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1860

VIEW
OF
THE STATE OF EUROPE
DURING
THE MIDDLE AGES.

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IN THREE VOLUMES.—VOL. III.

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THOUGH the undisputed accession of a prince like Edward I. to the throne of his father does not seem so convenient a resting-place in history as one of those revolutions which interrupt the natural chain of events, yet the changes wrought during his reign make it properly an epoch in the progress of these inquiries. And, indeed, as ours is emphatically styled a

government by king, lords, and commons, we cannot, perhaps, in strictness carry it further back than the admission of the latter into parliament; so that if the constant representation of the commons is to be referred to the age of Edward I., it will be nearer the truth to date the English constitution from that than from any earlier era.

The various statutes affecting the law of property and administration of justice which have caused Edward I. to be named, rather hyperbolically, the English Justinian, bear no immediate relation to our present inquiries. In a constitutional point of view the principal object is that statute entitled the Confirmation of the Charters, which was very reluctantly conceded by the king in the 25th year of his reign. I do not know that England has ever produced any patriots to whose memory she owes more gratitude than Humphrey Bohun, earl of Hereford and Essex, and Eoger Bigod, earl of Norfolk. In the Great Charter the base spirit and deserted condition of John took off something from the glory of the triumph, though they enhance the moderation of those who pressed no further upon an abject tyrant. But to withstand the measures of Edward, a prince unequalled by any who had reigned in England since the Conqueror, for prudence, valour, and success, required a far more intrepid patriotism. Their provocations, if less outrageous than those received from John, were such as evidently manifested a disposition in Edward to reign without any control; a constant refusal to confirm the charters, which in that age were hardly deemed to bind the king without his actual consent; heavy impositions, especially one on the export of wool, and other unwarrantable demands. He had acted with such unmeasured violence towards the clergy, on account of their refusal of further subsidies, that, although the ill-judged policy of that class kept their interests too distinct from those of the people, it was natural for all to be alarmed at the precedent of despotism. These encroach-

^a The fullest account we possess of those domestic transactions from 1294 to 1298 is in Walter Hemingford, one of the historians edited by Hearne, p. 52-168. They have been vilely perverted by

Carte, but extremely well told by Hume, the first writer who had the merit of exposing the character of Edward I. See too Knyghton in Twysden's *Decem Scriptores*, col 2492.

merits made resistance justifiable, and the circumstances of Edward made it prudent. His ambition, luckily for the people, had involved him in foreign warfare, from which lie could not recede without disappointment and dishonour. Thus was wrested from him that famous statute, inadequately denominated the Confirmation of the Charters, because it added another pillar to our constitution, not less important than the Great Charter itself?

It was enacted by the 25 Edw. I. that the charter of liberties, and that of the forest, besides being explicitly confirmed,¹ should be sent to all sheriffs, justices in eyre, and other magistrates throughout the realm, in order to their publication before the people; that copies of them should be kept in cathedral churches, and publicly read twice in the year, accompanied by a solemn sentence of excommunication against all who should infringe them; that any judgment given contrary to these charters should be invalid, and holden for nought. This authentic promulgation, those awful sanctions of the Great Charter, would alone render the statute of which we are speaking illustrious. But it went a great deal further. Hitherto the king's prerogative of levying money by name of tallage or prise from his towns and tenants in demesne had passed unquestioned. Some impositions, that especially on the export of wool, affected all his subjects. It was now the moment to enfranchise the people, and give that security to private property which Magna Charta had given to personal liberty. By the 5th and 6th sections of this statute "the aids, tasks, and prises," before taken are renounced as precedents; and the king "grants for him and his heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church, as also to earls, barons, and to all commonalty of the land, that for no business from henceforth we shall take such manner of aids, tasks, nor prises, but by the common assent of the realm,

^b Walsingham, in Camden's *Scriptores Rer. Anglicarum*, p. 71-73.

^c Edward would not confirm the charters, notwithstanding his promise, without the words, *salvo jure corona nostra*; on which the two earls retired from court. When the confirmation was read to the people at St. Paul's, says

Hemingford, they blessed the king on seeing the charters with the great seal affixed; but when they heard the capacious conclusion, they cursed him instead. At the next meeting of parliament, the king agreed to omit these insidious words, p. 168.

and for the common profit thereof, saving the ancient aids and prises due and accustomed." The toll upon wool, so far as levied by the king's mere prerogative, is expressly released by the seventh section.¹¹

We come now to a part of our subject exceedingly important, but more intricate and controverted than any other, the constitution of parliament. I have taken no notice of this in the last section, in order to present uninterruptedly to the reader the gradual progress of our legislature down to its complete establishment under the Edwards. ^TSo excuse need be made for the dry and critical disquisition of the following pages; but among such obscure inquiries I cannot feel myself as secure from error as I certainly do from partiality.

