies by parliament was excluded by the pressure of events. The privileges of parliament became further limited through the increasing power of the press, which victoriously maintained its struggles against parliamentary privileges. On the other hand, since Pitt's East India Bill, the cabinet acquired a significant influence over the colossal British Empire in India, until finally in 1858, the Indian government was committed to the care of this parliamentary section.

Since the revolution of 1688 material alterations have taken place in the composition of parliament. The Acts of Union with Scotland (1706), and with Ireland (1801), brought many new members to the lower house, and to the upper house a new category of peers—viz., "elected" peers. The Catholic Emancipation Bill of 1829 threw open parliament to British Catholics; and finally, the "Reform Bill" (1832) destroyed many close and insignificant boroughs, and gave the right of representation to many large commercial towns and cities. By the introduction of new elements the character of the lower house and the cabinet policy has been modified, the upper house sensibly weakened, and the *primum mobile* of government substantially centred in the lower house.

CHAPTER II.

THE COMPOSITION OF PARLIAMENT.

Meaning of "Parliament."—The Parliament a Court of Judicature.—Presence of the King in Parliament.—Since George I. no King has been a Listener in Parliament.—The King the Beginning and End of Parliament.—Summoning of Parliament.—Conventions.—Annual Sessions.—Annual Parliaments.—Triennial.—Septennial.—Place of Summoning.—Opening of Parliament.—Election of Speaker.—Ratification.—Speech from the Throne.—Bill read *pro formâ*.—Amendments to "Address."—Prorogation.—Proclamation for the Summoning of Parliament.—Dissolution.—Demise of the Sovereign.

The expression, "parliament," was first made use of in the year 1248 by Henry III., inasmuch as he termed the assembly at Runnymede, which forcibly obtained Magna Charta, "Parliamentum Runemedo quod fuit inter dominum Johannem regem, patrem nostrum, et barones suos Angliæ." (Rot. cl. 28 Hen. III.)*

Parliament, as the successor of the "Curia Regis," is especially a court of judicature as well as the supreme council of the crown; it is styled by Coke, "The High Court of Parliament," and in Shakespere's Henry VI., part ii. act 5, s. 3, it is so termed:—

> "The king is fled to London,
> To call a present court of parliament."

As in all the courts of law, the sovereign is regarded as being ever present in parliament, the conception to the mind of the lawyer is, that the king sits with the "Lords" in one house, and with the "Commons" in the other. Under Plantagenet rule, the king was by law bound to be always present in parliament, unless it were shown to a committee of twelve members of the parliament that he was suffering bodily.† Under Henry VI. the king and parliament first recognized in express terms that the upper house might deliberate even during the voluntary absence of the king. Charles II., James II., William III., and Anne, were listeners at the proceedings. Since George I. this has no longer occurred,

* Pauli iv. 688.

† *Modus Tenendi Parliamentum*, edited by Hardy, London, 1846, 34, 35. Rex tenetur omni modo personaliter in teresse parliamentum nisi per corporalem ægritudinem detineatur.

probably from the simple fact of this king not having understood English.* The lord chancellor, that is, one of the "advisers of the crown," in his capacity as prolocutor of the upper house, is the personal representative of the sovereign. The sovereign has likewise been occasionally regarded as one of the "estates" of the realm, but the conception is an erroneous one. By the "estates" of the realm are to be understood the lords spiritual, lords temporal, and the commons; the sovereign and these three estates are the first corporation or body politic in the kingdom.†

The sovereign is not only the head, but also the beginning and the end (caput, principium et finis) of parliament; he alone can summon parliament, and no parliament, save on the demise of a sovereign, can assemble of its own accord (*vide post*). Parliament is summoned by a writ of the sovereign issued out of chancery, by advice of the privy council, at least thirty-five days previous to its assembling. If a new parliament is to be elected, the chancellor sends his warrant to the clerk of the crown in chancery, the latter issues writs to the sheriff to procure the election of "knights" and "burgesses." On a vacancy occurring whilst parliament is sitting, a writ for the election of a new member is issued after motion in the house. If the vacancy occur during the prorogation, and it be occasioned by death, the writ is issued at the instance of the speaker.

Upon every convocation of parliament (1384) special matters of business concerning the parliament were wont to be indicated; at present the parliament, without further indication of its duties, is summoned merely for the deliberation of important business.

"Conventions," that is, parliaments summoned without the king, have frequently occurred. At the restoration of Charles II. a convention met above a month before the return of the king; the lords by their own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament. The first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defects of the king's writs. The legality of this act is, however, contested by many. In 1688

* His minister, Robert Walpole, understood neither German nor French, the conversation between king and minister had consequently to be conducted in a barbarous kind of Latin.

† Petyt, *Lex parliamentaria*.

another "convention" of the two houses met, and after it had called William and Mary to the throne, and legalized such assembly as a "parliament," it was declared by 1 Will. and Mary, st. i. c. 1, that this convention was really the two houses of parliament.*

By 4 Edw. III. c. 14, it was enacted, "It is accorded that parliament shall be holden every year once or (and ?) more often if need be." Also by 36 Edw. III. c. 10, it was directed, "that a parliament be holden every year if need be." The interpretation put by the Stuarts amounted to this, that only in the event of its being "*needful*" should a parliament be holden every year, or more frequently—a sophistical interpretation truly.

By 16 Chas. I. c. 1, it was enacted, that if the king neglected to call a parliament for three years, the chancellor or keeper of the great seal might issue writs for summoning the peers and for the election of the commons; that if the chancellor or keeper should neglect to do it, any twelve of the peers might summon the parliament; that if the peers should neglect to issue the necessary summons, the sheriffs of the counties and other magistrates respectively might proceed to the election; and should they refuse then, that the freeholders of each county might elect their members, and that the members so chosen should be obliged, under severe penalties, to attend. This act was deemed such an invasion of the prerogative, that it was repealed on the Restoration by 16 Chas. II. c. 1. But that act contains a provision that parliament shall not in future be intermitted for above three years at the most. "Thus," says Mr. Hallam, "the result of the enactment was, that the law of the long parliament subsisted as to its principle, without those unusual clauses which had been enacted to render its observance secure. Although the king promised to observe this act, yet at the time of his death nearly four years had elapsed since the dissolution of his last parliament.

By 1 Will. and Mary, sess. 2, c. 2, it was enacted, "that parliaments shall be holden frequently." As, however, the "Mutiny Act" and the "Budget" are only granted for a year, the crown, since the revolution, is compelled to summon a parliament annually.†

Probably so long as the knights and burgesses were bound by

* Bl. i. 151.

† Bowyer, 81.

"mandates," their powers were confirmed annually by their constituents. Mr. Wynn remarks, "the common law has always approved of an annual or temporary rather than of a fixed delegation of power, of which kind are the sheriffs and all the subordinate peace officers; need I add, the law had formerly as little idea of a member of parliament being fixed for more than a year, as it now has of a parish officer."*

Samuel Johnson, the clergyman,† in his "Essay concerning Parliament" (1693), says: "Our forefathers would have regarded a permanent or old parliament as being just as little possible as an old moon cut up into stars." The revolutionary "long parliament" lasted, though with protracted intermissions, from 1640 to 1660. The second parliament of Charles II., termed also the second long parliament, endured without fresh election of the lower house from 1661 to 1678; but during that interval, by reason of intermediate elections, completely changed its character. The stat. 6 Will. and Mary, c. 2 (Triennial Bill), introduced triennial parliaments. 1 Geo. I. stat. 2, c. 38, called the "Septennial Act," fixed the duration of parliament at seven years. This bill, on its introduction, was strenuously opposed, and frequent endeavours have been made to repeal it.‡ How it tends to uphold the system of parliamentary supremacy will be shown further on.

The sovereign may summon parliament to meet in any place at pleasure; in 1625 and 1681 parliaments were held at Oxford, it is now, however, generally held at Westminster.

At the opening of parliament each house assembles separately, the commons, however, attend in the lords, to hear the address from the throne. The lord chancellor then invites the commons to choose the "speaker," when a *new* parliament has been elected;

* Eunomus, p. 576.

† For an account of this ardent lover of liberty, *vide* Macaulay's *History*.

‡ In the upper house it passed with a majority of 35 votes; in the lower house by 264 against 121; the protest of the minority in the lords runs thus:—

"We protest—

"I. Because we conceive that frequent and new parliaments are required by the fundamental constitution of the kingdom; and the practice thereof, for many ages (which manifestly appears by our records), is a sufficient and evident proof of this constitution.

"II. Because it is agreed that the house of commons must be chosen by the people; and when so chosen, they are truly the representatives of the people, which they cannot be so properly said to be, when continued for a longer time than that for which they were chosen; for after that time they are chosen by the parliament, and not by the people, who are thereby deprived of the only remedy which they have against those who either do not understand, or through corruption do wilfully betray the trust reposed in them; which remedy is to choose better men in their places," etc.

the new peers are forthwith introduced into the upper house, and the lords take the oaths required.

At the election of speaker of the lower house, the permanent clerk officiates as chairman, the speaker is proposed by the leader of the house of commons, and elected for the duration of the parliament; when elected, the mace is forthwith placed before him, whereupon the speaker proceeds with the commons to the upper house, where the lord chancellor confirms him in his office. During the civil war the speaker was in 1647 presented to the lords for confirmation.* In 1679, when Seymour was elected as speaker, the ratification was withheld; this had never previously happened, and has never occurred since.† Even at the period referred to, the commons maintained that the ratification was an empty form; Sir Edward Coke, however, had declared (1592) to the queen, that he first regarded himself as speaker on receiving the royal ratification. The speaker on occasion of his election was wont to pray, "that they might choose one more worthy." Sir John Cust was the last who (1761) condescended to such mock modesty.‡ On another occasion (1806) the speaker, Abbot, reverted to the antiquated tone of servility when, in referring to the payment of the king's debts, which parliament had already paid off five times, he exclaimed, "The pomp of the throne spreads splendour and dignity over the entire land." The speaker still prays, however, though, of course, only *pro formâ*, that the queen would confirm the privileges of parliament, especially insure freedom of speech. After the speaker's confirmation in office, the required oaths are administered in the lower house; Jews must be dispensed by a "resolution" of the respective house from the formula, "on the true faith of a Christian." Should the sovereign die pending the existence of a parliament, a fresh oath has to be administered; whoever takes part in the deliberations and votings without having taken the necessary oaths is subject to a penalty of £500.§

Every session of parliament is opened by a "speech from the throne," composed by the cabinet; the speech is addressed to both houses. The queen either opens parliament in person and reads the speech from the throne, or by means of the lords com-

* May, *Parliament*, 179.
† Bowyer, 91.
‡ Crabb, 232.
§ See Miller *v.* Salomon, *Ann. Reg.*, 1852, 369.

missioners, who open the session by virtue of a special "commission," in which case the opening speech is read by the lord chancellor. These are the last remains of the ancient observance, according to which, on the opening of every parliament, the grounds for assembling the same had to be stated by this functionary.* The statement was usually made in presence of the king, who merely uttered some complimentary words to the parliament, but never ventured upon any matter relating to parliamentary business. James I., in his silly vanity, was fond of indulging in a mass of common-place stuff on opening parliament, but he never touched the inner core of parliamentary business; whatever concerned public affairs was reserved for the lord chancellor's or lord keeper's speech, as in the reigns preceding. Charles II. first began to open parliament with a royal speech previously prepared, the written text of which he held in his hand; he excused himself for doing so by his want of memory. The custom that the king should, on the opening of parliament, read the programme of the party in power, in the form of a royal speech, first became general after the revolution of 1688.†

The speech from the throne is addressed partly to parliament at large, but when the question of supplies is concerned, to the lower house only. As soon as the commons have retired to their chamber, the speech from the throne is read out anew in both houses, a bill being previously read for the first time, *pro formâ*, in either house.‡ In the lower house, in 1840, a question of privilege, which had arisen out of the proceedings in Stockdale *v.* Hansard, was deliberated upon before any notice whatever was taken of the speech from the throne.§ In the upper house such notice takes place by virtue of a "standing order," and in the lower house, since 15th February, 1676, this principle has been established without interruption,‖ the parliament thereby intending to protect its right to proceed to business without being forced to examine the grounds of its summons, and to determine in an independent manner the order in which the business is to be proceeded with.¶

Either house has the right to issue an "address" to the crown;

* *Parl. Rem.*, v. 1.
† *Ibid.*, v. 3, 4.
‡ *Ibid.*, iv. 1, 4.
§ May, *Parliament*, 43.
‖ *Parl. Rem.*, vol. ii. 1.
¶ Cox, *Commonwealth*, 13.

the standing custom is to reply to the speech from the throne by means of such address, separately issued by either house. The address is "moved" in either house by a member of the government party, and "seconded" by another member; it is afterwards drawn up by a select committee, and then, without further division or debate, is agreed to.* Generally speaking, addresses are more empty acts of politeness, and not at all compromising, as the elder Pitt affirmed in 1750.† Amendments to the address are seldom put,; in the debate on the address, however, the respective parties already develop their political views. As a rule the address passes without a division; occasionally the fate of the cabinet is determined by an amendment; thus in 1841 the whig administration was defeated in consequence of amendments which passed both houses. The Derby ministry was likewise defeated on 10th of June, 1859 by an amendment to the address. Whenever an amendment is put, it is discussed, and a division taken previously to the motion, to answer the royal speech by an address, being proceeded with.‡ If the queen opens parliament in person, the two houses present their addresses *in corpore*. The speaker of either house conveys to the respective assemblies the queen's answer.

By the old law parliament could not separate so long as there was a petition to discuss, or an answer from the sovereign to be given thereto; if the sovereign permitted this, he was regarded as forsworn;§ this is quite out of date.

Every session must now end with a prorogation; a prorogation renders abortive the bills which have not been brought to a conclusion. Both houses are prorogued at the same time; before a session can be closed by prorogation one bill at least must have become an "Act of Parliament." A statute of Charles I. even directs that the consent of the king to one bill alone does not determine the session.

Parliament is prorogued either by the queen in person, by commission from the crown, or by proclamation; the lower

* *Parl. Rem.*, iv. 4, 45.

† *Ibid.*, iv. 1 v. 3. "I for my part have always regarded addresses by the parliament as a fashionable, unmeaning formality — usurpers, idiots, and tyrants have been successively complimented with almost the same professions of love and duty."

‡ *Parl. Rem.*, iv. 5.

§ Parliamentum departiri non debet dummodo aliqua petitio pendeat indiscussa vel adminus ad quam non sit determinata responsio, et si rex contrarium permittat perjurus est.— *Modus tenendi Parliamentum*, 45.

house appears at the bar, and if the queen be not present, the speaker reports upon the labours of the session; the royal assent is then given to bills of the closing session, and a speech from the queen is read; thereupon the chancellor prorogues the parliament to a certain day. Parliament resumes business, however, as soon as it is summoned by royal proclamation on a certain day, which may be at a date earlier than the original date of prorogation appointed. Should the term of prorogation elapse, and no proclamation be issued, parliament cannot assemble of its own accord. The royal proclamation which summons parliament in order to proceed to business must be issued fourteen days before the time of meeting.

A dissolution is the civil death of parliament; it may occur by the will of the sovereign, expressed in person or by commissioners, and even, as in 1806, during the "recess" by proclamation or by lapse of time.

Formerly, on the demise of the sovereign, parliament was dissolved *ipso facto*, but the calling of a new parliament immediately on the inauguration of the successor being found inconvenient it was enacted by the statutes 7 and 8 Will. III. c. 15, 6 Anne, c. 7, and 37 Geo. III. c. 127, that the parliament in being shall continue for six months after the demise of any king or queen, unless sooner prorogued or dissolved by the successor; that if, at the time of the demise, the parliament be adjourned or prorogued, it shall immediately assemble; that, in the case of the demise of the sovereign between the dissolution of a parliament and the day appointed by the writs of summons for the meeting of a new one, the last preceding parliament shall immediately convene for six months, unless sooner prorogued or dissolved by the successor; and that in the event of the sovereign's demise, on or after the day appointed for the assembling of the new parliament, but before it has assembled, then the new parliament shall in like manner convene for six months, unless sooner prorogued or dissolved.

CHAPTER III.

ORGANIZATION OF THE UPPER HOUSE.

Classification of Peers.—Hereditary Right.—Questions of Privilege.—Numerous Creations of Peers.—Non-exclusiveness of the Upper House.—Bill of 1719.—Walpole Touching the Upper House.—Creation of Peers under the House of Hanover.—Bishops *not* Peers.—Life-peerages.—Irish Peers.—Scottish.—Statistics of the Upper House.—Privileges.—Proxy.—Protests.—Speaker of the Upper House.—Seats.—Upper House but little Visited.

The upper house consists of peers who hold their seats—

1st. By virtue of hereditary right;

2nd. By summons from the crown;

3rd. By virtue of their office (bishops);

4th. By being elected for life (Irish peers);

5th. By being delegated for the duration of a parliament (the Scottish peers).

The succession to the peerage has been indicated previously. Formerly every peerage was at the same time a feudal barony (*Barone par tenure*). To be qualified to appear, however, in the national assembly of the Plantagenets a special summons was necessary (*Barone par writ*). According to Camden, after the battle of Evesham every baron was expressly forbidden, without such special writ to appear in parliament. Any one affording proof that his ancestor was called by "writ of summons" has the right to sit as hereditary peer. The claim may likewise be based on prescription. Whoever is called by writ of summons must actually take his seat in order to acquire the full rights of a peer; the eldest sons of dukes, marquesses, and earls are sometimes called by writ to the upper house under a special title. The creation by patent is at the present day the ordinary form employed, the peer being thereby summoned "ad consulendum et defendendum regem;" and the peerage rights are acquired whether the individual summoned take his seat in the upper house or not. Peers are now only representatives of ideal seigniories, receiving merely the title of some ancient or fictitious barony.

Should a question arise as to the legal capacity of a peer to be

admitted to the sittings of the upper house, the queen is prayed for a writ through a secretary of state; the attorney-general supports the petition, and, if willing to allow it, it is ordinarily complied with. If the matter is doubtful, he recommends it to be referred to the upper house; which resolves itself into a committee of privilege. Upon a report to the house the latter declares its opinion by way of address; hereditary peers may, by a "standing order" of the upper house take their seat without further preliminary; peers newly created or summoned have to be "introduced." *

The crown is unrestricted in its privilege of creating peers; "the sovereign may legitimately summon 100 peers at once, and raise a body-guard in the peerage," (Lyndhurst).†

The present peerage, as we have seen, is of very recent origin; Henry VII. began his reign with twenty-five temporal and five spiritual peers;‡ Henry VIII. raised the number to fifty-one temporal peers, and Elizabeth named seven new peers; under the Stuarts the upper house was recruited from the leading country gentlemen and lawyers. The most powerful noblemen of the century preceding the civil war, the Dukes of Somerset, Northumberland, Buckingham, and the Earls of Leicester and Strafford, Lords Seymour and Burleigh, had elevated themselves by means of courtly artifices or prominence in parliament. James named 98, Charles I. 130, Charles II. 137, and James II. 11 new peers; after the revolution William III. summoned 36, and his successor, Anne, 47. When Lord Oxford named 12 peers at once, he was reproached with having thereby immoderately increased the influence of the crown, and on the ground of this measure accusations were raised against him. In consequence of this abuse, as it was then accounted, Lord Sunderland persuaded George I. to renounce his important prerogative of making peers, and a bill supported by the ministry was carried through the upper house, limiting the house of lords, after the creation of a very few more, to its actual members. This measure was, however, rejected by the commons.

"It is," says a prominent conservative historian,§ "exactly the constant affluence which keeps the stream of the peerage clear, and prevents it from becoming a stagnant and fetid pool. What

* May, *Parliament*, 172.
† *Ann. Reg.*, 1856, p. 86.
‡ Pauli, v. 542.
§ Mahon, i. 540.

has kept it firm and unshaken while so many neighbouring aristocracies have tottered to decay, or fallen before political convulsions? It is because their families are constantly coming from the people, and returning to the people; they have been an institution not a caste, not a separate and jealous oligarchy like that of Venice, asserting for themselves and for their descendants an inborn superiority over their brother men. With us how many sons of ploughmen or weavers, enrobled for their services, sit side by side with the loftiest of the Somersets and the Howards!"

Robert Walpole violently attacked this bill, which made of the upper house "a fixed impenetrable phalanx." "Until now," he says, "the usual path to the temple of honour had been through the temple of virtue, but by this bill, it is only to be through the sepulchre of a dead ancestor."

The house of Hanover, at a later period, made extensive use of the cherished prerogative. George I. created 60 and George II. 90 new peers; from 1761 down to 1821, 388 persons were elevated to the peerage; from 1700, however, down to 1821, 667;* George IV. created 59, William IV. 55, and Queen Victoria, up to 1857, 60 new peers.† A body like that of the present upper house cannot, accordingly, be termed an assembly of magnates, but rather one of notables distinguished by birth, fortune, learning, or official position.

At the Reformation the twenty-seven mitred abbots were excluded from the upper house.‡ From Henry VIII. till 10 & 11 Vict. c. 108, the two archbishops and twenty-four English bishops have sat in the upper house. Since the last-named statute two archbishops and twenty-four English bishops have a seat; the Bishop of Sodor and Man is excluded from voting, but not from sitting. The youngest bishop has not a seat in the upper house until he has advanced by seniority. The Bishops of London, Durham, and Winchester, however, always sit in the upper house. Since the Union, four Irish bishops (one archbishop

* May, *Const. Hist.* i. 235.

† *Ibid* 237.

‡ The number of the prelates summoned was formerly always undetermined, and very often far exceeded the number of the temporal lords and barons. In the 49th Henry III. 120 prelates and 23 temporal peers were summoned; in 22nd Edward I. 90 prelates and 50 temporal peers; the 23rd Edward I. 77 prelates and 63 temporal peers, and the same year 90 spiritual and only 50 temporal peers; the 24th Edward I. 91 prelates and 43 temporal peers; the 27th Edward I. 58 prelates and 90 temporal peers; the 28th Edward III. 102 prelates and 80 temporal peers.

and three bishops) sit in the upper house, replacing each other by rotation of sessions.* All the bishops are "lords of parliament," but not "peers;" and hence do not enjoy the privileges of nobility. If they abstain *in corpore* from voting upon any question, the vote of the house is effectual notwithstanding; so also, when they refuse to vote, or even when they put a protest on the journals; a vote given by them conditionally has no validity.† They may vote on occasion of a "bill of attainder," provided it do not involve a capital sentence.

Coke assumes‡ that bishops sit in the upper house by virtue of holding certain ancient baronies under the crown; this has, however, been greatly controverted. The opinion advanced by Dr. Warburton, Bishop of Gloucester,§ is now generally adopted, viz., that the right to sit in the upper house is a privilege which is connected with the episcopal dignity by prescription. Bishops take their seat in parliament after their election has been confirmed. Since the Reform Bill an attempt has been made, though unsuccessfully, to exclude bishops from the "Lords."‖ Bishops newly nominated must be "introduced" to the "Lords" by two of their own body.¶

In 1856 the attempt was made to summon peers merely "for life;" such peerages had not, however, been created for 400 years. Coke, it is true, expresses himself in favour of the right of the sovereign to create such peers. The measure excited, however, such violent opposition, the upper house deeming its independence thereby imperilled, that Lord Wonsleydale (Baron Parke) was created an hereditary peer, and the government abandoned its scheme of "life" peerages.

In 1860 there were 193 Irish peers, among whom, the King of Hanover, as "Earl of Armagh;" seventy-one of them are "peers of the United Kingdom," twenty-eight sit in the upper house as "elected for life," in conformity with the Act of Union (39 & 40 Geo. III. c. 67, 1801.)** Those Irish peers are eligible to the upper house, who are not summoned as hereditary peers of the United Kingdom, and who have not a seat in the commons. The number of Irish peers not peers of the United Kingdom

* Bowyer, 75.
† Burns, i 213.
‡ 4 *Inst.* i. 12.
§ *Alliance between Church and State*, 134.
‖ May, *Const. Hist.* i. 251.
¶ May, *Parliament*, 172.
** May, *Const. Hist.* i. 241.

may always be brought up to 100; for the time being there are also twenty-two Irish peerages which are extinct, and the sovereign according to the provisions of the Act of Union can only create one new peerage for every three peerages that have lapsed. When an Irish peer has a seat in the lower house, he loses his rights as peer.

Since the Act of Union with Scotland (1707) sixteen Scotch peers belong to the upper house, being elected by their peers for the duration of parliament.

The crown cannot create any new Scotch peers; they form, consequently, a close electoral body. A fresh election of representative peers of Scotland takes place on every dissolution. The upper house consisted:—

	In 1859.	In 1713.
Of English archbishops	2	2
,, Irish ,,	1	—
,, English bishops	24	24
,, Irish ,,	3	—
,, Dukes of royal blood	2	1
,, ,, having an English title	19	22
,, Marquesses	19	64
,, Earls	107	3
,, Viscounts	21	10
,, Barons	195	97
,, Scotch peers	16	16
,, Irish ,,	28	—
	457*	208

Every bill affecting the privileges of the upper house takes its rise and beginning in the house of peers, and cannot be amended by the commons; who, however, may reject it altogether.

Peers are free from arrest even during the parliamentary recess. Conformably with the Charta de Foresta (9 Hen. III. c. 2) a peer has a very ancient privilege, mentioned only in illustration of a former era, of killing one or two of the king's deer while passing, on his way to parliament, through the king's forests. "In view of the forester," says Blackstone, "if he be present, or in blowing a horn if he be absent, that the peer may not seem to take the king's venison by stealth."

* A. Fonblanque, *How we are Governed*, 27.

In former times they frequently assembled of their own accord to offer "advice" to the sovereign. Occasionally also they were specially summoned to give advice to the king. A great council of the peers met, for instance, in 1640, before the summoning of the "long parliament." Every individual peer has the right to consult majesty, and can request an audience for that purpose, *which must be granted. This right is likewise possessed by Irish* and Scotch peers even when they have not a seat in the upper house.* A peer can only sit and vote on attaining the age of twenty-one.

The right of voting by proxy dates from the reign of Edward I. At that period the "attorneys" of the peers were mere messengers; but under Henry VIII. one peer first began to represent another. In the reign of Charles I. the Duke of Buckingham had at one time fourteen proxies at his disposal, and hence an order was passed that no peer should hold more than two proxies. The right to vote by proxy is possessed by every lord of parliament, and hence by the bishops. It is formally acquired by previous licence of the sovereign; the holder of the proxy need not give his own vote in accordance with that of the person empowering him. In 1835 Duncombe made an unsuccessful attempt to set aside voting by proxy. Under Henry IV. the "protests" of minorities were introduced. Every peer has the right to record his vote, together *with the grounds of his dissent, in the journal of the house;* when the protest is not immediately inscribed in the journal, the house must give formal permission that it be entered on the day when it is presented.†

The speaker, or chairman of the upper house, is the lord chancellor, or "lord keeper" of the privy seal. The Queen may be represented by commission. A lord chancellor, not a peer, cannot vote or take part in the debates; thus, Brougham, on the 22nd November, 1830, and Sir Edward Sugden (Lord St. Leonards) on the 14th March, 1852, were speakers of the upper house in their character as "chancellor," without having been as yet created peers.* The woolsack being regarded as outside the house, any one not a peer may take his seat thereon. The judges, as previously intimated, whenever assisting at the sittings of the upper house, are seated on the woolsack. As to the order of precedence,

* Bowyer, 122. † *Parl. Rem.* 120.

the Archbishop of Canterbury takes his seat on the right of the throne, next comés the Archbishop of York, then follow the Bishops of London, Durham, and Winchester, and the rest of the bishops by seniority ;* the other peers according to their rank. Three peers may wield all the authority of the house.†

* Burns, i. 2196.

† May, *Const. Hist.* i. 266.

CHAPTER IV.

THE COMPOSITION OF THE LOWER HOUSE.

A.—Electoral System before the Reform Bill.

Corporate Representation.—Qualification under Henry VI.—Conditions of Eligibility.—Number of Representatives.—Disproportion between Electors and Elected.—From 1673 down to the Reform Bill, no New Boroughs Summoned.—Electoral Right in Towns.—Oligarchy.—Rotten Boroughs.—Old Sarum.—Sale of Electoral Boroughs.—Small number of Electors.—Inconsistencies in the Representative System.—Paley's opinion on the English Representative System.—Representation in Scotland.—Ireland.—Family Seats in the Lower House. The Lower House *not* a Representation of the People.—Admiral Byng.—Corruption.—Striking Examples.—Poll.—Electioneering Manœuvres.—Court-influence.—Elections and the "Military."—Categories of Functionaries Excluded.

The lower house is regarded as representing all the "commons of England," but in reality only the counties, and certain boroughs and towns to which the king granted the right of voting, have been represented. As taxation was during the middle ages merely regarded as an agreement between the boroughs represented and the sovereign, the exclusion of boroughs from the right of representation was not deemed an injury, but rather an act of grace, many towns having frequently petitioned for the privilege of being excluded.

Till 8 Hen. VI. c. 7, universal suffrage seems to have been of common right in the counties. This act expressly says, in the preamble:—*Item*, "Whereas the elections of knights of shires to come to the parliaments of our lord the king in many counties of the realm of England have now of late been made by very great, outrageous, and excessive numbers of people, dwelling within the same counties of the realm of England, of the which, most part was of people of small substance and of no value, whereof every of them pretended a voice equivalent as to such elections to be made with the most worthy knights and esquires dwelling within the same counties, whereby manslaughters, riots, batteries and divisions among the gentlemen of the same counties shall very likely rise and be, unless a convenient and due remedy be provided in this behalf," etc. The act provided that the knights of the counties should be elected by the resident freeholders, having a yearly income of forty shillings from land. By reason

of the more general subdivision of landed property, the number of freeholders qualified to vote under Henry VI. was much greater than under George IV.

So early as the 19th parliament of Edward II. there were twenty-eight representatives of counties, not actually "knights," but validly elected as "titular" knights of the shire. The act of 8 Hen. VI. c. 7, destroyed this relic of class-representation by allowing the election of "all notables, esquires, and gentlemen in the county."* An act of Henry V.,† and the act 8 Hen. VI. c. 7, directed that the knights of the shire were to be resident in the county for which they were elected, although so far back as the 4th parliament of Edward II. two knights, not resident in Rutland, represented that county.‡ The requirements touching residence have, accordingly, since those two acts, never been observed for county members; and 14 Geo. III, c. 58, ultimately allowed towns and counties to take their representatives from any part of the kingdom.

The number of knights deputed by each county was not uniform, some counties sending two, others as many as four. For the 18th parliament of Edward I. three knights were summoned respectively, for Norfolk, Suffolk, Cambridgeshire, and Huntingdonshire. In the ancient parliaments each county appeared as a "unit," and the representatives were bound by their mandate; it was hence immaterial how many representatives appeared for the county. When the mandates became no longer binding, the custom continued of sending to parliament either two knights or one, but, generally speaking, two for each county.

The representation of counties, by reason of the social development of the country, became a confused admixture; in 1685 there were still 160,000 small freeholders, but they gradually disappeared, and in their stead arose a body of small farmers without any right of voting;§ and thus, by degrees, there originated a strange disproportion in many counties between the number of representatives and the voters.

Towns were arbitrarily summoned to parliament, and just as arbitrarily released from the burthen. In the 23rd parliament of Edward I. all cities were represented, and also many boroughs and market-towns which subsequently sent no deputies. In the reign

* Hallam, *M. A.* iii. 118.
† Pauli, v. 659.
‡ Hallam, *M. A.* iii. 118.
§ Bucher, 121.

of Henry VI. York and Scarborough returned members to parliament, and the sheriff stated that he could not get any representatives of other towns elected, as there were no towns or boroughs in Yorkshire besides the two named, qualified to elect representatives.* Under Edward III. 120 to 130 towns regularly sent members to the lower house; 30 others were occasionally added when the sheriff deemed them qualified; thus, the boroughs of Lancaster and Preston, in the first year of Edward's reign, each sent one member; in the thirty-fourth year of the same reign Lancaster only was represented. Under the Tudors, many small towns dependent on the crown received enfranchisement.†

When the electoral body acquired some importance, several towns claimed to be represented by setting up a prescriptive right.‡ From the time of the Stuarts the lower house closed its ranks, and the sovereign could no longer summon new towns. Since 1673 till the Reform Bill no town received enfranchisement.

It was not the population but the corporation of a town that *was represented in parliament.* To the 8th parliament of Edward II., York was to send four representatives; two received the commission to represent the corporation, and only two were present in the parliament. It was quite immaterial how many representatives a place might send,§ as each town, despite the number of its representatives, made up merely a "unit" in the parliament. It is difficult to determine by what class of persons the elective franchise in ancient boroughs was originally possessed. In 1624, a committee of the house of commons declared that the original right as enjoyed by boroughs represented in the parliament of Edward I., and all of later creation, where one of a different nature has not been expressed in the charter from which they derive the privilege, was in the inhabitant householders resident in the borough, and paying "scot and lot;" under these words including local rates and probably general taxes.‖ The common law, however, at an early period, fell into abeyance in this particular, and the right of voting, according to Brady, was limited in corporate boroughs to the aldermen or other capital burgesses.¶ From the time of the Stuarts, in almost all the towns, only the

* Lord John Russell, Hansard, Ser. iii. ii 1098.

† Lord Brougham, Hansard, Ser. iii. ii. 878.

‡ Hallam, *M. A.* iii. 112.

§ Sir Robert Inglis, Hansard, Ser. iii. ii. 1098.

‖ For an account of the conflicting views on this subject, *vide* Hallam's *Const. Hist.* p. 40.

¶ Boroughs, 132.

burgesses and freemen exercised the right of voting; in some towns the residents bearing "scot" and "lot" were added. In some boroughs the common practice appears to have been this: a few of the principal members of the corporation made the election in the county court, and those named as actual electors were generally returned upon the writ by the sheriff. But we cannot surely be warranted by this to infer that they acted in any other capacity than as deputies of the whole body; and indeed it is frequently expressed that they chose such and such persons by the assent of the community.* In Grimsby, Bristol, and Hull, the right of voting was acquired at once by marrying the daughter of a freeman; previous to an election many such unions were devised. In Grimsby alone, in 1790, sixty were hurried through in one week; and the right of voting was there ordinarily appraised as a marriage portion.† Until the 2 Will. and Mary, st. 1, c. 7, the lord warden of the "Cinque Ports" had the privilege of nominating a "baron" for each of the five havens.‡ A confused admixture consequently existed; neither persons, places, nor property, being represented, but merely a strange compound of adventitious interests, landed property holding the supremacy. As a consequence, the lower house remained for 150 years a close oligarchic body, which was, theoretically, spoken of as the "democratic part of our constitution."

Amid the varied aspects of the electoral bodies, the rotten boroughs stand forth with startling prominence. "Rotten," or "nomination boroughs," were either localities which had dwindled from their original importance, or which had ever been of small significance, owing their privilege either to proscription or to the efforts of the Tudors to create a subservient majority. They were gradually consigned to the close keeping of individual families, which, by the contrivance of a simulated election, nominated one or more members to parliament. By means of such rotten boroughs, however, men of great capacity were frequently introduced into the parliamentary arena.§

Notorious above all was the borough of "old Sarum." The ancient lime-rock on which, at the time of the Reform Bill, five or six wretched tenements were standing, was a deserted spot so

* Hallam, *M. A.* iii. 117.

† Archenholz, *Britische Annalen*, xi. 20.

‡ Hansard, Ser. iii. i. 1104.

§ Schlosser, *Geschichte des* 18 *Jahrhunderts*, iv. 328.

far back as the time of Richard I.* Still it retained the right of sending two members to parliament till 1832, although a writer in the time of Henry VII. called it *omnino desertum*. The persons inhabiting this lime-rock and the five tenements, amounted ultimately to twelve; ordinarily the election was conducted by a notary or a servant of the proprietor, and he "nominated" the two members. Through governor Pitt, the possessor of the great diamond, "Old Sarum" came into possession of this celebrated family. "His descendants," says a writer of the last century,† "have quite as good an hereditary right to a seat in the house of commons as the earls of Arundel had in the upper house." Of Lord Camelford, who nominated Horne Tooke for Old Sarum, it is related that he threatened, "If the house of commons were not satisfied with his members, the next time he would nominate a couple of sweeps."

Rotten boroughs were put up publicly for sale; Jews and Catholics were not allowed to sit in parliament; but if they had cash enough no one could prevent them from purchasing rotten boroughs, and thereby exercising a direct influence on politics. In 1714 Lady Montague wrote thus to her husband: "The best thing will be to intrust a certain sum to a good friend, and buy a small Cornwall borough." In 1761 the "nabobs" entered the field as purchasers; in 1766 the borough of Sudbury was publicly put up for sale.‡ Winchelsea, in 1784, had but three voters, and was the property of a rich nabob; the borough of Bossiney, in Cornwall, had one voter only. A borough which had been swallowed up by the sea still continued to be represented; the owner of the beach on which it had stood rowed out in a boat with three voters, and there played out the electoral farce.§ In 1790 there were 30 boroughs, with 375 voters, which sent 60 members to the lower house—amongst them, Tiverton, with its 14 voters,‖ Tavistock, having only 10 freeholders, and St. Michael's, with 7 scot and lot voters, returned one member each.¶

In the greater towns and boroughs likewise, the electoral bodies were frequently limited in number; Plymouth, which in 1716 still possessed 400 voters, in 1831 had but 59; in Bath there were but 30 persons constituting the electoral body—viz.,

* Kohl, *Reisen in England*, iii. 99.
† *Magna Britannia*, vi. 189.
‡ May, *C H* i. 279, 280.
§ Archenholz, v. 12.
‖ *Ibid* v. 8.
¶ May, *Const. Hist.* i 270.

the mayor, aldermen, and common councilmen.* As to the disproportion between representation and population, a report of 1790 affords the following disclosures :—†

The city of London, with 495,550 inhabitants, sent four representatives; the city of Westminster, with 240,800 inhabitants, two representatives; the county of Cornwall, on the other hand, with 165,600 inhabitants, including the borough, sent 44 members to parliament.

The county of Devon, which, including the boroughs, comprised 337,860 inhabitants, sent in all 26 representatives.

		Inhabitants.	Representatives.
Hants, including boroughs, with	...	162,350	26
Lincoln	,, ...	24,340	12
Huntingdon	,, ..	112,000	4
Sussex	,, ...	129,240	28
Westmoreland	,, ...	39,000	4

London, Westminster, and Middlesex yielding a land-tax of £307,140 sent only 8 representatives; whereas Cornwall with £31,976 land-tax sent 44. In 1790, 500 towns, although possessing an industrial population, not unfrequently wealthy, remained unrepresented, from the simple fact that the rich merchants and manufacturers were not at the same time "freeholders" in the county.

"The house of commons," says Paley, "consists of 558 members, of whom 200 are elected by 7000 constituents, so that a majority of these 7000, without any reasonable title to superior weight or influence in the state may, under certain circumstances, decide a question against the opinion of as many millions. If my estate be situated in one county of the kingdom, I possess the 10,000th part of a single representation; if in another the 1000th; if in a particular district, I may be one in 20 who choose two representatives; if in a still more favoured spot, I may enjoy the right of appointing two myself. If I have been born, and dwell, and have served an apprenticeship in one town, I am represented in the national assembly by two deputies, in the choice of whom I exercise an actual and sensible sharing of power; if accident has thrown my birth, and habitation, and service into another town, I have no representation at all, nor more power or concern in the election of those who make the laws by which I am governed than if I were a subject of the

* Hansard, Ser. iii. iv. 1101. † Archenholz, v. 7.

grand seignior, and this partiality subsists without any pretence whatever of merit or of propriety, to justify the preferment of one place to another."*

"Until now!" exclaimed Sir George Saville, "I have been elected in Lord Rockingham's dining-room; at last I have been for once called to parliament by an actual meeting of voters." Electors previous to the Reform Bill could boast of few members of their own making; nine peers nominated sixty-three members of the lower house; the greater number of the latter from 1780 being returned by 6000 electors:

Before the Reform Bill—		
87 English peers nominated		218 members.
21 Scotch ,, ,,		31 ,,
36 Irish ,, ,,		51 ,,
		300
123 other large landholders	,,	171 ,,
The ministry direct	,,	16 ,,
Not nominated by the aristocracy, there were, out of 658 members, only independent		171 ,,

Writing in 1821, Sidney Smith says:—"The country belongs to the Duke of Rutland, Lord Lonsdale, the Duke of Newcastle, and about twenty other holders of boroughs. They are our masters."† The house itself was composed of as aristocratic elements as its patrons. In 1789 there were—‡

Irish peers and sons of British peers	216
Country squires	190
Officers of the army and navy	50
Members connected with the East India Company	35
Lawyers	36
Merchants	31
	558

Still more deplorable was the electoral system in Scotland and Ireland.§ In the Scotch towns only the self-elective magistrates voted for members; in 1831 there were only 1440 borough voters;

* Paley's *Moral and Political Philosophy*, b. vi. c. 7.
† May, *Const. Hist.*, i. 300.
‡ Archenholz, v. 16.
§ Schulte, *Das Englische Parlament*, 107.