One constituent branch of the great councils held by William the Conqueror and all his successors ^{The spiritual peers.} was composed of the bishops and the heads of religious houses holding their temporalities immediately of the crown. It has been frequently maintained that these spiritual lords sat in parliament only by virtue of their baronial tenure. And certainly they did all hold baronies, which, according to the analogy of lay peerages, were sufficient to give them such a share in the legislature. Nevertheless, I think that this is rather too contracted a view of the rights of the English hierarchy,

^d The supposed *stotnte*, *De Tallagio non concedendo*, is considered by Blackstone (Introduction to Charters, p. 67) as merely an abstract of the *Confirmatio Chartarum*. By that entitled *Articuli super Chartas*, 28 Edw. I., a court was erected in every county, of three knights or others, to be elected by the commons of the shire, whose sole province was to determine offences against the two charters, with the power of punishing by fine and imprisonment; but not to extend to any case wherein a remedy by writ was already provided. The *Confirmatio Chartarum* is properly denominated a statute, and always printed as such; but in form, like *Magna Charta*, it is a charter, or letters patent, proceeding from the crown, without even reciting the consent of the realm. And its "teste" is at Ghent, 2 Nov. 1297; Edward having engaged, conjointly with the count of

Flanders, in a war with Philip the Fair. But a parliament had been held at London, when the barons insisted on these concessions. The circumstances are not wholly unlike those of *Magna Charta*.

The Lords' Committee do not seem to reject the statute "*de tallagio non concedendo*" altogether, but say that, "if the manuscript containing it (in *Corpus Christi College*, Cambridge) is a true copy of a statute, it is undoubtedly a copy of a statute of the 25th, and not of a statute of the 34th of Edward I." p. 230. It seems to me on comparing the two, that the supposed statute *de tallagio* is but an imperfect transcript of the king's charter at Ghent. But at least, as one exists in an authentic form, and the other is only found in an unauthorized copy, there can be no question which ought to be quoted.

and, indeed, by implication, of the peerage. For a great council of advice and assent in matters of legislation or national importance was essential to all the northern governments. And all of them, except, perhaps, the Lombards, invited the superior ecclesiastics to their councils; not upon any feudal notions, which at that time had hardly begun to prevail, but chiefly as representatives of the church and of religion itself; next, as more learned and enlightened counsellors than the lay nobility; and in some degree, no doubt, as rich proprietors of land. It will be remembered also that ecclesiastical and temporal affairs were originally decided in the same assemblies, both upon the continent and in England. The Norman Conquest, which destroyed the Anglo-Saxon nobility, and substituted a new race in their stead, could not affect the immortality of church possessions. The bishops of William's age were entitled to sit in his councils by the general custom of Europe, and by the common law of England, which the Conquest did not overturn.^e Some smaller arguments might be urged against the supposition that their legislative rights are merely baronial; such as that the guardian of the spiritualities was commonly summoned to parliament during the vacancy of a bishopric, and that the five sees created by Henry VIII. have no baronies annexed to them;^f but the former reasoning appears less technical and confined.^g

Next to these spiritual lords are the earls and barons, or lay peerage of England. The former dignity was, perhaps, not so merely official as in the Saxon times, although the earl was entitled to the third penny of all emoluments arising from the administration of justice in the county-courts, and might, perhaps, command the militia of his county, when it was called forth.^h Every

^e Hody (Treatise on Convocations, p. 126) states the matter thus: in the Saxon times all bishops and abbots sat and voted in the state councils, or parliament, as such, and not on account of their tenures. After the Conquest the abbots sat there not as such, but by virtue of their tenures, as barons; and the bishops sat in a double capacity, as bishops, and as barons.

^f Hody, p. 128.

^g [NOTE I.]

^h Madox, *Baronia Anglica*, p. 138.

Pialogus de Scaccario, 1. i. c. 17. Lytelton's *Henry II.* vol. ii. p. 217. The last of these writers supposes, contrary to Seldeu, that the earls continued to be governors of their counties under Henry II. Stephen created a few titular earls, with grants of crown lands to support them; but his successor resumed the grants, and deprived them of their earldoms.

In Rymer's *Fcedera*, vol. i. p. 3, we find a grant of Matilda, creating Milo of Gloucester earl of Hereford, with the

earl was also a baron, and held an honour or barony of the crown, for which he paid a higher relief than an ordinary baron, probably on account of the profits of his earldom. I will not pretend to say whether titular earldoms, absolutely distinct from the lieutenancy of a county, were as ancient as the Conquest, which Madox seems to think, or were considered as irregular so late as Henry II., according to Lord Lyttelton. In Dugdale's Baronage I find none of this description in the first Norman reigns; for even that of Clare was connected with the local earldom of Hertford.

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

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

But about the latter end of John's reign, some only of the most Eminent tenants in chief were summoned by

moat and castle of that city in fee to him and his heirs, the third penny of the rent of the city, and of the pleas in the county, three manors and a forest, and

the service of three tenants in chief, with all their fiefs; to be held with all privileges and liberties as fully as ever any earl in England had possessed them.

particular writs; the rest by one general summons through the sheriffs of their several counties. This is declared in the Great Charter of that prince, wherein he promises that, whenever an aid or scutage shall be required, *faciemus summoneri archiepiscopos, episcopos, abbates, comites et majores barones regni sigillatim per literas nostras.* Et praeterea *faciemus summoneri in generali per vicecomites et ballivos nostros omnes alios qui in capite tenent de nobis.* Thus the barons are distinguished from other tenants in chief, as if the former name were only applicable to a particular number of the king's immediate vassals. But it is reasonable to think that, before this charter was made, it had been settled by the law of some other parliament, how these greater barons should be distinguished from the lesser tenants in chief; else what certainty could there be in an expression so general and indefinite? And this is likely to have proceeded from the pride with which the ancient and wealthy barons of the realm would regard those newly created by grants of escheated honours, or those decayed in estate, who yet were by their tenures on an equality with themselves. They procured therefore two innovations in their condition; first that these inferior barons should be summoned generally by the sheriff, instead of receiving their particular writs, which made an honorary distinction; and next, that they should pay relief, not, as for an entire barony, one hundred marks; but at the rate of five pounds for each knight's fee which they held of the crown. This changed their tenure to one by mere knight-service, and their denomination to tenants in chief. It was not difficult, afterwards, for the greater barons to exclude any from coming to parliament as such without particular write directed to them, for which purpose some law was probably enacted in the reign of Henry III. If indeed we could place reliance on a nameless author whom Camden has quoted, this limitation of *the* peerage to such as were expressly summoned depended upon a statute made soon after the battle of Evesham. But no one has ever been able to discover Camden's authority, and the change was, probably, of a much earlier date.¹

¹ Seldell's Works, vol. iii. p. 713-743.

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

^k Lyttelton's *Henry II.* vol. ii. p. 212.

^m Hody on Convocations, p. 222, 234.

ⁿ Lib. ii. c. 9.

^o Hody and Lord Lyttelton maintain these "barons of the second rank" to have been the sub-vassals of the crown; tenants of the great barons to whom the

name was sometimes improperly applied.

This was very consistent with their opinion, that the commons were a part of parliament at that time. But Hume, assuming at once the truth of (his interpretation in this instance, and the falsehood of their system, treats it as a

only a man, was of Very large significance, and is not unfrequently applied to common freeholders, as in the phrase of court-baron. It was used too for the magistrates or chief men of cities, as it is still for the judges of the exchequer, and the representatives of the Cinque Ports.^p

The passage however before cited from the Great Charter of John affords one spot of firm footing in the course of our progress. Then, at least, it is evident that all tenants in chief were entitled to their summons; the greater barons by particular writs, the rest through one directed to their sheriff. The epoch when all, who, though tenants in chief, had not been actually summoned, were deprived of their right of attendance in parliament, is again involved in uncertainty and conjecture. The unknown writer quoted by Camden seems not sufficient authority to establish his assertion, that they were excluded by a statute made after the battle of Evesham. The principle was most likely acknowledged at an earlier time. Simon de Montfort summoned only twenty-three temporal peers to his famous parliament. In the year 1255 the barons complained that many of their number had not received their writs according to the tenor of the charter, and refused to grant an aid to the king till they were issued.^q But it would have been easy to disappoint this mode of packing a parliament, if an unsummoned baron could have sat by mere right of his tenure. The opinion of Selden, that a law of exclusion was enacted towards the beginning of Henry's reign is not liable to so much objection. But perhaps it is unnecessary to frame an hypothesis of this nature. Writs of summons seem to have been older than the time of John;^r and when this had become the customary and regular preliminary of a baron's coming to parliament, it was a natural transition to look upon it as an indispensable condition; in times when the prerogative was high, the law unsettled, and the service in parlia-

deviation from the established rule, and a proof of the unsettled state of the constitution.

P [NOTE II]

q M. Paris, p. 785. The barons even tell the king that this was contrary to his charter, in which nevertheless the

clause to that effect, contained in his father's charter, had been omitted.