Edinburgh and Glasgow had only 33 electors.* The right of voting in the counties was founded on the so-called "supremacies," which were publicly sold in the market, and conferred on any one purchasing the right to vote, whether resident in the county or not. In 1831 there were only 2500† voters, and in no county were there more than 240, few of whom voted at all.

Thus the county of Argyle, with a population of 100,000, had 115 voters, 84 of whom did not reside in the county.

Caithness, with 30,000 inhabitants, had 36 non-resident out of 47 electors; Inverness-shire, with 90,000 inhabitants, had 50 non-resident out of 88 electors. The county of Bute, with a population of 14,000, had 21 electors, of whom only *one* resided in the county. At an election at Bute, not beyond the memory of man, only one person attended the meeting, except the sheriff and the returning officer. He, of course, took the chair, constituted the meeting, called over the roll of freeholders, answered to his own name, took the vote as to the preses, and elected himself. He then moved and seconded his own nomination, put the question as to the vote, and was unanimously returned.‡ No one, of course, took the slightest part in the elections, which were usually conducted in some small room.§ The Scotch magnates nominated nearly all the Scotch members, and sold themselves *with* their *protégés* to the ministry of the day.‖ In Ireland two-thirds of the 100 members were "nominated" by some 60 influential patrons.¶ The thoroughly aristocratic character of the lower house in the eighteenth century renders the striking sameness in its outward features somewhat explicable. So far back as the year 1627 a Sibthorp representing Lincoln, preached up passive obedience, and this self-same rigidly conservative family has been met with, even in our own days, representing in every parliament the self-same electoral district. We find in parliament from 1714:—

A	"Drake"	elected for	Amersham.
,,	"Musgrave"	,,	Carlisle.
,,	"Cholmondeley"	,,	Cheshire.
,,	"Bathurst"	,,	Cirencester.

* May, *Const. Hist.* i. 295.

† "Actually there were only 2000 voters, as many persons had the right of voting in several counties at the same time."—*Edinburgh Rev*, Oct. 1830.

‡ May, *Const Hist.* i. 297

§ *Ibid.* i. 297.

‖ *Ibid* i. 296.

¶ *Ibid* 299.

A.	"Lowther"	elected for	.	Cumberland.
,,	"Wynn"	,,	.	Denbigh..
,,	"Foley"	,,	.	Hereford.
,,	"Elliot"	,,	.	St. German's.
,,	"Berkeley"	,,	.	Gloucestershire.
,,	"Lord Hinchinbrook"	,,	.	Huntingdon.
,,	"Walpole"	,,	.	Lynn.
,,	"Wentworth"	,,	.	Malton.
,,	"Cartwright"	,,	.	Northamptonshire.
,,	"Vernon"	,,	.	Stafford.
,,	"Cecil"	,,	.	Stamford, etc.

Whose descendants are still in great measure in the parliaments of the present day, just as though they were "hereditary" members, and, like the Sibthorps, had outlived the Reform Bill.*

This assembly of oligarchs could only be energized by two means; by bribery, or by an anxiety to become popular. Such a powerful *esprit de corps* was developed that the lower house became, in some degree, a counterpoise to the aristocratic ascendancy; subsequently the control of publicity was super-added, and many an aristocratic member sought to strengthen his power in the house by his power out of it; the house was, however, so inadequate a representation of the people that the king, on Pitt's informing him that the house of commons desired his mercy to be exercised in favour of Admiral Byng, was fairly entitled to reply, "You have taught me, sir, to seek for the popular opinion elsewhere than in the house of commons."

Previous to the union with Ireland only about 130 or 140 English members had been actually *elected;* as these members preserved the equipoise between the two aristocratic factions, a stout fight occurred in the places of election; whenever one party sought to insure the return, bribery was the ready instrument at hand. The first case of bribery occurred in the reign of Elizabeth. In 1571 a certain Thomas Long, with a view to secure his election, bribed the borough of Westbury to the amount of £4. The mayor and the aldermen were obliged to refund the money, Long himself lost his seat, and the borough the franchise.

In the 18th century bribery was the rule in all boroughs not dependent on the aristocracy; thus, in the elections of 1754 very gross bribery prevailed, and out of forty-two elections only one

* Mahon, i.

electoral contest actually took place; still more lavish was the bribery resorted to in 1761. Foote, in one of his comodies, makes an elector to say—"When I first became an elector, I could only get thirty guineas for a pair of knight's boots, whereas my neighbour for just the same affair had the luck to receive a £50 note for a pair of wash-leather breeches."

In 1790 a gooseberry-bush was sold during the election for £800; thus astutely were the penal enactments evaded.

In 1768 the mayor and aldermen of Oxford agreed to return their former members, on condition that they undertook to pay the debts of the corporation; on their consenting, the election was carried triumphantly. The house of commons in consequence sent the electoral body to Newgate for five days; on the other hand, in 1826, the corporation of Northampton expended a portion of the town funds to secure the return of a ministerial candidate.* Other expedients still more infamous were likewise resorted to. In 1734 two Catholics of high family apostatized in order to get elected.

The polling in the case of contested elections lasted forty days. During that time, all the public-houses were thrown open to the voters, who were treated at the expense of the candidates.†

The expenses of an election were thereby raised to an enormous height. In 1784 the Westminster election cost Fox £18,000.‡ An election in the county of York on one occasion cost as much as £150,000.§

Earl Spencer in 1768 spent £70,000 to return his candidate for Northampton. Coincidently the value of rotten boroughs rose enormously. In 1767 Lord Chesterfield wrote to his son, "that rotten boroughs were to be had for £3000 to £5000," but they soon rose to £9000. Gatton, before the election of 1794, already fetched £70,000.‖ In 1830 Lord Monson is said to have given for the same borough, for which two members were returnable, as much as £180,000.¶ Matters must have gone very far indeed when boroughs were deprived of the franchise, on the ground of the bribery having been on too lavish a scale; this occurred, however, in the case of the borough of Shoreham, which was the property of an Indian nabob. Lord Chatham on seeing the petition exclaimed, "I am truly glad that the borough of Shoreham has been

* May, *Const. Hist.* 313.
† *Ibid.* 290.
‡ *Ibid.* 291.
§ *Ibid.* 294.
‖ Mahon, vi.
¶ *Ibid.*

brought back from Bengal to its own place in Sussex." In 1782, Cricklade was, in like manner, disfranchised.*

The harmless expedients everywhere resorted to for the purpose of securing election, in other words, the ordinary electioneering tactics, are still in vogue, although the fashion is tiresome enough in itself, every elector, even of the most insignificant borough, expecting a ceremonious visit from the candidate, who, in a measure, depends upon "his vote." "In three-and-a-half hours," recounts Lord Jeffrey, relative to his candidature in 1831, "I knocked in the borough of Malton at 635 doors, and shook 494 people by the hand."† These election visits have to be endured by both parties, and are mere matters of form. An old hypochondriac in "Humphrey Clinker," exclaims, "Nothing is so common as a candidate! this familiarity has made the populace so impertinent, they are all a purchasable and corrupt rabble." This is admittedly as gross a caricature as Hogarth's broad sketches of the elections; not unmingled, however, with a spice of truth in both instances. The elections of the last century were, at any rate, scenes of the greatest violence and wantonness on the part of the populace. Even at the present day a contested election, which lasts but for one day, is oftentimes a disgrace to a civilized people.‡

During the 18th century court influence only made itself felt by bribery, the withdrawal of custom, or the dismissal of functionaries, mainly however when court and cabinet were in real accord. Under the Tudors and the Stuarts the crown did not shrink from interfering, and with the whole weight of its authority. Mary in 1554 directed the sheriffs to cause good Catholics to be elected. Interference by an armed power and by personal influence had been forbidden so far back as 3 Edw. I. c. 5. "Et pur ceo que elections doivre estre frankes cy defend le roy sur la greeve forfeiture que nul haute home, ne autre per povar des armes, ne par malice ou menaces ne disturbe de faire frank elections."

As the Bill of Rights provided that parliamentary elections shall be free, the ancient right thereby received fresh confirmation.

A further protection of the freedom of election against the encroachments of the crown was secured by 8 George II. c. 30, whereby all soldiers on the day of election have to withdraw two

* Mahon, vii.
† *Ibid.* vii.
‡ May, *Const. Hist.* i. 291.

miles from the place of election, and are not to return till one day after the poll. By later enactments and observance the troops are merely confined to their barracks, and need not any longer be withdrawn from the district. When Lord Palmerston was re-elected in the year 1861 at Tiverton, he was accompanied to the hustings by the Tiverton volunteers; this meddling on the part of an armed body met with severe rebuke in the house of commons. The secretary at war has, in consequence, forbidden all similar processions of volunteers.* The lord warden of the Cinque Ports cannot any longer recommend candidates. A customs' official interfering in an election forfeits £100, and becomes incapable of discharging any office. A resolution of the lower house in 1779 declares the interference of ministers in elections highly criminal; such interference, however, does take place indirectly by means of party supporters. Another resolution declares the intervention of a lord lieutenant or a peer, to be a gross breach of privilege.

By the Act of Settlement, 12 & 13 Will. III. c. 2, it was enacted that no person who has an office or place of profit under the king, or receives a pension from the crown, shall be capable of serving as a member of the house of commons.† As a result of this clause, no minister could have a seat in the house of commons to bring forward or defend the measures of the executive government. As the clause was, therefore, found impracticable, it was repealed by the 4 Anne, c. 8, s. 25. By the 6 Anne, c. 7, it was provided that every member of the house of commons accepting an office under the crown, except a higher commission in the army, should vacate his seat, and a new writ issue, and that no person holding an office created since the 25th October, 1705, should be capable of being elected or re-elected at all. At the same time, all persons holding pensions during the pleasure of the crown were expressly excluded from seats in the commons. Sheriffs, mayors, or bailiffs, cannot be elected in their official district. The same holds good with respect to returning officers. *The judges at Westminster, the vice-chancellors, and ordained* clergymen are excluded from the privilege of being elected. The enactments relative to the exclusion of salaried functionaries are constantly being renewed. In the first parliament of George I. there were still 271 such representatives; in the first parliament of George II., 257; in the first of George III., however, only 109.‡

* *Parl. Rem.* iv. 65.
† Mahon, i.
‡ Hansard, Ser. iii. ii. 1118.

B.—The Electoral System since the Reform Bill.

Cromwell's Reform.—Chatham and Junius respecting the Electoral System.—*Early Attempts at Reform.*—The *Reform Bill of 1832.*—"*Rotten Boroughs.*"—*New* System of Representation.—"Freemen."—Ten Pound Qualification.—Electoral Qualification.—The Universities.—New Irish Electoral Law.—No Property *Qualification.*—*Certain Officials not Eligible.*—*The Rights of Corporations In*fringed.—Protest of the Minority.—Citizen Class.—Large Towns Represented. Small Localities Represented.—Town Representation.—County.—Disproportion *between Representation and the Importance of Large Towns—Arbitrariness of the* System.

Such defects in the electoral system could not fail to provoke hostile criticism. So far back as the reign of Elizabeth people did not hesitate to speak of the "rotten boroughs." Cromwell stripped them of the franchise, which he re-granted to large towns not previously invested with it. Of the 400 members belonging to the *parliament which he convoked*, on the 3rd September, *1654*, the counties were represented by 250, the towns and corporations by 150 members.* The Restoration, however, re-established the former state of things, and the attacks upon rotten boroughs were revived.

It has been already shown how far such conditions were removed from Chatham's dictum that representation and taxation ought mutually to go together. Against arbitrary alterations Chatham himself did not hesitate to raise a warning voice.

"According to the theory of our constitution," he says, "there should be a constant connection between the representatives and the electors. Will any man say that this connection now exists? *But beware of having recourse to violent expedients.*" Speaking of boroughs, he employed language sufficiently contumelious:—"They are the rotten parts of the constitution, but, like the evils of the body, we must bear them patiently, we must carry them about with us; the limb may be mortified, but amputation would be death."† And Paley, after having laid bare the evils of the electoral system, affirms—"In the end it would only come to this, who ought to be elected? and not, who ought to elect?"‡ Junius is entirely of opinion—"That just as easily as they may disfranchise rotten boroughs, even so might they disfranchise all commoners, by a parliamentary resolution."§ To large towns not yet

* Ranke, iii., 473.
† Hansard, iii. ser., vol. xii., 137.
‡ Lib. i cap. 7.
§ 44th *Let. to Printer of Pub. Adv.*

enjoying the franchisq he did not wish that it should be granted, being of opinion that the large manufacturers ought to become freeholders; on the other hand, he wished the county representation to be increased. Lord Chatham was not averse from a reform of parliament, provided it did not violate corporate rights, and he was desirous of adding 100 new county members to the lower house. After such a scheme of reform foundered in 1760, and the universal suffrage and annual parliaments proposed by the Duke of Richmond in 1780 had met with no acceptance,* Pitt brought forward a motion, in 1782, to appoint a committee to inquire into the state of the representative system, but it was defeated by 161 against 141. Burke declared, in a private letter, "that the parliament was actually, and ever had been, exactly what it should be, and that whosoever wished to reform it would be attempting to overthrow the constitution."† Further measures of reform were proposed by Pitt in 1785, and by Grey in 1793, 1797, and 1800.

The French revolution barred the way to all attempts at reform, by inclining the higher classes against the movement. In 1832, however, the Russell-Grey Reform Bill was, in the face of the most strenuous opposition, triumphantly carried (2 & 3 Will. IV. c. 45). By this statute the franchise was withdrawn from all boroughs whose population, according to the census of 1831, was under 2000. 56 rotten boroughs with 111 seats were thereby cast; 30 boroughs with less than 4000 inhabitants, and which had previously returned two members, were in future to send but *one; the boroughs of Melcombe Regis, and Weymouth, having* four members, were amalgamated, and the number returned reduced by one half. The vacant seats were apportioned amongst places hitherto unrepresented. Of 43 boroughs hitherto unrepresented, 22 (amongst which, Birmingham and Manchester) were allowed to return two members, and 21 to return one member. Yorkshire, previously returning four members, was allowed six; and Lincolnshire, in lieu of two, was allowed four. *The representation of 25 counties was doubled, from the* fact of their being divided. Seven counties were to return, henceforth, three instead of two knights. Three counties hitherto returning one were henceforth to return two each. The Irish representation was increased by five members. The representation of Scotland was increased from 45 to 53.

* Bucher, i. 134. † Mahon, vii.

Since the Reform Bill the representation of the United Kingdom has been apportioned as follows:—

I.—England.

Knights of the Shire.

1.	Yorkshire, two members for each of the three ridings		6
2.	26 Shires, each, 4		104
3.	7 „ „ 3		21
4.	6 „ „ 2		12
	Citizens.		
5.	The City of London		4
6.	23 other cities (including Westminster) each, 2		46
	*Burgesses.**		
7.	110 Boroughs (including Finsbury, Marylebone, and the Tower Hamlets, each, 2		220
8.	54 Boroughs, each, 1		54
9.	The Universities of Oxford and Cambridge, each, 2		4
		——	471

II.—Wales.

Knights of the Shire.

1.	3 Shires, each, 2		6
2.	9 „ „ 1		9
	Burgesses.		
3.	50 Electoral districts, together with the Boroughs	14	
		——	29

III.—Scotland.

Knights of the Shire.

1.	27 Shires, each, 1	27	
2.	6 „ 2 and 2, alternating 1	3	
	Carried forward	30	500

* From the boroughs of St. Albans and Sudbury, two members have been withdrawn since then; these four seats have recently been conferred on other electoral districts, Yorkshire receiving two, Lancashire one, and the borough of Birkenhead one.

	Brought forward	30	500
	Citizens.		
3.	Edinburgh and Glasgow, each, 2	4	
	Burgesses.		
4.	5 Towns, and 14 Electoral districts	19	
			53

IV.—IRELAND.

	Knights of the Shire.		
1.	31 Counties, each, 2	62	
2.	1 Electoral district to the City	2	
	Citizens and Burgesses.		
3.	The 5 Cities, Dublin, Cork, Limerick, Galway, and Waterford, each 2	10	
4.	The University of Dublin	2	
5.	29 Boroughs, each 1	29	
			105
	Sum Total		658

Previous to the Reform Bill, England and Wales had thirteen representatives more, whereas Scotland had eight, and Ireland five less than now. An elector must occupy, as owner or tenant, a tenement within the borough of the clear yearly value of not less than £10. The voter cannot be registered in any year (registration is as essential in boroughs as in counties) unless he *shall not only have occupied the premises* (or *some different* premises of the required value, occupied in immediate succession) for twelve calendar months next previous to the last day of July in such year, but also during such period of occupation shall have been rated to all the poor rates of the place, and on or before the 20th July in that year shall have paid up all the poor rates and assessed taxes which shall have become payable from him in respect of the premises before the 5th of January then last past, and unless he shall also have resided for six calendar months next previous to the last day of July in the same year within the borough, or within seven statute miles thereof.* In Scotland the

* Stephen's Bl. ii. 865.

franchise is withdrawn from the corporation, and the £10 qualification imposed.

The rights of the old burgesses or freemen to vote have been preserved. All persons who as burgesses or as freemen would have been entitled to vote if the Reform Bill had not been passed are still permitted to exercise the franchise. If a person have property which would qualify him as a borough elector he cannot, instead of becoming a borough elector, choose in respect of that property to qualify as a county elector.

The qualifying estate for the county must be either—first, a freehold of inheritance of the clear yearly value of not less than forty shillings; secondly, a freehold for life of the same value, provided it is in the actual and *bonâ fide* occupation of the party claiming to vote, or shall have been acquired by marriage, marriage settlement, devise, or promotion to any benefice or office. If the freeholder for life is not in actual occupation, or shall have acquired his estate otherwise than in the mode above mentioned, his freehold must be of the clear yearly value of not less than £10 per annum. Before the Reform Act all who held freehold property for life of the clear yearly value of forty shillings, were entitled to vote irrespective of the manner of its acquisition, and without the necessity of occupation. Persons so qualified to vote at the time of the Reform Act are still permitted to exercise the franchise so long as they continue seized of the same freehold. Thirdly, copyhold or other property not of freehold tenure, provided the interest be for life, or for any larger estate of the clear annual value of not less than £10. Fourthly, leaseholds, of the clear yearly value of £10, if the term was originally not less than sixty years, and of the clear yearly value of £50 or upwards if the term was originally not less than twenty years. Fifthly, by the occupation of any lands or tenements for which the tenant pays a yearly rent of not less than £50. This latter qualification was introduced by the now famous Chandos clause.

The other legal requirements for electors have continued in force. Aliens, persons under twenty-one years of age, or of unsound mind, in receipt of parochial relief, or convicted of certain offences, are incapable of voting. No one can vote who possesses a freehold *conveyed to him merely for the purpose of empowering him* to vote. The judges, constables, and many officers who are concerned in the collection of the revenue, are disqualified.

The two English universities retained the right granted to them by James I. of sending two members to parliament; a property qualification does not apply in their case; the members are chosen in Cambridge and Oxford by masters of arts of a certain standing. In Dublin the fellows, scholars, and graduates elect the members. The Cinque Ports are represented as previously by their "barons."

The franchise in Ireland, since 13 & 14 Vict. c. 69, is combined with a lower qualification than in England; occupiers of land rated to the poor at a net annual value of £12, and persons entitled to estates in fee, or in tail, or for life, of the rated value of £5, have been added to the various clauses of freeholders and leaseholders invested with the county franchise by the Reform Act. The borough franchise has also been extended to householders rated at £8.

The property qualification for members was not disturbed by the Reform Bill, it amounted to £600 for the knights, and £300 for the burgesses, but it has been abolished by 21 & 22 Vict. c. 26 (28th June 1858). The other grounds of exclusion have remained, and have even been partially increased. No one can sit or vote in parliament who has not attained the age of twenty-one years. This was, however, frequently overlooked; Fox was nineteen years and four months old when he entered the house, and Pitt was not much older when he first unfolded his great talents in the commons, although the act of 7 & 8 Will. III. c. 25, s. 8, expressly excludes minors. Fox, at the age of twenty-one, was already accounted one of the best speakers in the house.* Neither the one nor the other ventured to vote before they had attained their majority.†

No excise, custom, stamp, or other revenue officer is eligible. Since 1840, the judge of the Admiralty Court is excluded from being elected, the same holds good with respect to all the later judges.‡ The master of the rolls alone is eligible. It has, however, been declared in the lords as highly inexpedient that he should ever attempt to get elected.§ No English or Scotch peer can be elected to the house of commons, but an Irish peer may; finally, foreigners, even when naturalized (unless the right be conceded

* Walpole, *Memoirs, introd.*
† May, *Parl* 82.
‡ May, *Const. Hist.* i. 307.
§ *Annual Register*, 1856.

in express terms), as well as persons who have been convicted of treason or felony, are ineligible.*

The Reform Bill was regarded with great disfavour by certain sections of the community, as being an unwarrantable encroachment on chartered rights, and was pronounced not only impracticable but pernicious.

The following protest was entered on the journals of the house of lords by the dissentient peers: "We protest, because by this bill that [scrupulous regard for the sacredness of chartered rights and vested interests which have always hitherto been deemed part of the essential policy of the British constitution and a fundamental principle of British justice, is now for the first time utterly abandoned."†

"In treating the house of the third estate," says Disraeli, "as the house of the people, and not as the house of a privileged class, the ministry and parliament virtually conceded the principle of universal suffrage. In this point of view the ten pound franchise was an arbitrary, irrational, and impolitic qualification. It had, indeed, the merit of simplicity; but its immediate and inevitable result was chartism."‡

That universal suffrage in England can be justified from the stand-point of historical law, has been amply demonstrated. The protest of the lords was mainly directed against that new element of the citizen class first introduced by the Reform Bill. How far this element has disturbed the previous counterpoise and contributed to open up new channels of legislation, it is needless to demonstrate. The disproportion of individual electoral districts in relation to the electoral body, has not however, substantially disappeared. The connection between taxation and representation has, by its instrumentality, been simply brought slightly nearer to its realization. The act, says the "Westminster Review,"§ is a gigantic patchwork; the Reform Bill created new electoral districts and destroyed the old, without allowing one to ascertain a rule on which it is grounded. The bill is fruitful in devices of the most manifest caprice.

The rotten boroughs of the Whigs were partly admitted—for

* *The Parliamentum indoctum*, 6 Hen. IV. excluded even lawyers.

† *Hansard, Ser. iii. xii. 461.*

‡ Coningsby, i. c. 7.

§ 1852, i. 10.

instance, Tiverton and Droitwich; whereas larger towns, with immense populations, have been left entirely unrepresented. To bring about a more successful result, however, without placing in jeopardy the entire structure of the constitution, is a question of endless difficulty, and one perhaps impossible of solution, considering the actual state of things.

C.—The Elections and Assembling of the Lower House.

Electoral Lists.—Revising Barristers.—Returning Officers.—Assurance of the Liberty of Election.—Bribery Bill.—Show of Hands.—Poll.—Report of the Elections.—Election Inquiry formerly in the Privy Council and Chancery.—Subsequently in the Lower House.—Chippenham Election.—Grenville Act.—New Procedure.—Election Committees.—Petitions before these Committees.—Committee of Inquiry.—Chiltern Hundreds.—Expulsion of Members.—Wilkes.—Cochrane.—Expenses.—Speaker.—Treasury Bench.—Plenum.—Full House.

The overseers of the poor are bound to make up the lists of electors annually; they frequently leave this business to the assistant-overseers and the vestry-clerk. Up to 20th July in each year, appeals and notices may be sent in; on the 1st of August they are to make known the list of electors, appeal against the final settlement being allowable up to the 25th August. Before the 1st of September they are to publish the list of persons appealing.*

The revising barristers for London, Westminster, and Middlesex, are nominated by the lord chief-justice of the Queen's Bench; the judges on the several circuits nominate the others. Between 15th September and 31st October in each year, the revising barristers hold their courts. Every elector residing in the district has the right to enter objections against the electoral list, and appeal lies from the decisions of the revising barristers to the court of common pleas. The writs for elections are addressed to the sheriff. He is the returning-officer for his county, and formerly held the elections in the ordinary county court. Since 25 Geo. III. c. 84, he has to summon a special county court for the election two days after receiving the writs. In boroughs, the mayor, if there be one, or some other town functionary, is "the

* Toulmin Smith, *The Parish*, 156.

returning-officer." The writ for the election in any borough, city, or corporate town, is sent to the returning-officer, and if there be not one, to the sheriff, who nominates one of the leading inhabitants as "returning-officer" for the duration of a year. In the universities, the chancellor exercises the functions.

At the beginning of each election the sheriff and returning-officer have to take an oath to the effect that they will not allow themselves to be influenced by bribery. The candidate also, until recently, had to take an oath as to his "qualification;" the elector is only bound to take an oath as to his identity, and not in respect to his qualification; the oath against bribery may also be administered to him. By 17 & 18 Vict. c. 102, no candidate is permitted to treat the electors, under penalty of becoming ineligible. The "Corrupt Practices Prevention Act" (1854) is now annually renewed. It forbids every kind of compulsion or threats against the voters, the wearing of emblems, the raising of banners, or engaging bands of music. In regard to the election no other payments can be made excepting through an election auditor appointed by the returning-officer. Each candidate has to notify to the auditor the election agents whom he intends to employ; the auditor controls all the election accounts. Any violation of this act involves the loss of the right of voting. Every one, however, who comes forward as a prosecutor must first deposit £200 surety before he is admitted to go on with his suit.

The poll lasts at present one day only; in the universities, however, it still continues five days; but this it has been proposed to alter.* The counties are apportioned into districts for the purposes of the election.

The returning officers of the boroughs and towns, as well as the sheriffs, make their return to the writ of election, to the crown secretary of the court of chancery.†

Down to the reign of Elizabeth questions of contested elections were at first determined by the king in council, afterwards in the Court of Chancery; under that reign the commons themselves first began to examine the validity of the returns.‡ The claim of the commons to this right led to a violent contest between the commons and the crown in the early part of the reign of James I. In the proclamation for calling together his first parliament, James

* May, *Const. Hist.* i. 375.
† Korr's *Bl.* 1857, vol. i. 169.
‡ Hallam, *Const. Hist.* i. 373.

commanded that no bankrupts or outlaws should be chosen, but only men of known reputation and sufficient livelihood. For the county of Buckingham Sir Francis Goodwin was returned in opposition to Sir John Fortescue, a privy councillor; the writ was returned into chancery, but as Goodwin had some years before been outlawed, the return was sent back to the sheriff as contrary to the late proclamation; on a second election Sir John Fortescue was returned. On these proceedings being brought before the house of commons, a resolution was passed, declaring that Goodwin was lawfully elected and entitled to sit. The commons had a conference with the king, in which he insisted that they ought not to meddle with the returns, which could only be inquired into by the Court of Chancery. After a second conference a compromise was come to; it was agreed that both Goodwin and Fortescue should be set aside by the issue of a new writ. Although this result was short of what the commons could have desired, their exclusive right to determine the validity of the returns has since remained unquestioned. Previous to 1770 controverted elections were tried and determined, as mere party questions, in full meeting of the whole house. Thus Sir Robert Walpole resigned in 1741 in consequence of an adverse vote on the Chippenham election petition. The present method of trying election cases is based on the Grenville Act of 1770 and the 11 & 12 Vict. c. 98 (1849). All persons intending to question the return of any member must *do so within fourteen days after the new return has been brought* in. The petition is prepared by a parliamentary agent, and must be signed by at least one elector. Frequently, however, elections which have resulted from bribery are set off one against another, so that a whig agent brings his petition to bear against a tory member and *vice versâ*. The heavy costs and expenses act as a sufficient check, persons questioning the return having to give security for £1000 before the matter can be entertained. The petition must be based on specific facts, and must attack in express terms specific votes. The petitions are determined by the various committees to which they have been referred. At the commencement of each parliament the speaker constitutes a general election committee. Their first duty is to select six, eight, ten, or twelve members to serve as chairmen of election committees, who are called the chairmen's panel. The members of the panel make regulations amongst themselves for the appoint-

ment of chairmen of election committees. Until recently those select committees were alone invested with the privilege of examining witnesses on oath. This right, since 21 & 22 Vict. c. 78, has been extended to committees on private bills. An act of perjury before a parliamentary committee is as punishable as if committed before one of the judges.* The committees determine whether the sitting members, or either of them, or any and what other persons were duly returned; whether the election be void, or, whether a new writ should issue. If the select committee report the petition, or the opposition to it, frivolous or vexatious, the party in whose favour the report is made is entitled to his full costs as against the opposite party. Any one proved guilty of bribery becomes incapable of taking his seat, during the continuance of the parliament, for the electoral district in which he was elected. Where, in the election for a particular borough or district, gross corruption has prevailed, the crown may, on an address from the commons, issue a commission to inquire into those practices. These commissioners officiate as judges, and may, *ex officio*, examine witnesses and inquire also into previous elections; St. Alban's, *e. g.*, on the ground of such inquiries, was deprived of the franchise. The expenses are borne by the treasury.

Should any one be chosen as member in several places, he must elect for which borough or county he will sit. No one can resign voluntarily; whoever wishes to resign or to take a seat for a new district prays the ministry to grant him a royal office. Such simulated office is ordinarily secured by the appointment as steward and bailiff of one of Her Majesty's three Chiltern Hundreds of Stoke, Desborough, and Bonenham, or of the manors of East Hendred and Northstead.† Such nomination acting as a disqualification renders a new election necessary.

The house has reserved to itself the right of expelling members; thus in 1581 Arthur Hall, the member for Grantham, was expelled for the publication of an absolutist book, which contained libels on certain members of the house of commons, and also reflected on its proceedings. The house imposed a fine of 500 marks, and sent him to the Tower until he should make a sufficient retraction. In 1679 Colonel Sackville was expelled for ridiculing the Popish plot. Mr. Wollaston in 1698 was expelled from parliament; but, on re-election, took his seat in that same parliament,

* Hallam, *Const. Hist.* iii. 110. † May, *Parl* 435.

Sir Robert Walpole was expelled in 1711 for gross abuse of office and notorious bribery;* he was likewise declared unfit to be elected, but was returned again. When the candidate of the minority, Mr. Taylor, petitioned against this re-election, it was declared to be valid. In 1721 Aislabie† was expelled for corruption in the affairs of the South Sea Company, and in 1727 John Warde, of Hackney, for forgery. Steele, in 1714, was expelled for his pamphlet, "The Crisis," alleged to be insurrectionary, and he was declared unfit to be elected. Blackstone, however, declared in the first edition of his commentaries that parliament has no right to exclude a validly elected member, or to declare him unfit to be elected, provided he were otherwise eligible. In the second edition he altered his opinion, and assumed that a mere parliamentary custom was good law.‡ It subsequently became the usage at opposition dinners to propose the toast of "The first edition of Blackstone's commentaries."§ This modification in his views was induced by the ministerial measures against Wilkes, who had been most illegally prosecuted by parliament in 1762, on account of an article in the "North Briton," in which he reproached Bute with his treachery to Frederick the Great. He was elected for Middlesex in 1769; the king wrote, however, to Lord North: "I deem it highly necessary to tell you that Wilkes' expulsion seems most expedient, and must be brought about." The expulsion ensued accordingly on 3rd February, 1769, on the ground of a libel which the parliament described as "a false, scandalous, and malicious calumny." Wilkes, however, was re-elected; thereupon the parliament declared that *Luttrell, the candidate of the minority, was the duly elected* member, and allowed him to vote. Lord North defended this measure on the ground of expediency. In 1782, however, this resolution against Wilkes was solemnly expunged from the parliamentary journals after he had ceased to be unacceptable. In 1814 Lord Cochrane was expelled for spreading false reports on the Stock Exchange. He was re-elected, however, for Westminster, and the new election was not declared invalid.‖

Till the Restoration the members received their wages and

* Smollett, b. x. c. xli.
† Mahon, ii.
‡ Junius ii. *Letter to Duke of Grafton*, 24th April, 1769.
§ Mahon, v.
‖ Hughes, c 55.

travolling exponses. The first writ for the levying of wages is coeval with the first-known attendance of knights in the parliament, 49 Hen. III., "De Expensis." Though many of the writs subsequent to this period are not now extant, it appears that they continued to be issued at the end of every parliament. They were at first very general and indefinite, expressing neither the sum to be paid, the names of those who were to receive payment, nor the term of their services. In later writs, the particular sums are specified, with the number of days for which payment is to be made. In the reign of Edward I., the barons of the Cinque Ports and the members of the City of London were paid 10*s.* per diem. In the 16 Edw. II., the writs first reduced the wages to a definite amount, namely, to 4*s.* a-day for every knight of the shire, and 2*s.* for every citizen and burgess in coming, staying, and returning. The amount, however, in cheap years, sometimes varied, and the expenses were occasionally paid in kind, the electoral body covering the outlay. The cities and boroughs which did not return deputies to the parliament were exempted from payment. No knights or burgesses were bound to serve gratuitously, and such counties, cities, and boroughs as could not or would not pay their members, might not legally make any election or returns, and lost their privilege of sending. The knights, citizens, and burgesses received wages only for the period of their actual attendance, and they could not absent themselves a single day without leave, except under a forfeiture of their wages and the discharge of the several counties, cities, and boroughs from the liability of such debt. The privilege of parliament was precisely limited by the number of days for which wages were received, and was precisely bounded by *actual* attendance there till the dissolution.*

The house of commons is competent to act when forty members are present. Before the union with Ireland a house of 508 members was considered the fullest ever known. On the 10th June, 1859, only 21 members were absent, and Lord Derby's administration was overthrown by a majority of 323 against 310.† The house is, however, in regard to its legislative functions frequently very neglectful. On the passing of the highly important "Nuisance Removal Bill" on 10th July, 1860, there were only 44 members present.‡ But this was not a party question.

* *Parliaments and Councils of England*, Introd. xxxv.

† *Parl. Rem.* 1859, vol. ii. 93.

‡ *Ibid.* 1860, iii. 185.

CHAPTER V.

PRIVILEGES OF PARLIAMENT.

Proof of Privilege.—Nature of Privilege.—The Parliament as Council of the Crown.—Omnipotence of Parliament.—Fortescue's Opinion.—Hale's, Burleigh's, and Blackstone's.—Parliament changes the Religion of the Realm.—Privilege and the Courts of Law.—Stockdale *v.* Hansard.—Conflict with the Queen's Bench.—Statute concerning the Publication of Parliamentary Papers.—Mansfield, Denman, Littledale, Patteson and Coleridge concerning the Limits of Parliamentary Privileges.—Privileges have to be Proved.—Collision of the two Houses in Matters of Privilege.—The Lower House as a Court of Law.—Arbitrariness of Procedure.—Prohibition against Printing Parliamentary Reports.—Later Usage.—Exclusion of the Public.—O'Connell and "the Times."—Actions for Libel in Parliament.—The Upper House a Court of Record.—Kneeling at the Bar.—Prosecution of Petitioners.—Responsibility of Members Publishing their Speeches.—Arrest of Members.—Bankruptcy Laws.—Protection of Witnesses.

THE law of parliament is a portion of the unwritten law of the land.* In 1704 it was resolved by both houses of parliament "That neither house of parliament has power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of parliament."

Parliamentary privileges concern either the general body or *individual members*. As a body politic, parliament, but chiefly the upper house, constitutes the "supreme council of the crown." "The house of commons is a council of control, but it is likewise a council of advice, and I think the man ill read," says Canning, "not in your journals, but in your constitution, who should say that no case of such transcendent importance could exist in which it would not be competent for the legislature, by the timely interposition of advice, to prevent the necessity of control."† Whereas any individual peer has the right to claim an audience, the lower house can claim admission to the sovereign only *in corpore*, and headed by the speaker.

The idea of the omnipotence of parliament is not of recent date. The mad parliament at Oxford declared in 1258—"Parliament is the supreme power; it is ever of like and absolute authority. It

* May, *Parl.* 60. † Hansard, Ser. iii. vol. xii. 784.

recognises nothing higher upon earth; no former parliament can control a later one." Parliament decides, consequently, by its own legislative capacity respecting its privileges. Sir John Fortescue declared in 1451, "It hath not been used aforetime that the justices should in anywise determine the privileges of the high court of parliament, for it is so high and mighty in its nature that it may make law, and that which is law it may make no law; and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices."*

Sir Matthew Hale observes, "that parliament being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should, in any way fall upon it, the subjects of this kingdom are left without all manner of remedy." "England can never be ruined except by a parliament," says lord treasurer Burleigh. "What the parliament —comprising, that is, the king—doth, no authority upon earth can undo, saving only the parliament itself." For it has, according to Blackstone, absolute power, it is omnipotent.† Delolme hazards the assertion that "parliament can do everything which is not impossible. Hence it cannot make a woman a man, and a man a woman." Christian‡ remarks with reason, that "the omnipotence of parliament signifies nothing more than the supreme sovereign power in the state, which power it is true is more extensive in England, by reason of its unique character, than anywhere else." Since the exercise of the royal prerogative has been gradually transferred to parliament or the cabinet, it may be contended that rarely has a more puissant representative of the state power, or one invested with larger attributes, ever existed in any state.

Under Henry, Mary, and Elizabeth it changed and re-changed the religion, and, under William III., the succession to the throne. In the reign of Henry VI. it set aside a portion of its own electors; under William IV. on the ground of expediency withdrew from corporations the right of representation, and, on the like ground

* Pauli, v. 661. Lex et consuetudo parliamenti ab omnibus quærenda a multis ignorata, a paucis cognita (Coke). In comitiis parlamentariis posita est omnis angustæ absolutæque potestatis vis (T. Smith, *Angliæ descriptio*). Quidquid in centuriatis comitiis aut in tribunitiis populus Romanus efficere potuisset, id omne in comitiis Anglicanis tanquam in cœtu principem populumque *representanto eo*modo transigitur; interesse enim in illo conventu omnes intelligimur; cujuscunque amplitudinis, statûs aut dignitatis princepsve aut plebs fuerit, sive per ipsum hoc fiat, sive per procuratorem (*Ibid.* 179).

† Bl. i. 160.

‡ Bl. 161, note 12.

of expediency, in 1716, introduced "septennial" parliaments, and prolonged its own official existence. English historians who take their stand on the ground of parliamentarism, deny, indeed, that the-last-named act was usurpatory.* Schlosser, on the other hand, contends that by means of this measure, the law and constitution were doubly violated.†

In determining matters of privilege, parliament is a special court of law, each house having equal right, and being actually able to emancipate itself from all protective forms, and by a mere resolution to cause individuals to be incarcerated. In its legislative capacity, parliament may at once, by a legislative act, and without resorting to any of the usual modes of judicial procedure, punish any one in life, limbs, estate, and honour.

In matters of privilege parliament is judge in its own cause, and does not suffer any interference on the part of the courts. "All matters concerning the peers and commons in parliament ought to be determined by the law and customs of parliament, and not by the laws of any inferior court," says Chief Baron Comyn,‡ meaning thereby the law courts. "It is our duty," says Blackstone, in the Brass Crosbye case, "to assume that the resolutions of parliament and their execution are conformable with the law." A person put in arrest by one of the houses of parliament cannot by the writ of any other court of law, not even by a writ of *habeas corpus* be liberated, save by the special consent of the house.§ As the law of parliament now stands, the two houses are invested with a separate and uncontrollable power of making laws as occasion may require, of grinding, as it were, a little new law as they want it, and to suit the particular cases which arise; nor is any limit but their own discretion assigned to this pretended right.‖

The courts at Westminster have, even in our century, manfully upheld the independence of justice against the encroachments of parliament. The celebrated Hansard case discloses one of the most memorable conflicts between parliament and the courts. In a report which the brothers Hansard, the printers to the house of commons, had published by order of the house, the jail-governor

* Hallam, *Const. Hist.*, iii. 316. Mahon, i.

† Schlosser, i. 285.

‡ May, *Parl.*, 150.

§ Bowyer, 13. This latter practice first obtained in 1704. Parliament had not previously taken heed of the writ of *habeas corpus*.

‖ Brougham, *Const.*, 260.

Stockdale felt himself aggrieved, and in 1836 brought an action for libel against the printers before the law courts. Lord Chief Justice Denman in his summing up, instructed the jury that the order of the house of commons directing Messrs. Hansard to publish their parliamentary reports was no justification for them, or any one publishing a report, containing a libel upon any man. The jury, however, acquitted the Hansards, because they did not discover any libellous matter in the report.

When parliament reassembled the lower house declared this interference of the courts a breach of privilege, and passed the following resolution :—

"That the power of publishing such of its reports, votes, and proceedings as it shall deem necessary, or conducive to the public interests, is an essential incident to the constitutional functions of parliament, more especially by this house, as the representative portion of it.

"That by the law and privilege of parliament, this house has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding for the purpose of bringing them into discussion or decision before any court or tribunal elsewhere than in parliament, is a high breach of privilege, and renders all the parties therein concerned amenable to its just displeasure, and to the punishment consequent thereon.

"That for any court or tribunal to assume to decide upon matters of privilege, inconsistent with the determination of either house of parliament thereon, is contrary to the law of parliament, and is a breach and contempt of the privileges of parliament."

Stockdale, however, immediately brought another action, to which the house, instead of acting on its recent resolutions, directed the Messrs. Hansard to plead. They were unanimously condemned by the Queen's Bench. Stockdale commenced a third action against the Hansards, the defendants did not appear; judgment went against them by default, the damages were assessed in the sheriff's court at £600, and levied by the sheriffs.

At the meeting of parliament in 1840, the sheriffs had not yet paid over the money. The house of commons continued deliberating upon a matter in which the courts had contemned its resolutions, and the serjeant-at-arms received express orders to arrest Stockdale. The sheriffs were required to restore the money,

and they in like manner, on refusing, were committed to the custody of the serjeant.* Howard, the attorney of Stockdale, incurred a reprimand; the sheriffs remained in possession of the money until compelled by an attachment from the Court of Queen's Bench to pay it over to Stockdale. Had the sheriffs not complied with this order, they would have been punished by the Queen's Bench for contempt of court. While Stockdale was in custody, he brought, by means of the same attorney, a fourth action, and in consequence of this was sent to Newgate with his attorney.† The brothers Hansard were enjoined not to plead. Judgment was once more entered up against them, and another writ of inquiry issued.

As, however, France, the undersheriff, who had to execute the writ was furnished with a copy of the resolutions of the house, he expressed his readiness to obey, and by a petition prayed the protection of the house; he was thereupon allowed to show cause before the Court of Queen's Bench why the writ should not be executed. The imprisonment of the plaintiff and his attorney did not, however, prevent meanwhile a further suit from being brought. The son of Howard and his clerk Pearce, who had concerned themselves with the matter, were in like manner committed. The printers were not allowed to plead, which mode of acting was regarded by the independent courts as illegal; parliament, on the other hand, punished the subordinates and the plaintiff; the former because they had done their duty, and the latter because he had followed up his right. It was unable, however, to stem the course of justice, as the Queen's Bench would, at all hazard, have punished the contempts committed against it. Parliament did not, however, risk pushing the matter to extremities; although it might, perchance, relying on its own paramount authority, have proceeded to commit even the judges of the Court of Queen's Bench. The difficulty was tided over by recourse to legislative measures. The statute 3 and 4 Vict. gives summary protection to the printer who, on an order from parliament, publishes any parliamentary papers, and thus finally brought the unseemly contest to a close. But supposing the upper house had rejected the bill, and everything had reverted to the old course? May observes with justice,‡ "The present position of the privilege question is in the highest degree unsatisfactory, as

* That is, for the duration of the session.

† May, *Parl.*, 159.

‡ *Ibid.*, 167

parliament can take advantage of privileges which the courts do not recognize.*

In other cases likewise the judges have recognized certain limitations of parliamentary privilege and supremacy. Lord Mansfield has laid down the principle that a resolution of the lower house requiring a sentence to be pronounced by a judge in a determinate form would not be at all binding in the courts at Westminster. In the celebrated Hansard case, the judges ruled as follows :—†

Denman, C. J.—"The mere order of the house will not justify an act otherwise illegal, and the simple declaration that the order is made in exercise of a privilege does not prove the privilege."

Littledale, J.—"The lower house has only the right to protect its privileges, but it cannot declare what its privileges are. *The courts alone have to determine respecting the existence of a privilege.*"

Patteson, J.—"Illegal acts of the lower house cannot be carried out."

Coleridge, J.—"The sentence of the courts cannot be determined by the orders of any power."

In the case of Howard *v.* Gosset, the same judge declares, "The law is supreme over the house of commons, and over the crown itself. If the limits of the law be passed by either, for most satisfactory reasons, they are, indeed, themselves irresponsible, but the law will require a strict account of the acts of all persons and their agents ; and these, according to the nature of the illegality, will be answerable civilly or criminally."

The privileges of parliament are accordingly exceptional precedents, of which the courts are not required to have any knowledge, and they are accordingly to be proved before the courts. This may lead to the gravest inconvenience. If the court admits a privilege to prevail, the party against whom it has been resorted to has the option of further appeal to the house of lords ; which will, however, refrain from giving an opinion, as one house cannot judge the other. In Wilkes' case the upper house declared that

* "The privileges of either house of parliament are, it is true, indefinite ; that is, they are not described or laid down in any code or declaration whatsoever : but whenever a question of privilege has arisen it has invariably been disputed or maintained upon the footing of precedent."—Junius, *Seventeenth Letter to the Printer of the Public Advertiser*, 1*st Aug.*, 1769.

† May, *Parl.*, 152.

it had no right to bring before its tribunal any sentence of the lower house in matters wherein the latter possessed competent jurisdiction. Supposing, let us assume, the courts of law were not to recognize a privilege, the lower house would straightway appeal to the upper, or interfere as against the courts; in the latter case the upper house would find itself forced either to vacate its own judgment, seeing that it cannot determine respecting the privileges of the lower house; or it would have to decide whether the guardians of English liberty, that is to say, the common law judges, should be subjected to the disciplinary procedure of parliament. The test would assuredly be a most venturesome one.

Conflicts of jurisdiction between the two houses in the matter of privilege have likewise occurred. A sentence of the upper house sitting as a judicial court acknowledged that electors had a right to bring actions against returning officers, touching their right of voting. The lower house in 1704 declared such an action to be a breach of privilege; in the same year, however, five burgesses of Aylesbury, commonly known as "the Aylesbury men," commenced actions against the constables of their borough for maliciously refusing their votes. For which offence the parties and their attorneys upon an order of the house of commons were committed to Newgate. A writ of *habeas corpus* was refused them by the courts; the counsel who had pleaded for the prisoners were committed to the custody of the serjeant-at-arms. The lords took part with the Aylesbury men against the commons, and, after a tumultuous session, occupied with addresses, conferences, and resolutions upon privileges, the queen prorogued the parliament.*

Within the limits of the privileges not contested by the courts there still remains a discretionary power to both houses of parliament, especially in the matter of bills of attainder.

In 1751 the house of commons expressly declared in the case against Mr. Murray, that it deemed itself not bound by the ordinary common law modes of procedure. However little parliament may recognize judicial forms it arrogates notwithstanding all the power of a court of law, when proceeding against individuals. It orders dwelling-houses to be broken open, and both civil and military authorities must, if required, render assistance. In 1810, Sir Francis Burdett, after an entrance had been forced into his house,

* May, *Parl.*, 157.

was arrested and conveyed to the Tower, with the assistance of a military force.* Sir Francis Burdett subsequently brought actions against the speaker and the serjeant-at-arms. The house directed the attorney-general to defend them; the causes were both tried, and verdicts were obtained for the defendants. Lord Ellenborough on this occasion affirmed the principle in the King's Bench, that parliament just as well as any other court can punish for contempt of court.

Parliament has not only emancipated itself from the ordinary *forms of procedure, and withdrawn all the protective aids which* otherwise surround the accused in England, but it does not allow anyone arrested by parliament for contempt, to be discharged on bail. In the respective warrant no ground for the arrest need be stated.

"In earlier times it was not the custom to prepare a formal warrant for executing the orders of the house of commons; but the serjeant arrested persons with the mace, without any written authority; and at the present day he takes strangers into custody who intrude themselves into the house, or otherwise misconduct themselves, in virtue of the general orders of the house, and without any specific instructions.†

When proceedings are to be taken against the author of a publication, the respective paper must be produced by the party complaining. Breach of privilege most frequently occurs in regard to the press, inasmuch as the antiquated resolutions are zealously upheld. In order to protect itself against the royal power the commons, 13th July, 1641, resolved:—

"That no member was justified, without the permission of the house, in allowing a speech to be printed, or a copy thereof to appear." An order of 22nd July, 1641, enjoins the privacy of the sittings; and a third order, 28th March, 1642, expressly forbids the printing of parliamentary debates; a standing order of the lords on the 27th February, 1698, declares it as a breach of privilege to print or spread abroad anything concerning the transactions of the house, without permission of the same. Even in 1728 and 1738, the commons passed a resolution to proceed with extreme severity against the publishers of parliamentary reports. Reports were published despite these precautions. "The London Maga-

* May, *Parl.*, 66. † May, *Parl.*, 77.

zine" put them forth as "Debates in the Political Club," and the "Gentleman's Magazine," as "Debates of the Senate of Lilliput." The public readily got accustomed to recognize English faces under the shadow of Roman names. In 1770 detailed reports began to appear, edited by a certain Miller, a liveryman of London. Being summoned to appear before the house of commons he failed to do so; the city, on the other hand, caused the serjeant-at-arms to be arrested by a constable for violating the privileges of the city; thereupon the mayor and aldermen were sent to the Tower. The opposition, however, acted energetically in the debate on the matter, securing a majority of twenty-three votes, and Miller in the ensuing year was unmolested.*

Thenceforth it became the practice to ignore all reports on the sittings; the persons who drew up the reports, however, were not allowed to take any notes. Even so late as 1807 a reporter was denounced for having noted down the debates in the reporters' gallery, and even now this expedient is resorted to whenever it is sought to annoy a reporter.† Since 1836 it is also allowed to publish the division lists.‡ In 1696 this was pointed out as being a gross breach of privilege, destroying the liberty and right of parliament. At present members are wont to speak more for the purpose of satisfying their constituents outside the house than to produce conviction within the house. Just as jealously did parliament array itself against strangers in the character of hearers. Occasionally, however, strangers did effect an entrance, and in 1771 a stranger was counted in a division.§ From the middle of the 18th century the rule was gradually relaxed. The public is, however, at times formally excluded; thus on the 14th May, 1770, all hearers, including commons and sons of peers, were turned out of the house of lords,‖ and in the ensuing year, on the 12th December, the members of the lower house were excluded from the house of lords.¶ The lower house revenged itself by ordering those present, "peers and all," to withdraw, and this was continued throughout the whole session. There are reports extant of the sittings of the lower house during that interval, based however on the mere scanty notes of the members.** Towards

* Mahon, v.
† May, *Const. Hist.*, i. 428.
‡ *Ibid.*, 433.
§ *Ibid.*, i. 408.
‖ May, *Const. Hist.*, 410.
¶ *Ibid.*, 411.
** *Ibid.*, 412.

the end of the American War, Lord North passed a measure entirely excluding the public from the lower house. It lasted for a session and a half, as, however, according to Sheridan's narrative, thousands of clubs sprang up during this excited period, in order to mollify the eagerness for political discussion, the house ultimately reverted to the previous state of things.* In 1831, the lords for the first time erected a gallery in their house, thereby formally sanctioning the publicity of their proceedings.† Occasionally, by motion, secret sittings are still held. Thus, in 1849 a secret sitting of two hours' duration took place.‡ Strangers who remained in the galleries on occasion of the division were formerly always arrested; such a case, for instance, occurred so late as 1833.§ Since 1853 strangers have been allowed to remain in the galleries of the lower house even during a division, and since 1857 in the upper house.‖ In consequence of the prevailing right to exclude members at any time, and on the ground that parliamentary reports are still against the law of parliament, and their publication always punishable,¶ parliament has the means at its disposal of keeping newspaper reporters within proper limits. Till now the greatest number of contests on account of inexact reports, or for wilful misrepresentation, has been incurred by "The Times." Thus, in 1832, O'Connell accused "The Times" of having reported a speech of his in quite different terms from what he had uttered, which report would expose him to the anger of his constituents.** In consequence thereof "The Times" promised to report his speeches more faithfully,†† but later on refused to publish them at all until he should withdraw his charge that the reports were false.‡‡ As O'Connell failed to prove in the house all his charges against "The Times," he remarked: "That strangers were present in the gallery, which was a known breach of privilege." They were turned out, and with them "The Times" reporter, and the house was closed against strangers for the whole evening.§§ "The Times," as a matter of course, was obliged to give in. The complaint made by Mr. Dawson, to the effect that the reports which the newspapers give of the parliamentary sittings are very

* *Ann. Reg.*, 1810, lii. 97.
† Hansard, Ser. iii., viii. 1831.
‡ May, *Const. Hist.*, 429.
§ Hansard, Ser. iii., v. 518.
‖ May, *Const. Hist.*, i. 433.
¶ May, *Const. Hist.*, 431. Hansard, Ser. iii., xx. 94.
** Hansard Ser. iii., xiii. 905.
†† *Ibid.*, 951.
‡‡ *Ibid.*, xx. 6.
§§ *Ibid.*, xx. 95.

inexact,* is well founded even at the present day. Each paper, as in times past, favours the supporters of its party, recasts many speeches, introduces "Hear, hear!" when the house was quite still, in a word, the picture which the outside world receives of the transactions of parliament is not of an entirely reliable nature. Hansard merely publishes the great mass of speeches in indirect terms. There are no authentic short-hand reports, uninfluenced by party spirit. The publication of depositions taken in the committees is stringently forbidden until such time as they have been reported to parliament.

Parliament has always most zealously punished libels uttered against itself, its members, or persons in whom it took an interest. In the reign of James I. it came to the knowledge of parliament that a person named Floyd, confined in the Fleet, had uttered contumacious words of the Elector Palatine and his wife. The commons became exceedingly indignant, and proceeded to chastise what they deemed a grave offence. They subjected him to the most degrading punishment: "Floyd was adjudged to be degraded from his gentility and to be held an infamous person, his testimony not to be received; to ride from the Fleet to Cheapside on horseback without a saddle, with his face to the horse's tail, and his tail in his hand, and there to stand two hours in the pillory, and to be branded in the forehead with the letter K; to ride four days afterwards in the same manner to Westminster, and there to stand two hours more in the pillory, with words on a paper in his hat showing his offence; to be whipped at the cart's tail from the Fleet to Westminster Hall; to pay a fine of five thousand pounds, and be a prisoner in Newgate during his life."†

In 1720, the house of commons sent the printer of a Jacobite pamphlet to prison without even asserting that he had been guilty of a breach of privilege.‡ Any libel on a member of either house is still regarded as a breach of privilege.§ Thus, on April 19th, 1839, the printer of "The Times" was fined £100, and confined for an unstated period to Newgate, merely because he had called the Earl of Limerick "a thing with human pretensions."‖ With reason does Lord Brougham term this kind of chartered juris-

* Hansard Ser. iii., xiii. 908.

† Brougham, *Const*, 256. For the share of the lords in this infamous transaction, *vide* Hallam's *Const. Hist.*, i. 261.

‡ Brougham, *Const.*, 259.

§ *Ibid*, 257.

‖ Hansard Ser. iii., iii. 1481.

diction, "an infringement on the whole principles of the constitution, because the party wronged not only institutes the trial without the intervention of a grand jury, but assumes to be the sole judge of the charge, to find the guilt and mete out the punishment. If the party deny the charge he is obliged to bring proofs of his innocence; and, finally, because he is tried, not by a general law previously promulgated, but by an *ex post facto* law, a resolution passed by his accuser, declaring the criminality of the act.*

A breach of privilege committed during an earlier session may be punished in the session ensuing, and a crime committed against a previous parliament by a later one. The upper house only is reputed a court of record; whether it be a court of record in its legislative capacity is admittedly a moot-point; as a matter of fact, however, it is quite immaterial, as it is undoubtedly lawful for the upper house, in the latter capacity, to sentence to specified penalties, pecuniary or otherwise. Down to 1845 it conducted cases of privilege with closed doors. Persons imprisoned by the upper house are not released during a prorogation of parliament, inasmuch as they must bear the penalty inflicted† during the continuance of the parliament. On the termination of the session, the arrest of any one imprisoned by the lower house determines. The close of the session, in like manner, releases such an one from the burthen of costs. Money penalties have not been imposed by the commons since 1666.‡ Both houses, in cases of imprisonment, send the offenders either to Newgate or the Tower. Whoever is brought before the bar of either house on frivolous charges receives compensation in costs and damages.

Formerly when a culprit was sentenced to apologize, or offered to apologize, he was obliged to do so on his knees, repeating aloud the words written down for him. When Mr. Murray, in 1750, refused to listen to his sentence kneeling before the bar of the lower house, the commons resolved that he should be placed in close confinement in Newgate, without pens, ink, and paper, and that no one, without special permission of the house, should be admitted to him. When he fell ill in prison, the house by a resolution determined that he should have special medical advice.§ On the 16th March, 1772, the house resolved that no accused person should be compelled to kneel before the

* Brougham, *Const.*, 257.
† Bowyer, 84.
‡ May, *Parl.*, 96.
§ *Ibid.*, 98; Smollett, 1751.

house unless expressly ordered. The upper house, of recent years has allowed this strange ceremonial to fall into disuse.* Even as parliament has not shrunk from infringing the liberty of the press, in like manner, at certain periods, it has failed to respect the rights of petition. In 1680, the "abhorrers," or those who petitioned against the "Exclusion Bill," were imprisoned by a resolution of the house.

So far as not otherwise determined the two houses enjoy similar privileges.† Since the Declaration of Rights they have perfect freedom of speech, art. 9 enacting, "that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament." Every member is responsible to the house, and may be punished by it. If a member publish a speech delivered in parliament he can be prosecuted like any other author. In 1795, Lord Abingdon was condemned to a penalty of £100 and to find surety for his good behaviour, on account of a speech which he had made against his attorney in the upper house, and subsequently got printed. In 1818 Mr. Creasy gave the authentic text of his speech, which the newspapers had mutilated, to a London paper. Some one feeling himself aggrieved by the speech, brought an action for libel, and he was sentenced to pay £100. The Queen's Bench rejected his appeal, and the house of commons did not take up the sentence as a breach of privilege.

An assault on a member of parliament is severely punished by the courts, and no member can, without permission of the respective house, be arrested, with exception in the case of treason, felony, or breach of the peace. If a member is arrested for an indictable act—treason, felony, or breach of the peace—the speaker of the respective house must at once be informed of it, and the house thereupon determines whether it will make use of its privilege by claiming the member. Thus, Lord Cochrane, in 1815, was arrested by the King's Bench, with assent of the house, but he broke prison and appeared in the house, where, upon an order of the court, he was recaptured before the opening of the sitting; the house declared that no breach of privilege had been committed. It is doubtful whether a court of law can cause a member to be arrested for "contempt of

* May, *Const. Hist.*, i. 448. † May, *Parl.*, 61.

court;" the house has at times, even in this respect, refused its members the necessary protection, as in the case of Wilkes, when arrested for a "squib" in 1763.

A peer cannot, even after prorogation, be arrested for debt; peers are subject, however, to the bankruptcy laws. An M.P. enjoys protection from arrest for debt for forty days before the assembling, and forty days after the prorogation, of parliament. If an M.P. become bankrupt he cannot be consigned to prison. 52 Geo. III. c. 144, however, provides that, if a member of the commons become bankrupt, and the bankruptcy is not annulled within one year, he is deprived of his seat.

Witnesses, barristers, and other persons who are summoned before parliament, enjoy its protection.

CHAPTER VI.

ROUTINE OF BUSINESS IN PARLIAMENT.

"Standing Orders."—Power to hold a Sitting.—Motion for "Candles."—Order of the Day.—Amendments.—"The Previous Question."—The Speakers of the Two Houses.—Putting the Question.—Reverence towards the Sovereign.—Privilege of the Minority.—Mode of Voting: "Ayes" and "Noes."—Contents and Non-Contents.—Committees of the Whole House.—Select Committees.—Their Powers.—Citation of Witnesses.—The Oath.—Petitions.—Their Number.—Private Bills.—Costs thereof.—Committees for Deliberating thereon.—Committee of the Whole House.—Bills relating to "Status" and Restitution of Blood.—Initiative of the Ministry.—Formerly all Bills were Petitions.—Modern Form.—Triple Reading of a Public Bill.—Deliberation thereon in Committee.—Conference of the Two Houses.—Form of Conducting the same.—Accelerated Proceedings.—Bringing in the Bills.—Royal Assent: in Person; by Commission.—Thanks of Parliament in case of Pardon Bills.—Validity of Defective Bills after receiving the Royal Assent.—Communication between the "Crown" and Parliament.—Documents.—Blue Books.—The Affghanistan Affair.

The "standing orders" of the upper house have been codified and published; in the lower house, down to 1854, the order of conducting business was founded merely on unwritten custom. In that year, by order of the house, there was published "A Manual of Rules, Orders, and form of Proceedings of the House of Commons *relating to Public Business.*" In *contradistinction to the* "standing orders," are the "sessional," passed for the duration of a session.

The upper house usually begins its daily sittings at five in the evening; the lower house generally at three-quarters to four. Formerly its sittings were held at eight in the morning. It still holds morning sittings, but only on the Wednesday. The sittings are frequently protracted until the "small hours." In 1764, on the question of "general warrants," a sitting occurred of seventeen hours duration.

The sitting of either house is opened with prayer by a clergyman. The house cannot proceed to business unless there be a certain number of members present. In the middle ages, the lords who were summoned to the "curia" were obliged to appear, and when the house of commons was instituted it was considered

a grave misdemeanour to remain away from the sessions of parliament, every member who did so being severely fined. Hence, as a matter of course, most of the members were usually present. Yet Prynne declares, in his "Legal Vindication of the Liberties of England," the number of forty as being sufficient to hear prayers and commence minor business, but he opines that only the majority of the house of commons has the right to vote money or pass a bill. It is, therefore, by later custom, that forty members are held to be sufficient to transact general business. If in the lower house there be not forty, and in the upper house three, present, the sitting is adjourned. In the course of a sitting, a "count" is occasionally called for, so as to defeat some business in hand; it is thereby thrown over, as the house does not take any further heed of the matter. Should there not be a "count," a house consisting of twenty members is considered *capable of sitting*, provided there be no division. In earlier periods all the members were required to be present, and might not depart *without the king's license*. In case of their inability or refusal to attend to their parliamentary duties, the king might command the election of other fit members in their place (5 Edw. II.). By the 6 Hen. VIII. c. 16, it was enacted that "none of the knights, citizens, burgesses, and barons shall *depart* from the parliament, nor *absent* themselves from the same until it be fully finished, ended, or prorogued, without license of the speaker and commons, upon pain to lose all those sums which they should have for wages, and all counties, etc., are discharged of the said wages." Lord Herbert, in mentioning the statutes made in this session, says:—"And because divers being weary with sitting so long in parliament did depart hence without license, they only remaining who factiously combined themselves, with intention to gain the *major part of voices in anything they desired to* obtain, it was ordered that they should lose their wages."* The Bishop of Winchester was arrested in the King's Bench "for that he, coming to parliament, departed without licence."† On 25th

* *Precedents and Councils of England*, Introd.

† "If a lord depart from parliament without leave, it is an offence done out of the parliament, and is finable by the lords; and so it is of a member of the house of commons, he may be fined by the house of commons."—Coke *Inst.*, iv. 44. "Après que members sont returns, lour personal attendance est oy necessary al parliament, que il ne doivent par aseun business estre absénte, et nul un person poit estre bien omis, eq que il est un necessary member. Comme Reson voit que infant que le roy, et tout son realm ad un interest en le corps de chescun de dits

January, 1709, it was resolved, "that such members as absent themselves without leave, be reputed deserters of their trust, and neglecters of the duty they owe to the house and to the country." On the 26th April, 1729, "in regard there was not forty members present to proceed in the business, Mr. Speaker adjourned the house till Monday morning next, nine of the clock." This would appear to be the first notice in the commons' journals of the monstrous abuse now known as a "count-out," which can only be reputed as a wholesale desertion of trust, a factious combination of the most unworthy kind, oftentimes contrived for the worst purposes. An excellent example of the system of "counting out" was afforded in 1861, on a notice for papers concerning Mexico having been brought by Lord Robert Montagu. It was intimated to him by a friend on Lord Palmerston's side of the house, that "Lord Palmerston and the opposition had agreed to count him out, and that since this was on the very best authority, he had better not bring on the motion at all!" Lord Robert Montagu answered, that this was the very reason for doing so. His speech was short, and he "came on" an hour sooner than was expected; Layard replied; Seymour Fitzgerald had spoken hurriedly, and Kinglake was speaking when the "count" took place, although Lord Robert Montagu had warned the house, at the beginning of his speech, of the base agreement to save ministers from their responsibility, by counting the house. A motion tending to remove the abuse of counting out the house in the midst of a member's speech, was negatived by a large majority.*

members, il semble que le privat commodity d'aucun particular home ne doit estre regard."—Dyer, 16 a, pl. 19.

* The mischief of the "count out" has lately been ably described by two M.P.'s, in letters addressed by them to a meeting held at Leeds. Lord Robert Montagu, conservative member—whose motion to consider the question of the Danish Treaty of 1852, on the succession to the crown of Denmark, was defeated by means of the unfair expedient of a "count out"—thus graphically described the contrivance:—

"A 'count out' does not overtake a dull and stupid speech. I have heard many such speeches, when no one dreamt of counting the house. I have always seen the house nearly empty when the fate of millions of our Indian fellow-subjects has been discussed, but no one tried to count out the house. I have seen the benches deserted while millions sterling of English people's money were being voted away; but if any one had moved 'that the house be counted,' he would have been deemed no better than a fool or a madman. A 'count out' is always pre-concerted and arranged between the leaders on each side of the house. It is attempted only when a subject which is inconvenient to government either has been broached or is about to come on. It takes place when a case has been made out which cannot be satisfactorily answered, or when there is on the paper for subsequent discussion a notice of motion which is likely to bring awkward facts to light. Sometimes a 'count out' is resorted to when, in an impending

The speakers of either house adjourn the house every day to the next day of sitting. An adjournment takes place at times without any business being transacted, as on the occasion of Sir

division, to vote one way would be a scandal, and would give just offence to constituents, and to vote the other way would imply a censure on their accomplices, or would commit the government to a course which would militate against their schemes. A 'count out,' in fact, is quite in accordance with a tendency that has predominated in modern legislation —it carries out the determination to conceal things from the nation, and even to take the supervision and control of affairs out of the hands of parliament itself. The cabinet have thus virtually constituted themselves the rulers of the empire. Their deeds are kept secret from the people, and even concealed and shrouded from the inquiring gaze of parliament. The queen herself is generally shut out from the secret deliberations of the cabinet, and despatches have been written in her name without her sanction. The cabinet *feel that they rule the empire, and do* not blush to affirm it when they say, 'We sent the army there;' 'We made such an arrangement with that foreign despot;' 'We propose to take such and such a course.' The queen is nothing now in her own kingdom. Similarly, people talk of 'the government of Lord John Russell;' 'the government of Lord Palmerston;' but no one thinks of the government of the queen. When any one gets impatient under this tyranny of a cabal, and wishes to return to the ancient order of things, and pay, to the best sovereign who ever adorned the throne of England, the honest allegiance which they owe, then the cabal on the right of the speaker agree with the ex-cabal on the other side to smother these endeavours by a 'count out.' It is thus that the country is crucified between two thieves. Then again, the effect of these 'counts' is to accumulate a great mass of business for the end of the session. Every one then is fagged and ill, from doing a lot of work which should never have been put upon them; the accumulation of business is hurried through in the most unseemly manner, and no one challenges any misdeed or extravagance. Thus the same independence of parliamentary supervision, the same immunity from scrutiny, is secured by the press of business at the end of the session as by the 'count out' at the beginning."

Mr. E. Baines also expressed himself in similar terms:—

"The practice of 'counting out' the house is resorted to either when a very dry subject, or one that is particularly unpalatable to some one section of the house, is under discussion. The time generally chosen is when the greater part of the members are at dinner—that is, between 7 and 9 o'clock, at which part of the evening the attendance is always thin. There is also especial liability to a 'count out' on the night following a very prolonged and exciting debate, but it is considered a clever thing and a good joke thus to burke a troublesome discussion. Sometimes one side of the house suffers from the practice, and sometimes the other side. Lord Robert Montagu was stopped on the occasion to which I have referred; but the most audacious case of the kind that I have known was *earlier in the last session, when a liberal* member was speaking, and several conservative members stood at the door of the house, after the speaker had been requested to 'count' and while the warning-bell was ringing, and blocked up the way, so that members desirous to get into the house had almost to fight their way through, and Mr. Baxter had his hat smashed. On the night of the Danish discussion Lord Robert Montagu was deserted by his own side of the house, not more than ten or a dozen members of that side being present when the 'count' was called for, and not one on the front opposition bench; while Lord Palmerston and Lord John Russell were both in their places. If you can do anything to promote a better attendance of members, especially during the discussion of the estimates, you will render a public service. But I doubt the expediency of prohibiting a 'count out,' when the attendance is so thin as to make the proceeding with business a mockery. There must, I conceive, be some limit below which the house should be prevented by its own rules from proceeding to any important division. Nor can you confine members to the house. They must dine; and many members who are attending on committees from 12 at noon to 4, and in the house from 4 to 7, go about that time to dinner, and return about 9 or 10, to stay till the house rises, perhaps at

Robert Peel's death. Down to 1717, the opposition, with a view to interrupt the sitting, resorted to the artifice of bringing a motion "for candles."

The "order of the day" is the order in which certain questions are discussed by the house, conformably with its resolution, on days set apart for the same. In settling "the order of the day," ministerial measures take priority. As, however, a cabinet is not a recognized entity, ministers have no more right than any other member in regard to the discussion of their measures. Ministerial measures are, however, *de facto*, always taken into account and put on the order of the day at any sitting. A member intending to put a motion gives notice to the house, and in the commons must subsequently enter it in the order book. Motions not seconded are forthwith at an end. The order in which motions are to be discussed is determined by ballot.

Any matter may be set aside or kept from discussion, 1. By a motion for adjournment. 2. By amendment; in the lower house every amendment must be seconded, otherwise the speaker does not put it to the vote. 3. By a motion "to pass to the order of the day." 4. By "the previous question," that is, as to whether the house shall occupy itself generally with the question. In the event of "the previous question" being rejected, the motion to put it first on the next day of sitting is then brought forward.

In the upper house every member in speaking addresses "their lordships;" and in the lower house, "Mr. Speaker." While delivering his speech the member must remain standing and uncovered, those members only who are suffering from ill health being allowed to remain seated. A member is not permitted to read his speech, but he may make use of notes. In the upper house the lords determine who shall be allowed to speak; if several stand up at once, the house decides, the lord chancellor being merely qualified like any other member to bring forward a motion to the effect that the right to speak be accorded to a certain member. The chancellor's functions are limited to the putting of questions; he cannot call any member to order, but may bring a

1 or 2 in the morning. These men cannot be blamed. The blame belongs to those who neither attend committees nor the house except on great party battles or other exciting occasions. I see no remedy for 'counts out' and scanty attendances except in every constituency looking after its own members, and giving them a hint when they neglect their duty."

motion before the house, having reference to the observance of order. In the commons the speaker is empowered to maintain order, and to grant the right of speaking to the first who rises.

Every matter is determined in both houses by formally putting the question; whoever wanders from the matter in hand is speedily interrupted by the cry, "Question, question." Only mere personal remarks and explanations can be discussed without a question being put. In the matter of personal remarks it is not the custom to withdraw anything, the house usually acting very indulgently in this respect. Explanations take place apart from the order of the day, and may give rise to debates. No member can speak more than once on a motion, unless it be in explanation, or in reply to questions. In committee every member is allowed to speak as often as he may please.

The name of the sovereign ought not to be mixed up with the debates unbecomingly. On the 4th of December, 1717, the Jacobite Shippen, styled "Downright Shippen," for having dragged the person of the sovereign offensively into the debate, was, by a resolution of the house, consigned to the Tower, where he remained in arrest for the remainder of the session.* On the 17th of December, 1783, the house resolved that the introduction of the actual or assumed intention of the sovereign into the debates was a high crime and misdemeanor, calculated to injure the honour of the sovereign, to disturb the fundamental principles of the parliament, and to subvert the constitution of this land.† Reference is not allowed to previous debates, or to debates of "the other house;" nor can a member reflect upon the proceedings of the house.

Should a member of either house so far take anything amiss as to send a challenge, this is deemed a breach of privilege, and the party challenging, unless he apologizes to the house, is imprisoned;‡ thus, on the 22nd of June, 1781, such a challenge was punished as "contempt," and an affront committed by one member against another has been regarded with like disfavour.§

* Mahon, i.

† Hughes, c 26.

‡ On 20th May, 1798, on the ground of a debate in the commons, a duel took place between Pitt (the minister!) and Tierney. Pitt discharged his pistol in the air (Hughes, c. 41.) On account of the expedition to Walcheren, two members of the cabinet, Canning and Castlereagh, on 21st September, 1809, had a duel after having resigned their respective offices. Canning was wounded (Hughes, c. 50). Of recent years public morality in England has passed final judgment upon political duels, as well as upon duels generally.

§ May, *Parl*, 86.

Mr. Sheil and Lord Althorp were arrested in the year 1834, by the serjeant-at-arms on the ground of an intended duel. The same happened (1836) to Mr. Watson and Sir F. Trench.* In February, 1862, the secretary for Ireland, Sir Robert Peel, offended the member for Tipperary, Mr. O'Donoghue; no formal challenge was given; Lord Palmerston was arranging the matter with Major Gavin, the second of the offended party. The premier mentioned the case in the house as a breach of privilege. The O'Donoghue, when called to account by the speaker, implored the pardon of the house, which was not withheld. On this occasion, Lord Palmerston uttered the opinion, "That in this case, the Bill of Rights was violated!" basing his remark apparently upon the provision, "that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament."

Deference has always been exhibited by the majority to the voice of the minority. The rules of procedure in the house of commons are such as to enable a persistent minority to impede the business of the house. In the words of Henry Drummond, "So long as parliament has existed, that is, for the last 800 years, every self-willed, hard-skulled fellow, has it in his power incessantly to shout 'No, no!' or bring a motion for adjournment, and thereby put a stop to the course of business."† The debate on the second reading of the "Ecclesiastical Titles Bill" was thus drawn out to seven days.† In May, 1854, a bill was introduced by Thomas Chambers, to submit the Catholic and Puseyite convents to supervision. The Irish members and the Catholics raised such an opposition, however, that Chambers was ultimately obliged to withdraw it, from the pure impossibility of carrying his measure. Lord John Russell declared this kind of resistance wholly constitutional; a course which was moreover adopted and followed by Lord Althorp, Peel, and others.§ A motion to close the debate is not allowable.

Reports of the transactions of the house are drawn up; the journals of the upper house being reputed public records; and excluding the necessity of being proved; this is not the case with those of the lower house. On occasion of the voting the questions put may be divided on; at the "division," "strangers," at least

* *Parl. Rem.*, v. 23.
† Bucher, 163

‡ *Ann. Reg.*, 1851.
§ Bucher, 162.

those below the gangway and in the front gallery, withdraw; their presence is, however, simply endured. Every member present in the house is bound to vote, excepting when he has an interest in the subject-matter, in which event he must refrain.

In the "lords" no member is allowed to speak from the woolsack; should any member on a division be there seated, his vote is not recorded. In the commons members of either side frequently come to an understanding not to vote, and withdraw before the question is put; which is termed "pairing off." In certain cases, however, either house can compel under a penalty the presence of all members who are not otherwise prevented. The customary reading over of the member's names is termed, "to call over the house."

On a division, after the speaker has called out "Strangers must withdraw!" the lower house is closed; the supporters and opponents of the motion betake themselves to their respective lobbies, and then return to the body of the house by special entrances; hereupon marks are made against their names upon two printed lists, and the result of the voting is forthwith proclaimed; either the "Ayes have it," meaning the motion is accepted, or the "Noes have it," *i. e.*, the motion is rejected. In the lords, only those members who oppose a measure, the "non-contents" leave the chamber; the "contents" remaining seated. After the votes of the non-contents have been counted, the votes by "proxy" are given out aloud. If the votes are equal in the lords, the pending motion is dashed. The lord chancellor, if a peer, may vote on every motion. The speaker of the commons has the privilege of a casting vote, as was the case in 1861, on occasion of the rejection of the motion for the third reading of the Church-rate Bill, when he thus stated his grounds for availing himself of his privilege:—

"If the equality of voices had arisen in an earlier stage of the bill, I should have had no difficulty in the course I should pursue; because, guided by the rule which has been established by many able men who have preceded me in this chair, I should have desired so to vote as to give the house another opportunity of deciding the question for itself, rather than to have taken that decision into my own hands. But that rule does not prevail on the third reading of a bill. I think I shall but discharge my duty by leaving to the future and deliberate judgment of the house to

decide what change should be made in the law, if it should be their pleasure to make a change, rather than to take the responsibility of the change on any single vote. I therefore give my voice with the 'Noes.'"*

The speaker of the commons cannot give his opinion or argue any question in the house, except when it has resolved itself into "a committee of the whole house," in which latter case he quits the chair and may sit, debate, and vote as an ordinary member.

All bills which relate to the granting of public money, to religion, or trade, or the imposition of a charge upon the subject, must originate in a committee of the whole house.† The house has two standing committees on financial matters—"the committee of supply," which is a committee of the whole house, "to consider the supply granted to her majesty," and "the committee of ways and means," which is likewise a committee of the whole house, appointed "to consider of ways and means for raising the supply granted to her majesty." The first business of the committee of supply is to elect a chairman, who continues to preside over that committee for the remainder of the parliament; he also presides over the committee of "ways of means," and other committees of the whole house. "The former controls the public expenditure, the latter provides the public income; the one authorizes the payment of money, the other sanctions the imposition of taxes and the application of public revenues not otherwise applicable to the service of the year."‡ In the general committees of the whole house an irregular discussion takes place, in which a conversational tone mainly prevails. Select committees are nominated on the motion of any member after previous notice being given; the proposer of the motion at the same time mentions the members whom he would like to see nominated. The speaker, however, formally appoints the members. A member above sixty years of age need not sit upon any such committee. Committees having to deliberate upon private bills may, upon a resolution of the upper house, have parties interested superadded. *Such a committee ordinarily consists of fifteen members; upon* the election of the members the government and the opposition have generally concurred. The "Saturday Review" of the 23rd of March, 1861, gave a humorous description of the manner in which

* Hansard, Ser iii., clxiii, 1322. † Bowyer, 128. ‡ May, *Parl.*, 438.

such committees are organized :—"A public committee is a body composed of fifteen or more members, selected by the combined wisdom of the government and opposition whip, which sits for about five hours in the week, and is empowered to summon before it anybody who chooses to come, and to ask of him any questions he may think fit to answer. To complete its qualifications, the attendance on it is completely optional; and very few members have time to be present at every meeting; so that they form not only a powerless and sluggish, but also a changing tribunal. Every member present has the right of asking as many questions as he pleases, and every member thinks it necessary to ask as many as his neighbour, in order to show that he is an active and intelligent representative. The way they go to work will be best illustrated by an example: we will suppose the question referred to a select committee to be the merits of the 'Anti-maid-servants-cleaning-windows-in-town-houses Bill,' by means of which Sir Charles Burrell annually, though vainly, tries to hand down his name to posterity as a legislator. The committee is probably carried after a long debate, in which the government protest that the house of commons is assuming to itself all the power in the state, and that if this motion is granted the responsibility of the home secretary will be at an end. Many days elapse before it is nominated; for there are crowds of members preparing to be put upon it, and it is impossible to please them all. There must be at least four official members to represent the government, and four would-be official members to represent the opposition. Then the metropolitan members must be put on to represent the vestries, and see that no damage is done to the pavement. Then there are two members who are connected with the glass trade, and are therefore held to understand windows, and one member who understands maid-servants; and then there is Lord Raynham who represents the repression of cruelty to animals in general. Then there are the Irish members, who maintain that the right of sitting on every committee is secured to them by the Act of Union; and the Scotch members, who care very little about window-cleaning, but who will consent to be left out if the Irish are let in. At last, with much management, the committee is made up."

The purpose of these committees is to afford information on certain questions to the house, and to draw up the relative report. Either house is authorized to examine witnesses, and this holds

good with respect to every select committee, provided the house has conferred the authority. Committees of the commons when examining witnesses are, as a rule, open to the public. Peers are allowed to speak, but not to vote, at all committees of which they are not members. Only on leave being granted by the lower house can a committee prevent other members, not nominated upon the same, from being present.* If no decision has been come to respecting a "quorum," that is, the precise number enabling the committee to act, all the members of the committee must take part in the same; a quorum is, however, generally appointed.

Peers and peeresses appearing as witnesses in the upper house, are usually summoned by requisition from the lord chancellor. The commons, on the other hand, summon witnesses by an "order" of the clerk, transmitted either through the post, or directly by the serjeant-at-arms, or by special messenger. Only those witnesses summoned before an election-committee are required to appear before the lower house by direct warrant from the speaker. If a member of one house has to appear as a witness in the other, the respective house must first be applied to for leave. If the upper house sit in judgment on a peer, the presence of any member of the commons may be required as of course. Members of either house when examined in their respective house may give their deposition from their own seat; all other witnesses must give their deposition at the bar of the respective house.