^r Henry II., in 1175, forbade any of those who had been concerned in the late rebellion to come to his court without a particular summons. Carte, vol ii. D. 249.

ment deemed by many still more burthensome than honourable. Some omissions in summoning the king's tenants to former parliaments may perhaps have produced the above-mentioned provision of the Great Charter, which had a relation to the imposition of taxes wherein it was deemed essential to obtain a more universal consent than was required in councils held for state, or even for advice.⁸

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

In the Magna Charta of 1 Henry III. it is said: *Pro hac donatione et concessione. . . . archiepiscopi, episcopi, comites, barones, milites, et libere tenentes, et omnes de regno nostro, dederunt nobis quintain decimam partem omnium bonorum suorum mobilium.*¹ So in a record of 19 Henry III.: *Comites, et barones, et omnes alii de toto regno nostro Angliae, spontanea voluntate sua concesserunt nobis efficax auxilium.*^u The largeness of these words is, however, controlled by a subsequent passage, which declares the tax to be imposed *ad mandatum omnium comitum et baronum et omnium aliorum qui de nobis tenent in capite*. And it seems to have been a general practice to assume the common consent of all ranks

Upon the subject of tenure by barony, besides the writers already quoted, see West's Inquiry into the Method of creating Peers, and Carte's History of England, vol. ii. p. 247.
^t Hody on Convocations, p. 293.
^u Brady, Introduction to History of England. Appendix, p. 43.

to that which had actually been agreed by the higher. In a similar writ, 21 Henry I I I , the ranks of men are enumerated specifically; archiepiscopi, episcopi, abbates, priores, et clerici terras habentes quae ad ecclesias suas non pertinent, comites, barones, milites, et liberi homines, pro 80 et suis villanis, nobis concesserunt in auxilium tricesimam partem omnium mobilium.^x In the close roll of the same year, we have a writ directed to the archbishops, bishops, abbots, priors, earls, barons, knights, and freeholders (liberi homines) of Ireland, in which an aid is desired of them, and it is urged that one had been granted by his fideles Anglian

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

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

Origin and progress of parliamentary representation.

The first instance of actual representation which occurs in our history is only four years after the Conquest; when William, if we may rely on Hoveden, caused twelve persons skilled in the customs of England to be chosen from each county, who were sworn to inform him rightly of their laws ; and these, so ascertained, were rati-

^x Brady's History of England, vol. i. Appendix, p. 182.

^y Brady's introduction, p. 94.

fied by the consent of the great council. This, Sir Matthew Hale asserts to be "as sufficient and effectual a parliament as ever was held in England".^z* But there is no appearance that these twelve deputies of each county were invested with any higher authority than that of declaring their ancient usages. No stress can be laid at least on this insulated and anomalous assembly, the existence of which is only learned from an historian of a century later."

We find nothing that can arrest our attention, in searching out the origin of county representation, till we come to a writ *in* the fifteenth year of John, directed to all the sheriffs in the following terms: Rex Vicecomiti N., ealutem. Praecipimus tibi quod omnes milites ballivas tuse qui summoniti fuerunt esse apud Oxoniam ad Nos a die Omnium Sanctorum in quindecim dies venire facias cum armis suis : corpora vero baronum sine armis singulariter, et *quatuor discretos milites* de comitatu tuo, illuc venire facias ad eundem terminum, ad loquendum nobiscum de negotiis regni nostri. For the explanation of this obscure writ I must refer to what rryne has said ;^b but it remains problematical whether these four knights

^z Hist of Common Law, vol. i. p. 202.

This assembly is mentioned in the preamble, and afterwards, of the spurious laws of Edward the Confessor; and I have been accused of passing it over too slightly. The fact certainly does not rest on the authority of Hoveden, who transcribes these laws *verbatim*; and they are in substance an ancient document. There seems to me somewhat rather suspicious in this assembly of delegates; it looks like a pious fraud to maintain the old Saxon jurisprudence, which was giving way. But even if we admit the fact as here told, I still adhere to the assertion that there is no appearance that these twelve deputies of each county were invested with any higher authority than that of declaring their ancient usages. Any supposition of a real legislative parliament would be inconsistent with all that we know of the state of England under the Conqueror. And what an anomaly, upon every constitutional principle, Anglo-Saxon or Norman* would be a parliament of twelve from each county! Nor is it perfectly

manifest that they were chosen by the people; the word *sommonci* fecit is first used; and afterwards, *electis de* (not *in*) *singulis totius patrie comitatibus*. This might be construed of the king's selection; but perhaps the common interpretation is rather the better.

William, the compiler informs us, having heard some of the Danish laws, was disposed to confirm them in preference to those of England; but yielded to the supplication of the delegates, *omnes compatriota, qui leges narraverant*, that he would permit them to retain the customs of their ancestors, imploring him by the soul of King Edward, *citus erant leges, nec aliorum exterorum*. The king at length gave way, by the advice and request of his barons, *consilio et precatu baronum*. These of course were Norjmen; but what inference can be drawn in favour of parliamentary representation in England from the behaviour of the rest? They were supplicants, not legislators.

b 2 Prynne's Register is

(the only clause which concerns our purpose) were to be elected by the county or returned in the nature of a jury, at the discretion of the sheriff. Since there is no sufficient proof whereon to decide, we can only say with hesitation, that there *may* have been an instance of county representation in the fifteenth year of John.