False evidence before the lords, being upon oath, renders a witness liable to the penalties of wilful and corrupt perjury; as the penalties of perjury do not attach to false testimony before the house of commons, it is simply treated as a breach of privilege. False evidence before an election-committee is not only liable to punishment as a breach of privilege, but also to the penalties of perjury.† The right of examining witnesses on oath having been extended by 21 and 22 Vict. c. 78, to committees on private bills, any false statement made before such committees is of course punishable as perjury. Committees of the lower house, other than those named, cannot examine witnesses on oath, nor can the house *in pleno*. During the 17th century, however, the commons caused witnesses to be examined on oath before a com-

* May, *Parl.*, 317. † May, *Parl.*, 315.

mittee of secrecy, by such of its members as were justices of the peace for Middlesex, by the house of lords, or by the judges of the superior courts. Since 1757 the lower house has relinquished the attempt to administer oaths, or cause them to be administered, excepting at a subsequent period in election-committees and, since 1859, in committees on private bills. The minutes of evidence are stenographed, printed, and sent to the witnesses for correction; they cannot, however, be printed before the delivery of the report; witnesses who are examined in matters concerning the state receive from the treasury their costs for attendance.

"Receivers and triers of petitions" are still appointed annually in the upper house, but their functions are purely nominal. Every petition presented to parliament must terminate with a prayer, otherwise it is merely treated as a remonstrance. No petition which is printed containing any cancellations or erasures, or to which documents are appended, is accepted. Every petitioner must sign his own name; forgeries of signatures are treated as a breach of privilege. The mode of addressing the houses respectively is: "To the Lords Spiritual and Temporal in Parliament assembled;" or, "To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled."

Petitions from the Corporation of London are presented by the sheriffs at the bar of the house; and from the Corporation of Dublin by their lord mayor, in the same manner. All other petitioners must get their petitions presented by the members, to whom they are addressed, who are responsible for the contents. By an order of the upper house of the 30th of May, 1685, a peer on presenting a petition, may open a debate in connection therewith. In the commons, also, petitions might formerly have been discussed. The number of petitions, however, increased so immoderately that all debates on their presentation have been disallowed since 1839. Any member may, however, bring forward a motion on the ground of a petition. The petitions are referred to a committee of the lower house, which classifies and analyzes them. The reports of this committee are printed three times a week, and point out the name of the petition, number of signatures, and the general object.* Petitions from the population at large are a recent innovation.† Prior to 1779, petitions to parliament were

* May, *Parl*, 392.

† May, *Parl.*, 438.

of rare occurrence, whereas, from 1833 to 1837 alone, 5000 petitions were presented relative to the observance of the Sabbath; and in 1845, 10,253 petitions, with 1,288,742 signatures against the Maynooth grant. In 1851, 4144 petitions against "Papal aggression," with 1,016,657 signatures, were presented; and in 1860, a grand total of 24,279 petitions.* Signatures to petitions emanating from the general population are not always to be depended on. To the chartist petition of 1842 and 1848, signatures as if given by the "Duke of Wellington" and "Prince Albert," were found appended.† Petitions sent under open cover are post free, provided they are addressed to a member of parliament.

Private bills, which do not affect any public interest whatever, must still be introduced by way of petition. The lower house, in deliberating thereupon, proceeds with many of the formalities of a court of justice, but, in its legislative capacity takes every precaution that no bill hostile to the public good shall pass into law. Every private bill, in other words, one which only consults the particular interest or benefit of some individual, or public company, corporation, parish, city, county, or other locality,‡ must be supported before the lower house by a responsible parliamentary agent. Members of the lower house are not allowed to be agents, but two members usually become sponsors for the bill. Every private bill must be read for the first time the day after the petition in behalf of it has been presented. If this rule be not observed, the bill is considered as dropped for the session. Those bills are occasionally sent to the "standing orders'" committee, elected at the beginning of every session; in such case, the first reading must take place the day after the permission of the house has been given to proceed with the bill.§ No second reading of such bill can take place before the third, and not later than the seventh day after the first reading. The house seldom opposes the first or second reading of a private bill. On the 7th of March,

* May, *Const. Hist.*, i. 441.

† Such practices appear to have been coeval with agitation by means of petitions. Lord Clarendon states that in 1640, "when a multitude of hands was procured, the petition itself was cut off and a new one framed suitable to the design in hand, and annexed to the long list of names, which were subscribed to the former. By these means many men found their hands subscribed to petitions of which they had before never heard." —*Hist. of Rebellion*, ii. 357.

‡ A bill for the benefit of three counties has been regarded as a private bill.—*Com. Jour.*, i. 388.

§ *Parl. Rem.*, iv. 4, 5, and 35.

1861, the Great Dover Road Bill, however, was only passed by a majority of eighty-two to sixty-six. Opposition must be raised against a private bill within seven days after the second reading if the house is to take notice of it. Whether such opposition be raised or not the bill is always "referred" for the discussion of a special committee.

Opposition is frequently neutralized by incurring a certain outlay; but a large expenditure of money is usually requisite. Every mile of a railway, without any recourse to such expedient, generally costs, in parliament alone, from £3,500 up to £15,000. The act for the "London and Birmingham Railway" cost £72,000; for the "Great Western," £88,000. In the contest of the "London and Brighton Railway," the costs in committee alone amounted daily to £1000 for counsel and witnesses; and the inquiry lasted fifty days. One company expended in three years, £550,000 for parliamentary and legal expenses. How strenuously new projects have to contend against conflicting interests in parliament may be apprehended from the fact that, in 1849, 147 railway shareholders and 81 railway directors sat in the house of commons.* The vast number of private bills introduced, and the consequent accumulation of business may be collected from the journals of the house. In the year 1861 no less than 399 such bills were presented.† For the discussion of every private bill a special committee is usually formed. At the commencement of every session parliament appoints a "committee of selection," consisting of a chairman and five members, three of whom compriso a "quorum," *i. e.*, render the committee capable of sitting. This committee chooses a general "committee on railway and canal bills." The number of the members is unrestricted; five constitute a quorum. The first committee nominates the respective members to serve on every special committee; the general railway committee appointing its own chairman. The members for the county or borough concerned by the bill are added to the committee as advising members.

Every committee must hold its sittings fourteen days after the second reading. The agent or promoter must afford information even in the case of bills unopposed. If a bill be opposed a public hearing takes place before the committee, accompanied by the

* Gneist, i. 283.

† *Parl. Rem.*, iv. 5.

examination of witnessos and arguments of counsol; tho respoctive partios may, forthwith, havo the minutes of evidonco printed. Only thoso interested, however remotely, aro to be examined upon tho matter in hand. Tho committoo doliboratos in secret session, and comos to a resolution by a majority of votos. Even in tho caso of bills unopposed a report is to bo drawn up; tho lowor houso oxorcisos a control over tho committoos and can compol thom to fulfil their duty within a timo specified. As tho houso itsolf is not fully informod respecting tho subject mattor, it ordinarily adopts tho report of tho committoo. Should a privato bill concern tho royal prorogativo it must, after tho third reading, rocoivo tho royal assent, otherwiso it cannot bo procoodod with. No privato bill can proceed moro than one stago in a singlo day.*

All bills rolating to ostato, for restitution of honours, and in blood, "naturalization," and "namo," must originato in tho houso of poors. All ostato and non-local bills, after tho first reading, aro roferrod to a committoo of two of tho judgos in rotation, not boing lords of parliamont, who aro to report thoir opinion, whothor it is reasonablo that tho bill should pass. After tho second reading all unopposed bills aro referred to a committoo of tho whole houso; an opposod bill is roferrod to a soloct committoo of tho houso, to which tho judgos and such privy councillors as aro nombors of tho uppor houso belong, *ex officio*. All privato bills concorning tho removal of "attaindor" or restitution of honour, land, or blood, must bo signed by tho sovoroign, and by command of tho crown bo prosontod by a lord to tho houso of poors; after which thoy pass through tho ordinary stagos in both housos, and rocoivo tho royal assont in tho usual form.

In tho caso of public bills tho crown has not any initiativo; money bills, howovor, aro prosontod by tho "advisors of tho crown," and aro only disoussod in tho commons on motion madc by thom.

Ministors only onjoy an actual initiativo in rogard to logislativo monsuros, when thoy can rockon upon a majority, which latter is gonorally so woll disciplinod by "tho whip," that it knows how to rofrain from all loading motions not omanating from tho ministry. Honco a ministry is novor overthrown by

* May, *Parl*, 502.

means of an opposition bill, but rather through the instrumentality of an opposition "amendment," or the rejection of one of its own measures. When, in 1852, Lord Palmerston overthrew the Russell administration by an amendment to the Militia Bill, the new cabinet, whose members had voted for such amendment, adopted the bill in its amended form.

The constitutional form of legislating by bill and statute, agreed to in parliament, had its origin and its sanction in the reign of Henry VI. At that period, consequently, the parliament began to be a self-sufficing, independent body. In the upper house a bill is introduced forthwith, in the commons a motion must be put "that leave be given to bring in a bill." Occasionally, instead of by a bill the house proceeds by way of "resolution," as in the case of the "India" Bill in 1858. Bills must contain the form which they are ultimately to assume as laws of the realm, and must be written, blank spaces being left for numbers and date.

The first reading is generally unopposed; previous to the second reading, however, the chief debate and division usually take place; the opposition generally puts the amendment, "that the bill be read in three or six months," *i. e.*, when the parliament is prorogued, whereby the bill would, *de facto*, be laid aside. A bill may be defeated by means of a "resolution." A bill, if rejected, cannot be brought forward anew during the same session; should a prorogation take place, however, a rejected bill may be forthwith revived. If the lords amend, the commons may incorporate the amendments as a new bill during the same session, laying aside the bill as previously framed. Should the peers send down a bill in which the privilege of the lower house is concerned, the bill is returned to the lords (in case the commons do not reject it), such bill being then treated as a new bill mooted in the lower house.

Previous to each reading the speaker asks, "Shall we proceed any further?" After the second reading the bill is "committed," *i. e.*, the house determines to discuss the bill in select committee, but usually in a "committee of the whole house;" the latter only being resorted to in the case of public bills.

In general committee the speaker's mace is removed, and the chairman of the "committee of ways and means" presides in his stead. In the upper house a chairman of committees is

appointed for the duration of a session; the chairman may debate in committee. The bill is discussed "clause by clause," blanks are filled up, amendments are discussed, and the votes taken thereon, the bill being sometimes entirely remodelled in the process. After it has passed through committee *the chairman reports it to the house with the amendments proposed.* The house itself thereupon considers the alterations brought forward in committee, and on each clause of the bill divisions take place; fresh amendments may be brought in at this stage. The bill is next ordered to be printed, and the third reading takes place. Even in this stage of the discussion it is allowable to bring fresh amendments; finally, the speaker asks, "whether the bill shall pass?" and if this be agreed to, the "title" is then settled. A member of the lower house, usually the chairman of "ways and means," then carries the bill to the bar of the house of peers, accompanied by several other members, the speaker coming down from the woolsack to receive it.

When the lords adopt the bill they send a message to the commons—in more important cases, by two of the judges. The bill remains with the lords, if they have made no amendment, but if amendments have been adopted, they are sent down with the bill. Should the commons dissent from the amendments, a conference of the two houses usually follows. Either house may apply for such conference, especially in the case of addresses or resolutions to which the concurrence of the other house is desired; when the privilege of parliament is concerned; likewise on account of differences in connection with a bill, and with a view to ascertain the grounds for the acceptance or rejection of any clause or amendment. In 1575 the commons declined a conference concerning a bill, pending in the other house, as being irregular, declaring that, "according to its ancient rights and privileges, that 'conference' is to be required by that court which, at the time of the conference demanded, shall be possessed of the bill, and not of any other court." In 1604, however, James I. compelled the commons to confer with the lords respecting a contested election.

The lords settle the time and place of meeting, which generally is held in the "painted chamber." In demanding a conference, the purpose for which it is desired ought to be explained,

lest it should be on a subject not suited for a conference. The business of either house is usually attended to by "managers." The number of the commons named for a conference is always double that of the lords. When the time appointed arrives business is suspended in both houses. The managers of the commons are the first to appear at the conference; they enter the room uncovered, and remain standing the whole time. The managers of the lords have their hats on, till they come within the bar, when they take them off and walk uncovered to their seats; they remain sitting and covered during the conference. A discussion can only ensue when a free conference has been specially resolved upon by parliament. The managers of the peers, at a free conference, speak standing and uncovered. Such free conferences have only occurred twice within the last two hundred years, viz., in 1702 and 1836. As a rule, the managers of one house merely receive in writing the grounds stated in justification of the course resorted to by the other house. Joint committees of lords and commons are now out of date. If both houses remain inflexible, the bill is dropped.* Despite this apparently irregular mode of conducting business, in urgent cases bills have been allowed to pass through all the legal stages in a single day.

Money bills are deposited in the lower house previous to obtaining the royal assent; all other bills remain in the upper house; the assent of the sovereign gives to a bill the complement and perfection of a law. The queen gives her assent in person or by letters-patent under her sign manual and under the great seal. The Regency Bill, however, of the 5th of February, 1811, became an act of parliament on the great seal being impressed by means of a commission empowering the lord chancellor to impart the royal assent.

The queen usually gives her assent in person at the close of the session, in the house of peers, the commons appearing at the bar. The titles of all the bills that have passed are read out by the clerk of the crown and the clerk-assistants of the parliaments, making obeisance to the throne. Her majesty gives a gentle inclination indicative of assent, the clerk declaring, in the case of public bills, "La Royne le veult;" and in the matter of private bills, "Soit fait comme il est désiré." The dissenting formula

* In the year 1851 both houses agreed to receive messages instead of holding conferences, unless a conference should be specially desired.

"Le Roy s'avisera," whereby a bill was rejected by the sovereign, has not been heard in parliament since the beginning of the 18th century, when Queen Anne refused her assent to a bill for settling the militia in Scotland. In the case of a money bill, which the speaker delivers to the queen, the clerk says, "La Reyne remercie ses loyals sujects, accepte leur benevolence, et aussi le veult."

In case of the assent being given by commission, the lord chancellor declares, "My lords and gentlemen, by the command and by virtue of the powers and authority to us given by the said commission, we do declare and notify her majesty's royal assent to the act in the said commission mentioned, and the clerks are required to pass the same in the usual form and words." Whereupon the clerk declares, "La Reyne le veult," etc.

As bills of pardon and acts of grace proceed originally from the queen, and have the royal assent in the first stage, the clerk of the parliament, in token of their adoption, gives expression to the gratitude of parliament in the following terms:—"Les prelats seigneurs et communes, en ce present parliament assemblées, au nom de touts vos autres sujects, remercient très humblement votre majesté, et prient à Dieu vous donner en santé bonne et vie longue."

Cromwell gave his assent in English. In 1706, the upper house voted for the abolition of Norman-French in parliament and in the law courts, but the commons rejected the bill. Since 1731, Norman-French has been banished from the courts of law, but in parliament the antiquated formulæ have been retained. Of the legislative authority of the Norman kings this solitary relic remains, viz.: That the royal assent shall cure all formal defects in a bill, even when a bill has been laid before a sovereign, respecting which, through error, both houses have not come to a vote. This actually occurred in 1839 and 1843; in the latter year the lords had sent down an amended bill to the commons, the latter rejected the amendments and sent back the bill; the lords being under the impression that the bill had passed in the sense intended by them, the bill received the royal sanction, and became an "act of parliament" in the form given by the commons.

The royal consent is necessary for all motions, bills, or amendments, when they concern the prerogative, the revenue of the

sovereign, or the Duchy of Cornwall, which may be granted at any stage of the bill. In 1844 the St. Asaph and Bangor Diocese Bill was withdrawn in the upper house on the Duke of Wellington intimating that it required the royal assent, which would not be granted.

In addition to the acceptance of bills, and the opening and closing of parliament, a communication frequently takes place between the crown and parliament. Public events, state ceremonies, occurrences in the royal family, and a demand for supplementary money, are "communicated" to parliament by a "royal message," under the queen's sign-manual, such messages are specially addressed to either house, and are presented by the ministers who have a seat in parliament, or by a member of the royal household. In the lords the message is read by the lord chancellor, and subsequently by the clerk; in the commons, by the speaker. If the message relate to application for money, it is addressed, without detriment to the privilege of the commons, to both houses simultaneously. Formal messages are ordinarily answered by way of address; occasionally both houses concur in a common form.

Public documents are laid on the table in the original, either directly by order of the queen, or after either house, by way of address, has applied for them. By resolution of the house they are printed. Other official documents printed in the form of collections are laid before parliament. "Blue-books" often contain invaluable materials, so far as the internal administration of the kingdom is concerned, such as are not, indeed, to be met with in any other country; but, in regard to foreign politics, can only be made use of with great precaution and judgment. A recent startling example has brought to light the manner in which they are at times "got up."*

* An "Affghanistan" Blue-book might serve to show that the publicity and wondrous penetration of the English foreign policy are not, as a matter of course, to be depended on. These Blue-books have been pointed out as a valuable source of information in regard to foreign politics. It is, however, incontestable, that the Blue-book laid before parliament in 1839, in relation to the Affghan War was grossly tampered with, as after evidence has irrefragably proved.

The correspondence published in the Blue-book referred to, alleged that the occupation of Cabul had been undertaken to protect England against the harmful influence of Russia in Cabul, and was as necessary as expedient. The ruler of Cabul, Dost Mohamed, was made to appear as the enemy of England and the friend of Russia. What more natural than that the minister then at the head of foreign affairs in England should be anxious to withstand Russia? The Blue-

On the 21st of February, 1860, Sir M. Seymour asked for the publication of additional despatches about China, although the Blue-book, previously published, was said to contain all the do-

book showed, however, that even had Dost Mohamed succumbed to the influence of the Russian agent, the Emperor Nicolas himself was innocent of instigating such Russian agents. Nowhere was mention made of the emperor, but only of "Russia," and of the "Russian government." The czar had, consequently, given no grounds for complaint. People were all the more satisfied when the Russian government disavowed the course of action both of its ambassador in Teheran and of his agent, Vickovitch. The latter, in consequence thereof, shot himself. Mr. Kaye, the secretary of the East India Company, to whom the veritable despatches of Alexander Burnes, British resident at the court of Dost Mohamed, were made accessible, denounced, in his history of the Affghan War, the Blue-book as an arrant forgery. He says, vol. ii., p. 13: "People are deceived if they believe that such collections supply the best documents for history; they are oftentimes merely one-sided compilations and forgeries, put in circulation under the ministerial seal; they deceive contemporaries, and are calculated to carry down to posterity a troop of perilous lies."

Lord Palmerston, who was the secretary for foreign affairs, has frequently been attacked on the score of the forgeries perpetrated. In the outset he maintained that no actual forgeries had taken place, but that there were only mere omissions. On the 1st of March, 1843, he replied to Mr. Roebuck and Mr. Hume: "These gentlemen who have now, for the first time, found out that official despatches have been given by extracts, and who imagine that they have made a mighty discovery, only show their ignorance of the course of public business." When Anstey, in 1848, attacked Lord Palmerston on account of the same circumstance, he merely admitted, "that the documents had not been fully published, but the house had so often taken it amiss when they were bored with useless material, that it would be grateful to the government for having left out all that was superfluous and unimportant." When, in 1859, the Tory ministry allowed the publication of the veritable documents, it became at once apparent how little these grave discrepancies were to be treated as simple omissions.

On the Affghan papers being laid before the public in 1859, in all their completeness, they were found to contain despatches which had been either entirely suppressed or partly mutilated, together with a letter of the Emperor Nicolas addressed to Dost Mohamed in 1839, which had not been published at all. The words "The Emperor of Russia" were carefully omitted throughout, and in lieu thereof, "The Russian Government" or "Russia"—two indeterminate expressions—were substituted. In the new Affghan Blue-book the omitted passages are indicated by parentheses. This clever kind of arguing *ad hominem*, is attributable chiefly to Mr. Kaye, who superintended the editing of the new edition. Certain despatches to be met with in the revised edition serve to illustrate this art of Blue-book making. The parenthetic passages were suppressed by the Blue-book of 1839.

(1.) Translation of a letter from Molla Reshid, the councillor of Kohin Dil Khan Sirdar, to the address of Ameer Dost Mohamed Khan, received at Cabul on the 19th of December, 1837:—

A. C.

"An ambassador on the part of (*the*) Russia(*n Emperor*) came from Moscow to Teheran, and has been appointed to wait on the sirdars at Candahar, and thence to proceed to the presence of the Ameer. He paid his respects to Mohamed Shah at Nishapoor, and passing through Kayanat, Lash, and Jawor, Seistan, and Ghour Sail, arrived at Ahmed Thahee (*Candahar*). He is the bearer of (*confidential messages from the Emperor, and of the*) letters from the Russian ambassador at Teheran.

"The Russian ambassador recommends this man to be a most trusty individual, and to possess full authority to make any negotiation (*on the part of the Emperor and himself*). Captain Burnes will undoubtedly comprehend the real motives of this Elchee," etc.

(2.) Translation of a letter from Count Simonitch, the Russian ambassador at

spatches written between the 27th of April, 1857, and the 19th of May, 1859. It oozed out that the despatches of the 23rd of April, 1858, and the 23rd of November, 1858, were wanting. The house, while ordering the printing of the despatches, resolved that the original Blue-book was not complete, and did not furnish all the correspondence which it should have contained after the primary vote of the house.* Even the recently published Chinese correspondence relating to the Taeping rebellion, has been tampered with,

Teheran, to the address of Ameer Dost Mohamed Khan, of Cabul, received the 20th of December, 1837:—

A. C.

"The respectable P. Vickovitch will wait upon you with this letter (*and deliver to you an epistle from his imperial Majesty in reply to the petition which you had addressed through your agent Hajie Hasan Alee.*")

"I have (*received*) some Russian rarities (*from the imperial store*) to forward to you," etc.—Papers, East India (*Cabul and Affghanistan*), ordered by the house of commons to be printed, 8th of June, 1859, p. 86, 87.

(3.) Extract from a despatch to the Right Hon. Lord Auckland, G.C.B., Governor-General of India, &c., &c., &c.:—

"CABUL, *Dec.* 23, 1837.

"The communications which passed on this second occasion have also been made known to me, and are of a startling nature. Mr. Vickovitch informed Dost Mohamed Khan that the (*Emperor*) [for Emperor there formerly stood, in No. 3, the Russian Government] had desired him to state his sincere sympathy with the difficulties under which he laboured, and that it would afford (*his Majesty*) great pleasure to assist him in repelling the attacks of Runjeet Sing on his dominions; that (*his Majesty*) was ready to furnish him with a sum of money for the purpose, and to continue the supply annually, expecting in return the Ameer's good offices; that it was in (*the Emperor's*) power to forward the pecuniary assistance as far as Bokhara, with which state (*he*) had friendly and commercial relations, but that the Ameer must arrange for its being forwarded on to Cabul," etc.

Last year Mr. Dunlop referred anew, in parliament, to the affair of the Affghan Blue-book; Mr. Horsman, Mr. Bright, Mr. Walpole, and Colonel Sykes, vehemently attacked the premier on this occasion, who mainly relied upon the fact, "that it was an old story, and people might just as well go back to the war of 1830, as to the bombardment of Copenhagen." The independent press, however, was unanimous in the condemnation of his conduct. The *Dial* of 22nd of March, affirmed that, "A British Blue-book enjoys, for the future, as much credit and reliance as Pullinger's ledger." The *Times* had, on a previous occasion, uttered its condemnation of the forgery, and in no measured terms.

The same paper, which is now on the best understanding with the premier, has previously reproached him with something of the same cast. In its number 20th April, 1838, it blamed him for having falsified the Blue-book relating to the American boundary-line. In the *Parliamentary Remembrancer* (vol. iv., p. 45,) he is likewise denounced as the author of this monstrous falsification. A Berlin printer, who was for many years occupied in England upon Blue-books, once explained to the author the manner in which they are occasionally *prepared*. The original documents are sent to the printers unfalsified, there they are set up and sent to the Foreign-Office for correction. After a time they are returned revised and improved; in the proof-sheets entire passages, or notes, being left out, or additions introduced. After the first "revise" the matter is set up anew and transmitted for further correction to the Foreign-Office. Here it is again prepared for use in parliament, and once more returned to the printers, with fresh corrections. In this form it is ultimately laid before parliament as a reliable historical document.

* *Parl. Rem.*, iii. 96.

according to Colonel Sykes, who is a man of acknowledged moderate views, and whose statement is eminently trustworthy.

The instruction afforded by such manœuvres and artifices should be kept ever in view by the earnest observer of party opinions and their upholders.*

* "We must not fail to point out how things have been managed behind the scenes, and are still being managed, even though no conversions should follow amongst our rabid politicians."—Schlosser, iii. 361.

CHAPTER VII.

LEGISLATIVE POWER OF PARLIAMENT.

The Legislative Supremacy of Parliament Doubtful.—Blackstone.—Paley.—American Constitution.—Magna Charta of the Colonies.—Coke.—Holt and Hobart against the Absolute Legislative Power of Parliament.—Immoderate Number of Statutes. —36 Quarto Volumes of Criminal Laws.—Lord Cranworth's Opinion.—Clumsy Form of the Statutes.—Division of Acts of Parliament.

The legislative power of parliament is thus defined by Blackstone:*—"Parliament hath sovereign and uncontrollable authority in 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 entrusted 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. The parliament can change and create afresh even the constitution of the kingdom, and of parliaments themselves; it can, in short, do everything *that is not naturally impossible*, and therefore, what the parliament doth, no authority upon earth can undo." Paley says:†—"An act of parliament in England can never be unconstitutional, in the strict and proper acceptation of the term; in a lower sense it may, viz., when it militates with the spirit, contradicts the analogy of, or defeats the provision of other laws made to regulate the form of government. Even that flagi-

* Bl. i. 161.

† Book vi. c. 7.

"An act of the British parliament vesting the sovereignty in the king, or vesting the sovereignty in the king and the upper or lower house, would *essentially alter the structure of our present* supreme government, and might, therefore be styled, with propriety, an *unconstitutional* law; in case the imagined statute were also generally pernicious, and in case it offended, moreover, the generality or bulk of the nation, it might be styled *irreligious and immoral* as well as *unconstitutional*, but to call it illegal were absurd; for if the parliament, for the time being, be sovereign in the United Kingdom, it is the author, directly or circuitously, *of all our positive law*, and exclusively sets us the measure of legal justice and injustice."—John Austin, *Province of Jurisprudence Determined*, 280.

tious abuse of their trust by which a parliament of Henry VIII. conferred upon the king's proclamation the authority of law, was unconstitutional only in this latter sense."

From the beginning of the 17th century Englishmen, like Sir Edward Coke, *contended, notwithstanding, that there exists a* "sovran" power which is more puissant than Magna Charta; but this doctrine was swept away during the civil war. The opposition of the Stuarts to the parliament resulted in their losing the actual "sovran" power which they possessed, and in its being transferred to the parliament. The omnipotence claimed by parliament led to the American war; and the fathers of the American Union, who were no fantastical or speculative politicians, *but simply thorough English commoners of the good old stamp*, set the Union law courts, in constitutional questions, above the President and the legislature. It is not to our present purpose to discuss the development of the American constitution. Its origin, however, shows what legal conceptions were then in vogue in America amongst the conservative colonists.* In the so-called Magna Charta for the colonies, whereby the right of taxation has been relinquished by parliament, the latter has acknowledged, in a most important particular, that statutes exist which parliament dare not violate without legalizing armed resistance to its authority.

According to the views of those jurists who are styled "the pillars of the common law," no act of parliament is valid if it offend against reason, equity, and natural law. "The parliament," says Lord Coke, "cannot withdraw protection from any one which the law of nature secures. Hence the sovereign may grant pardon to a man found guilty of præmunire, although, by the statute, 25 Edw. III. c. 22, he has lost the king's protection. In many cases the common law will serve as a check upon acts of parliament, and the expounder thereof will declare the act as void, according to the common law. For if an act of parliament is

* The courts of law can never call in question the legality of the acts of the sovereign body; this is true even in relation to America, only, in that country, the supreme power does not reside in the congress and the President of the United States, but in the States' governments as *forming one aggregate body*. The government, consisting of the congress and the President of the United States, is merely a subject minister of the United States' government; the tribunals of the latter, therefore, are competent *to inquire into* the validity of the acts of the former, as into the acts of any other agent which may be brought under their consideration.—*Vide Province of Jurisprudence Determined.*

against common legal conscience, and against sound reason, or cannot be carried out, the common law will control such act and repute it null and void."* Lord Chief Justice Holt, in the reign of William III. declared, "It is a very judicious and wise saying that if an act of parliament should order that one and the same person should be judge and party at once, the act would be null; an act of parliament cannot create a wrong, although such acts may at times appear to have a two-fold meaning. Never, however, in our realm, can the office of judge and the position of client be conferred on one and the same person. Never can parliament permit adultery."

"An act of parliament," says Lord Hobart, "made against natural equity, as to make a man judge in his own case, is void in itself, for jura naturæ sunt immutabilia; and they are leges legum."†

It is manifest that the Americans, in establishing their constitution, created no new law in regard to the control of legislative acts. They had even taken up arms against the application of Blackstone's theory of the unrestricted legislative authority of the parliament. This theory has, it must be owned, obtained ascendancy amongst certain classes, and there are many members of parliament who hold as law whatsoever the queen's printer may have published.‡ Nevertheless, resistance might still be raised in the law courts against irrational acts of parliament. That the courts of law have not swerved in presence of such assumed privileges has been previously shown.

The queen, in the privy council,—*i. e.*, the state government,—the colonial departments, the corporations, and also the courts of law, exercise a share in the legislative power.§

The subject-matter of parliamentary legislation has, especially in modern times, become very extensive. In criminal law alone, according to the first report of the criminal law commissioners, there are some thirty-six volumes in quarto, each containing from 600 to 1200 pages. The subjoined table will afford an insight into the number of statutes issued since the Plantagenets:—

* This doctrine is no longer held.

† Hob. *Rep.*, 87.

‡ Bucher, 83.

§ This is only by delegation. "Every positive law or rule of positive law exists *as such* by the pleasure of the sovereign; *as such* it is made immediately by the sovereign one or number, or by a party in a state of subjection to the sovereign; as such it flows from one or another of those sources."—Austin, *Outline of a Course of Lectures on General Jurisprudence*, lxiv.

Under	Henry III.	1225—1272 ..	Statutes	15	0·3	yearly.
„	Edward IV. ..	1461—1483 ...	„	54	2·4	„
„	Richard III.	1483—1485 ..	„	33	16·5	„
„	Henry VIII.	1519—1547 ...	„	713	18·8	„
„	Elizabeth	1558—1603 . .	„	438	9·9	„
„	Charles II..... ..	1660—1684 .	„	533	22·2	„
„	James II.	1684—1688 ..	„	30	7·5	„
„	Will. and Mary...	1688—1702 .	„	783	60·2	„
„	Anne	1702—1714 . .	„	919	79·1	„
„	George I.	1714—1727 ...	„	768	58·8	„
„	George II.	1727—1760 ..	„	2791	84·5	„
„	George III.	1760—1820 ...	„	14,800	246·7	„
„	George IV. .. .	1820—1830 ...	„	3223	322·3	„
„	William IV.	1830—1837 ...	„	1862	257·4	„
„	Victoria	1837—1853 ...	„	5634	333·4	„*

From 1 Edw. III. down to 1844, 14,408 penal statutes appeared; they are, as declared by Lord Cranworth, in the house of peers, on the 10th of February, 1853, in a most repulsive form, being drawn up in a very perplexing style, and devoid of any classification. The judges were supposed to be acquainted with all these laws, but, in fact, no human mind could master them, and ignorance has ceased to be a disgrace.† "Complication is itself an evil, and, at the present time, it is one of the greatest evils from which the law of England suffers. It is now some time since the great historian, Hallam, predicted that the law of England would be simplified in the worst and least honourable manner—a tacit agreement of ignorance amongst its professors. This prophecy has approached more nearly to its fulfilment than some may suppose. No person can be much engaged in the practice of the law without being surprised, both at his own ignorance on subjects with which he thought he was acquainted, and also at the ignorance of others who are generally supposed to know. No *man can possibly overtake the whole. Anomalies are so frequent,* and principles when discovered lead to so little, that an inert *acquiescence in the last decided case satisfies the mass, a strong* memory usurps the province of a sound judgment, and to advise correctly on *future cases becomes daily more difficult.*‡ "The proportions of the materials," says a German writer, "have developed immeasurably. The legislature does not occupy itself with inquiries into the matter, nor does it take time to fashion the

* Bucher, 200.
† *Ann. Reg.*, 1853, 4.
‡ Joshua Williams, *Essay on Real Assets*, p. 110.

material with care and exactness. I know of nothing so slovenly or clumsy as an act of parliament. There is seldom any trace of co-ordinateness or general applicability; as a rule, a measure owes its premature birth to some sudden emergency or special interest. A solicitor employed by government, or it may be his clerk, is the compiler; parliament considers that it has amply acquitted itself of its duty when it has waged a longthened wordy war on the general principles and political expediency of the measure. The curtness and precision of the language, and the applicability of the contents of the bill, are too paltry for the attention of legislators; these small precautions being ordinarily the affair of the compiling clerk, saving when parties, prompted by mutual hostility, feel it a matter of duty to defend every inch of ground. The consequence is, that acts of parliament are frequently the converse of what a good law should be; instead of being curt, clear, and precise, they are long-winded, contradictory, and unintelligible, oftentimes equivocal and impracticable. The true purport and meaning of many acts of parliament must first be collected from a long range of decisions of the law courts. Hundreds of families are reduced to beggary in consequence of law-suits, not because the law is on the side of the opposing party, but because they mistake the intent of the legislature, until the courts of law after manifold oscillations have solemnly determined that the statute has *a* meaning of which in all probability the original legislator never dreamed."* Whoever wades through the "Statutes at Large" for the last twelve years will not find the above description over-drawn. In no country in the world is fresh legislation so readily resorted to as in this. The Divorce Act, passed in 1857, has already been modified by two new acts. The organization of the county courts, which exist since 1846, has been already disturbed, directly or indirectly, by at least five or six enactments.

Since 33 Geo. III. c. 13, a statute acquires force of law from the day it has received the royal assent.† Prior to that enactment, all acts passed in the same session of parliament were considered to have received the royal assent on the same day, and were referred to the first day of the session. Defective formalities do not deprive a bill of its binding force. The statutes

* Schulte, *das Englische Parlament*.

† Bowyer, 18.

are kept in the archives of the kingdom. They are regarded as being published before the nation at large, as represented by the house of commons, when they have been received from the sovereign. In earlier times, the sheriffs published them in the county court. The statutes are printed, and transmitted to all the departments. The sovereign is only bound by an act when expressly mentioned therein. Since 1 Will. and Mary, stat. 2, c. 2, the right of the sovereign to dispense with penal statutes is abolished. Acts of parliament are divided into—

1. Public and general acts; which are acts binding on all the citizens, and of these the judges must take, *ex officio*, notice. Prior to 1850, every act must first have had a public character assigned to it, otherwise it was reputed a private act. Every act is now reputed public unless the contrary be declared.

2. Private acts have to be produced in court, as the judge need not otherwise take notice of them. Since 1815 they have been chiefly printed by the royal printer, with the clause, "that the printed copies of the act are to be taken as evidence, but shall not be reputed as public acts."

3. In the case of purely personal private acts, concerning naturalization, name, and estate, the royal printer merely prints the title. There are also—

4. Public acts with a private clause; those are acts that are general for a place or district, but, at the same time, affect only the interests of individuals—public local acts; the judges are bound to take note of them.

CHAPTER VIII.

THE PARLIAMENT AS A REVENUE DEPARTMENT.

Ordinary Revenue.—Bishops' Temporalities.—Corodies.—Royal Domains.—Royal Fish.—Wrecks.—Gold and Silver.—Treasure.—Waifs.—Estrays.—Bona Vacantia —Escheat.—Extraordinary Revenue.—Budget.—Land-Tax.—Malt-Tax.—Excise.—Right of the Lower House to Grant the Taxes.—Limited Power of the Peers.—Paper-Duty.—Tacking Bills.—Money only Granted for Specified Purposes.—Committees of Supply.—Committees of Ways and Means.—National Debt.—Loans.—Right of the Commons to Reject the Entire Budget.

The ordinary revenues of the sovereign or state are distinguished from the extraordinary, from the fact that the former are chiefly due to accident or chance circumstances, and are not dependent on any parliamentary grant. Even these revenues, however, are under the control of the lords of the treasury. The "ordinary" revenues consist:—

1. Of the temporalities of bishops—revenues which formerly the sovereign derived from the income of the bishopric during its vacancy. Now-a-days the new bishop is restored to his temporalities.

2. Corodies—the right of the sovereign to have one of his chaplains maintained by the bishop; this right is antiquated.

3. Rents and profits of the demesne lands of the crown—the "terræ dominicales regis," which consist either of appropriations made by William I. at the conquest, or of lands confiscated. In the middle ages the "estates" frequently revoked royal grants by acts of resumption. The statute 1 Anne, sec. 1. c. 7, declares all future grants or leases from the crown for a longer period than thirty-one years, or three lives, as void. By an act of the present reign, the shores of any sea or river, and land that has been abandoned, may be granted out for wharves, docks, and dock-buildings for ninety-nine years.

4. Certain small revenues returned to the crown, arising out of law proceedings.

5. Because of the sovereign protecting the sea against pirates,

any whale or sturgeon taken in the vicinity of the shore belongs to him, as "royal fish."

6. Wrecks are, at the present day, made over to the owner if he prove his right within a year and a day, otherwise they belong to the state.

7. Royal mines are only those of silver and gold. If gold and silver be found in mines of base metal—tin, iron, or lead, the sovereign has only a right of pre-emption according to the price set forth in the respective act.

8. Treasure-trove, according to the Saxon law, belonged to the finder; from the time of the Normans the sovereign received a share thereof.

9. Waifs, "bona waviata," are goods stolen which the thief has thrown away in his flight, from fear of being apprehended. These are given to the king as a punishment upon the owner for not having pursued the felon. Should the owner, however, produce evidence to convict the thief he receives his goods again.

10. Estrays are valuable domestic animals (dogs and cats not being classed in the number) which pertain to the king whenever their owner is not known; they must, however, have been previously "proclaimed."

11. Goods without an owner, or "bona vacantia," lapse to the king as the feudal lord; likewise,—

12. Forfeitures of lands and goods (escheat). Deodand, *i.e.*, the forfeiture of any animal or instrument which had immediately occasioned the death of any reasonable creature, is now obsolete. In like manner Danegelt, and the profits arising from the custody of the lands of idiots and lunatics, are obsolete.

Tonnage and poundage, as well as excise, were granted to the sovereign for life down to Charles II. On the Revolution, however, parliament undertook to settle the yearly outlay for the several departments of the government.

The expenditure, augmented by the extensive requirements of the empire is almost entirely covered by the extraordinary revenues of the crown. To these belong,—

1. The land-tax, which was derived from scutages or commuted money, payments for feudal services not rendered. In 1692 a new survey was taken, and the land-tax from 1698 to 1798 was

raised as a new tax, annually granted by parliament, varying from one to four shillings in the pound, yielding an average of 3*s.* 3*d.*

38 Geo. III. c. 60, converted this tax into a perpetual one, and fixed it at 4*s.*, and, as on the part of the legislature, this tax was taken as the average for rent, it was made redeemable by 42 Geo. III. c. 116. It is apportioned among the counties, and there imposed by the leading landowners. It amounted in 1848 to £1,158,245, and approximated to the amount of the local property-tax.

2. The malt-tax was introduced in 1697, and till 1821 was in like manner only granted for a year. 3 Geo. IV. c. 18, made this also a fixed tax.

3. Import dues.

4. Revenues arising from the post-office.

5. Stamps.

6. Duties on male-servants.

7. Taxes on licences.

8. Taxes on horses, dogs, and carriages.

9. Succession duty.

10. Life and marine insurances.

11. Income and property-tax, which, up to the present, has only been granted for a specified time. The first income-tax dates from 1798; in 1803 a property-tax was imposed. The present income-tax was introduced by Sir R. Peel, on the 22nd of July, 1842. In 1853 incomes within £100 were not subject to the tax; incomes from £100 to £150 paid 7*d.* in the £1, and those beyond, paid 10*d.** The duty is now 9*d.* in the £1, and for occupiers of farms 4½*d.* in the £1. on the rent, and 3*d.* in Scotland and Ireland. Incomes of £100 and under £150 are to pay 6*d.* in the £1. The tax is only imposed for a year, and is partly of an indirect nature, as it is deducted immediately on payment of the interest of the national debt and the dividends of shareholders.

12. Inhabited-house-duty,† and—

13. Excise; this latter unpopular tax was first levied on ale, cider, meat, etc., in 1643, on a motion of Prynne, by the Long Parliament, and the opposition parliament at Oxford acted in like

* *Parl. Rem.*, iii. 70.