We may next advert to a practice, of which there is very clear proof in the reign of Henry III. Subsidies granted in parliament were assessed, not as in former times by the justices upon their circuits, but by knights freely chosen in the county court. This appears by two writs, one of the fourth and one of the ninth year of Henry III.^c At a subsequent period, by a provision of the Oxford parliament in 1258, every county elected four knights to inquire into grievances, and deliver their inquisition into parliament.¹¹

The next writ now extant, that wears the appearance of parliamentary representation, is in the thirty-eighth of Henry III. This, after reciting that the earls, barons, and other great men (*caeteri magnates*) were to meet at London three weeks after Easter, with horses and arms, for the purpose of sailing into Gascony, requires the

^c Brady's Introduction, Appendix, pp. 41 and 44. "The language of these writs implies a distinction between such as were styled barons, apparently including the earls and the four knights who were to come from the several counties *ad loquendum*, and who were also distinguished from the knights summoned to attend with arms, in performance, it should seem, of the military service due by their respective tenures; and the writs, therefore, apparently distinguished certain tenants in chief by knight-service from barons, if the knights so summoned to attend with arms were required to attend by reason of their respective tenures in chief of the king. How the four knights of each county who were thus summoned to confer with the king were to be chosen, whether by the county, or according to the mere will of the sheriff, does not appear; but it seems most probable that they were intended by the king as representatives of the freeholders of each county, and to balance the power of the hostile nobles, who were **then leagued against him; and**

the measure might lead to conciliate the minds of those who would otherwise have had no voice in the legislative assembly." Report of Lords' Committee, p. 61.

This would be a remarkable fact, and the motive is by no means improbable, being perhaps that which led to the large provisions for summoning tenants in chief, contained in the charter of John, and afterwards passed over. But this parley of the four knights from each county, for they are only summoned *ad loquendum*, may not amount to bestowing on them any legislative power. It is nevertheless to be remembered that the word *parliament* meant, by its etymology, nothing more; and the words, *ad loquendum*, may have been used in reference to that. It is probable that these writs were not obeyed; we have no evidence that they were, and it was a season of great confusion, very little before the granting of the charter of Henry III.

d Brady's Hist. of England, vol. i. Appendix, p. 227.

sheriff to compel all within his jurisdiction, who hold twenty pounds a year of the king in chief, or of those in ward of the king, to appear at the same time and place. And that besides those mentioned he shall cause to come before the king's council at Westminster, on the fifteenth day after Easter, two good and discreet knights of his county, whom the men of the county shall have chosen for this purpose, in the stead of all and each of them, to consider, along with the knights of other counties, what aid they will grant the king in such an emergency.⁰ In the principle of election, and in the object of the assembly, which was to grant money, this certainly resembles a summons to parliament. There are indeed anomalies sufficiently remarkable upon the face of the writ which distinguish this meeting from a regular parliament. But when the scheme of obtaining money from the commons of shires through the consent of their representatives had once been entertained, it was easily applicable to more formal councils of the nation/

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

^e 2 Prynne, p. 23.

f "This writ tends strongly to show that there then existed no law by which a representation either of the king's tenants in capite or of otherB, for the purpose of constituting a legislative assembly, or for granting an aid, was specially provided; and it seems to have been the first instance appearing on any

record now extant, of an attempt to substitute representatives elected by bodies of men for the attendance of the individual so to be represented, personally or by their several procurators, in an assembly convened for the purpose of obtaining an aid." Report, p. 95.

^g 2 Prynne, p. 27.

At length, in the year 1265, the forty-ninth of Henry III., while he was a captive in the hands of Simon de Montfort, writs were issued in his name to all the sheriffs, directing them to return two knights for the body of their county, with two ^{pitTZCTis} or "burgesses for every city and ^{l^mfCWgh} containetri^

J ^ J ^ ^ . ^ of the commons Becomes indisputably manifest; even shoul^{3~w^}reject altogether the more equivocal instances of it which have just been enumerated.

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

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

may probably have enjoyed the same privileges, being subject in general to the same burdens, their number will be greatly augmented, and form no inconsiderable portion of the freeholders of the kingdom. After the statute commonly called *Quia emptores* in the eighteenth of Edward I. they were likely to increase much more, as every licensed alienation of any portion of a fief by a tenant in chief would create a new freehold immediately depending upon the crown. Many of these tenants in cap'ite* held very small fractions of knight's fees, and were consequently not called upon to receive knight hood. They were plain freeholders holding in chief, and the *liberi homines* or *libere tenentes* of those writs which have been already quoted. The common form indeed of writs to the sheriff directs the knights to be chosen *de communitate comitatus*. But the word *communitas*, as in boroughs, denotes only the superior part: it is not unusual to find mention in records of *communitas populi* or *omnes de regno*, where none are intended but the barons, or at most the tenants in chief. If we look attentively at the earliest instance of summoning knights of shires to parliament, that in 38 Henry III., which has been noticed above, it will appear that they could only have been chosen by military tenants in chief. The object of calling this parliament, if parliament it were, was to obtain an aid from the military tenants, who, holding less than a knight's fee, were not required to do personal service. None then, surely, but the tenants in chief could be electors upon this occasion, which merely respected their feudal duties. Again, to come much lower down, we find a series of petitions in the reigns of Edward III. and Richard II., which seem to lead us to a conclusion that only tenants in chief were represented by the knights of shires. The writ for wages directed the sheriff to levy them on the commons of the county, both within franchises and without (*tarn intra libertatos quam extra*). But the tenants of lords holding by barony endeavoured to exempt themselves from this burthen, in which they seem to have been countenanced by the king. This led to frequent remonstrances from the commons, who finally procured a statute, that all lands which had been accustomed to contribute towards the wages of members should continue to do so, even

though they should be purchased by a lord.^h But, if these mesne tenants had possessed equal rights of voting with tenants in chief, it is impossible to conceive that they would have thought of claiming so unreasonable an exemption. Yet, as it would appear harsh to make any distinction between the rights of those who sustained an equal burthen, we may perceive how the freeholders holding of mesne lords might on that account obtain after the statute a participation in the privilege of tenants in chief. And without supposing any partiality or connivance, it is easy to comprehend that, while the nature of tenures and services was so obscure as to give rise to continual disputes, of which the ancient records of the King's Bench are full, no sheriff could be very accurate in rejecting the votes of common freeholders repairing to the county court, and undistinguishable, as must be allowed, from tenants in capite upon other occasions, such as serving on juries, or voting on the election of coroners. To all this it yields some corroboration, that a neighbouring though long hostile kingdom, who borrowed much of her law from our own, has never admitted any freeholders, except tenants in chief of the crown, to a suffrage in county elections. These attended the parliament of Scotland in person till 1428, when a law of James I. permitted them to send representatives/

Such is, I think, a lair statement of the arguments that might be alleged by those who would restrain the right of election to tenants of the crown. It may be urged on the other side that the genius of the feudal system was never completely displayed in England ; much less can we make use of that policy to explain institutions that prevailed under Edward I. Instead of aids and scutages levied upon the king's military tenants, the crown found ample resources in subsidies upon moveables, from which no class of men was exempted. But the statute that abolished all unparliamentary taxation led, at least in theoretical principle, to extend the elective franchise to as large a mass of the people as could conveniently exercise it. It was even in the mouth of our kings that what concerned all should be approved by all. Nor is

^h 12 Ric II. c 12. Wynne's 4th Re- p. 120, 357. But this law was not re-
nter, gularly acted upon till 1587. p. 368.

¹ Piakerton's Hist of Scotland, vol. i.

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the language of all extant writs less adverse to the supposition that the right of suffrage in county elections was limited to tenants in chief. It seems extraordinary that such a restriction, if it existed, should never be deducible from these instruments; that their terms should invariably be large enough to comprise all freeholders. Yet no more is ever required of the sheriff than to return two knights chosen by the body of the county. For they are not only said to be returned *pro communitate*, but "*per communitatem*," and "*de assensu totius communitatis*." Nor is it satisfactory to allege, without any proof, that this word should be restricted to the tenants in chief, contrary to what must appear to be its obvious meaning.* Certainly, if these tenants of the crown had found inferior freeholds usurping a right of suffrage, we might expect to find it the subject of some legislative provision, or at least of some petition and complaint. And, on the other hand, it would have been considered as unreasonable to levy the wages due to knights of the shire for their service in parliament on those who had no share in their election. But it appears by writs at the very beginning of Edward II.'s reign, that wages were levied "*de communitate comitatus*."^m It will scarcely be contended that no one was to contribute under this writ but tenants in chief; and yet the word community can hardly be applied to different persons, when it occurs in the same instrument and upon the same matter. The series of petitions above mentioned relative to the payment of wages rather tends to support a conclusion that all mesne tenants had the right of suffrage, if they thought fit to exercise it, since it was earnestly contended that they were liable to contribute towards

k What can one who adopts this opinion of Dr. Brady say to the following record? *Rex militibus, liberie hominibus, et toti communitati comitatus Wygorniae tam intra liberates quam extra, Balutem. Cum comites, barones, milites, liberi homines, et communitates comitatum regni nostri vicesimam omnium bonorum suorum mobilium, civisque et burgenses et communitates omnium civitatum et burgorum ejusdem regni, necnon tenentes de antiquis dominicis coronae nostrae quindecimatu bo-*

norum suorum mobilium nobis concesserunt. Pat. Rot 1 E. II. in Hot Parl, vol. i. p. 442. See also p. 24] and p. 269. If the word community is here used in any precise sense, which, when possible, we are to suppose in construing a legal instrument, it must designate, not the tenants in chief, but the inferior class, who, though neither freeholders nor free burgesses, were yet contributable to the subsidy on their goods.