† The taxes under numbers 6, 8, and 12 are called assessed, and are levied on objects of luxury. They were first introduced in 1798 as war taxes. Since 1820 they have been frequently reduced, and since 1823 Ireland has been entirely freed from them. *Rau. Lehrb. der. pol. Oekonomie*, iii. 2; Abth. 201.

manner. Later on, tobacco, wine, and sugar were taxed; in 1660 it was imposed on beer and spirituous liquors, but taken off from the other articles. The excise affects producers or sellers. There is a long list of articles still subject to these inland taxes.*

The right to require taxes and imposts belongs neither to the executive nor legislative power, they are the voluntary gifts and grants of the commons. In the legislative act, the commons are said to *grant* the sums in question, by and with the advice of the lords spiritual and temporal. All taxes must, hence, take their rise in the lower house, as was finally settled by a resolution in 1678, and the crown must obtain from the commons the adoption of its several requirements, but the crown alone, and no mere government functionary has the right to apply to the house for a grant of money. In accordance with a resolution of the 11th of December, 1706, and a standing order of the 11th of July, 1713, the commons do not accept any petitions for grants of money, and *merely take into consideration those recommended by the crown.* Motions for grants of money can only be brought by way of address of the commons to the crown. Since the resolution of the 22nd of February, 1821, such address is to be presented by a committee of the whole house, the house praying the crown to bring a bill into the lower house concerning the particular money grant. The mere wish, expressed by the peers in 1640, that the commons would occupy themselves with the granting of subsidies, was reputed a breach of privilege. The house of commons, so far safeguards its right, that all penal enactments involving pecuniary penalties must originate in the lower house.† On this ground, a bill for *the protection of game was rejected, in 1830, because it had originated* in the lords.‡ Strict adherence to this rule entailed much inconvenience. In 1831 a "standing order" was adopted

* The excise was always very unpopular, and regarded as an instrument of oppression. In Rushworth's Historical Collection, the memorial of a Jesuit is preserved counselling Charles I. to restrain England by means of the excise. Pulteney, in 1778, termed the excise "a monster," and its introduction, "a scheme to uphold absolute power." Johnson calls it "a hateful tax, which is not apportioned by justices, but by miserable hirelings who are sold to those who levy the excise." When Walpole proposed to introduced the excise generally, the cry, "Liberty, property, no excise!" was raised against him. At that period, William Windham exclaimed in the commons, "In every country excise of every kind has always been regarded as the token of slavery." Frederick II. in the *Geschichte seiner Zeit*, speaking of Walpole's excise project, says, "If this project were realized, unlimited power would be secured to the sovereign by means of the amounts resulting from such impositions."

† Hansard, *Ser. iii.*, lii. 478.

‡ *Ibid.* ii. xxv. 416.

directing the speaker, in any special case, to report whether it appear to be the purpose of the lords either to impose any money burthen or charge; to modify or abolish the same; or, whether their intent merely concern the punishment of a crime; the house thereupon will determine whether it be expedient to insist on the exercise of its privilege.

The lords can neither introduce modifications in the budget nor in any money bill. Sir Matthew Hale contends that the lords may grant a minimum; when, for instance, the commons grant a tax for four years, the lords may grant it for two, and the bill need not, according to his views, be sent back to the commons. The lords have not, however, resorted to such an expedient for many centuries. The right of the upper house to reject money bills was, nevertheless, acknowledged in express terms in 1671.* It is questionable whether, after the commons have abolished a tax, the peers have the right to retain it by throwing out the respective bill. In 1860 the lords, after the income-tax and the stamp-tax had been assented to by the crown, rejected the bill for the abolition of the paper duty.† Despite the opposition which this act awakened in the lords, it was held by a majority that no privilege of the lower house had been technically infringed. The right of the lords, however, to impose a burthen negatively, appears more than doubtful, when taking into account the legal conception of taxation generally entertained, namely, that all taxes should originate in the commons. On Lord Palmerston's motion three resolutions were adopted:—

"I. That the right of granting of aids and supplies to the crown is in the commons alone.

"II. That although the lords had, occasionally, exercised the right of rejecting bills of different kinds, yet the exercise of that power was justly regarded with peculiar jealousy as affecting the right of the commons to grant the supplies and to provide the ways and means for the service of the year.

"III. That this house has in its own hands the power so to impose and remit taxes, and to frame bills of supply, that the right of the commons as to the matter, manners, measure, and time may be maintained inviolate."

While the power of the commons was still restricted, it

* May, *Const. Hist.*, i. 471. † *Ibid.*, i. 477.

was customary to interweave all possible burthens with money bills, as an inseparable whole. If the crown would not consent to a redress of grievances, it must forego the grants. This mode of extorting enactments is termed "tacking" bills. In 1702, however, the lords declared that the connecting of foreign objects with money bills was "unparliamentary, and calculated to entail danger." Such a course is now superfluous, as the commons possess other means of carrying out their objects. Formerly, grants were frequently made under condition. In 1339 an aid of 30,000 sacks of wool was voted to Edward III., but such aid was only to be applied for the purposes specified in the bill. To watch the due execution of the bill, a committee, consisting of prelates and barons was elected by the lords. Thus began the practice of the commons of appropriating their grants to particular purposes. In the year 1861 the customs and inland revenue bill was only voted on condition that the tax on paper should cease. By this vote the commons forced the lords either to agree with the repeal of the paper-duty or to vote against the estimates at large.*

The "budget" is the expenditure, as annually estimated by the chancellor of the exchequer;† being only granted for a year, it necessitates the annual assembling of parliament. From the time of Charles II. it has become the usage to grant supplies to the crown only for specified purposes. Clarendon styled this "a republican innovation."‡ The present form of the budget has been fixed since the Peace of Utrecht. In war times an extraordinary credit is usually granted to the crown, enabling it to prosecute the war even during the recess. Ministers who, like Pitt, can reckon upon a majority in the lower house, have even emancipated themselves from all granting by parliament. Thus, in 1797, without the cognizance of the commons, he granted to the Emperor of Germany, by way of subsidy, £1,200,000, and to

* *Parl. Rem.*, iv. 88.

† The budget of 1862-3 gives the following income:—Customs, £23,674,000; Excise, £18,332,000; Stamps, £8,590,946; Land and assessed taxes, £3,160,000; Property-tax, £10,365,000; Post-office, £3,510,000; Crown-lands, £295,000; Miscellaneous, £1,481,533; China war indemnity, £266,000; Total £69,674,479; *leaving a deficit of £1,442,006.* The army estimates amounted to £15,570,868; the navy, £12,598,042; civil service £7,984,463; collection of the Revenue £4,699,581. The remainder was expended in paying the interest of the National Debt, the Civil List, and other burthens of the Consolidated Fund.—(*Parl. Rem.*, vol. v., 86.)

‡ Bowyer, 206.

the Prince of Condé £200,000. A large majority in the commons subsequently sanctioned this unconstitutional mode of procedure as having been compelled by urgent necessity.* In like manner the parliament, in 1859, sanctioned many millions excess of expenditure on the budget of 1857.†

The committee of ways and means is charged with examining the measures which the chancellor of the exchequer deems necessary to cover the state expenditure, and further, the bills whereby taxes are either introduced, increased, diminished, or abolished. The committee passes resolutions in this intent. On the reports of the two committees being presented a division takes place on the day next ensuing. The resolutions of the committee of ways and means are thereupon introduced by means of bills. General alterations in the state taxes are discussed by special committees.

The committee of supplies is charged with settling the amount of the government requirements in the respective departments; its resolutions are introduced at the end of the session by the "Consolidated Fund Appropriation Bill," whereby the government is authorized to expend, for the purposes specified in the bill, the several amounts granted in committee of ways and means. On the 12th of January, 1784, the house resolved that it was a high crime and misdemeanour, an audacious breach of the public trust in regard to the privileges of parliament and the constitution, if, in any department the sums granted by way of resolution were expended previously to such outlay having received formal sanction by an "appropriation" bill.‡

This act contains the clause "that the money voted shall only be used for the very purposes mentioned in the bill." Exceptions are only allowed in regard to the expenses for the army and navy; a separate clause permits of a deviation from the estimates in cases of urgency. Such deviations are only legal when the commissioners of the treasury have consented thereto on the ground of a written remonstrance or demand on the part of the administration of the army or navy. Recent debates in the house of commons tend to show that, in this particular, the law is not

* *Ann. Reg.*, xxxix., pp. 133—141; *Edin. Rev.*, vol. xxvii., Sept. 1816. At the time of the war against France, a Russian fleet was likewise maintained in the English waters without the consent of parliament. Parliament subsequently had the grace to submit to an accomplished fact.

† *Parl. Rem.*, ii. 37.

‡ *Ibid.*, ii. 37.

unfrequently violated. On the 11th of March, 1861, it was proved by Sir H. Willoughby that, in the administration of the army, £38,000 were transferred from one department to another, simply on the ground of a conference of the several secretaries of the different departments. As to the navy estimates, £519,000, voted for the transport-service, had been spent for marine-stores; and out of £503,880 voted for iron-clad vessels, £200,000 were, in like-manner, expended for stores, and £38,521 for engines. Of late years, the "Appropriation Bill," as a rule, is not even printed previous to its being voted.* A motion, brought forward by Lord Robert Montagu on the 26th of July, 1861, to print the bill previous to the second reading did not obtain a majority.† In anticipation of the yearly income annual loans are raised by government by means of "Exchequer bills," which are paid back within a short time, duly specified, interest thereon being payable by the bank. They were introduced by Montague in 1696. Parliament annually fixes their amount.‡ According to the Exchequer Bills Act of 1859, they amounted to £13,277,400.§ The exchequer bonds issued in addition to these are put in circulation for a limited time, and bear a *per diem* interest. This kind of loan is known as "the Unfunded Debt." The chief outlay of the budget is for payment of the interest on the national debt. In 1850 the interest amounted to £28,091,589, on a budget of £50,231,984.

The national debt itself amounted—

			Principal.	Interest.
In	1702	At the Accession of Queen Anne ...	£16,394,702	£1,310,942
„	1714	„ „ George I.	£54,145,363	£3,351,358
„	1727	„ „ George II.	£52,092,238	£2,217,551
„	1756—1763	Geo. II. and Geo. III.	£138,365,430	£4,852,051
„	1775	At the Commencement of the American War	£128,583,635	£4,471,571
„	1784	At the Conclusion of the American War	£249,851,628	£9,451,772
„	1793	At the Commencement of the French War	£239,350,148	£9,208,495
„	1817	When the English and Irish Exchequers were Consolidated	£848,282,477	£28,854,466
„	1861	.....	£799,949,807	£26,090,260

* *Parl. Rem.*, iv. 87.
† *Ibid*, iv.
‡ *Rau. Lehrbuch der Politischen Oekonomie*, ii. 2 *Abth.* 316.
§ *Parl. Rem.*, ii. 77.

The augmentation of the national debt was mainly attributable to the French Revolution. From 1793 down to 1814, England paid in subsidies alone £46,289,459.* The first loan was effected in 1693. In acknowledgment thereof stocks were issued either with terminable or permanent annuities. By way of security for the capital and interest of the loans the revenues of the country are mortgaged, the interest being paid to the Bank of England. These liabilities are comprised under the term "National Debt."†

The amount raised annually for the state expenditure was, as follows:—

In the year	1801	£2	1	0	per head.
„	1811	3	10	3	„
„	1814	5	2	0	„
„	1821	2	12	8	„
„	1831	2	6	5	„
„	1841	1	18	10	„
„	1851	1	18	6	„ ‡

It is incontrovertible that the commons may reject "the Consolidation Fund Appropriation Bill," and thereby the entire budget. "The commons have a control over the crown, and the privilege of refusing the supply," as was affirmed by Earl Grey on the 17th of May, 1832;§ but the exercise of this right has not been found necessary since the Revolution. In 1784 the commons merely refused to discuss and grant the budget, in order to oust the Pitt ministry.‖ How Pitt withstood this resistance of the commons will be shown in the 10th and 11th chapters.

* Meidinger, 470.

† In England everything belongs, nominally, to the sovereign, but he himself owes nothing; therefore, people speak of "the king's revenue" and "the national debt." The classic parliamentary period was distinguished by the increase of taxation and loans. Schlosser (ii. 57) expresses himself very bitterly about the reign of George II.:—"What must the people not pay, first of all, in order to purchase the citizens, by purchasing their votes on occasion of a parliamentary election, and then, after the election, in order to purchase the members elected? In every session, according as the general prosperity advanced, the expenditure of the national debt increased year by year."

‡ Meidinger, 462.

§ Hansard, Ser. iii., xii. 1006.

‖ May, *Const. Hist.* i. 472.

CHAPTER IX.

PARLIAMENT AS THE SUPREME COURT OF LAW.

Power of Parliament over the Life, Estate, and Liberty of the Citizens.—Attaindor.—Bill of Attaindor or of Pains and Penalties.—Clarence.—Sir Thomas More.—Catharine Howard.—Strafford.—Fenwick.—South Sea Directors.—Queen Caroline.—Impeachment.—Ministerial Responsibility.—Questionable whether Commoners can be Tried for Felony by the Upper House.—Anstey's Attempt at Impeachment.—Heads of Indictment.—Court of the Lord High Steward.—Release Inadmissible.—Dissolution of Parliament does not Remove Impeachment.—"Managers" of the Lower House.—The first Impeachment and the Last.—Sir Robert Peel and Cox concerning Impeachment.

In addition to its judicial authority in matters of privilege, and the ordinary jurisdiction of the upper house as supreme court of appeal, and court to try peers and peeresses, the united parliament has further power over the life, liberty, and honour of citizens. By means of a special statute, in the ordinary enacting form, it may condemn any one individual, or several to specific punishment. The house of lords is likewise a supreme court for the trial of certain great criminals whom the commons may impeach.

An attaindor (*attinctura*) is a degradation or public dishonouring, which draws after it corruption of blood. It is the consequence of any condemnation to death, and induces the dishorison of the heirs of the condemned person, which can only be removed by means of parliament. A bill of attaindor, or of pains and penalties, inflicts the consequences of a penal sentence on any state criminal.* "They are, to all intents and purposes, new laws made *pro re natâ*, and by no means an execution of such as are already made." By the instrumentality of such bill the penalties of high treason are generally imposed. Penalties may, however, be imposed at pleasure, either in accordance with, or in contravention of, the common law. No other court of law can protect a person condemned in such manner.

The first bill of the kind occurred under Edward IV., when the commons had to confirm the statute condemning Clarence to

* Bl., iv. 380. † Bowyer, 314.

death.* This convenient method of getting rid of disagreeable opponents was in high favour during the reign of Henry VIII. The bills of pains and penalties were hurried through the parliament, and the parties accused were not even put upon their trial. Thus were the illustrious Sir Thomas More and Bishop Fisher, for misprision of treason, without regular trial, without examination of witnesses, or hearing the accused in their self-defence, *legally* consigned to the scaffold.† Anne Boleyn was formally tried for high treason by the house of peers; but the head of Catharine Howard was disposed of by a simple bill of attainder. This was the first case in which the offence charged was created by the very bill against which the pretended criminal was held to have offended.‡ Under Philip and Mary the benefit of clergy was, by means of a bill, withheld from a certain Rufford.

What had been an instrument of kingly despotism, under Tudor sway, was converted, under the Stuarts, into a parliamentary engine against the crown. The points of indictment against Strafford were so weak, that the lords were for acquitting him. Thereupon, Sir Arthur Haselrig introduced a bill of attainder in the commons. The staunch friends of freedom, such as Pym and Hampden did not support this measure; but yet it passed through the commons with only fifty-nine dissentient voices.§ After the thirty-five peers opposed to the trial of Strafford had withdrawn, the terror-stricken lords accepted the bill by twenty-six against nineteen votes, although Strafford had previously defended himself in person, and, by means of his counsel, before the house of lords. His legal advisers were threatened with the vengeance of the commons, but protected by the house of lords. The faithless Charles, with some show of reluctance, assented to the bill, and was thus a consenting party to the death of Strafford, whose chief fault was, that he had served the king too well. Strafford was beheaded, and Taylor, who had spoken of Strafford's execution as a "legal murder," was expelled the house, and committed to the

* Crabb, 423.—By the 3 and 4 Will. IV. c. 106, it is provided that when the person from whom the descent of any land is to be traced, shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such lands shall have escheated, in consequence of such attainder, before the 1st of January, 1834.

† Bowyer, 314.

‡ Lingard, *Hist. Eng.*, vi. 316.

§ Forster, *Debates on the Grand Remonstrance*, 134.

Tower. After the Revolution (1688) the bill against Fenwick, to whom counsel had been allowed, passed, by a feeble majority, in 1696. In 1723, Bishop Atterbury, after defending himself before the lords, was sentenced, by a bill of pains and penalties, to *banishment and deprivation, for high treason. Forfeiture was not* decreed against him; it was, however, to be accounted felony to correspond with him, and the king might only pardon him with consent of parliament.* The first septennial Parliament, urged by the popular outcry against the directors of the South Sea Company, who, by law, were not punishable, so far degraded itself as to assent to a bill of pains and penalties with retro-active effect, whereby the accused parties were sentenced to forfeiture of their goods and to heavy pecuniary penalties. So subservient was the lower house to the demands of the excited populace, that it did not even allow the accused a hearing at the bar of the house, and the crown gave its assent.† Bills of pains and penalties had been allowed to slumber since the first half of the 18th century. The last example on record is the bill against Queen Caroline, which Lord Liverpool introduced in the house of peers in 1820, whereby not only was her marriage with George IV. dissolved, but the queen was declared to have forfeited all her dignities.‡ This parliamentary administration of justice has by no means been relinquished.§

A bill of attainder may refer simply to a concrete case, and contrive penalties for acts which are not specially punishable by statute, whereas an impeachment applies to some violation of recognized legal principles, and is a solemn indictment preferred by the commons to the house of lords. *According to Lord* Somers, impeachment was introduced for the protection of the *safety of the realm and the maintenance of its liberties and rights.* The grounds for impeachment are, malversation in office, violation of constitutional rights, and analogous offences which concern the state at large. Since the time of the Stuarts impeachment has been made a party weapon. So far back as 1626, on the impeachment of Buckingham, the principle was set up, that common fame is a good ground of proceeding, either by inquiry or presenting the complaint to the king or lords. In the proceedings against

* Mahon, ii.
† Gibbon, *Miscel. Works*, 7.
‡ Gervinus, *Geschichte des* 19 *Jahrhunderts*, iv. 126.
§ Gneist, i. 289.

Danby (1678) it was laid down that ministers were responsible, not only for the legality, but also for the honesty, justice, and advantage of all their measures. This political, and not mere legal, responsibility of the ministers, is thus described by Lord Brougham:*—"The ministers are not only responsible for the legality, but also for the expediency and wisdom of their measures, for they are bound, on the one side, to employ their efforts in the service of the crown, and, on the other, they are punishable if they undertake so important a duty without the capacity requisite for its accomplishment. An act of the government may be unconstitutional, and the minister be made responsible in consequence, although the said act be not illegal."

Ministerial responsibility in the modern constitutional sense, cannot however, exist in England, from the fact that the law does not recognize a "ministry," but only individual advisers of the crown, whether presiding over a department or not. Impeachment is not restricted to the ministry; every high officer of state may be brought before the supreme court of law, as was the case with Warren Hastings, the Scotch lords in 1715, and, in 1746, the four Scotch lords, Balmerino, Cromartie, Kilmarnock, and Lovat.† It is, withal, doubtful whether commoners can legally be brought, by impeachment for felonies, before the house of peers, inasmuch, as Magna Charta requires every Englishman to be tried by his "peers."‡ In the fourth year of Edward III. the lords refused to entertain the accusation of the king against Sir Simon de Beresford for treason, and declared that they were not bound to render judgment upon others than peers, nor had power to do so. The right of the commons to impeach a commoner was brought into discussion in Fitzharris's case. In the Oxford Parliament, which met in March, 1680, the commons impeached Fitzharris of high treason, in general terms; he had, prior to the assembling of parliament been committed for a treasonable libel reflecting on the king and government. The lords, thinking there was no necessity for this proceeding, when he might be tried in the ordi-

* Debate on the address, 22nd Jan., 1846 (Bowyer, 136). "The ministers," says Hallam, "are responsible for the justice, uprightness, and utility of all the measures proceeding from the crown, and even for their legality. The executive is, consequently, or at least ought to be, subjected to the survey and control of both houses of parliament in all great political measures."

† Mahon, ii.

‡ Hallam, *Const. Hist.*, ii. 605. Bowyer, 816.

nary courts of law, rejected the impeachment. Upon this, the commons resolved, "that it was the undoubted right of the commons in parliament assembled to impeach any peer or commoner before the lords, and that the refusal of the lords to proceed on this impeachment of Fitzharris was a denial of justice and a violation of the constitution of parliament, an obstruction to the further discovery of the plot, and of great danger to his majesty's person and the Protestant religion; and that, if any inferior court should proceed against Edward Fitzharris, or any other person lying under an impeachment of parliament, it would be a high breach of privilege." This dispute between the two houses was determined by a dissolution of the parliament, after an existence of eight days, and, at the direction of the ministry, Fitzharris was tried at the King's Bench bar. Mr. Hallam says that it seems, indeed, difficult to justify the determination of the lords. The doctrine advanced by the lords in Fitzharris's case never obtained reception, and after the Revolution, the lords entertained, in several instances, the impeachment of commoners. Thus, on the impeachment of Sir Adam Blair and some others for high treason, the house of lords, after full deliberation, resolved to proceed on the impeachments. The opinion of Blackstone, that a commoner cannot be impeached before the lords for any capital offence, is contrary to the latest resolution of the supreme tribunal.

On the 8th of February, 1848, Anstey brought forward a motion for the production of papers, in order to found thereon an impeachment. It is incontestable, that a commoner may, on the ground of misdemeanors, be indicted before the upper house, seeing that Magna Charta only assures trial by one's peers in the case of felony.

An impeachment begins either with a preparatory motion for the production of the necessary papers, or by a motion for impeachment. If the house assent to the motion, the member bringing it proceeds to the bar of the house of lords, and in the name of the lower house, and of all the commons of the kingdom, impeaches *such* a one, at the same time engaging that the commons will in due time exhibit articles against him, and maintain them. These latter are prepared in a committee of the lower house, and are then a kind of bill of indictment. In the proceedings against Clarendon, the lords refused to concur in a general indictment of high treason. Clarendon was thereupon

accused, by way of specific headings, for arbitrary imprisonment of citizens in possessions beyond the seas, and for the maintenance of a standing army.* In 1701, Lord Somers, the Earl of Oxford, and Lord Halifax were indicted on account of the Spanish scheme of partition. The commons endeavoured to protract the affair; as, however, on the day set apart, the heads of indictment were not sustained by the members of the commons, an acquittal was given by the house of lords.† The court before which the accused has to answer is that which the lord high steward, during the parliamentary session, holds as president, and in which every peer is an assistant judge. Bishops can only sit in judgment on commoners impeached, but they cannot vote, because of the capital sentence involved. The court generally sits in Westminster Hall, and is bound by the ordinary rules of evidence.

If a peer is indicted, he is arrested by order of the house of lords; a commoner is transferred to the custody of the serjeant-at-arms. The accused has to answer clause by clause. Under the Stuarts, it was questioned as to whether a pardon under the great seal could put an end to the proceedings. In 1680, Danby wrote a despatch to Lord Montague, empowering him to offer France £6,000,000 in consideration of her neutrality. Danby excused himself on the ground that he had acted on a direct order of the king.‡ The commons, however, impeached him, and Danby pleaded pardon under the great seal; the commons, however, declared such pardon illegal in the case of impeachment. The act of settlement first cleared up the controversy, and henceforth a pardon from the king cannot be pleaded in answer to an impeachment of the commons; but after sentence an "act of grace" is admissible. In 1715, three Scotch peers § were thus pardoned, and in 1746 Lord Cromartie.‖ There being no difference in law between a minister of the crown and any other citizen in regard to impeachment before the lords, there is no doubt but that the sovereign has the right to pardon a condemned minister. No precedent in point, however, is to be met with.

Danby's case further gave rise to the question, how far a dissolution or prorogation affects an impeachment. The parliament of 1680 was prorogued after declaring that the impeachment was

* Hallam, *Const. Hist.*, ii. 496.
† Smollett's *Hist. of Eng.* chap. vi.
‡ Hallam, *Const. Hist.* ii. 553.

§ May, *Parl.* 505. Mahon, i. The seven Scotch rebels were impeached on the 9th of January, 1716.
‖ Mahon, iii.

not thereby at an end; the succeeding parliament, on the other hand, allowed the impeachment to drop. Danby thereby remained in the Tower until 1682, when he applied for enlargement to the King's Bench, which refused to interfere in parliamentary matters. Jeffreys, on becoming chief justice, under James II., effected his release. *The servile parliament of 1685 thereupon declared that* a dissolution or prorogation set aside an impeachment, *per se*. After the Revolution this was directly negatived in the impeachment of the Earl of Oxford in 1717, and in the case of Warren Hastings, the principle was formally recognized, that neither prorogation nor dissolution of parliament causes an impeachment by the commons to abate. A newly-elected house of commons may, as a matter of course, set aside the impeachment of a previous parliament.

To conduct the proceedings before the upper house, the commons appoint "managers." Burke, Fox, and Sheridan were invested with the office in the case of Warren Hastings. These managers argue the case before the house of peers, adduce *witnesses and the necessary evidence, and require the lords to* examine the witnesses. At the hearing, the speech of the managers first takes place, then the entering of proof, in regard to each separate head of indictment; the counsel for the accused then plead, and cross-examine the witnesses; after which, the managers reply. The vote of the peers is taken by the lord high steward, clause by clause, beginning with the youngest peer, each recording his vote upon his honour. If "not guilty" be returned, the accused is acquitted; if the accused is found "guilty," wholly or partially, the sentence is pronounced only upon a renewed motion made by the commons.

The first impeachment was that of Lord Latimer, in the reign of Edward III. Under Richard II. the commons impeached the chancellor *De la Pole*. *Under the Tudors, bills of attainder* superseded impeachments. From the time of the Plantagenets, the right of the commons to impeach remained in abeyance until the impeachment of Lord Middlesex, in 1621. In the reign of Charles II., the commons were solicitous that the right of impeachment should not lapse for want of precedents,* whereas under the first sovereigns of the house of Hanover, impeachments and bills of attainder were alternately resorted to. The last impeachment

* Hallam, *Const. Hist.*, ii. 504.

occurred in the present century, against a cabinet minister, Lord Melville, for malversation in office.*

Sir Robert Peel declared in the commons that the days of impeachment are gone by. Anstey's attempt to impeach Lord Palmerston completely miscarried.† Cox says, however, with reason, that impeachments are not obsolete at law. Under certain political conditions, they may actually revive, and render ministerial responsibility, as regards the entire body, and not merely some individual member, something more tangible than a fleeting reminiscence.

* May, *Const. Hist.*, i. 464. † *The British Commonwealth*, 266.

CHAPTER X.

FASHIONING OF THE ROYAL PREROGATIVE UNDER PARLIAMENTARY GOVERNMENT.

I. Account to be taken of Individuals.—Abuse of the Prerogative by the Stuarts.—William III.—Anne.—Awkwardness of George I.—Insignificance of George II.—Apparent Increase of Royal Power under George III.—Dismissals.—Alliance of George III. with North in Wilkes' affair.—Downfall of Lord North.—The Coalition.—Fox's East India Bill.—Pitt's Supremacy.—George IV.'s Pretensions and Impotence.—William IV. and the Reform Bill.—Queen Victoria's Youth.—Prince Consort.—Royalist Sentiment of Englishmen.

II. Parliamentary Government contended for by the Long Parliament.—The King cannot choose his Advisers Independently.—Probable Fate of a Non-aristocratic Cabinet.—The Crown may refuse to Dissolve Parliament.—Right to Dismiss Ministers.—Letter of the Queen to Lord John Russell.—Lord Palmerston and the Parisian Coup d'Etat.—Lord John Russell concerning Lord Palmerston's conduct.—Oral Communications of the Minister with Foreign Ambassadors.—The Bedchamber Question.—No Political Secretary since Sir Herbert Taylor.—Initiative of the Ministry.—Decline of the Veto.—Powerlessness of the House of Peers in relation to the Crown, the Ministers, and the Commons.—Countersigning of Royal Acts.—Proclamations.—The Right of Declaring War.—Foreign Troops in England.—Transfer of the Prerogative to the "Cabinet."—Right of Pardon.—Want of Delicacy on the part of the Parliament.—The Compass of the Prerogative continually Oscillating.

In treating of the constitutional functions of the crown, the personages who have ruled since 1688 should be kept in view, and the relation which the sovereigns of the house of Stuart held in regard to popular freedom, should also be borne in mind.

Under James I. the royal prerogative was nothing more than an instrument whereby to compass the destruction of the rights of the people. On his journey from Edinburgh to London, on a mere order, he caused a thief to be hanged at Newark without trial or judgment, merely to let his new subjects learn symbolically "that he was God's representative." His predecessors had trampled on *the law because they felt their strength*; he asserted "*that* he had a right to place himself above all law."* That which Englishmen had endured from sturdy monarchs like Henry VIII. and Elizabeth they unwillingly bore from a crowned pedant, destitute

* Bucher, 103.

of political foresight or purpose. The declaration of Charles I. in 1628, "that he was responsible to God alone for all his acts," undoubtedly prepared the way for the destruction of the monarchy. Charles II. sought by a recourse to bribery and intimidation of the judges to attain that which his father had endeavoured to achieve by open force; whereas the incautious James II. endeavoured to set aside the laws of the land to advantage his co-religionists. His "Act of Indulgence" scared even the servile Church of England. "*Nolumus leges Angliæ mutari*" became the war-cry of the aristocracy, and James was, in consequence of a conspiracy on the part of the nobility, forced to ignominious flight.* Recruits were led to William of Orange's banner even by the bishops and the higher nobility. The mass of the population took no part in that revolution,† which has been called "glorious," although, sooth to say, there was nothing very glorious for Englishmen in the fact that the Dutchman had expelled their king, and that the nation at large should submit with meek indifference to events brought about by mere foreigners. During this revolution there was never any mention made of the nation at large; in his proclamations William merely refers to his adherents amongst the gentry.

The crafty Orangeman was tracking high game—the destruction of French preponderance, and the independence of the Netherlands. He was a mere Dutch patriot and astute politician, who made use of England simply for the purpose of carrying out his own plans. For England and the English people he had as little reverence as for English freedom; his skill consisted in availing himself to the utmost of the two great parties in opposition; the whigs, who gloried in the revolution, and the tories who had opposed it, but were the aptest instruments to secure the prerogative of the crown.‡ As, however, William had acquired his crown through the parliament, he was only able to maintain his influence by neutralizing the play of parties in parlia-

* Bancroft, *Hist. of the U.S*, ii.

† Bancroft, ii. 675. Macaulay says, in his essay on *Hallam's Constitutional History*: "If in the revolution itself there was little that can properly be called glorious, there was still less in the events which followed. In a church which had as one man declared the doctrine of resistance unchristian, only 400 persons refused to take the oath of allegiance to a government founded on resistance. In the preceding generation both the Episcopal and the Presbyterian clergy, rather than concede points of conscience, not more important, had resigned their livings by thousands."

‡ Bancroft, ii.

ment. He did not succeed in making use of his prerogative against the two parties. The ignorant mass of the lower population had had but little to complain of the Stuarts, and therefore hated the phlegmatic Dutchman, who was to them a foreigner in every respect. Queen Anne inherited all the narrow-mindedness of her father; she hated the revolution, and manifested Jacobite tendencies openly. The succession of the house of Hanover to the crown filled her with horror. Dependent upon the intrigues of party, she was not in a position to withdraw the exercise of the royal prerogative from the respective parties amongst the nobility. The return of the Stuarts on her demise was only prevented by a counter-plot which a section of the nobility contrived against Bolingbroke's project.

On the news of Queen Anne's death the elderly elector, George of Hanover, flanked by his two mistresses, the Baroness Kielmannsegge, subsequently created Countess of Darlington, and Melusina von Eberstein, afterwards Duchess of Kendal, hastened with all speed to England.* Thus solemnly was the present dynasty inaugurated in the island kingdom! George I. was a German to the backbone, unable to speak one word of English. On account of the strong Jacobite opposition which was rife, and the impotence of the so-called Hanoverian tories, he was obliged to let the whigs do as best suited them, and thereby the prerogative was completely transferred to the cabinet and parliament.

His son, George II., found himself at the outset in a still more disastrous plight; of diminutive stature, he had no glimpse of royalty about him. After the fashion of German princes, he delighted above all things in playing at soldiers. "As king of England," remarks Frederic the Great, "he had too much in view the advantage of the electorate, and was too little his own master, to be able to lead a nation whose idol is liberty." That his throne was not subverted in the year 1745 is attributed to the faults and apathy of the English Jacobites, and not to the fact of any support received from his English subjects. Under George II. there could have been no question of an independent government on the part of the king; he must have been well content to meet with ministers with whom he could come to an understanding.

In historical treatises frequent mention is made of the increase

* Bancroft, ii. 930. George I. caused his wife to be imprisoned, and a youth of whom he was jealous to be made away with.

of the influence of the crown under George III. The rule of George III. had indeed far different bases than in the case of his forefathers. George III. was born an Englishman; the Jacobites had already died out during Pitt's brilliant administration, and whereas the two first Georges were completely dependent on the whigs, George III. was able to place reliance once more upon the tories, and, by their agency, to keep the whigs in check. On the 6th of April, 1780, Mr. Dunning brought forward the following motion—"That the influence of the crown is augmenting, and ought to be diminished;"* such influence was chiefly brought about by the concurrence of the sovereign with the parliamentary majority and the ruling whig minister. The premier, Lord North, was the king's great favourite, and the king identified himself completely with his policy during twelve years (1770—1782).† The king, it must be owned, often followed his own course, and influenced the elections even against the ministers who preceded North's administration; but, in so doing, he merely acted like any other gentleman in the kingdom; he simply bribed electors, as, for instance, in his first parliament, when he raised an opposition at Portsmouth to his own chancellor of the exchequer.‡

In parliament, also, by means of dependent court functionaries, though not during the North administration, he raised an opposition to the cabinet for the time being. Lord Bute, who had previously been the king's favourite, even after his downfall retained, under the Grenville ministry, all his secret influence.§

It was through pressure from the king that the Duke of Devonshire was expelled from the privy council, on the ground of his opposition. In like manner, the Earl of Temple's name was erased from the list of the privy council, on account of his friendship for Wilkes.‖ But if the cabinet had resisted, and relied upon parliament, all this would have been impossible. How little power the king had without the support of the parliamentary party is amply shown by the circumstance that, in 1765, he was obliged to admit into the ministry the Marquis of Rockingham, who, together with the Dukes of Newcastle and Grafton, had a few years previously been deprived of their lord lieutenancy for having expressed themselves unfavourably about the peace with

* May, *Const. Hist.*, i. 44.
† *Ibid.*, 38, 41.
‡ *Ibid*, 15.
§ *Ibid.*, 21, 11.
‖ *Ibid.*, 24.

France; and, further, General Conway, who a short time previously had been deprived of his regiment because of his opposition.*

Englishmen usually connect with the idea of the royal prerogative the remembrance of the tyranny of the Stuarts. Encroachments on the part of the cabinet and parliament chiefly manifest themselves in the exercise of this prerogative. Under George III., however, the absolute aspirations of the king, and the arbitrary tendency of cabinet and parliament were for a long time *in unison. What more natural than that, in accordance with* the popular view, one agent should have been made solely responsible, but the king was only powerful because the parliament was inclined to identify itself with the propensity of the king. This alliance of the king with North's cabinet and the parliament resulted in the Wilkes scandal and the American war.

The king was Wilkes's personal enemy.† In order to remove him, the aid of parliament was invoked. This concealment of the royal purpose behind the parliamentary privilege has been capitally hit off by Junius. "The persons who, till within these few years, have been most distinguished by their zeal for high-church and prerogative, are now, it seems, the great assertors of the privileges of the house of commons. This sudden alteration of their sentiments, or language, carries with it a suspicious appearance. When I hear the undefined privileges of the popular *branch of the legislature exalted by tories and Jacobites, at the* expense of those strict rights which are known to the subject and limited by the laws, I cannot but suspect that some mischievous schemes in agitation, to destroy both law and privilege by opposing them to each other. They who have uniformly denied the power of the whole legislature to alter the descent of the crown, and whose ancestors, in rebellion against his majesty's family, have defended that doctrine at the hazard of their lives, now tell us that privilege of parliament is the only rule of right, and the chief security of the public freedom."‡ But can anything afford better proof than this case how omnipotent the governmental body must have been, before whose power the king must fain cringe in order to strike an insignificant opponent?

Thus was George III. able to arrogate to himself all patronage,

* May, *Const. Hist.*, i. 20.
† *Ibid.*, i. 25.
‡ *Forty-fourth Letter to the Printer of the Public Advertiser.*

but only by aid of a minister who had the greater part of the whig aristocracy as adherents, and the majority of the commons at his disposal.* Thus was he able to remove without risk lords lieutenants, such as the Earl of Pembroke (whose family had been invested for hundreds of years with the office of lord lieutenant of Wiltshire), simply on the ground of his opposition in parliament.

The Americans, however, destroyed the dangerous triple alliance of king, cabinet, and a corrupt parliament. On the 4th of March, 1782, a motion by General Conway, whereby all those who counselled the crown to continue the war with America were declared as enemies of the people, passed the commons.† Lord North was ready, indeed, to carry out the policy of the opposition, but was obliged to resign, and was succeeded by the Marquis of Rockingham as premier. Fox, also, and Burke entered the ministry, although the former was personally hated by the king. The death of Lord Rockingham broke up the cabinet, and Fox and his friends refused to act under Lord Shelburne, which resulted in the overthrow of his administration; and in April, 1783, a new ministry, with the Duke of Portland at its head, was formed. Lord North and Mr. Fox were the secretaries of state, and Lord John Cavendish chancellor of the exchequer. Fox and North declared that they would only take office together, and the king, to whom North had now likewise become an object of dislike, threatened to go to Hanover. Lord Thurlow, on being asked for his advice, expressed himself to this effect: "It was easy enough to go to Hanover, but difficult to come back;" and pointed out the example of James II.‡

This celebrated coalition of North and Fox was very unpopular outside the parliament, and the king expressed himself openly: "A ministry against which I resisted to the utmost, inasmuch as I appealed to all possible parties, can neither enjoy my favour nor my confidence; and I shall withhold every extension of honours which the cabinet may propose to me to grant." The cabinet, however, very soon increased its unpopularity outside the parliament by a measure which secured the king so much support on the part of the nation as to vanquish the majority in parliament. The king had at first given his consent to Fox's East India Bill; it met with keen opposition in the commons from

* May, *Const. Hist.*, i. 50.
† *Ibid.*, i. 48.
‡ *Ibid.*, i. 55; Hughes, c. 25.

Pitt, who accused Fox of wishing to perpetuate the ignominious coalition between oligarchs and liberals. The bill passed the commons, however, very rapidly, and through all its stages indeed, by a majority of over a hundred voices. In the upper house, however, Lord Temple stigmatized it as "a shameless bill, an assault upon the most cherished part of the constitution, on 'chartered rights.'" Even there, however, the bill reached the second reading by a majority of 97 against 80. Thereupon Lord Temple succeeded in making the already wavering king alter his opinion, and declare himself in express terms as to the dangerous character of the bill. The king thereupon wrote on a card, "that he allowed Lord Temple to tell the friends of the king amongst the peers, that any one of them who should vote for his minister's India Bill could not only not be his friend, but would be regarded by him as his enemy." In consequence of this the Prince of Wales remained away from the third reading, and the greater part of the bishops did the same. The Archbishop of Canterbury, the lords of the bedchamber, and the Scotch lords went over to the opposition.* The bill was accordingly rejected at the third reading.† In consequence of this, a resolution passed in the commons declaring Lord Temple's procedure as a high crime and misdemeanor. On the same day, the 17th of December, 1783, Fox was still minister of the crown. This did not prevent him from using, in reference to the defection of his supporters, at the instance of the crown, the words of Granville in experiencing a similar treachery: "I will never again be at the head of a string of Janissaries, who are always ready to strangle or despatch me on the least signal." Fox did not, however, resign; thereupon the king, in the night of the 18th and 19th of December, sent for the seals of office, and appointed Pitt as minister, who, after a protracted struggle, succeeded in scattering the parliamentary majority. How far George III., in the undoubtedly justifiable exercise of his prerogative, had the interests of the state at heart when he dismissed Fox, is difficult to determine. Certain it is that this prince possessed many qualities which afterwards rendered him worthy of the surname, "the Good Old King." He was in sooth an honourable man,‡ but his inclination to absolutism cannot

* Auckland (Lord William), *Journal and Correspondence*, i. 1.

† Schlosser, iv. 365.

‡ Mahon, iv.

be contradicted, and despite his good qualities, he was a self-willed, stiff-necked, and bigoted individual, of very limited intelligence.* How far his narrow-mindedness went is manifest from the fact that he declared the emancipation of the Catholics as "a thing of the worst Jacobinical character;"† and, further, in 1807, the permission granted to the Grenville ministry to bring in a Catholic Relief Bill he withdrew, and preferred dismissing the ministry.

The "chartered rights" gained nothing by the fall of the coalition, as Pitt's East India Bill was not more favourable to them than that of Fox.‡ The royal influence likewise vanished under the powerful administration of Pitt, who, from the time of the French Revolution, supported by the fears of the aristocracy and the complaisance of a majority which had not existed since Walpole, ruled with almost absolute sway.§ But the royal prerogative was not likely to gain fresh accessions of power from the fact of the king having frequently applied to parliament to pay his debts, nor from the fact that on two occasions parliament had deliberated as to his mental capacity. On occasion of the first malady of the king, in order to prevent Fox and the Prince of Wales from attaining the management of affairs, Pitt claimed for parliament an absolute authority to nominate any regent it might please, even without sanction of the crown. The prerogative was not likely to attain fresh *éclat* by the government being centred in the Prince of Wales during a prolonged regency.

George IV. was not the man to maintain the dignity of the crown, even had he possessed all the claims of a king worthy of the name;‖ the trial directed against his consort was not calculated to strengthen the royal dignity.¶ He was truly jealous, however, of his prerogative; but in the presence of such men as Canning and Wellington, his opposition was wholly ineffectual.

William IV. was an upright, frank, and not unintelligent

* Brougham, *Statesmen*, i. 10.

† Gervinus, *Geschichte des* 19 *Jahrhundert*, iv. 1.

‡ Mill, *Hist. of Ind.*, iv. 567.

§ May (*Const. Hist.*, i. 75) calls this, in the ordinary parliamentary jargon, "the absolute government of king and minister."

‖ The abominable letter which Queen Caroline wrote him during her trial was dictated to her by the demagogues. It is highly characteristic, and though exaggerated withal, yet not unfounded. She thus writes:—"Your court offers the picture, not of noble manners or refined intercourse, but of base intrigues and licentiousness; a court in which spies, dealers in obscene stories, and perjurers, valiantly drive their trade."—Hughes, p. 60.

¶ On the 29th of December, 1820, Mr. Fremantle wrote to the Marquis of Buckingham: "His (the king's) invective against Lord Grey was stronger and more violent than I can possibly repeat." In the same way he raged against the entire opposition.—May, *Const. Hist.*, i. 111.

sailor; although in the earlier years of his reign he was a sturdy opponent of the Reform Bill,* on perceiving that it had become necessary he manfully supported it, in order to quell the excited feelings of the community. With intent to carry the measure, he dissolved parliament; and on the 18th of May, 1832, by means of the well-known Taylor circular, induced the opposition peers to abstain from voting.† Whatever opinions may be entertained with respect to the benefits of the Reform Bill, such exercise of the prerogative was as praiseworthy as salutary, for the king thereby averted a general revolution. But William IV. was not competent to direct the vessel of state into a broader track of his own free initiative. His advanced years, and the shortness of his reign afforded but little scope to inaugurate any really grand measure.

On the accession of a youthful queen, both parties contending for the vantage ground, brought all their resources to bear. An inexperienced lady of eighteen was naturally inclined to move patiently in the accustomed routine, and was not in a position to interfere actively in the government. Yet Queen Victoria has known how to maintain the throne in general esteem, and shown herself throughout as a ruler who has fully understood the scope of her duties, availing herself of her rights to the utmost for the advantage of the country at large.

The absolute dependence of the royal lady on the parties in parliament might have seemed endangered by her marriage with an intelligent German prince. That the prince, as consort and privy councillor, was justified, nay, bound, to afford counsel to the queen in the concerns of state, was amply acknowledged by Lord Aberdeen, Lord Campbell, and Lord John Russell. Lord Melbourne had previously assented to the communications of the Queen with Prince Albert on political matters.‡ In order that such counsel might not imperil the power of the ruling coterie, the phantom of an increase of the prerogative and of "Germanization" was raised by the press, and flashed before the nation at large, and frequently with success. The moment the Prince's mortal remains were consigned to the royal sepulchre at Windsor, the nation at large, with one acclaim, recorded its high esteem of one who was a sincere friend of civil and religious liberty, and ever sensitive where the glory of his

* May, *Const. Hist.*, i. 115.
† *Ibid.*, i. 117, 119.
‡ *Annual Register*, 1854, 10.

new fatherland was at stake. If the royal prerogative has lapsed from its high estate through a tyrant race like the Stuarts, by reason of the feebleness of the first Georges, and, finally, through the helplessness of a woman, and, if such a result be now regarded as wholly consistent with the assumed relations between the subjects and the crown, yet the external dignity of the crown still remains intact. The prerogatives are not obscured; they have merely been transferred to parliament and the cabinet.

On the outbreak of the civil war, the commons required from Charles I. that no minister or peer should be created without their consent, and that the king should relinquish the command of the army.* Charles replied, "Were I to accept what you require of me, people might still appear before me bare-headed, might still kiss my hand, and style me 'Majesty;' the words, 'the will of the king expressed by the two houses' might still be the form of your commands; I might have staff and sword borne before me, and enjoy the sight of sceptre and crown—withered branches that could no longer blossom, for the trunk would be dead: but as to any actual or real power, I should be nought but the presentment, the image, the vain shadow of a king."

These requirements from Charles I. were not, indeed, in the form of statutes, but were actually wrested from the crown; for, to a nation whose rights had been trampled down under the hypocritical device of "divine right," this had become a matter of necessity. Royalty is weak in England as a result of the abuse of royal power exercised by a whole dynasty. There is no right at present asserted by parliament which had not previously been a weapon in the hands of royalty to destroy the liberty of the people; the consequence of such abuse of power has been the transfer of the essential attributes of the prerogative from the crown to the parliament. It is not the crown but parliament which actually names the ministers; and, under pressure of a majority in the commons, the sovereign may find it necessary to proceed to the creation of peers. At all events it takes place with the consent of the cabinet, or ruling parliamentary section. The army only legally lives by the favour of parliament; and, since the siege of Dettingen, has not been commanded by the sovereign. The acting commander-in-chief

* Macaulay, i.

was for a long time a party minister; now the office is without political significance.

The theoretical extent of the prerogative has been already shown (Book II. c. 3). It is now to be considered from a practical point of view. "The king has incontestably the privilege to choose his own ministers; excellent delusion! The aristocracy choose them; the heads of that aristocratic party which is the most powerful must come into office whether the king like it or not."* "It is become no uncommon spectacle in this country to see men promoted by the king to the highest offices and richest preferments which he has in *his power to bestow, who have been distinguished by their* opposition to his inclinations."† We have already adduced the example of a coalition ministry. Erskine, who had been a member of the opposition, and very hostile to the crown, eventually became lord chancellor, and, consequently, a member of the cabinet. George IV. likewise strove long and vehemently against Canning's recall to power. In like manner Sir R. Peel could scarcely have been an acceptable person to the queen after the "bedchamber question," and yet her majesty felt forced to invite him to take office in 1841. When the Derby ministry was overthrown in 1859, to avoid recurring to Lord Palmerston, the queen desired to have a cabinet with Lord Granville as premier; but the latter declining to form a ministry, the queen, as erewhile her grandfather in the case of Fox, was fain to put up with Lord Palmerston. When parties are so disorganized, as in 1852, on the overthrow of the tory government by a coalition, the queen may choose a leader from the victorious majority. On that occasion she chose Lord Aberdeen, who had been Peel's foreign secretary. "But could the king choose a cabinet out of men unknown to the aristocracy—persons belonging neither to whig nor tory? Assuredly not. The aristocratic party in the two houses would be in arms! What a commotion there would be! Imagine the haughty indignation of my Lords Grey and Harrowby! What a 'protection' we should receive from Lord Brougham 'deeply meditating those things.' Alas! the king's ministry would be out the next day, and the aristocracy's ministry, with all due apology, replaced. The power of

* Bulwer, *England and the English* † Paley, b. vi., c. 7.

the king is but the ceremonial to the power of the magnates. He enjoys the prerogative of seeing two parties fight in the lists, and of crowning the victor."* An actual exercise of the prerogative takes place as soon as ministers and parliament disagree. The ministry may have the confidence of the sovereign, but not that of the parliament, as in 1784, when Pitt, after the commons had repeatedly attempted to effect his overthrow, ultimately dissolved parliament, and by the new election secured a great majority. The like occurred in 1807, and the result of the dissolution was in like manner favourable. Matters stood in the same position in the year 1831, when William IV. dissolved parliament in favour of the Grey administration.† In 1834, the king dismissed the Melbourne ministry because it did not enjoy his confidence; and the new tory cabinet dissolved parliament—on this occasion, however, unsuccessfully. Finally, in 1841, the Melbourne administration was overthrown in consequence of a parliamentary election which had turned out unfavourably. A dissolution depends solely on the will of the sovereign, and is frequently refused to ministers. The right of the sovereign to dismiss ministers, although they may enjoy the confidence of parliament, has been retained even under the parliamentary government. The Melbourne administration was likewise thrown out at the wish of the king in 1834, but the triumphant majority of the whigs brought it once more into power. No better success has attended efforts made in the present reign. At the end of 1851, her majesty dismissed Lord Palmerston, then acting as secretary for foreign affairs. Scarcely had a year elapsed, however, when, by a coalition of the whigs, radicals, and Peelites, Palmerston was brought back to office as home secretary.

It is acknowledged that in all important acts of state whereby the crown is in any way concerned, consent of the sovereign should previously be obtained.‡ From such control Lord Palmerston sought to emancipate himself. In August, 1850, the queen issued the following order:—

"The queen requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the queen may know as distinctly to what she is giving the royal sanction. Accordingly, having once given her sanction to a measure

* Bulwer, *England and the English*. ii. 246.
† Lord J. Russell, *Memoirs of Fox*, ‡ May, *Const. Hist.*, i. 132.

that it be not arbitrarily altered or modified by the minister, such an act she must consider as failing in sincerity towards the crown, and justly to be visited by the exercise of her constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and the foreign ministers before important decisions are taken, based upon that intercourse; to receive the foreign despatches in good time, and have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off." In spite of this, Lord Palmerston, in December, 1851, privately declared to Count Walewski his approval of the *coup d'état*, and—as Lord John Russell affirmed in parliament, on the 3rd of February, 1852,*—he had written on the 16th of December, 1851, of his own accord, a despatch to Lord Normanby, the English ambassador in Paris, without previously informing the queen. In this despatch he once more expressed his approval of the *coup d'état*.

This mode of acting was blamed by Lord John Russell in the strongest terms.

"The secretary of state for foreign affairs had thereby put himself in the place of the crown. The authority of the crown had been set aside, in order to give his own opinion upon the position of things in Paris. . . . . Wherefore it concerned me," explained the premier, in order to qualify the dismissal of his colleague, "to determine whether the secretary was entitled, of his own authority, to write a despatch, as the organ of the queen's government, in which his colleagues had never concurred, and to which the queen had never given her royal sanction. It appeared to me that, without degrading the crown, I could not advise her majesty to retain that minister in the foreign department of her government."

The queen's letter of August, 1850, shows that the minister of foreign affairs, previous to Louis Napoleon's *coup d'état*, pretended to complete autonomy in his own department. Hence, it is assumable that Lord Palmerston, during the continuance of the Russell administration, from 1846—1852, cultivated the same kind of independence.

On the 3rd of February, 1852, Lord John Russell particularly

* This contest between the queen and Lord John Russell on one side, and Lord Palmerston on the other, has been deemed so important for the comprehension of modern English governmental policy, that Cox, in his *Commonwealth*, and May, in his *Constitutional History*, have published the respective documents.

complained that he missed the influence of Lord Grey and Lord Melbourne over his colleague, and frequently experienced serious responsibility. Under those circumstances, the expression employed by Lord Palmerston, in 1850, to a committee of the commons, becomes appreciable: "The intercourse between England and France could not be kept up by written communication alone; great advantage might arise from personal intercourse with the ambassadors." Such oral communication, already referred to in the queen's letter, in inculpatory terms, withdraws itself, as a matter of course, from the control of the other members of the cabinet, of the crown, and parliament, and has frequently led to the most important acts of state. On the ground of a mere verbal interchange between the secretary of state for foreign affairs and the Russian ambassador, England entered into a fresh convention, of a burthensome nature, on the 16th of November, 1831, relative to the Russo-Dutch loan. As to what measure of control the queen may since have exercised over the foreign policy, there are no certain data at hand which might conduce to a safe inference.

As previously stated (Book II. c. 7), the sovereign is bound to dismiss, together with the ministers, a portion of the royal household, irrespective of the terms of friendly relation which may be entertained towards the holders of the respective offices. This is a consequence of party government; as the personal influence of those members of the opposition who are about the court might prove inimical to the ruling party. When George III., in 1782, dismissed the North ministry, he was obliged to substitute for the Earl of Hertford, who had been chamberlain for fifteen years, the Earl of Effingham, whom he disliked. Even the aged Lord Bateman, who had been specially intimate with the king, was obliged to resign his office as master of the buck hounds.*

When, in 1839, the Melbourne administration left office, Sir Robert Peel, who had to form the cabinet, required from the queen the dismissal of her court ladies. The queen declared that "she could not consent to adopt a course which she considered contrary to usage, and which was repugnant to her feelings." In consequence of this "bedchamber question," or conspiracy, as the opposition termed it, the Melbourne administration remained in office,

* Schlosser, iv. 832.

and the opposition press indulged in the most violent diatribes against the court. As Peel, however, in 1841, on account of the large majority against Melbourne, could not be refused the office of premier, her majesty, now sensible that the position she had once been advised to assert was constitutionally untenable, allowed the principle contended for to be applied to the household, and the office of mistress of the robes and ladies of the bedchamber, when held by ladies connected with the out-going ministers, have been considered as included in the ministerial arrangements."*

The restriction of the Act of Settlement, according to which the sovereign cannot quit the realm without leave of parliament, was repealed by 1 Geo. I. c. 51. Since the accession of her majesty, it has been deemed expedient by the ruling parties that no political secretary like Sir Herbert Taylor should be allowed, experience having shown that by such influence William IV.'s independence of the reigning parties had become too great.

The crown can only exercise any influence upon legislation through the agency of the ministry, the power of initiative pertaining almost wholly to the latter. Ministers who are supported by parliament may carry measures, however unacceptable they may be to the sovereign. From Lord Eldon's papers it would appear that George IV. maintained that he had been entrapped by his ministers with regard to the emancipation of the Catholics; he did not dare, however, to record his veto: "If I do give my consent, then I'll go to the baths abroad, and thence to Hanover; I'll return no more to England; I shall not create any Roman Catholic peers; I shall do nothing to which this bill may empower me; I repeat, I'll return no more." But Lord Eldon himself told the king that he had given his assent to the introduction of a measure of relief, and that he could not withdraw it.†

The right of the crown to oppose its veto to a bill has not been exercised since 1707, when Queen Anne refused her assent to a bill relating to the militia in Scotland.‡

* May, *Const. Hist.*, i. 132 —"Since the bedchamber conspiracy," exclaims Disraeli (*Conningsby*, b. iv. c. 13), "royalty has become a nullity." He forgets, however, that that which applies to the male associates of a king is equally applicable to the female companions of a queen.

† Miss Martineau, iii. 1.

‡ May, *Parl.*, 391. Bowyer (166) and others erroneously assume that, in 1692, the veto was made use of for the last time in the case of a bill for a triennial parliament. Mirabeau says: "I hold the veto of the king as so thoroughly necessary, that I would rather live at Constantinople than in France if it did

The decline of this right is a forced consequence of cabinet government. The crown stands in need of advisors ready to shield the act by their own responsibility. In the case of Fox's East India Bill, George III. did not venture to record his vote; he merely threatened that, in the event of the bill passing, he would abdicate, or at least take his departure. If the sovereign can rely upon one of the ruling parties, or upon the mass of the nation, it cannot be difficult to ensure the passing of a bill in the upper house, as, generally speaking, the bishops always vote with the crown. It would indeed be a hazardous procedure to act at the present day as George III. did in the case of the East India Bill, unless an imminent danger to the nation gave assurance to the sovereign of the support of the people.

But if ministers with a majority are supported by the crown, the resistance of the house of peers dwindles into insignificance. The abolition of the corn-tax affords ample proof of this, a simple threat uttered by the Duke of Wellington having led the lords at once to yield. When, during the struggle of the Reform Bill, the Grey administration was found in a minority, and the lords obtained information that the king intended to dissolve the house of commons, Lord Wharncliffe, 21st of April 1831, gave notice of a motion, in the house of lords, for an address to the king, remonstrating against a dissolution, when the king arrived to prorogue parliament.* The new house of commons was favourable to the ministry, but as the lords, on the 13th of April, 1832, only passed the second reading by a majority of nine, the Grey administration resigned. The commons thereupon resolved, May 10, 1832, to present an address praying the crown not to summon any

not exist; nay, I declare once more, that I know nothing more hateful than the sovereign aristocracy of six hundred people, who may to-morrow make themselves irremoveable, and the day after hereditary, and, like the aristocracies in all countries, would finally end by arrogating everything to themselves."—*Etats Généraux*, June 16, 1789. The Tudors exercised this prerogative of rejecting bills very frequently; thus Elizabeth, at the close of one session, gave her assent to twenty-four public and nineteen private bills, and at the same time rejected forty-eight which had passed the two houses of parliament. The formula, "*Le Roy s'avisera*," originally implied a serious intent to take the subject under consideration, corresponding to the phrase formerly used by the courts of justice when they required time to consider their judgment: *Curia advisari vult*. In the times of the Plantagenets, together with this form in the case of petitions from the commons, an open refusal of the king occurs; on the other hand, for instance, 37 Edward III. No. 33, it is thus expressed: "Quant au cette article, il demande grande avisement et partant le roi se en avisera par son conseil." Bl. i. p. 184, Note 61.

* Hansard, Ser. iii., iii. 1306.

advisors who had expressed themselves adversely to the Reform Bill.* The king, in consequence, re-established the Grey administration, "for the sake of the tranquillity of England."†

He also authorized his ministers to create, at any stage of the measure, as many peers as they might deem necessary.‡ Although Wellington declared such intended creation a destruction of the constitution, the fear of such a wholesale creation, coupled with Sir Herbert Taylor's letter, led to the passing of the bill. Even at the present day a sovereign may thus exercise control over acts of the legislature, and hence cannot in any sense be said to be a mere "grand functionary."

The prerogative of declaring war and concluding peace has always been materially limited by reason of the absolute right of parliament to refuse the requisite aid. In 1678 the commons declared that they would only grant money on the king making known his alliances. Further, a resolution of the commons, March 4, 1782, declaring that "all those who should advise the continuance of the American war were to be treated as enemies to the king and country," brought the war to a conclusion despite the king's intentions. This branch of the prerogative is substantially exercised by the cabinet; if the king has the parliament, and, consequently, the cabinet on his side, he may, as in the case of George III., carry on wars, however unpopular.§ How the cabinet virtually emancipates itself from the control of parliament, in regard to the exercise of this branch of the prerogative, will be shown in the ensuing chapter. The right of the sovereign to bring foreign troops into England was acknowledged on occasion of the landing of the Hessians in the Isle of Wight. This doctrine, so directly opposed to the spirit of the Declaration of Rights, was triumphantly accepted by the parliament, which was then entirely subservient to Pitt. The premier intimated that "the measure was without danger, as they could refuse the king the money to maintain such troops;"‖ thereby establishing a precedent which might prove the source of great calamity.

As in the matter of legislation, so also in regard to the execu-

* Hansard, Ser. iii., xii. 886.

† In 1831, Sir De Lacy Evans, in a meeting at the Crown and Anchor Tavern, had threatened to march on London with 10,000 men, from Sussex, in case the bill did not pass.

‡ Brougham, *Const.*, 260.

§ In 1795 the people insulted the king at the opening of parliament, shouting out "Peace, peace!" and hurled stones at the royal carriage.

‖ Archenholz, xii. 73.

tive, wherever the word "king" is used theoretically it is fitting to substitute the word cabinet. Hence Duport, in 1790, erroneously affirmed in the French "Constituante": "In England, to the king alone belongs the executive power; once the enactments are passed in parliament, he alone has to carry them out, and for this purpose nominates all the executive, the judges, ministers, and functionaries of the treasury."

That the sovereign may, by means of friendly ministers, remove functionaries not personally acceptable, has been shown in the case of George III.* The influence of the crown within the limits of party patronage is sufficiently great at the present day, but only through the support of the ruling party. Any increase of the influence of the crown by the bribing of members who might afterwards act against the ministers, is little to be feared now-a-days, especially as the financial means of the crown are not so overwhelming.

Even the prime prerogative of the crown, namely, the right of pardon, is exercised within the limits of parliamentary control. During the period when, by reason of the alliance of George III. and North, the prerogative was most fully assured, two chairbearers, named Macquirk and Balf, were to be executed for the murder of one Wilks Krawall; Mr. Boyle Walsingham stated in the commons, that he should like to see these two men pardoned, but did not know in what way he might most suitably obtain their pardon. Sir William Meredith concurring in the wish, applied for the pardon. Lord North replied, "It was unnecessary to bring forward a motion, for he was convinced that the king was inclined to pardon these two unfortunate fellows as soon as he knew it was the wish of the house of commons."† The pardon was accordingly granted. If it was withheld in the case of Byng, notwithstanding the favourable intentions of the house of commons, it arose simply from the fact, that the popular excitement weighed more in the balance than the opinion of parliament.

Against personal insults on the part of the parliament, the sovereign is sufficiently protected by reason of the royalistic feeling which sways all parties. This does not, however, prevent

* Lord North wrote to Fox in 1774: —"Sir, his majesty has deemed it expedient to appoint a new commission of the treasury, wherein the name of Charles James Fox does not occur."

† Walpole, iii. 167.

painful discussions arising touching persons near the throne, as in 1854 respecting the prince consort, and even concerning all the acts and arrangements of the court, particularly so far as they regard the expenditure. Thus in 1777, Burke, in the course of the debate, directly referred to the royal table. The discussion relative to the provision to be allowed for the princess royal in 1857, was not conducted in the most delicate manner possible. The debts of George III. and the bed-chamber question led to acrimonious debates not very loyal in character.

A very interesting phase of English political life is afforded by the fact, that the three Princes of Wales, who afterwards became George II., III., and IV. found themselves continually in the opposition against the measures of their respective fathers, and against those ministers who specially enjoyed their confidence.

The actual conditions of the prerogative are, it is obvious, continually fluctuating, depending greatly on the individuals who are called to exercise it, hence absolute rules as to the virtual extent of the prerogative cannot be laid down. Should England ever find a ruler possessed of not merely monarchical aspirations, but also the far-sighted views and native talent necessary to a great sovereign, kingship would attain to a much higher significance in the realm.

CHAPTER XI.

PARLIAMENTARY GOVERNMENT.

Share of the Several Estates in Parliamentary Government.—Septennial Parliament. —Frequent Dissolutions of late years.—Bribery of Members.—Walpole and Fox on Bribery.—Less Bribery under Pitt the Younger.—The case of Private Bills. —Unpopularity of Parliament.—Importance of the Upper House.—Preponderance of the Commons.—The Lords without Initiative.—The Lower House delegates its Power to the Cabinet.—Junto.—Cabal.—Act of Settlement.—No Responsibility in the Cabinet.—Vote of "Want of Confidence."—Walpole's Overthrow.—Defective Control.—Dictatorship of the Minister of Foreign Affairs. —Government of India.—Dangers arising from the Dissolution of the Company. —Hurtful Influence of Parliament on Indian Affairs.—Chatham on India.—Premiers since 1830.—Composition of the Cabinet.—The First Lord of the Treasury not always the Leading Minister.—Downfall of the Cabinet.—Governments without a Majority in their favour in the Commons.

THE almost absolute power exercised by parliament since the accession of the house of Hanover, has been variously apportioned at different periods between the upper and the lower house as represented by the parliamentary section styled the "cabinet." Macaulay points out, as a consequence of the Revolution,* "that the commons, by the annual discussion of the budget, determines peace and war, makes and unmakes ministers." The house of commons itself was, however, for a long time chiefly in the hands of the aristocracy, and was led by a small oligarchy of whig family connections, in regard to whom Chatham maintained, that they would involve the country in ruin.† The claim asserted by the Long Parliament, that the house of commons ought to represent the nation was deferred to in words during the last century. For more than sixty years the house of commons was ostensibly submitted to the Hanoverian princes, but the members were really nominated by a small and exclusive party, holding complete sway in the upper house. The house was responsible to no one, and did not allow itself to be intimidated by the crown. Publicity of debates was strictly excluded; the members of the

* *Essay on Sir James Mackintosh's Hist. of the Revolution.*

† Mahon, vii.

rotten boroughs had only to court the favour of the aristocrats who returned them; thus, with the increase of the formal power of the commons, the power of the people over the commons daily diminished.* By the agency of this vast ascendancy the enactment for the Septennial Parliament was mainly brought about. Two long parliaments under Charles I. and Charles II. had established, although transiently, parliamentary power. Triennial parliaments followed, but, for parliament to achieve real power, it was needful that it should be either permanent or of longer duration; hence, in 1716, triennial parliaments were abolished, and septennial introduced. Parliaments now last, in fact, about six years, but the first five under Georges I. and II. were of seven years' duration. This period is sufficient to impart a certain stability to the house, and the necessary *esprit de corps* to give *unity and fixity to parliamentary government*. Septennial parliaments,† instead of those party oscillations which prevailed under Queen Anne, presented, under the first two Georges, tolerably even features.

In the elections of 1722, 1727, 1734, the government achieved the victory. In 1741, Walpole only gained a majority of sixteen votes, and was soon after defeated; in 1761, Pitt obtained a very large majority. The Reform Bill has, in this particular, disturbed the old routine, and dissolutions have, of late years, become more frequent. In 1834, 1841, 1852, 1857, 1859, dissolutions were resorted to for the purpose of appealing to the nation; five dissolutions in the lapse of twenty-five years! expedients which, in the last century, were seldom recurred to, and only under exceptional circumstances.

The exclusive parliaments of the last century would have been completely in the hands of the oligarchy or of corporations with vested interests, if the government had not succeeded, by bribery, *and occasionally, also, by the intervention of the aristocracy*, in ruling the house of commons. Bribery of members, as an established thing, came into vogue in 1673. The parliament, then led by Danby, went by the name of the "pensioned parliament." The

* Macaulay's *Essays*, ii. *Essay on Horace Walpole*. Disraeli, *Sibyl*, b. i.

† Junius says in the dedication of his *Letters*:—"With regard to any influence of the constituent over the conduct of the representative, there is little difference between a seat in parliament for seven years and a seat for life; although the last session of a septennial parliament is usually employed in courting the favour of the people, consider that, at this rate, your representatives have six years for offence, and but one for atonement."

leaders of the opposition, Sir Robert Howard and Sir Richard Temple, were appeased by obtaining places, and hence acquired the sobriquet of "placemen."* Walpole was only able to maintain himself by corruption; he even went so far as publicly to declare, that "every man had his price." The sums made use of for this purpose were taken from the secret fund, from which ample source, during the last ten years of his government, more than £100,000 sterling was expended. Chesterfield complained (February 22, 1740) of the manner of the bribery, on the ground of the secret pensions taken from this fund. Walpole never bought up opponents, asserting, in broad terms, that "for one mouth stopped up, fifty others would gape at once."† When, in 1727, he wished to carry his excise bill, even the familiar expedient failed him; his followers told him that he was paying them only at the rate of ordinary follies, but that the present project could not be carried out by any bribery in the world.† Even in the time of the American war, bribery was in the ascendant. Horne Tooke declared that in the commons, seats were publicly hired for legislation, just as at the fairs stalls are hired for cattle.§ In 1780, Fox exclaimed: "The government has not in the whole realm, a single man who supports its measures from inner conviction, and, as the members of parliament walk through this room to take their places, you may ask each one of them what he thinks of the measures of the ministry, of their honourable character, of their wisdom, and he will answer, 'that he despises and abominates them;' one may rest assured that no sooner has the member taken his seat, than he votes in favour of a question for which the minister seems to interest himself. This bribery increases every moment the influence of the crown, an influence so much the more dangerous because it surrounds itself with constitutional forms, in order thereby to inflict surer blows upon the constitution." At the time of the French Revolution, bribery was less rife, as the terrors of the democracy drove the aristocracy to Pitt's standard; later on, when the war became more popular, the public voice of parliament was needful for the support of the leading statesman.

Few will maintain that the tone of public morality in England

* Hallam, *Const. Hist.*, ii. 398.
† Macaulay, *Essays*, ii.
‡ Friedrich ii., *Geschichte seiner Zeit in der Ausgabe seiner Werke in einem Bande*, p. 80.
§ Archenholz, v. 25.

has been improved by the Reform Bill, for experience shows that many convictions allow themselves to be modified by an assured participation in the parliamentary spoil. Open bribery on the part of the government, by the gross means of money, is not so rife as in Walpole's time, simply because the government has not such large funds at its command. By the agency of private bills, however, and the forced outlay of moneys for the ostensible purpose of defeating hostile opposition, parliamentary support is inevitably created.

That parliament, as the governing power of the country, should share all the unpopularity which ordinarily attends governing bodies would seem to follow as a matter of course. Every grievance that an Englishman experiences is straightway ascribed to the tyranny or the negligence of the ruling body; a merchant appeals from the courts of law at Rio and St. Petersburg to parliament; an historical painter complains to parliament that his branch of art does not meet with due encouragement (Macaulay).

Previous to the Revolution the parliament was frequently a demagogic assembly, seeking to anticipate every popular question; since it has taken the goverment in hand it follows every movement with lagging steps and at distant intervals; hence, it has become unpopular, mainly because the mischief which proceeds from it strikes the eye more than the good which it seeks to effect (Macaulay).*

The constitutional centre of gravity has been displaced through the instrumentality of the Reform Bill, and though the influence of the peers upon the composition of the lower house is still power-

* "If England does not share the same fate, it is because we have better *resources* than in the virtue of either house of parliament."—Junius, *Dedication*. "For the last 160 years the public power is in parliament, and since then it has become more and more unpopular; in 1830 it endeavoured, by an innovation, to uphold the public well-being, but, in truth, the more powerful parliament has become, the more is it hated."—Disraeli, *Coningsby*, b. iv., c. 13. In alluding to the trial of Hardy, and the powerful pressure against which he had to contend, Erskine thus characterized the house of commons:—"Under all this, I could have looked up for protection in other circumstances: I could, as defending one of the people in a fearful extremity, have looked up to the people's representatives; to that mighty tribunal, above all law, and the parent of all the protections which the law affords to the subject: I could have looked up to the commons of England to hold a shield before the subject against the crown; but in this case, I found that shield of the subject a sharp and destroying sword in the hands of the enemy; the protecting house of commons was itself, by corruption and infatuation, the accuser, instead of the defender of the subject: it acted as an Old Bailey solicitor, to prepare briefs for the crown, and that in a case which the judges declared to be so new that they were obliged to try experments in the legal constitution to find a way of trying it."—Hughes, c. 87, 1794.

fully felt, the latter possesses, notwithstanding, a certain number of members who are beyond the range of aristocratic control. The press, and the so-called "public opinion" exercise such increased influence that the plenary power of parliament now substantially centres in the commons. The upper house retains, indeed, by reason of the men of talent, statesmen, and erudite lawyers whom it absorbs continually, a very great influence. Lords Stratford de Redclyffe, Normanby, Lansdowne, Brougham, St. Leonards, Derby, Lyndhurst, Westbury, Ellenborough, and Russell, maintain the traditional splendour of an assembly in which the divisions of party do not stand out so sharply defined as in the commons; the ancient renown of the senate remaining ever unimpaired.* At an early period the granting of supplies by the commons was the means of transferring all power to that house;† the greater independence which the lower house has achieved since the Reform Bill renders this power almost unlimited. "It is a fact not to be denied, that, as the kingly power had before descended to a seat lower than that of parliament, the house of peers now took rank in the government below the commons. It will ever stand in history that the house of commons became the true governing power in Great Britain in 1832, and that from that date the other power existed, not by their own strength, but by a general agreement founded on considerations as well of broad utility, as of decorum and ancient affection."‡ In like terms does Disraeli describe the position of the upper house in relation to the lower.§ "All the power of the country is concentrated in the commons; the upper house itself and the monarch have publicly declared and acknowledged that the will of the house of commons is decisive; a simple vote of the commons urged the Duke of Wellington, in 1832, to declare in the upper house, that he was forced to abandon his master in the most difficult and painful circumstances. The house of commons is absolute, *it* is the state."‖ "The pro-

* *Vide* the small tract of Dr. Heinrich Marquardsen, *Das Oberhaus von England*, etc.: Erlangen, 1862.

† Hume observes, touching the power of the lower house—"Under the pretext of advice, the commons can convey covert commands, inasmuch as while complaining of public misfortune and injustice, they can arrogate to themselves all the power of government. The nature of this parliamentary liberty manifestly shows that it cannot be limited by law—for, is it possible to foresee the large number of abuses, and into what portion of the administration they will insinuate themselves? The nature of the human mind allows us to expect that this liberty will make itself felt in the fullest degree."

‡ Miss Martineau, b. iv. c. v.

§ *Coningsby*, b. i. c. vii.

‖ *Ibid.*, iv. c. iii.

sent house of lords originates nothing; it has in fact announced itself as a mere court of registration, and if, by any chance, it ventures to alter some miserable detail in a clause of a bill that excites public interest, what a clatter through the country at conservative banquets, got up by rural attorneys, about the power, authority, and independence of the house of lords."*

The house of peers was not in favour of the abolition of the corn-tax, but the Duke of Wellington declared that it must yield, and it meekly submitted. The censure of Lord Palmerston by *the upper house, in regard to his proceedings in the Don Pacifico* affair, failed to have any effect in the presence of a strong public opinion in his favour, and a vote of approval by the commons. When, in 1860, the house of lords rejected the abolition of the paper-duty, a general storm arose throughout the land, as if the house of peers were bent on destroying the balance of the constitution. "It was contended, with great force, that to undertake the office of revising the balance of supplies and ways and means, which had never been assumed by the lords, during two hundred years, was a breach of constitutional usage, and a violation of the first principles upon which the privileges of the house of commons are founded."† The house of lords is, however, allowed, from *time to time, to exercise a certain power of rejecting*—as erewhile in the case of the "Jew Bill," and the bill relating to "marriage with a deceased wife's sister"—but only so long as the commons are not in earnest in pushing the measures.

The lower house exercises its vast power, in a measure, by *delegation; as a governing body, comprising 658 members, is* unfitted for the actual functions of government, those functions are, accordingly, discharged by "the cabinet;" the parliamentary majority allowing the crown to nominate it from its body. The cabinet, which is under sway of the parliamentary majority, has drawn to itself almost the entire business of the privy council; and thus has the government of the country been transferred from the crown to that parliamentary section, which has insinuated itself into the place of the privy council.

As all the members of the cabinet are likewise privy councillors, the cabinet itself is, at the same time, a section of the privy council.

Charles I., under the name of "Junto," formed a committee

* *Coningsby*, iv. c. iv. † May, *Const. Hist.*, 478.

from the privy council, consisting wholly of his devoted adherents; the name of "cabinet council," as distinguished from a larger body, dating from this reign. The Long Parliament, however, required that all the acts of the king should be treated of before the privy council at large. Later on, Charles II. again established, out of the privy council, a committee devoted to him, under the name of the "Cabal,"—Clifford, Ashley, Buckingham, Arlington, Lauderdale—wholly in the interest of the monarch. The Act of Settlement re-established the full powers of the privy council. Men like Lord Somers did not refrain from expressing themselves energetically against government by means of a cabinet:—"It is an invention of bad ministers," he says, "that peace and war, and matters of the highest moment, should be decided upon by a cabal, and merely passed through the privy council *pro formâ*. If this fashion continue it will never be known who gave the advice."

The respective clause of the Act of Settlement was again abolished by an act of Queen Anne, as the forced consequence of the existing parliamentary government. Parliament, desiring to exercise, or, at least, to possess the sole control of power, could not endure a council of the crown, which the latter might, at pleasure, constitute from men of all parties. As the will of a deliberative assembly only manifests itself by the voice of a majority, the crown felt forced to form, out of such majority, a government charged with carrying out the leading political principles of the ruling party, and charged with directing, at the same time, the details of the administration.

As a result of this innovation the personal responsibility of the ministers has disappeared. The cabinet being unknown to the law by any distinctive character, or special appointment, does not draw up and sign reports of its proceedings; the sovereign is not present when the plans of this conclave are discussed and determined; the results of the deliberations are, however, duly communicated. This custom of holding cabinet councils without the presence of the sovereign originated from the fact of George I. not understanding English. So long as a cabinet minister does not compromise himself in any writing under his signature he is, *de facto*, not responsible for his advice. "During the reign of William III. the distinction of the cabinet from the privy council, and the exclusion of the latter from all business of state, became

more fully established. This, however, produced a serious consequence as to the responsibility of the advisors of the crown, and at the very time when the controlling and chastising power of parliament was most effectually recognized, it was silently eluded by the concealment in which the objects of its inquiry could wrap themselves. Thus, in the instance of a treaty which the house of commons might deem mischievous and dishonourable, the chancellor setting the great seal to it would, of course, be responsible; but it is not so evident that the first lord of the treasury, or others more immediately advising the crown on the course of foreign policy, could be liable to impeachment with any prospect of success for an act in which their participation could not be legally proved."*

"I do not mean that evidence may not possibly be obtained which would affect the leaders of the cabinet, as in the instances of Oxford and Bolingbroke, but, that the cabinet itself, having no legal existence, and its members being surely not amenable to punishment in their simple capacity of privy councillors, which they generally share, in modern times, with a great many of their adversaries, there is no tangible character to which responsibility is attached; nothing except a signature or the setting of a seal, from which a bad minister need not entertain any further apprehension than that of losing his post and reputation."† The privy council is only legally responsible in such cases where it has authorized a despatch to which the lord chancellor has refused to affix a seal.‡

It is not merely the difficulty of discovering the offending parties, by reason of the secrecy with which the cabinet proceedings are conducted, which has done away with ministerial responsibility. Two parliamentary parties have, since 1688, divided power between them. On losing the majority, the party in power relinquishes the treasury bench, and the opposition assumes possession; hence the loss of power is not the result of any wrong committed, but merely the change of government or opinion, which carries with it the parliamentary majority. The opposing principles of the respective parties have, since the revolution, been toned down, and, despite all the virulence of party strife, never proceed to violent extremities. Certain broad liberal principles are recog-

* Hallam's *Const. Hist.*, iii. 186.
† Bowyer, 180.
‡ *Somers' Tracts*, xi. 270. Somers himself was impeached for having affixed a seal without the instrument being properly filled up and signed.

nized by both parties, and so long as these are not violated, one party acquits the other of all guilt. In lieu of the capital sentence the vote of "want of confidence" has been substituted, and instead of the axe and the block, the temporary disfavour of the imperial parliament.

Even in 1742, Robert Walpole had cause to fear an impeachment; yet, violently though the multitude outside the house clamoured for blood, Walpole's opponent, Pultoney, was inclined to mercy, and declared, "he did not wish to destroy Walpole's person, but only his power." The inquiry which had been resolved upon eventually fell to the ground; Pultoney became Lord Bath, and Walpole, Lord Orford, both subsiding into the house of peers, the peaceful arena where the vote of want of confidence is now wont to be reverently recorded.*

"Since Walpole's downfall it has been the practice," says Macaulay, "although not strictly according to the theory of our constitution, to consider the loss of office and the public disapprobation as punishment sufficient for errors in the administration not imputable to personal corruption."† It cannot be gainsaid that violent acts against individual rights can no longer occur as they did under the Stuarts on the part of royal ministers. Whether, as Bowyer contends, impeachment of ministers has become wholly useless is more than doubtful, for many Englishmen have long thought otherwise. Fox, who previously was so eager for the impeachment of Hastings, on the 13th of April, 1806, styled an impeachment "a clumsy contrivance."

Not only has the impeachment of ministers, but also all effective control over the transactions of certain departments been destroyed by means of party government. Parliament, which delegates its authority to ministers, is able, when they are no longer found fitting instruments, to receive them back into its bosom, all proceedings which might have been taken against a minister being thereby prevented. So long as a minister has the

* Mahon, iii.

† Macaulay, *Essays*, i., on *Hallam's Const. Hist.* In the preface to his *Letters*, Junius says: "Our ministers and magistrates have, in reality, little punishment to fear, and few difficulties to contend with beyond the censure of the press and the spirit of resistance which it excites among the people. While this censorial power is maintained, both minister and magistrate are compelled, in almost every instance, to choose between their duty and their reputation. A dilemma of this kind will not, indeed, work a miracle on his heart, but it will assuredly operate in some degree upon his conduct. At all events, these are not times to admit of any relaxation in the little discipline we have left."

majority of the house in his favour, it protects him from all culpability; if a ministry is overthrown, all its previous official doings are, according to Sir Robert Peel's theory, buried in oblivion; "*for*," *contends that statesman*, "*it is not parliamentary usage for* ministers who command a considerable majority in the house, who have access to all the secrets of office, it is not customary for them to employ all their political power in condemning the policy of their opponents."* Hence, we may apprehend of how little moment it really is (as Lord Brougham contends), that "ministers are not only responsible for the legality but also for the constitutional character of their proceedings."†

Despite the protection which the "*out*" and the "in" play affords, despite the protection relied on by all parties in the saving principle of "Live, and let live," ministers never cease speaking of this responsibility of theirs, and very large use they make of this most meaningless word,‡ in order to maintain official secrecy. Let a question be addressed to them upon a matter of foreign policy, the ready-made declaration is at once heard: "Their 'responsibility' prevents them from making communications to the house." Should parliament ultimately obtain the information, and if, as in the case of the Affghan Blue-book, ministers are forthwith attacked, the timely explanation is resorted to, "that it is foolish to rake up old stories."