^m Madox, *Firma Burgi*, p. 99 and p. 102 note Z.

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

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

The progress of towns in several continental countries, from a condition bordering upon servitude to wealth and liberty, has more than once attracted our attention in other parts of the present work. Their growth in England, both from general causes and imitative policy, was very similar and nearly coincident. Under the Anglo-Saxon line of sovereigns we scarcely can discover in our scanty records the condition of their inhabitants, except retrospectively from the great survey of Domesday Book, which displays the state of England under Edward the Confessor. Some attention to commerce had been shown by Alfred and Athelstan; and a merchant who had made three voyages beyond sea was

ⁿ Prynne's 2nd Register, p. 50.

^o Carte's Hist of England, ii, 250.

^p The present question has been dis-

cussed with much ability in the Edinburgh Review, vol. xxvi. p. 341. [Note

raised by law of the latter monarch to the dignity of a Thane,^q This privilege was not perhaps often claimed; but the burgesses of towns were already a distinct class from the ceorls or rustics, and, though hardly free according to our estimation, seem to have laid the foundation of more extensive immunities. It is probable, at least, that the English towns had made full as great advances towards emancipation as those of France. At the Conquest we find the burgesses or inhabitants of towns living under the superiority or protection of the king, or of some other lord, to whom they paid annual rents, and determinate dues or customs. Sometimes they belonged to different lords, and sometimes the same burgess paid customs to one master, while he was under the jurisdiction of another. They frequently enjoyed special privileges as to inheritance; and in two or three instances they seem to have possessed common property, belonging to a sort of guild or corporation, and in some instances, perhaps, had a municipal administration by magistrates of their own choice/ Besides the regular

^q Wilkins, p. 71.

^r *Burgensis Exonia uirbis babent extra civitatem terrain duodecim carucatarura : quae nullam consue, tudiriem reddunt nisi ad ipsam civitatem.* Domesday, p. 100. At Canterbury the burgesses had forty-five houses without, the city, de quibus ipsi babebant gablum et consnetudinem, rex autem socam et sacani; ipsi quoque burgenses babebant de rege tripinta tres acras prati in gildam, suam. p. 2. In Lincoln and Stamford some resident proprietors, called Lagemanni, had jurisdiction (socam et sacam) over their tenants. But nowhere have I been able to discover any trace of municipal self-government; unless Chester may be deemed an exception, where we read of twelve judices civitatis; but by whom constituted does not appear. The word iageman seems equivalent to judex. The guild mentioned above at Canterbury was, in all probability, a voluntary association: so at Dover we find the burgesses' guild-hail, gihalla burgensium. p. 1.

Many of the passages in Domesday relative to the state of burgesses are collected in Brady's History of Boroughs; a work which, if read with due suspicion

of the author's honesty, will convey a great deal of knowledge.

Since the former part of this note was written, I have met with a charter granted by Henry II. to Lincoln, which seems to refer, more explicitly than any similar instrument, to municipal privileges of jurisdiction enjoyed by the citizens under Kdwani the Confessor. These charters, it is well known, do not always recite what is true; yet it is possible that the citizens of Lincoln, which had been one of the five Danish towns, sometimes mentioned with a sort of distinction by writers before the Conquest, might be in a more advantageous situation than the generality of burgesses. *Sciatis me concessisse civibus meis Lincoln, omnes libertates et consuetudines et leges suas, quas habuerunt tempore Edwardi et Will, et Henr. regum Anglice, et gildam suam mercatoriam de liominibus civitatis et de aliis mercatoribus comitatus, sicut iilam habuerunt tempore predictorum, antecessorum nostrorum, regum Anglue, melius et liberius. Et omnes homines qui infra quatuor divisas civitates manerit et mercatum deducunt, sint ad gildas, et consuetudines et assisas civitatis, sicut*

payments, which were in general not heavy, they were liable to tallages at the discretion of their lords. This burthen continued for two centuries, with no limitation, except that the barons were latterly forced to ask permission of the king before they set a tallage on their tenants, which was commonly done when he imposed one upon his own.⁵ Still the towns became considerably richer; for the profits of their traffic were undiminished by competition, and the consciousness that they could not be individually despoiled of their possessions, like the villeins of the country around, inspired an industry and perseverance which all the rapacity of Norman kings and barons was unable to daunt or overcome.