To discuss the value or otherwise of parliamentary government is beside our present purpose; we content ourselves with affirming that by its instrumentality Walpole succeeded in establishing the line of succession in the house of Hanover, a result which, in regard to the assurance of national freedom cannot be rated too high.§ Although the Duke of Newcastle—of whom George III. had said, "that he was unfitted to be the chamberlain of the most insignificant German prince—was for thirty years secretary of state and first lord of the treasury,‖ yet under such a man the splendid genius of the elder Pitt put forth its wondrous powers. Under Pitt and his son, England became not only the first naval power,

* Hansard's *Parl. Debates*, *H. C.*, March 1, 1843.

† Brougham, 136.

‡ "An authority tells us the house wishes to deprive the ministry of their responsibility; this would actually be *stripping the naked*."—*Sat. Rev.*, March 23, 1861.

§ "Of politics Walpole understood *nothing*; *on one occasion*, when *several* ladies invited him to the gaming table, he replied, 'Play and Europe I relinquish to my brother Horace.'"—Friederich des Grossen *Werke*, 89.

‖ Macaulay, *Essays*, ii., on *Walpole and Chatham*.

but also the wealthiest kingdom in the world. Under their parliamentary rule, England, despite the dark and foul spots in her social features, despite her proletarian class, was an abode of well-being and of civil freedom. While investigating the actual relations, however, the question mainly calling for solution is, how far the people of England takes the lead in controlling the policy of the realm, or how far the parliament predominates.'

Excepting in periods of great excitement, as in the time of the French Revolution, when even parliament itself lent a hand to state prosecutions, ministerial power is restricted in relation to the national freedom. By the introduction of the "cabinet," the authority of the secretary of state has, it must be owned, greatly increased;* but, as compared with continental states, such authority, in regard to internal administration is very limited. In the matter of foreign affairs, however parliament may change the dictators to whom it has confided its foreign policy, the dictatorship itself continues in existence despite the change.

Parliament, as with every great assembly, is little calculated to rend asunder the web of secret diplomacy, simply from the fact of its not being able to enter into the intricate details of diplomatic negotiations. "In every other department of its government† the nation insists on being made acquainted with the progress of legislation; in foreign affairs, alone, it submits to be led in the dark. This pernicious system of secrecy (which is continually asserted, but never proved, to be necessary) shelters the incompetency of diplomatists, renders England too often the victim of foreign fraud, and the unconscious agent of foreign tyranny; and what is, perhaps, the worst result of all, habituates the people to regard international laws as compacts to which they are not parties, and respecting which they have, therefore, no moral obligations."

On the 19th of March, 1861, Mr. Horsman complained, in the house of commons, of the secret procedure of diplomacy, and especially, that so much business of the government was conducted by way of correspondence. What results from this non-acquaintance of the parliament with foreign policy? While the devoted members are keenly struggling about a penny in the pound, diplomacy is elaborating schemes, the consequences

* Hallam, *Const. Hist.*, iii. † Cox, *Brit. Com.*, 499.

whereof are streams of blood, the draining of the hard earnings of a tax-paying population! "While, in the parish, people are playing the niggard over a sixpence, the house of commons are found passing votes with respect to matters that have been already done *out of hand; and, without the trouble of any deliberation whatever,* are mulcted in some £10,000,000 sterling, for a little interlude that has been played out during the recess."* The Persian war, in 1857, was declared, commenced, and concluded without any communication whatever having been made to parliament; while extensive armaments were fitted out without the house having given its assent to any measure of the kind. The ministers defended themselves on the ground that they were merely exercising the prerogative of the crown;† but seeing that the crown of England is deprived of all personal right of government, the prerogative of the crown in such case means nothing but the absolutism of the cabinet. To affirm that it is merely in the matter of foreign affairs that the government avoids control is a sorry consolation to the general public; what, then, it may be asked *are* foreign affairs to an empire on which the sun does not go down, an empire with more than 180 millions of Asiatic subjects? Have not Manchester and Birmingham felt the consequences of the Indian Mutiny? and do people fancy that they are advantaged by the fact of the direct government of India having been made over to a parliamentary conclave?

The act 21 and 22 Vict. c. 106, transferred the government of India to the minister for India (see Book III. c. iv.), who is now, in reality, the absolute master of the empire; the council appointed to assist being a mere cipher. Little has been changed by the new enactment in regard to the general administration. The president of the late board of control was formerly in all important questions the true regent or king of India,‡ and the officials of the East Indian Government mere puppets—the details of administration actually depending on the directors. "My worthy general," wrote Sir John Hobhouse to Sir W. Napier, "your brother seems not to know that the 'secret committee of the company' is really the 'president of the board of control,' and, that if he feels himself aggrieved by any act of the committee I am responsible; the

* Bucher, 49.
† *Ann. Reg.*, 1857, 142.
‡ *Selections from the Papers of Lord Metcalfe*, 164. London, 1855. Mr. Roebuck at the East India Reform Meeting, Dec. 17, 1857.

second despatch of the directors of the company of which he so much complained was written by myself."* While the company promoted its officials by seniority only, the board of control acted according to the system of parliamentary patronage;† the highest functionaries, who could do most mischief, were chosen on the score of ministerial party interests; if they made any mistake, their apologists were at hand to hush the matter up.‡ So long as the Indian government was independent of the ministry the latter might hope, by hiding the defects of the East Indian administration, to render itself somewhat popular. At times the ministry found its advantage in instituting an inquiry; occasionally, too, a parliamentary control was admitted, and if a fault were committed it was, as a matter of course, the result of over zeal.§

Since the time of Pitt's bill no parliamentary inquiry had taken place.‖ The court of directors gradually subsided into a petty clique, which the ministers frequently made use of, as their own ready tools.¶ Under the old system the ministry of foreign affairs, and the board of control, involved the possessions of the East India Company in perilous and costly contests. The Afghan war in 1839 was conducted without the concurrence of the East India Company, and the policy of the government was expressly condemned by the court of directors. The budget of England and that of the company were saddled, notwithstanding, with the charges of a ruinous undertaking, of the commencement whereof no one in parliament had any misgiving.**

"I can never think of any change in Indian affairs," wrote Lord Metcalfe, on the 20th of June, 1820,†† "which would not be a gradual sinking from bad to worse." The dissolution of the company, and the complete transfer of the government to the crown was pointed out by the same statesman as a transfer of the government to the parliamentary majority; "if such a result were arrived at, ten years further rule on the part of England could scarcely be looked for."‡‡ The terrible revolt of 1857 evoked a universal

* *Life of Sir C. J. Napier*, 57.
† Mill, *Hist. of India*, iv. 557.
‡ *Ibid.*, iv. 560.
§ *Ibid.*, iv. 570.
‖ *Ibid.*, iv. 571.
¶ *Ibid.*, iv. 578. Mr. Kaye, *Administration of the East India Company*, 181, 1853.

** Col. Sykes in the house of commons, March 10, 1861.

†† *Selections from the Papers of Lord Metcalfe*, 150. London, 1855.

‡‡ Metcalfe, 150—164. "We may be blown away by a single storm, for we have not struck root in India; the well-inclined natives are indifferent to any change of government, and in the north-west provinces there is scarcely an indi-

outcry in the English press against the company, as being totally unfitted to guide the interests of India. Leadenhall Street was made the scapegoat, and the India House was sacrificed to the wrath of the nation. Disraeli, in the "Press" of the 5th of September, 1857, gratuitously affirmed, that the guilty parties were to be found in Downing Street. "Downing Street" soon after changed hands, and Disraeli himself, as minister, helped to destroy the company.

The entire patronage of the government of India, in all its branches, has now been transferred to the cabinet, and the last remnant of the power of the company has entirely disappeared; the secretary of state has become "responsible" to parliament. Parliamentary control, even when parliament has the best intentions, is naturally of little avail if the members are not party men. What do so many railway directors, lawyers, and country gentlemen understand about the difficult and complicated relations of India? Parliament must, consequently, in the matter of Indian affairs, look about for guides, but they are not to be met with, either amongst the ministers or amongst the organs of public opinion, which are ever so fully informed upon all questions of the day, and ever ready with their advice—not even in the "Times," which is up to the level of every occasion. The council, comprising persons of experience, of men fully acquainted with India, such as Sykes, Lawrence, Outram, Ellenborough, the late Lords Dalhousie and Canning, opposed the bill for the amalgamation of the European troops of the late company with the English army. The "Times" was, however, in favour of this project, and the bill, as a matter of course, became law.* Incapable though parliament is, of preventing mischief in India, even when best inspired, yet it can, by means of the pressure which it exercises upon ministers, create complications, and has already caused much harm. Religious fanaticism has often found partisans in parliament, and impelled the government to favour the ill-directed efforts of proselytizers.†

vidual who does not expect advantage from a change," p. 143. "Our position is so precarious that a very small mistake might bring about our expulsion, and who knows whether events do not themselves urge us on to mistakes? The fault of this precarious position is, that our power does not repose on actual strength, but on mere display. Empires become old, decline, and perish. Our empire in India can scarcely be called old, but it seems destined to have only a short existence."

* *Parl. Rem.*, 1860, iii., 154, 175, 201, 211.

† The minutes of evidence of the year 1838, afford a sufficient insight into the danger which the missionary system (as then conducted) entails. A few enthusiasts took to preaching publicly in Benares

Since the sanguinary suppression of the insurrection of 1857, the hatred cherished by Englishmen in India against the natives has naturally deepened, and threatens to lead to fresh entanglements. The English government has hitherto shown sufficient wisdom to withstand the efforts that have been made to emancipate the Europeans and Americans in India, entirely from the jurisdiction of the native*—a measure in itself calculated to exempt Europeans from punishment, by reason of the restricted number of European judges. The most enthusiastic adherent of the present form of government in England must admit that the absolute rule of a party cabinet, subject to frequent change, is unfitted to deal with Indian affairs, and with the interests of a population comprising 180,000,000, and that parliament is, of course, unable to control such rule. "Indian affairs are, according to my ideas of greatness, the most important of all our concerns." This saying of Chatham's is still more true at the present day. On the maintenance of the Indian empire materially depends England's status in the world.

The functions and responsibility of the cabinet having been discussed, we now proceed to examine the manner of its formation. When a ministry is defeated, the queen, on the advice of the retiring minister, ordinarily summons the leader of the opposition, who thereupon takes steps to form a new cabinet, and generally assumes the office of first lord of the treasury; through the latter the ministry enters into communication with the sovereign. Since the accession of William IV. the following have been at the head of the treasury:—

1830, Earl Grey.
1834, Viscount Melbourne.
1834, Duke of Wellington.
1834, Sir Robert Peel.

against the false religions. Lord Teignmouth, Lord Munro, Colonel Malcolm, and people of that class, rightly opposed themselves to the unconditional admission of Europeans, and especially of missionaries, into India. (Wilson, *Hist. of Ind.* i. 518.) The number of persons baptized, according to the "Proceedings of the Church Missionary Society," is very insignificant. In the Punjaub, according to the missionary reports, there were converted in 1856-7—

1. In Umritsir, fifty-four persons, and twenty-five adults.
2. In Kangra, twenty-one in all.
3. In Mooltan, none.
4. In Peshawur, "a few."

On the 12th of June, 1857, Lord Ellenborough said, in the house of lords—"If the English were driven out, scarcely a dozen sincere converts would remain behind."

* "Times," Nov. 24, 1859.

1835, Viscount Melbourne.
1841, Sir Robert Peel.
1846, Lord John Russell.
1852, Earl of Derby.
1852, Earl of Aberdeen.
1855, Viscount Palmerston.
1858, Earl of Derby.
1859, Viscount Palmerston.

The following have usually a seat in the cabinet:—The lord chancellor, the chancellor of the exchequer, the five secretaries of state (home, foreign, colonies, war, and India), the first lord of the admiralty, president of the board of trade, and the lord privy seal, for the time being (June, 1861) the paymaster-general, postmaster-general, chief secretary for Ireland, the chancellor of the Duchy of Lancaster, and the president of the poor-law board. Until 1816 the commander-in-chief, likewise, belonged to the cabinet. On every change of ministry sixty functionaries, including the members of the cabinet, relinquish their posts, according to their respective departments; viz., three junior lords and two secretaries of the treasury, the junior lords of the admiralty, the president and secretary of the poor-law board, the attorney-general, solicitor-general, judge-advocate, the lord-lieutenant of Ireland, lord-advocate and solicitor-general for Scotland, as well as all the higher court functionaries.

The cabinet constitutes, however, according to the good pleasure of the party chief who forms it, a wider or narrower circle. In 1834 the Duke of Wellington was first lord of the treasury, and combined, likewise, in his own person, the several branches of the secretaryship of state; the lord chancellor, Lyndhurst, was his only colleague.*

In the Aberdeen administration Lansdowne held office without a seat in the cabinet. The postmaster-general, president of the board of trade, and the chancellor of the Duchy of Lancaster, had not a seat in the last cabinet; whereas in the present ministry, the representatives of these departments have a seat. All the members of the cabinet are privy councillors, and, as such, take the prescribed oath. Every ministry comprises statesmen who, with regard to certain questions of the day, are

* May, *Const. Hist.*, i. 123.

fully agreed, and who, in relation to their professed opinions, have the expectation of receiving sufficient support from the house of commons. Each minister attends, independently, to the business of his own department.* On account of the disorganization of the party system "upon questions," in other words, questions in relation to which every member of the ministry is at liberty to hold his own individual opinion, have come into favour. Lord Brougham blames this in the roundest terms,† as thereby people renounce fulfilling their duties to the government while retaining the advantages and profits of power. It is exactly in regard to the most important questions that the ministers, of all Englishmen, have no opinion, and this arises simply from the fact that ministers prefer retaining office to doing their duty.

When a ministry, upon certain important questions, fails to secure a majority, it either retires from office or applies to the crown for a dissolution. Occasionally, however, even important questions are not treated as cabinet questions; thus, in 1710, the ministry did not retire, although the Peerage Bill, which it had introduced, was rejected by a majority of 269 against 177. Walpole attempted, though unsuccessfully, to retain office in 1742, with a majority of one. Pitt who, in 1784, had the king and country with him, withstood five resolutions of the commons, which were passed at first by a majority of 160. The commons declared the continuance of his ministry unconstitutional, as he had not the confidence of the house, and frequently applied to the crown, by way of address, to dismiss the minister, but without success. From the 12th of January to the 1st of March, the opposition dwindled from 160 down to one—of course, by means of *the* well-known expedient.‡ By the dissolution of parliament in 1841 a powerful majority was returned against the Melbourne cabinet; an amendment to the address by the opposition, having been adopted in the lords by a majority of seventy-two, and in the commons by a majority of ninety-one. Although the members of that ministry were personally acceptable to the queen, she thus expressed herself: "Ever inclined to esteem the advice of my parliament, I shall at once give attention to the formation of a new government."

By reason of the actual break-up of parties it frequently

* Macaulay, *Hist.*, vii.
† Brougham, *Const.*, 64.
‡ Anstey, 295.

occurs that ministries, notwithstanding repeated discomfitures, continue in office until a direct vote of want of confidence turns them out. Thus, in the year 1851, the Russell cabinet was continually in a minority; in consequence of Locke King's motion on electoral reform, it resigned, but as a new ministry could not be formed, the previous administration was, in a short time, reinstalled, and remained in power until Lord Palmerston, with the aid of the tories, succeeded in overthrowing it in 1852. The Derby administration (1858-9) only governed by the sufferance of the majority. On a dissolution and new election, it was displaced, not on account of any unacceptable procedure, for the cabinet had thoroughly accommodated itself with the majority, but simply because the ministry did not belong to the party of the majority.

CHAPTER XII.

PARTIES AND PUBLIC OPINION.

Party System.—Its Value or otherwise.—The whole Nation swayed by Party System.—Trial of Queen Caroline.—Walpole's Impeachment.—Cavaliers and Roundheads.—"Addressers" and "Abhorrers."—"Whigs and Tories."—Difference of Principles.—Democracy of the Jacobites.—"Hanoverian" Tories.—Republican Whigs.—Opposition against Walpole.—Parties from 1702 to 1780.—Preponderance of the Tories since 1780.—The Whigs and the Reform Bill.—The Tories supporters of the Policy of the Puritans.—Sir Robert Peel.—Protectionists.—Peelites.—"Palmerstonian Whigs."—Radical Aristocrats.—Benthamites.—Hume's Little Charter.—Manchester Party.—The Irish Brigade.—Chartism.—Public Opinion.—Want of reliable Information.—Alternating Influence of the Press and "Public Opinion."—The "Times;" Its Behaviour in the Matter of the New Poor Law; Its Supremacy.—Parliamentarism Jeopardied by "Public Opinion."

As a consequence of parliamentary government there exist exclusive groups or sets, which are always striving for the possession of the treasury bench. Before the harmony of parliamentarism was disturbed by the Reform Bill, two great parties only were taken account of, the "whigs" and the "tories." The value or otherwise of such party system has been abundantly controverted. Parliamentary government would seem to stand in need of fixed parties; at all events, from this stand-point, Burke,* Russell, and Brougham are right, when treating of the party system, and yet the defects of parliamentary rule cannot be gainsaid. "For no one will contend that it is the best conceivable system which involves the resignation of competent and incompetent executive officers together, an able chancellor of the exchequer with an incompetent postmaster-general, a learned and upright lord chancellor with an unsuccessful home or colonial secretary."† Even Brougham, who, with a certain air of resignation, deems parliamentary rule a matter of necessity, depicts its consequences in the most striking colours; the game which falls a sacrifice to party are the noblest principles, the nation is deluded, and its aristo-

* "The best patriots in the greatest commonwealths have always commended and promoted such connections. "Idem sentire de republicâ" was with them a principal ground of friendship and attachment; nor do I know any other capable of forming firmer, dearer, more pleasing, more honourable, and more virtuous habitudes."—Burke.

† Cox, 122, 123.

cratic masters ascribe to it their own opinions. The nation itself is nothing but a toy and a tool of the aristocracy.*

Party system pervades the whole English nation, and manifests itself either by an adherence to a certain set of principles or persons, or to both. Party spirit is ever alive upon all occasions; people who style themselves "independent" usually declaim so violently against parties, that one may perceive how thoroughly party spirit is embodied in Englishmen, since it even gives a party colour and tone to would-be neutrals. Party spirit warps all judgment, it dissolves old connections, and combines the most heterogeneous elements. The "Times" truly said in 1854—"If the whigs had not been in office in 1848, Lord John Russell would have declaimed on Penenden Heath to excited mobs, and Mr. Tuffnell would have pelted the windows in Trafalgar Square." "Can any one be so blind," says Brougham,† "as to believe that, if Burke and Fox had been ministers of George III. they would rather have resigned than make an attempt to subdue America?" "No," says Junius; "Mr. Pitt and Lord Camden were to be the patrons of America, because they were in the opposition."

Party spirit avails itself of every possible expedient; thus, the whigs attempted to get into office by means of the trial of Queen Caroline; Cobbett, the demagogue, laboured for the queen in the interest of the radicals, in order to prevent any compromise being effected between her and the king, and his endeavours were crowned with success.‡ While George IV. was still Prince of Wales *and a whig, Eldon, Percival, and Canning were the friends* of the Princess of Wales; but when the regent let the tories into office, Eldon and Percival fell away in their devotion, and were anxious to have nothing more to do with her.§ When Lord Melbourne was premier, certain exclusive tories, in order to drive him from office, induced a Mr. Norton to bring an action against the minister for criminal conversation‖ which it was alleged he had had with Mrs. Norton. When it was sought to impeach Walpole, a bill of indemnity to witnesses, or, in plain words, a bill to reward all who might give evidence, true or false, against the Earl of Orford, passed the commons, but was rejected by the lords.¶

* Cox 122, 123.
† Brougham, *Const.*, 375.
‡ Cobbett, *Hist. of Geo. IV.*, secs. 425, 428, 454.
§ Brougham, *Statesmen*, ii., Geo. IV.
‖ A Letter to the Queen by Mrs Norton, 65, 66.
¶ Macaulay, *Essays*, ii., on the *Earl of Chatham*.

Even at the present day there are family alliances of whigs and tories, who remain the chief actors in the political drama, although scarcely representing principles, but persons only; a time may come, however, when the persons may again represent the leading principles of the respective party. "Cavaliers," and "*Roundheads,*" *served to mark out the parties in the Long* Parliament, and the civil war. At the time of the Exclusion Bill people first began to speak of "Addressors," the supporters of the Exclusion Bill, and "Abhorrers," the royalist petitioners against the bill.* Very soon, however, the two parties exchanged these for the classic "whig" and "tory,"† which, in their application to English factions, were first heard of in 1679. "Whig" was taken from a mixed drink which the Scottish Covenantors drank in their wanderings, composed of water and sour milk, and called "whig," or "whey." "Tory" was the name of an Irish "robber,"‡ who, during the civil war, robbed and plundered on every hand, professing to be in arms for the maintenance of the royal cause. "Whig and Tory," says an English writer, "were two good, useful, and simple designations; they were more names, and, in fact, honourably acquired, as the parties did not adopt them arbitrarily, but their opponents had imposed them."§ In times of quiet and moderation fixed political principles do not lie at the root of party distinction. Only at different periods have the respective family alliances become supporters of certain marked questions of the day.‖

Mahon maintains¶ that the difference between whig and tory, consisted in this, that tories were afraid of popular outcry, the whigs, on the other hand, of the encroachments of royal power. Now-a-days the whigs assuredly have no such fear, and in the 18th century tories have acted frequently as more demagogues; whereas, in the present century, they have often based their reliance on the working classes. The contrast has been rightly, because negatively, indicated by Hallam,** according to whom "a

* D'Israeli, *Curios. of Lit*, iii. 99.
† Hallam, *Const. Hist.*, ii. 593.
‡ D'Israeli, *Curios. of Lit.*
§ Urquhart, *Familiar Words*, 180.
‖ Brougham.—"The history of the English party system is nothing more than the history of certain great people and powerful families, who strive for power and position on the one side, and of a few others as opponents on the other side; just as in the case of the history of the Plantagenets, the Tudors, and the Stuarts. Nothing is more inconsistent with truth than to lay these principles as the foundations of the disputes." This applies perfectly to the chief epochs of parliamentary government since 1745.
¶ Mahon, I.
** Hallam, *C. H.*, iii. 199.

favourer of unlimited monarchy was not a tory, neither was a republican a whig;" and while to the tory the constitution, inasmuch as it was the constitution, was an ultimate point, beyond which he never looked, and beyond which he thought it altogether impossible to swerve, a whig deemed all forms of government subordinate to the public good, and therefore liable to change when they should cease to promote that object. "It has been common to speak of the whigs as an aristocratical faction. Doubtless the majority of the peerage, from the Revolution downwards to the death of George II., were of that denomination; but this is merely an instance wherein the party and the principle are to be distinguished."* In their principles the whigs were often very radical, and in the 18th century wholly republican; but in regard to the division of parliamentary spoil, they have always been more exclusive than the tories.

While the whigs under William III. learned moderation in office, the tories found it convenient to affect the language of liberty, as they were in opposition. The resistance which James II. met with in regard to his worst acts was always more respectful than William III. encountered, during the days of his power from his own dependants, or even from the Jacobites. How thoroughly the earlier principles of the parties were at that period displaced, is apparent from the fact that under Anne and George I. the whigs were for "septennial," the tories for "triennial" parliaments; the whigs for protective tariffs, the tories for free trade; the whigs for standing armies, the tories against them, and for the maintenance of the militia. The whigs were the most violent "no Popery" men; the tories had no objection to an alliance with the Jacobinical Catholics;† finally, the tories were for all possible retrenchment, as well as against rotten boroughs,‡ which at that time were mainly in the hands of the whig aristocrats. Under William III. and Anne the moderate tories rallied to the Revolution, inasmuch as, true to their theory of passive obedience, they contended that in the year 1688 they had not offered any resistance. A clergyman named Sacheverell was impeached in the reign of Anne, not for impugning what was done at the Revo-

* Hallam, *C. H.*, iii. 201. This designation is no longer applicable in the present day to parties, but is often well applied to individuals.

† Schlosser, iii. 333.

‡ Macaulay, *Essays*, ii., on *Sir J. Mackintosh*.

lution, which he affected to vindicate, but for maintaining that it was not a case for resistance to the supreme power, and consequently no exception to his tenet of passive obedience. The managers of the lower house proved that at that period resistance had been offered. His tory counsel declared, "that resistance to the supreme power was, indeed, utterly illegal on any pretence whatever, but that the supreme power in this kingdom was the legislature and not the king, and that the resolution took effect by the concurrency of the lords and commons."* In like manner the whigs, under Fox and Sheridan, supported the right of the Prince of Wales to the regency; William Pitt, who eventually became the leader of the tories, and conservative representative of corporate rights, contended for the absolute power of parliament alone to choose the regent, without the king having consented to a regency law.

After Marlborough's downfall the upper house remained whig, the lower house was thoroughly tory, almost Jacobite. "The Jacobites, or supporters of the Stuarts, uttered, both in parliament and through the press, very democratic language. Johnson, who was a Jacobite, declaimed, like a thorough republican, against pensioners, functionaries, armies, budgets, taxes, and excise. The Jacobites generally opposed the exercise of the royal prerogative. They were in favour of the crown, but for the crown upon the right head.† Their democratic opposition had, however, a still deeper importance, inasmuch as they, as conservatives, contended for the maintenance of the earlier municipal liberty. Tories who were in favour of the House of Hanover, were termed, by way of distinguishing them from the Jacobites, "Hanoverian tories." To the tory party, under the first two Georges, belonged the greater part of the country gentlemen and farmers; the whigs were supported by most of the great families, and the intelligent middle class.‡ Since 1767 the tories have been won over to the Hanoverian dynasty, especially through Pitt's splendid administration.

How little the whig aristocrats in the 18th century were

* Hallam, *Const. Hist*, iii. 206. The lords voted Sacheverell guilty by a majority of sixty-seven to fifty-nine, several voting on each side rather according to their present faction than their own principles. They passed a slight sentence, interdicting him only from preaching for three years.

† Hallam, *Const. Hist.*, i.

‡ *Bolingbroke's Letter to Sir William Wyndham*, p. 20, London, 1753.

inclined to monarchy may be gathered from "Walpole's Memoirs."* He himself supported the peaceful republicans, who have no objection if the spectre of a monarchy, like Banquo's ghost, take possession of the empty throne, provided the craver after honours, the murderer, the tyrant, do not strive for it; who, in a word, allow the *name* of king to be used, but exclude the reality of a king, etc. The phantom of a republic was, however, so little awe-inspiring, that the first two Georges were right in preferring a republican to an individual who exalted their prerogative overmuch, became, subsequently, a tory, and who harboured doubts as to the lawful origin of their power.†

Horace Walpole, despite his opinions, held high offices of state, although it was generally known that he had suspended at the head of his bed a copy of the sentence by which Charles I. was condemned to death, with the inscription, "Major Charta." Lord Strange, another whig aristocrat, maintained, in the parliament of 1763, "that it was a principle of the constitution that parliament and the people could judge the king."‡ The tories, who for seventy years were almost continually in opposition, became, during their political seclusion, the representatives of popular prejudices. They firmly believed that all fundholders were Jews, opposed their naturalization, and raised an outcry against the introduction of the Gregorian calendar.§

The nucleus of the opposition against Walpole consisted mainly of Jacobites, moderate tories, whig "patriots," by their enemies styled "place-hunters," and finally, of the younger whigs ("the boys"), who had very republican tendencies. After Walpole's downfall the extreme whigs and tories demanded at the same time the nomination of the higher functionaries by the parliament, the abolition of the standing army, and triennial parliaments; thus difficult had it become to discover any marked distinction between whig and tory shades of opinion.

On the accession of George III. the main points of difference between whigs and tories entirely disappeared.‖ The tories still constituted but a small section;¶ among the whigs, who were split

* *Walpole's Memoirs*, i. 121.

† Macaulay "Nothing was so displeasing at court as 'the kingdom by the grace of God,' and its upholders"

‡ Walpole, iii. 118.

§ In Hogarth's capital picture of "Going to the Poll," we notice the banners of the cries "No Jews!" and "Give us our eleven days!" the people believing that by the abolition of the Julian Calendar, eleven days were stolen from their existence.

‖ Schlosser, iii. 333.

¶ Mahon, v.

up into several small parties, we first happen upon "the king's friends." In the interval between Bute's and North's administration, these were not by any means friends of the ministers; they distinguished themselves by a special veneration for the royal power, and by marked confidence in the personal character of the king. The other small sections into which the whigs of 1767 were divided, and which carried on violent private feuds, followed the standard of Rockingham, Bedford, Pitt, or Grenville.* As almost all the nominations to the upper house down to the time of the French Revolution fell to the whigs, this party could reckon upon a safe majority in the lords, and likewise ruled the commons.

The French Revolution completely changed the relations of the two parties; Pitt, in opposition to the democratic innovators, allied himself with the tory landed aristocracy, and the tories' party, which, in opposition to the Revolution, again became conservative, and increased in power through the pressure of events.† The regency and the victory over Napoleon favoured the further development of the tories,‡ until, in the reign of George IV., this great party broke up, by declaring, under Canning, against the holy alliance; and, under Peel and Wellington, in favour of Catholic emancipation.

The Reform Bill was carried by the whigs against a house of lords which, in the lapse of forty years, had become thoroughly tory.§ The whigs at that period succeeded in obtaining office, not by means of a parliamentary victory, but under the pressure of events. How thoroughly the tories have abandoned their theories as supporters of legitimist pretensions is shown by Sir Robert Inglis's speech in the debate on the Reform Bill:—"I maintain," he said, "that the old tory party are the representatives and successors of the great men of the Revolution, for I am not aware of any doctrines held by them which are not now held by the tories."‖ Since the Reform Bill the whigs style themselves "liberals," the tories, "conservatives." The opposing principles, in consequence of Sir Robert Peel's reforms, are not substantial differences; the great conservative party, after holding together for four years, split up when Peel, in 1846, with the help of the whigs and radicals, and the support of the middle classes outside

* Mahon v. May, *Const. Hist.*, i. 7.
† May, *Const. Hist.*, i. 74.
‡ *Ibid.*, i. 107.
§ May, *Const. Hist.*, i. 255.
‖ Hansard iii., ix. 483.

the house, carried the bill for the abolition of the corn-tax. A portion of the tories rallied under a new banner, as "protectionists;" *Disraeli and Stanley (Lord Derby) remaining true to each* other. On the downfall of the Derby administration in 1852, a new position was assumed by the tories, and "protection" was shelved. Seeing that a tory ministry abolished the property qualification for members of the House of commons, and the East India Company, and considering that Disraeli, the many-minded, has become the leader of the tories, there is little cause to speak of either "conservative," or of "liberal." Parties are now as devoid of measures and objects as under George III., prior to the Revolution of 1789; foreign politics at most creating some slight distinction between tories and Palmerstonians. The opposition still endures, however, amongst the several classes of society; country gentlemen and farmers are mainly tories, whereas the old whig families rally round the Russell and Palmerstonian flag.

From the tories some fifty talented men separated, together with Sir Robert Peel, and, upon his death, received the sobriquet of "Peelites;" they are utilitarians in the Benthamistic sense, are much inclined to continental bureaucracy, and have become gradually merged in the whig party. The bulk of the latter party is now led by a man who did not originally belong to it; this fact has also materially contributed to the decomposition of a party which, equally with that of the tories, has only served to show the stagnation of public life in England.

There has not been a republican party in England since 1688; during the reign of Anne, a few extreme dissenters and, subsequently, a few distinguished aristocrats, were probably imbued with republican inclinations. The word "radical" was first made use of by Pitt, in 1798, when he reproached the opposition with wishing to withhold all taxes until a "radical reform" of parliament was brought about. The radicals of that time reckoned amongst them men of the highest rank, as, for instance, the Duke of Norfolk; who, in 1798, on occasion of Fox's birthday, drank, "to the health of our sovereign and the majesty of the people." In conjunction with these *aristocratic radicals, certain popular demagogues* advocated the principles of the French Revolution and Paine's Declaration of the Rights of Man. In 1806 Sir Francis Burdett and Lord Cochrane dubbed themselves "independents." Their leading principle was *to hold neither with whigs nor tories.* Major Cartwright who, from

the commencement of the American war down to 1820, battled for universal suffrage, took his stand on the old English constitution, as it existed prior to the reign of Henry VI. Bentham and Romilly represented French democracy, while Ricardo was the harbinger of the Manchester school. The Reform Bill did not satisfy the democratic principles advocated by the radicals, and Hume set up the so-called Little Charter, which asks for household suffrage, triennial parliaments, equal electoral districts, and the ballot. From the radical party has issued, since the Anti-corn Law League, "the Manchester school," the embodiment of Bentham's utilitarian theories. It advocates the purely external interests of the state: its purpose is to maintain within the country a mechanical self-government, based on election, but operating with a strongly bureaucratic character; and beyond the range of the kingdom, to pursue views purely utilitarian, such as a one-sided, calculating merchant might deem expedient in the matter of foreign policy.* All the higher aims of the state, apart from the purely administrative, are disavowed by this party, which is especially unwilling to recognize the high historical position of the state. In the event of the dissolution of the older parties, it is in a position to keep the two great parties in check. Mr. Milner Gibson has already forced an entrance into the cabinet. Radicals, like Horsman, Roebuck, etc., do not belong to the Manchester school, but are to be regarded as isolated politicians, rather than party men.

If the Manchester men and the other radicals have already succeeded in disorganizing parliamentary government, and in unsettling majorities, still more have the Irish Catholics the power of turning the scale on every important question. "Members have seats in parliament," says Newdegate, "who, judging by their names, are sent from Irish constituencies, but are, in fact elected by a priesthood which, in turn, is the agent of a foreign power; sooner or later the house will have to adopt new forms of procedure corresponding with the new elements." Lord Aberdeen

* The Manchester school seeks the reduction of armaments, economy in the administration of government; the repeal of indirect taxation, in order to relieve the working classes from the heavy burthens which they have too long borne; the extension of the franchise, non-intervention in the affairs and disputes of other nations, and, as a consequence thereupon, the maintenance of peace. It determines the worth of a government, not by its extravagance, the pomp which the sovereign is enabled to maintain, or by its splendid military pageants, but by the comfort, protection, and material prosperity which its measures afford to the individual members of the community.—ED.

was the first to give office to members of "the Irish brigade." Although its influence, from the absence of a competent leader, is declining from year to year, it is, withal, an element which, in all political combinations, must be held in account.* One thing cannot be gainsaid, the period of great majorities has temporarily gone by, and, coincidently, the period of settled party-principles. Hence parliamentary government has entered into new phases, which from their undefined nature cannot adequately be appreciated.

A considerable party has arisen wholly outside the parliament, who call themselves "chartists," that is, they demand a new charter, or thorough re-organization of the lower house. For the time being, this body appears weak and harmless enough, but in periods of excitement may become of great weight and influence. The word "chartism" was first made use of in the *Annual Register* of 1838. The "chartists" have sprung from the democrats of 1793, and the radicals of 1835.† The five points of the People's Charter‡ demand—manhood suffrage; annual parliaments; vote by ballot; remuneration of members; and the abolition of the property qualification. The last-mentioned point has been carried by the instrumentality of the tories. But, considering that the more important enactments in favour of the working-classes have been passed by the tories, despite the opposition of the whigs and radicals, and that many tories are to be found advocating the ancient order of things in regard to the parliament, and affecting a democratic tone and language, it can scarcely be wondered at that their patronage should occasionally have been extended to the doctrines contended for by the chartists.§ The latter are only to a certain extent revolutionary, impressed as they are with the idea that they represent historical rights, as in truth they do. A great portion of the English working-classes base their reliance upon the tories, whose strength is mainly centered in the gentry, rather than upon the aristocratic whigs and radicals.‖ In like manner the working-

* "The 105 Irish members, as they are particularly disposed to unite in defence of their particular objects and interests, often have a determining voice, and are able to exercise great control."—Bowyer, 41.

† Engel, *Lage der arbeitenden Classen in England*, 275.

‡ Engel, *Lage der arbeitenden Classen in England*, 277.

§ *Ibid*, 278.

‖ On comparing the principles of young England with those of the chartists, no very startling contrast will be found. "The foreign affairs committees" have been recruited mainly from the ranks of the old chartists.

classes of England are more monarchical than the middle classes. It may be taken for granted that if Hume's Little Charter would shake parliamentary government to its centre, chartism would ruin it wholly. Universal suffrage once established in England, a disastrous reaction in favour of the royal prerogative would forthwith be inaugurated.

Lord Brougham is of opinion that the nation is emancipating itself gradually from the supremacy of parties. This is so far true as that the bulk of the nation does not pertain to any more family connection, and hence, however earnestly it may adopt party views, is ever liable to oscillation. The bulk of the nation supporting, as the case may be, either the whigs or the tories, constitutes, together with the increasing power of the press and the other means of publicity, the so-called "public opinion," which, in political works of a higher range, is now regarded as a political factor in the state.*

Many an Englishman fancies that he may some day be summoned to govern the councils of Great Britain; as, however, *some* preliminary study is needful to manage the affairs of an empire which comprises 220,000,000 of subjects, the public require a leader, and find their convenient instructor in the daily papers, which are up in every matter, and are ever ready with an opinion, whether true or false, or half-true, upon every possible topic; and thus is every subject of the realm, without the cost of any previous effort, qualified to get up his daily share of "public opinion," upon Jamaica and Vancouver's Island, India and the Prussian criminal code, on Herr Von Schleinitz, and Nana Sahib.

* Think of it as we may, we must needs acknowledge it to be a power in the state, and, as with every political authority it is, at times, just-minded, though frequently splenetic, and, like absolute rulers generally, hard to control. The opinion advocated by the majority is not always the true one. "Not this man, but Barabbas!" shouted the multitude of old in Jerusalem. To regard a thing as unreasonable simply from the fact of public opinion clamouring for it would, however, be most unjust. Erasmus wrote to Ulrich von Hutten, regarding Sir Thomas More: "Nemo minus ducitur vulgi judicio; sed rursus nemo minus ab est a sensu communi." Granting that "the voice of the people is the voice of God," assuredly it does not make itself heard day by day through the medium of the press. Such public opinion as irresistably expresses the conviction of a whole nation, has manifested itself occasionally of late years; for instance, in 1846, on occasion of the corn-tax; in 1854, when it urged the war against Russia; and in 1858, when, out of love to Louis Napoleon, recreant endeavours were being made to subvert the laws of the country. The last two glorious manifestations of public opinion, short-lived though they may have been, were valiantly achieved in direct opposition to the "Times." For the manner in which "public opinion" is manufactured, according as occasion may serve, *vide* Mr. Kinglake's *Invasion of the Crimea*, *passim*.

"It is the habit of some persons, more ardent than profound, to lavish indiscriminate praise on the press, and to term its influence, the influence of knowledge. It is rather the influence of opinion. Large classes of men entertain certain views on matters of policy, trade, and morals. A newspaper supports itself by addressing those classes; it brings to light all the knowledge requisite to enforce or illustrate the views of its supporters; it embodies also the prejudices, the passions, and the sectarian bigotry that belong to one body of men engaged in active opposition to another. It is, therefore, the organ of opinion; expressing at once the truths and the errors, the good and the bad of the prevalent opinion it represents."*

An apparent deference to the opinion of the day, and the control of such opinion by means of such outward seeming, has ever been the *mot d'ordre* of the leading journal, conformably with the principle of all popular instructors, "If the mountain come not to Mahomet, let Mahomet go to the mountain." Till the 16th of April, 1834, the "Times" was in favour of the New Poor Law; on the 17th of April, 1834, to the wonderment of ministers, it attacked the measure in most energetic terms; the country justices, who were its "constant readers," had declared themselves hostilely to the measure, and "they were not only the great provincial support of the 'Times' newspaper, but composed an influence too important to be lightly regarded. Whatever might be the reason, the 'Times' certainly did, at the last moment, change its mind about supporting the New Poor Law. The fact of the suddenness of the change, in connection with the tenor of the opposition is worth noting, as illustrative of the character of newspaper support or opposition in our day. The side which the 'Times' would take was a chance pregnant with good and evil consequences which will influence the fate of whole generations. The hostility has been so venomous, so unscrupulous, so mischievous in one direction, and so beneficial in others, so pertinacious, so vigilant, and so remarkably based upon the aristocratic error—of confusing all ranks below a certain level—that it could not be passed over in the history of a time when the press is admitted to be our fourth estate."†

This nation, more than any other, stands in need of guidance

* Bulwer, *England and the English*, 237.

† Miss Martineau, iv. 88.

The "Times," fully understanding this, allows Englishmen, apparently, to think for themselves; on which account, and also by reason of the large capital at its command, it has driven almost all other journals out of the field. Whoever controls the "Times" may be sure to control England, unless "public opinion" once again elevates itself, in the twenty-four hours, from daily small talk to the high-level of the thunderer.

"The present premier, the future premier, and the 'Times,' which governs both;" thus, briefly, does the "Saturday Review" sum up the position. "The continual absence of all principles ranging above the morality of selfishness, of trading speculation, and atheistic expediency; this it is that we meet with in the 'Times.' It is, however, the household divinity and guide of most Englishmen. Its mill goes merrily with the wind, and grinds the meal of its own enrichment for the moral and intellectual nurture of Britons. That the meal is adulterated, that the 'Times' exercises a baneful and condemnable influence upon the homes of this land, we are as fully persuaded as we are of our own existence."

An influence thus originating out of commercial undertakings, and which partly reflects and partly creates opinion, at times, indeed, intentionally distorting or falsifying facts must, naturally, tend to disorganize party system and parliamentary government. The good influence which the press exercises, and might still more largely exercise, in keeping parliamentary ascendency in check, should not, however, be ignored. Acts of arbitrary authority, such as the parliament indulged in during the last century against individuals, are, at the present day, almost impossible, as "public opinion," and its organ, the "Times," effectually control the parliament. A stable and permanent party government, a powerful administration, jealous to uphold the honour of England, can hardly be hoped for, however, if conditions are to obtain like those which, in 1857, drove Cobden, Bright, and Milner Gibson from parliament, on the ground of their Chinese policy, and which, in 1859, equally by means of "public opinion," and purely on account of their peace principles, brought them back to parliament, and put the treasury bench within their reach. Again, in 1858, Lord Palmerston, as the subverter of the liberties of England, and the prosecutor of the refugees, was, by aid of Lord John, ignominiously ousted; in 1859, in the character of the friend of all oppressed

nationalities, with the co-operation of the very same Lord John, and under pressure of the self-same "public opinion," the outcast of 1858, celebrated his triumphant entry into Downing Street. By such rapid changes in the persons and principles of her leading men, by such veerings of popular opinion, England's influence cannot but be weakened, and the nation, in the matter of political sentiments and professions, can only become more callous and materialized.

BOOK VIII.

The Legal Relations of the British Colonies.

CHAPTER I.

EUROPEAN POSSESSIONS.

Power of Parliament over the entire Realm.—Appeal to the Privy Council and to the Queen's Bench.—England and Wales.—The Channel Islands.—Union with Scotland.—Laws of Scotland.—Stewards and Sheriffs.—Ireland.—Gibraltar.—Malta.—Heligoland.

THE realm of Great Britain comprises certain colonial possessions which are no part of the mother-country, but distinct, though dependent dominions. The parliament of England, Scotland, and Ireland, in conjunction with the sovereign of the United Kingdom, governs all the European possessions, the colonies, and the Empire of India. If the colonies have any power of legislation it is only to be regarded as delegated. Since the *parliament gathered painful experience from the vain and unprofit*able endeavour to impose taxes on America, it has relinquished all further attempt to raise taxes in the colonies. Parliament is empowered, provided it take the consequences, to innovate at any moment, by means of an act of parliament, upon the manners and customs of the Hindoos. From all the courts, in what part soever of the British realm, appeal lies to the jurisdiction of the queen in council; in certain cases, by *certiorari*, to the Queen's Bench, and thence a further appeal is permissible to the house of lords.

England, Scotland, and Ireland, constitute "the United Kingdom of Great Britain and Ireland;" to which appertain many small dependencies, partly under direct control of parliament, and *partly withdrawn from it.* The *kingdom of England comprises* Wales and Berwick-upon-Tweed. The Welsh were subjected to the crown of England in the reign of Edward I.; material alterations were then made in their laws, especially in the forms of their judicial proceedings, but they still retained much of their original polity, especially their rule of inheritance, according to which their lands were equally divided among all the issue male. Their provincial immunities were further abridged by subsequent

statutes. By 27 Hen. VIII. c. 26, it was enacted that the dominions of Wales should be for ever united to the kingdom of England; that all Welshmen born should have the same liberties as other king's subjects; that lands in Wales should be inheritable according to the English tenures and rules of descent, and that the laws of England and no other should be used in Wales. The 34 & 35 Henry VIII. c. 26, confirming these provisions, added further regulations, and divided Wales into twelve shires. The statute 1 Will. IV. c. 70, abolished the jurisdiction of the "Court of Great Sessions," and subordinated the inhabitants of the principality to the courts at Westminster.

The Channel Islands, Jersey, Guernsey, Alderney, Sark, and their appendages, have their own Norman customary law, called "Le grand coustumier." It is contended that the authority of the sovereign is exercised only in virtue of the ancient claim to the Duchy of Normandy; and that, therefore, the power of legislation is vested in the sovereign and council, and not in parliament. Neither parliament nor council, however, *interfere on ordinary occasions* with the internal regulations of the island. The queen's writ or process from the courts of Westminster is, in ordinary cases, of no force in those islands; but her commission is. Acts of parliament have no force therein unless the islands are particularly mentioned, or unless the acts, by virtue of an order in council, are registered on the records of the islands. Every act of legislative *authority by the parliament is regarded as a usurpation.*

Even last year Sir G. Cornewall Lewis declared that the relation of the Channel Islands to England resembled that of Scotland before the union, thereby acknowledging that parliamentary legislation, in regard to the Channel Islands, is virtually excluded. The judicial and executive authority is exercised by a convocation of several bodies, under the collective designation of the Assembly of the States, consisting of native bailiffs, jurats, the procureur-general of the royal court, the rectors of the parishes, two constables from each parish, and douzainiers or vingtainiers. The task of raising money to defray public expenses, is committed to the "States of Deliberation," unless in cases of peculiar emergency. Application must, however, be made to the sovereign for permission to carry into effect the levies proposed by this convention. The royal court consists of a bailiff named by the crown, and twelve jurats chosen by the members of the states,

who serve for life, unless discharged by the sovereign in council; the officers of the crown are the procureur, the comptroller, the provost, the greffier, and the crown-serjeant. The legal institutions are a mixture of English with Norman law, precedent, and custom, and, in criminal cases, with the judgment of the assessors themselves. Appeal only lies to the queen in council.*

Jersey has a separate administration, consisting of two bodies, one, the legislative body, called the States; the other, the judicial, called the Royal Court. The latter is composed of a president or bailiff of Jersey, appointed by the crown, and twelve judges, elected for life by the people. All heads of families paying parochial rates are entitled to vote in the election of a judge, and any individual may be made a judge who can obtain as many votes as will ensure his election. The legislative body is composed of thirty-six members, besides the governor and bailiff, consisting of the twelve judges, who, being judges for life, are legislators for life; the rectors of the twelve parishes, nominated, with the exception of the dean, by the governor, who are also legislators for life; and the twelve constables elected triennially by the people. The crown officers and the viscomte have also seats in the states, and may speak, but cannot vote. There is no regular session, nor fixed times for assembling; they are convened, with the consent of the lieutenant-governor, by the bailiff, whenever he deems a meeting necessary to consider certain measures. The states originate and pass laws, raise funds for the public service, and appropriate the revenue. All acts passed by the states, if meant to continue in force more than three years, must receive the royal assent. The governor and lieutenant-governor are appointed by the crown; the former holds office during life, and has the appointment of a receiver of the crown revenues. The lieutenant-governor, who is usually a major-general in the army, is commander-in-chief of all the forces and militia in the island. He may negative any act passed by the states, and may even withhold his consent to their assembling, but in such event must give his reasons to the home secretary.

The Isle of Ely was never a county palatine, although the abbots and bishops formerly possessed *jura regalia*. The secular authority has been taken away and vested in the crown by 6 & 7 Will. IV. c. 87.

* *Parliamentary Gazetteer.*

From time immemorial the Isle of Man has been governed by its own laws, made and enacted by the three estates: 1. The sovereign or lord, and his representative, the governor; 2. the council; 3. the keys. The island ranked as a separate kingdom till 1765, when the Duke of Athol agreed to alienate the sovereignty, which was accordingly transferred to the crown, and subjected to the regulations of the British excise and customs. The governor, appointed by the crown, is chancellor *ex officio*, and his consent is necessary to the passing of every law. The council consists of the bishop of the diocese, the attorney-general, the receiver-general, the two deemsters or chief justices, the clerk of the rolls, the water-bailiff, or judge-admiral, the archdeacon, and two vicars-general, who are members *ex officio*. Without the sanction of the majority of this council no law can be presented for the royal approbation The house of keys, consisting of twenty-four principal landed proprietors, who are regarded as representatives of the people, possesses powers legislative and judicial. They are in all cases interpreters of the common law, whence, it is conjectured, they have the name of keys. To them lies an appeal from the inferior courts, and from their decision no appeal lies but to the sovereign in council. The three estates may enact, abolish, or revive all insular laws, but they must be confirmed by the sovereign, and proclaimed. Beside the deemster courts, and those of the high bailiffs—the former for matters of the highest importance, the latter embracing actions for the smallest sums—there are a court of chancery, a court of exchequer, a court of common law, a manorial or shedding court, a court of general jail-delivery twice in the year, a court of admiralty, and ecclesiastical courts. The high bailiffs hold courts in each of the four market towns, for the determination of all cases under 40*s.*; they have, also, hitherto acted as the magistrates of the towns, in maintaining peace and apprehending offenders. Other magistrates, however, have been recently appointed, with powers similar to those of justices of peace in England. Manxmen alone are allowed to practise as agents in the law courts. The Isle of Man is only subject to parliamentary enactments when expressly named therein.*

The kingdom of Scotland, notwithstanding the union of the crowns on the accession of King James I., continued a separate

* *Parliamentary Gazetteer.*

and distinct kingdom, until 1707, when, by the Act of Union, it was declared that the "kingdoms of England and Scotland should be united into one kingdom by the name of Great Britain." The northern kingdom thereby became subject to the legislation of parliament, and its courts subject to the supreme authority of the house of lords. The Presbyterian Church, or "Kirk" of Scotland, has retained its independent democratic organization; the crown retaining only the right to grant one-third of the benefices, and to appoint a lord high commissioner to the general assembly of the kirk, such office, however, being of a purely honorary nature. The laws of Scotland have been recognized by the act of union, but are subject to modification by parliament; yet with this caution, that laws relating to public policy are alterable at *the discretion of the parliament; laws relating to private right* are not to be altered but for the evident utility of the people of Scotland. Every act of parliament passed since the union, applies to Scotland, unless the latter has been expressly excepted therein. Common law and equity are under one and the same jurisdiction in Scotland; the grand jury does not exist, nor is a unanimity of the jury necessary. The authority of the sheriff in Scotland is much more extensive than in England; the office was formerly often hereditary, or held for life. There are, further, exempted districts or "stewartries," administered by a steward. Since the reign of George II. the crown has acquired the right of nominating these functionaries, who hold office during life, and must be advocates of three years' standing. Since 9 Geo. IV. c. 29, s. 22, they are styled "sheriffs."

There is at least one sheriff court for each county, the immediate business being conducted before the sheriff-substitute; there are certain acts, however, both judicial and executive, which must be performed by the sheriff-principal. By an act passed in 1855, arrangements were made for grouping the counties into districts, and one sheriff-principal serves for all the counties of each district. Justices of peace, appointed under royal commission, and magistrates of municipal corporations, have jurisdiction in Scotland both in civil and criminal matters; their authority is, however, restricted within a narrow sphere by the efficiency of the jurisdiction exercised by the sheriffs, who are professionally trained and responsible judges. The supreme court in civil matters is the court of session, consisting of thirteen judges; they

not in what is called the "inner" and the "outer" house. The latter is the court of first instance, whence litigations pass to the inner as to a court of review. Five of the junior judges sit in the outer house, each holding a separate court, called the court of a lord ordinary. The inner house is apportioned into two divisions, each consisting of four judges. An ordinary litigation in the court of session comes first before the lord ordinary, and may be taken for review to one of the divisions of the inner house, where a decision is regarded as a decision of the court of session. The supreme tribunal for matters criminal is the court of justiciary, consisting of five of the judges of the court of session. The "high court of justiciary" sits in Edinburgh, but circuit-courts of justiciary are held, four in Glasgow, and two in the other circuit districts annually. This court has jurisdiction in all criminal charges, except those which are reserved by statute for summary trial in inferior tribunals. There are points which can be referred from the circuit courts to the high court of justiciary. The head of this court is the lord justice-general, who acts also as president of the court of session.*

Till 33 Hen. VIII. Ireland was only a lordship of the crown. The ancient national or Brehon law was overborne by the English law so early as the time of the Plantagenets. King John is said to have ordained that Ireland should be governed by the laws of England, but to this ordinance the natives were indisposed to conform, and still clung to their ancient Brehon law, which was only formally abolished in a parliament holden at Kilkenny, 40 Edw. III. The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws and imposed such taxes as might be deemed expedient for Ireland. The parliament of England, in like manner, might issue statutes applying to Ireland, and the parliament of the latter country was kept in a very subordinate position. The equity and common law courts are separate in Ireland, just as in England. The courts of justice, even before the union, were in a similar state of dependence, as there was an ultimate resort to the English courts. The superiority of the English parliament was often disputed by the Irish nation, and to define exactly the relation of Ireland to England it was declared, by 6 Geo. I. c. 5, that the

* *Encyc. Brit.*, article, "Scotland."

kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto, and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the people of Ireland. After a time, however, this statute was repealed, and by 23 Geo. III. c. 28, it was declared that the parliament and courts of Ireland had an exclusive right as to all matters of legislation and judicature in that country; this emancipation was followed, however, at no distant period by a fresh enactment, and by 39 & 40 Geo. III. c. 67, Ireland was made an integral part of the British dominions. Since the union all acts of parliament extend to Ireland, whether expressly mentioned or not, unless that portion of the United Kingdom be expressly excepted, or the intention to except it be otherwise plainly shown.

Gibraltar, Malta, Heligoland, St. Helena, and the Island of Ascension, are administered by royal governors. In Gibraltar the governor is the sole legislator, under control of the home government. In Heligoland there exists an assembly for local requirements. In Malta, in conjunction with the governor, there is an assistant council, which is partly elective. In St. Helena the council of the governor is appointed by the crown.

CHAPTER II.

THE COLONIES.

Three Classes of Colonies.—Magna Charta of the Colonies.—Governors.—Episcopal Sees.—Individual Colonial Constitutions.—1. Canada: Power of the Governor. —2. Jamaica.—3. Columbia.—4. Guiana.—5. Trinidad, St. Lucia, and the Falkland Islands.—6. Ceylon and Hong Kong.—7. Cape Colony.—8. Australia: —Captain-General; Recent Constitutions; New South Wales; Victoria; Van Dieman's Land (Tasmania); South Australia; Western Australia—9. New Zealand.

THERE are three classes of colonies:—The first, *provincial establishments*, having a constitution organized in accordance with the commission granted by the crown to the governors, under the authority of which the assemblies are invested with the power of making local ordinances, not repugnant to the law of England.

The second class consists of those proprietary governments granted by the crown to individuals, in the nature of feudatory principalities, and subordinate powers of legislation, similar to those formerly possessed by owners of counties palatine.

The third class, charter governments, in the nature of civil corporations, with such rights and authorities as are specially given in the charter of incorporation. There is, at present, no proprietary colony in existence, and almost all the colonies pertain to the first class, with the exception of Sierra Leone.

By the 6 Geo. III. c. 12, it was declared that all the American colonies are, and of right ought to be, subordinate to, and dependent upon, the imperial crown and parliament of Great Britain, who have full power and authority to make laws binding the colonies and people of America. In 1782, however, this power, so far as regards taxation, was formally renounced by the 18 Geo. III. c. 12, it being declared that the king and parliament of Great Britain will not impose any duty, tax, or assessment whatever payable in any of his majesty's colonies, provinces, or plantations in North America. The exercise of the so-called "right" of the British parliament to raise a revenue by colonial taxation, led to the

rebellion of the North American provinces, which resulted in their independence.* Wherever colonial representations now exist, the crown merely imposes upon the colonies such restrictions as are necessary for the regulation of trade, and for the benefit of the colonies. The statute 18 Geo. III. c. 12, is termed the Colonial Magna Charta; parliament is competent, however, to modify or abolish the resolutions of the colonial assemblies. Acts of parlia-

* "A *sovereign government*, whether of one or of a number, in its collegiate capacity can have no legal rights against its own subjects. To every legal right there are three several parties: namely, a party bearing the right; a party burthened with the relative duty; and a sovereign government setting the law, through which the right and the duty are respectively conferred and imposed. A sovereign government cannot acquire rights through laws set by itself to its own subjects. A man is no more able to confer a right on himself than he is able to impose *on himself a law or duty*. Every party bearing a right, divine, legal, or moral, has necessarily acquired the right through the might or power of another. Consequently if a sovereign government had legal rights against its own subjects, those rights were the creatures of positive laws, set to its own subjects by a third person or body. And, as every positive law is laid by a sovereign government on a person or persons in a state of subjection to itself, that third person or body were sovereign in that community whose own sovereign government bore the legal rights; that is to say, the community were subject to its own sovereign, and were also subject to a sovereign conferring rights upon *its own*, which is impossible and absurd. But so far as they are bound by the law of God to obey their temporal sovereign, a sovereign government *has rights* divine against its own subjects; and, so far as the members of its own community are severally constrained to obey it, by the opinion of the community at large, it has also moral rights against its own subjects severally considered. Consequently, when we say that a sovereign government, as against its own subjects, has or has not *a right* to do this or that, we necessarily mean by *a right*, a right divine or moral; that it has or has not a right, derived from a law of God, or derived from a law improperly so called, *which the general opinion of the community* sets to its members severally. But when we say that a government, as *against its own subjects*, has or has not *a right* to do this or that, we not uncommonly mean that we deem the act in question generally *useful* or *pernicious*. To ignorance or neglect of the palpable truths thus expounded may be imputed the pernicious jargon that was current in this country on the eve of her horrible war with her North American children. By the great and small rabble in and out of parliament, it was said that the government sovereign in Britain was also sovereign in the colonies; and that since it was sovereign in the colonies, it had a *right* to tax their inhabitants. *It was objected by Mr.* Burke to the project of taxing their inhabitants, that the project was *inexpedient*—pregnant with probable evil to the colonies, and pregnant with probable evil to the inhabitants of the mother country. But to that most rational objection the sticklers for the scheme of taxation returned this asinine answer. They said that the British government had a *right* to tax the colonists, and that it ought not to be withheld by paltry considerations of *expediency*, from enforcing its sovereign right against its refractory subjects. Now, assuming that the government sovereign in Britain was properly sovereign in the colonies, it had no legal *right to tax its colonial subjects; although* it was not restrained by positive law, from dealing with its colonial subjects at its own *pleasure or discretion*. If, then, the sticklers for the scheme of taxation had any determinate meaning, they meant that the British government was empowered by the law of God to tax its American subjects; but it had not a divine right to tax its American subjects, unless the project of taxing them accorded with general utility; for every divine right springs from the divine law; and to the divine law general utility is the index. Consequently, when the sticklers for the scheme of taxation opposed *the right* to *expediency*, they opposed the right to the only test by which it was possible to determine the reality of the right itself." —Austin, *On Jurisprudence*, 250—260.

ment have binding force in the colonies only so far as the latter are therein named.

The governor of every colony has the right of pardon, and power to nominate to the civil posts; he represents the queen in all respects, is usually nominated for six years, and is assisted by an executive council, or ministry, which occasionally acts as "court of appeal." Important judicial posts are usually filled up by the home government. Episcopal sees are established in the colonies under patronage of the queen; their jurisdiction is regulated by parliament, the bishops themselves are nominated by the crown, and consecrated by the two archbishops and the Bishop of London.

Glancing at the colonies cursorily, we find that Canada and Jamaica are invested with the oldest colonial parliaments.

1. By 17 & 18 Vict. c. 118 (1854), the legislature of Canada is empowered to modify the constitution of the colony, the governor reserving, however, all such modifications for the approval of the queen. As to other "acts of assembly," he is empowered, but not bound, to reserve the bill for the assent of the queen, who may withhold her sanction in council within a period of two years after they are received. The ordinances framed by the legislative assembly, with the assent of the governor, have force of law in the province without the assent of the crown, unless they are passed with a clause suspending their effect until her majesty's pleasure has been taken thereon.*

The council, as advisers of the representative of the crown, is appointed and holds office independently of the votes of the assembly. Upper and Lower Canada being united since 3 & 4 Vict. c. 35, the parliament now consists of two houses, viz., the council, or upper house of legislature, the members whereof are summoned by the crown for life, and the "house of assembly," formed on the model of the house of commons, and elected by the colonists. In reference to the election of speaker the legislature of Canada, in conformity with 22 & 23 Vict. c. 10, may pass autonomic resolutions.

The governor convokes, prorogues, and dissolves the legisla-

* "The authority of the home government is exercised mainly in two ways: first, by the appointment of governors; and secondly, by sanctioning or disallowing measures of the local government, of which these officers are the head. It is also exercised, sometimes, but much more rarely, in prescribing measures for their adoption."—Earl Grey, *on Colonial Policy*.

tive assembly. Apart from the bills reserved, he has a right of *veto* upon all its acts; money bills must first be discussed in the lower house, and no money bill can have effect otherwise than by a message from the governor to the lower house. Only native-born Canadians can be appointed as judges. The courts of justice are analogous to those in England. Under the governor of Canada are the lieutenant-governors of New Brunswick, Nova Scotia, and Prince Edward's Island. Newfoundland has an independent constitution, resembling that of Cape Colony and Australia (*vide* post).

2. Jamaica has possessed a constitution of its own for the last 200-years. It has been modified in many important particulars by several acts passed in the island in the years 1854 and 1856. The ruling body now consists of a governor or captain-general, advised by a privy council, of a legislative council, and of an elective legislative assembly. The governor, who is commander-in-chief and vice-admiral, is appointed by the crown. His privy council is appointed by himself during pleasure, without limitation of number or qualification; and its president, or senior member, administers the government during the absence of the governor, should no lieutenant-governor be appointed, though the commission is usually given to the commander of the forces. The upper chamber or legislative council consists of certain classes of functionaries, who belong to it by virtue of their office, and of members whom the governor appoints for life, subject to the ratification of the crown. The lower chamber or house of assembly is elected for seven years, by the body of freeholders. It is summoned by the governor in council, and may be adjourned, prorogued, or dissolved by the governor alone; in conjunction with the council, and by consent of the governor, it may pass laws for the colony, subject to the approval of the imperial government. The house of assembly had formerly the power of originating and appropriating grants of money; by the act of 1854, however, no grant is to originate in the assembly, except by message from the governor, or through the "executive committee." This latter body now forms the ministry of the crown, and consists of one member of the "legislative council," and three members of the "Assembly," not office-holders, chosen and changed at pleasure by the governor; they act as his medium of communication with the council and assembly, and assist him in preparing estimates, levying and disbursing money, and in the general administration.

3. By 21 & 22 Vict. c. 98, the governor of British Columbia has legislative authority; the parliament of England must, however, ratify his enactments; in civil matters appeal lies to the queen in council. The crown is empowered to order, whenever it may be found expedient, a popular representation in the colony.

4. In Guiana the governor is assisted by a body called "the Court of Policy," the members whereof are partly nominated by the crown, on the proposal of the governor, and partly consist of the higher functionaries, who are members *ex officio*. The unofficial members of the Court of Policy serve for three years, and go out by rotation. If taxes are to be levied six financial representatives are elected by suffrage, who are associated with the Court of Policy, under the designation of the "Combined Court," which proceeds to levy and appropriate the taxes. In the "Combined Court," every member, whether a representative or a member of the Court of Policy, has an equal vote. The governor not only has a casting vote as president of the Court of Policy, but an absolute *veto* on all laws passed by a majority. The supreme civil court consists of a chief judge, two puisne judges, a secretary, registrar, and accountant. The supreme criminal court is composed of the three civil judges, and three assessors, chosen by ballot. There are nine judicial districts, each under charge of a stipendiary magistrate, appointed and removable only by the secretary for the colonies, assisted by unpaid justices, holding their commission from the governor. In Guiana Dutch law is conformed to.

5. The legislative council of the colonies of Trinidad, Santa Lucia, and the Falkland Islands consists of certain classes of functionaries, and members for life, nominated by the crown on the proposal of the governor. Into Trinidad and Santa Lucia, municipal corporations have been introduced, which is regarded as an initiatory step towards representative government.

6. Ceylon and Hong-Kong do not possess any parliament; in the former island, however, municipal organization has commenced by the establishment of officers of roads, elected by the householders. In Hong-Kong the council consists wholly of official members.

7. Cape Colony. Conformably with the letters-patent of 1850, the legislative council enacted an ordinance for constituting a parliament, and another ordinance for regulating, in certain re-

spects, the appropriation of its revenues. By orders in council those ordinances were, with certain amendments, ratified and finally enacted in 1853. The legislature consists of the governor, the legislative council, and the house of assembly, both elected by the people. The chief justice presides in the legislative council, which consists besides of fifteen members chosen for ten years; every five years one portion retires. The lower house comprises forty-six deputies, elected for five years; the members thereof receive £1 per diem while engaged in travelling to and from, and in attending each session, but the payment is not to be for more than fifty days in one year: they are also allowed travelling expenses. Bills granting supplies, or imposing taxes, begin in the lower house, on the recommendation of the governors. The "assembly" must be held annually. The governor may prorogue or dissolve the council and assembly, or dissolve the assembly separately; and, in regard to the veto, has the same privileges and obligations as the governor of Canada: constitutional modifications, which the Cape parliament may have resolved upon, are to be proceeded with as in Canada. The ministers, particularly the colonial secretary, the attorney-general, the treasurer and auditor, may speak but not vote in either house.

8. The five Australian colonies are under a captain-general, who is also, since 1850, commander-in-chief; in each colony there is a governor. The upper houses of the Australian colonies, in conjunction with their legislative, exercise judicial and executive functions; they also act as privy council and civil court of appeal, the members thereof being, at the same time, justices of the peace. The Australian constitutions are regulated by 13 & 14 Vict. c. 52, intituled, "The Act for the Better Government of her Majesty's Australian colonies." It introduced analogous constitutions for New South Wales, Victoria, Van Dieman's Land (Tasmania), South Australia, and Western Australia.

New South Wales, however, by 18 & 19 Vict. c. 54, and Victoria, by 18 & 19 Vict. c. 45 (16th of July, 1855), received new constitutions, in conformity with which the colonial parliament in these two colonies is enabled to revise the constitution.

New South Wales, at the same time, received a governor, nominated for life, and an executive council, called the upper house. A parliament is held annually. In the event of constitutional modifications being introduced, two-thirds of both houses

must vote for the same, and the queen give her assent. A copy of the respective bill is to be laid before the parliament of Great Britain. All money bills must be recommended to the lower house by the governor. The crown receives a so-called civil list of £64,300, from which the salaries of the judges and other high functionaries and the clergy are paid.

In Victoria the two houses are elected by the colonists. The colony had previously enjoyed the intermediate step in the customary progress, namely, that of a legislature consisting of two-thirds representative, and one-third nominee, with a governor and executive responsible only to the crown. The colony, in drafting out in 1854 its new constitution, which was to receive the imperial sanction, decided, in common with the other colonies in like circumstances, upon having two houses of legislation. Both were elective, but the council or upper house was placed on the narrow foundation of a very high qualification. This body, consisting of thirty members, cannot be dissolved, but one-fifth of its number retires every two years. The assembly, consisting of seventy-two members, is of three years' duration. The principle of the ballot, with manhood suffrage, and the abolition of the property qualification for the assembly, with an electoral distribution based chiefly on population, has been adopted, and is found to work well.*

Van Diemen's Land. The Tasmanian legislature, in response to imperial invitation, embodied its views as to a new constitution in an act passed on 1st November, 1854, which received the royal assent. There are now two houses of legislation, the "council" and the "assembly," both of which are elective; the former requiring for votes a £50 freehold rental, the latter a £10 rental, or a freehold of £100 value. The "council" consists of fifteen

* *Encyc. Brit.*, art. "Australia."—"Important lessons have resulted from past colonial experiences. A few years ago it was thought dangerous to give colonists much liberty. They were democratic, rebellious, and wickedly disposed to break off from home ties on every opportunity. These notions have proved quite unfounded. Self-government has promptly developed, indeed, those extreme popular ideas that may be regarded as representing the normal state of new and detached societies of our countrymen; but it has also strikingly increased their loyalty to the empire. Indeed, there can now be no doubt that the restrictions heretofore imposed on colonial liberty by imperial distrust were the sole cause of whatever savoured of disloyalty or discontent in the past. Perpetual interference with local governments stirred up in the colonists everlasting antagonism to their governments, local and imperial. There is now in all this a manifest change. The colonists' differences are reserved for their own political parties, and the imperial authorities, by abandoning direct interference, have acquired a most powerful and indirect influence that must be for ever good to the lively but inexperienced offshoot"—*Ibid.*

members, five of whom retire every three years; the "assembly" consists of thirty members, who are elected for five years. The assembly may be dissolved by the governor.

In South Australia, and Western Australia, respectively, there has, hitherto, been but one house; a third of the members of the legislative council being appointed by the crown, and the remaining *two-thirds elected by the colonists.* *Modifications of the constitution must be ratified by the queen in council.* For individual districts, special district assemblies have been introduced.

From all the Australian colonies is withheld the right of levying—

1. Customs-duties which are contrary to British treaties with foreign powers.

2. Duties upon articles imported for the supply of her majesty's forces, and

3. Differential duties.

On a petition of the inhabitants of territories north of 30 *degrees south latitude, the queen may grant constitutions* resembling those of the three last-named colonies.

9. New Zealand consists of a confederation of six provinces, in each of which a provincial council, consisting of nine members, elected for four years, sits annually, which council, at the same time, elects the superintendent of the province, subject to the ratification of the governor, who has also power to dissolve the provincial council; *at the head of the confederation is the general* assembly, consisting of (1) the governor; (2) the upper house, or legislative council, composed of fifteen members appointed by the governor for life; and (3) the house of representatives, *consisting of thirty-six members,* elected for five years, by a suffrage similar to that of the electors of the provincial councils. The house of representatives can be dismissed by the governor at pleasure. The veto of the governor is legally admissible, as in Canada. The rights of municipal corporations are granted by the crown. In the general government, and also in the provincial superintendencies, the principles of responsible government are carried out as in England. *The majorities create and turn out* administrations, and each acceptance of office by a member is followed by a re-election. No other English colonies excepting the above-named at present enjoy parliamentary institutions.

CHAPTER III.

THE EAST INDIES.

Governor-General.—His Council.—Subordination of the Courts to the Courts of Law. —Native Civil Judges.—Jury.—Sessions Court.—Military Courts.—Sudder-Dewanee Adawlut.—Nizamut Adawlut.—Barristers.—Civil Functionaries.—Taxation System.—The Church Establishment.—Military System.

THE abolition of the board of control and of the East India Company's right of government, has in no wise changed the internal constitution of India.* By Pitt's East India Bill (13th of August, 1784) the governor of Bengal, as governor-general, in conjunction with his council, consisting of five members, was invested with a control over the governors of Bombay and Madras. This council has been remodelled by a bill passed in 1861. It now consists of five members, three of whom are nominated by the Secretary for India, and two by the crown, in other words, by the cabinet at large. The secretary for India is empowered to appoint the commander-in-chief for India to act as extraordinary member of the council. The governor-general has the right to appoint, for the discussion of general ordinances and legislative measures, from six to twelve members additional, one-half of

* "It floats in the minds of a great many persons, that, somehow or other, a tribute, or what is equivalent to a tribute, comes from the East Indies. Never did an opinion exist more completely without evidence, contrary to evidence, evidence notorious, and well known by the persons themselves by whom the belief is entertained. India, instead of yielding a tribute to England, has never yielded enough for the expenses of its own government. What is the proof? That its government had always been in debt, and has been under the necessity of continually augmenting its debt, till it has arrived at a magnitude which the government has often itself described as alarming. So far is India from yielding a tribute to Great Britain, that, in loans and aids, and the expense of fleets and armies, it has cost this country enormous sums. It is no doubt true, that some acts of parliament have assumed the existence of a tribute from India, or what has been called a surplus revenue, for the use of the nation. But parliament, we have pretty good experience, cannot make things by affirming them. *Things* are a little more stubborn than the credulity of Englishmen. That, in general, is obedient enough to the affirmations of those who lead the parliament, and who have sometimes an interest in leading it wrong. *Facts* take their own course, without regard to the affirmations of parliament, or the plastic faith of those who follow them."—*Encyclopædia Britannica*, art. "Colony," from the pen of the late James Mill.

whom is to be without any other office, and their commission to last for two years. The governor-general has the right to oppose his vote to every law devised by the council; if he give his assent, the English government has the right to suspend and repeal the law promulgated by him. The governor is only obliged to summon the council in cases of *great urgency; he alone has the right* to proclaim laws without advice of the council, which laws may, however, be abrogated by the home government. In the council the governor-general has only one vote, and in the event of there being equal voting he has the privilege of a casting vote. The governor-general and his council may issue, abolish, or modify laws, subject to the intervention of parliament. For the discussion of projects of law, three of the higher functionaries for each presidency, viz., the chief-justice or a member of the supreme court, and two other officials are, according to circumstances, added to the council, which then acts as a legislative council. The governors of Bombay and Madras are each assisted by a council consisting of three members; the new law empowers them to nominate from four to eight additional members for the space of two years.

At the head of the judicial system there is the high court of appeal, termed the Sudder Dewanee Adawlut, and the Nizamut Adawlut, or the chief civil and criminal court, which sits in Calcutta, and is composed of European judges. On the civil side this court has ceased to exercise any original jurisdiction; on the criminal side the court has cognizance in all matters relating to criminal justice and the police of the country, but it exercises no original jurisdiction. Appeals from the sessions judges lie to this court, but it cannot enhance the amount of punishment, nor reverse an acquittal. The sentences of this court are final. In cases of murder, and other crimes requiring greater punishment than sixteen years' imprisonment, all the proceedings of the trial are referred to the Nizamut for its revision. The Mohammedan law-officer of the court first records his judgment, and all the documents are then submitted to the judges of the Nizamut. If the case be not capital, it is decided by a single judge; sentences of death require the concurrence of two judges. Trials before the sessions judge for crimes punishable by a limited term of imprisonment are also referred for the disposal of the Nizamut when the sessions judge differs from the

opinion of the Mohammedan law officer. In each presidency there is a supreme or queen's court, in which the judges are appointed by the crown, and the mode of procedure is assimilated to that of the courts at Westminster. Appeal lies from their decisions to the judicial committee of the privy council. The English judges in India in civil matters act chiefly as judges of appeal, and have the subordinate Indian courts under their supervision.*

Some of the tributary states are controlled in regard to their civil jurisdiction, their army, and diplomatic relations. In Sirgoojah, for example, appeal lies from the civil courts to the British agents, in all difficult criminal cases; the agent supervising the sentences of the native judges. In cases involving capital punishment, the British agent alone may determine. In Southern Mahratta, the jaghiredars must bring all important criminal cases before the European judges.†

The administration of civil justice is almost entirely in the hands of the native magistrates; no residents in India being exempted from their jurisdiction. The principal sudder ameens decide upon civil disputes without reference to their amount, whereas the sudder ameens and the moonsiffs are only empowered to try suits of a minor nature; the jurisdiction of the former extends to suits of £100, and of the latter to suits to the amount of £30.

The salary of the moonsiffs seldom amounts to more than £200 a-year; the salary of the sudder ameens range from £240 to £120 a-year.‡ Appeal lies to the principal sudder ameen, or to the European zillah judge in the district. The lawyers in these courts are called "vakeels;" their fee is regulated according to the amount in dispute.§ Further appeal in matters of trivial import only lies in regard to a point of law. Herein a plaint of nullity lies to the supreme court (Sudder Dewanee Adawlut). In respect of all suits over £500, the plaintiff has the right of appealing either to the European zillah judge or to the principal sudder ameen. The zillah judge is competent to withdraw any suit from the Indian subordinate judge, and decide the matter him-

* Sykes, *Civil Justice in India*, 84.

† *Statistical Papers Relating to India*. London, 1853. Printed for the Court of Directors.

‡ Kaye, *The Administration of the East India Company*, 350.

§ *Ibid.*, 425.

self; but this very seldom occurs.* In either case, appeal lies to the supreme court, and from the latter in matters above 10,000 rupees, to the queen in council. All native courts are bound to give in a report of their decisions. In the majority of cases the superior courts confirm the sentences of the subordinate courts.† A paunchayet, assessors, or a jury consisting of five persons, may be summoned for the determination of civil suits. This scarcely ever occurs in Bengal, but in Madras, in four years, it was resorted to 130 times, and in Bombay, 253 times in the same period.‡

Felonies and misdemeanors are tried by the sessions courts, which consist of European zillah judges and native assistant judges. The summoning of a jury takes place likewise in these courts; they cannot condemn to more than sixteen years' imprisonment. The subordinate civil judges are chiefly native magistrates. The latter, in their capacity as criminal judges in the first resort, may condemn to three years' imprisonment; and if a European commit an assault or a trespass on a native, they may condemn him to 500 rupees' fine, or two months' imprisonment if the fine be not paid.

In the case of native soldiers, from three to five native officers determine questions relating to debt or matters of fact; for the trial of offences of a graver nature, from thirteen to fifteen native officers are necessary. The administration of justice by means of these military courts is justly held in esteem.§ The chief civil court of law, the Sudder Dewanee Adawlut,‖ is only an appeal court in civil matters, and has supervision over all the subordinate courts.¶ The members of this court are, at the same time, members of the Sudder Nizamut Adawlut, or court of appeal in criminal matters, which can neither remove sentences of acquittal, nor increase punishments, but may grant protection to a subordinate judge for an erroneous judgment. In criminal matters of a graver nature, where the punishment exceeds sixteen years' imprisonment, this court decides in the first resort. In cases involving capital punishment, two judges at least must sit; this court has only one native Mohammedan assistant judge.**

* Sykes, *Civil Justice in India*, 33.
† *Statistical Papers*, 45.
‡ Sykes, *Civil Justice in India*, 33.
§ *Ibid.*, 34.
‖ When this court was first established and determined according to English law and procedure, great excitement was occasioned from the fact, that the system of "contempt of court" was sought to be introduced. (*Vide* Kaye, 380)
¶ *Statistical Papers*, 48.
** *Ibid*, 49.

The vakeels undergo an examination before a commission composed of natives and Europeans. The standard to be attained would seem to be high, as in Agra, in the year 1852, out of twenty-seven candidates all failed; in Bareily, out of forty-eight, forty-six failed; and in Benares, out of seventy-two, sixty-eight failed. *From the vakeels are nominated the moonsiffs*, who have only to decide upon matters of minor import. Promotion takes place by seniority; a moonsiff becomes sudder ameen, and may, ultimately, be promoted to the post of principal sudder ameen.*

Formerly, the civil servants were educated at the college of Haileybury, and were subsequently initiated into their duties in India; after undergoing an examination they entered upon their practical career either as assistants to magistrates or collectors. Penal cases of a minor nature, and appeals against the taxes, were committed to them, but always under supervision of their immediate chief.† After a long practical initiation, and undergoing a final examination, they were definitively appointed to a post.

The system of taxation is under the control of the board of revenue, subordinate to which are the revenue commissioners and collectors; under these act the native deputy collectors. The chief revenues of the government in India are derived from the salt and land tax; other revenues are raised from duties on opium, the tobacco monopoly, the abkarree or tax on spirituous liquors, and from the post and stamp duos.‡

The land-tax is collected in a peculiar manner; in the provinces of Bengal, Behar, Orissa, and Benares, zemindars pay to the government a permanent rate irrespective of the higher or lower value of the ground. The zemindars, who were formerly only farmers of revenue, have, since 1793, been recognized by the British government as landowners. The second system of ground-tax is that called the "ryotwar;" which mostly prevails in Bombay. The "ryotwars" are merely farmers, who receive from the government a grant of land for a specified time, for which they have to pay an annual rent. In North-west India a mixed system prevails; the land-tax being levied on the village at large.

The ecclesiastical establishment is placed under the Bishop of Calcutta, as metropolitan in India, with such jurisdiction and

* *Statistical Papers*, 46.
† *Ibid*, 47.
‡ Kaye, 143.

functions as the sovereign may direct; subject, nevertheless, to the general superintendence and revision of the Archbishop of Canterbury. The Bishop of Calcutta has two suffragans, viz., the Bishops of Madras and Bombay, each of whom is assisted by an archdeacon.

The military system is controlled by a commander-in-chief. The rebellion of 1857 scattered the great Bengal army. There now exist the armies of Bombay, Madras, and the newly organized *army of Bengal and Central India, selected from and composed* of all manner of tribes, such as Sikhs and Ghoorkas.

THE END.

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