One of the earliest and most important changes in the condition of the burgesses was the conversion of their individual tributes into a perpetual rent ^{Towns let in fee-farm.} from the whole borough. The town was then said to be affinned, or let in fee-farm, to the burgesses and their successors for ever.¹ Previously to such a grant the lord held the town in his demesne, and was the legal proprietor of the soil and tenements; though I by no means apprehend that the burgesses were destitute of a certain estate in their possessions. But of a town in fee-farm he only kept the superiority and the inheritance of the annual rent, which he might recover by distress." The burgesses held their lands by burgage-tenure, nearly analogous to, or rather a species of, free socage^x. Perhaps before the grant they might correspond to modern copy holders. It is of some importance to observe that the lord, by such a grant of the town in fee-farm, whatever wo may think of its previous condition, divested himself of his property,

melius fueront temp. Edw. et Will, et Hen. regum Anglite. Itymer, t i. p. 40 (edit 1816).

I am indebted to the friendly remarks of the periodical critic whom i have before mentioned for reminding me of other charters of the same age, expressed in a similar manner, which in my haste I had overlooked, though printed in common books. But whether these general words ought to outweigh the silence of Domesday Book I am not prepared to decide. I have admitted below that the possession of corporate property implies an elective government for its administra-

tion, and I think it perfectly clear that the guilds maae by-laws for the regulation of their members. Yet this is something different from municipal jurisdiction over ail the inhabitants of a town.

[NOTE IV.]

Madox, Hist of Exchequer, c 17.

Madox, Firma Burgi, p. 1. There is one instance, I know not if any more could be found, of a firma burgi before the Conquest. It was at Huntingdon Domesday, p. 203.

^u Madox, p. 12, 13.

^x Id. p, 21.

or lucrative dominion over the soil, in return for the perpetual rent; so that tallages subsequently set at his own discretion upon the inhabitants, however common, can hardly be considered as a just exercise of the rights of proprietorship.

Under such a system of arbitrary taxation, however, it was evident to the most selfish tyrant that the wealth of his burgesses was his wealth, and their prosperity his interest; much more were liberal and sagacious monarchs, like Henry II., inclined to encourage them by privileges. From the time of William Rufus there was no reign in which charters were not granted to different towns of exemption from tolls on rivers and at markets, those lighter manacles of feudal tyranny; or of commercial franchises; or of immunity from the ordinary jurisdictions; or, lastly, of internal self-regulation. Thus the original charter of Henry I. to the city of London^y concedes to the citizens, in addition to valuable commercial and fiscal immunities, the right of choosing their own sheriff and justice, to the exclusion of every foreign jurisdiction.² These grants, however, were not in general so extensive till the reign of John.^a Before that time the interior arrangement of towns had received a new organization. In the Saxon period we find voluntary associations, sometimes religious, sometimes secular; in some cases for mutual defence against injury, in others for mutual relief in

y I have read somewhere that this charter was granted in 1101. But the instrument itself, which is only preserved by an Inspecimus of Edward IV., does not contain any date. Kymer, t. i. p. 11 (edit. 1816). Could it be traced so high, the circumstance would be remarkable, as the earliest charters granted by Louis VI., supposed to be the father of the Be institutions, are several years later.

It is said by Mr. Thorpe (Ancient Laws of England, p. 207), that, though there are ten witnesses, he only finds one who throws any light on the date: namely, Hugh Bigod, who succeeded his brother William in 1120. But Mr. Thorpe does not mention in what respect he succeeded. It was as *dapifer regis*; but he is not so named in the charter. Dugdale's Baronage, p. 132. The date, therefore, still

seems problematical.

² This did not, however, save the citizens from paying one hundred marks to the king for this privilege. Mag. Eo 5 Steph. apud Madox, Hist. Exchequer, t. xi. I do not know that the charter of Henry I. can be suspected; but Brady, in his treatise of Boroughs (p. 38, edit. 1777), does not think proper once to mention it; and indeed uses many expressions incompatible with its existence.

^a Blomefield, Hist. of Norfolk, vol. ff. p. 16, says that Henry J. granted the same privileges by charter to Norwich in 1122 which London possessed. Yet it appears that the king named the portreeve or provost; but Blomefield suggests that he was probably recommended by the citizens, the office being annual

poverty. These were called guilds, from the Saxon verb *gildan*, to pay or contribute, and exhibited the natural, if not the legal, character of corporations.^{1*} At the time of the Conquest, as has been mentioned above, such voluntary incorporations of the burgesses possessed in some towns either landed property of their own, or rights of superiority over that of others. An internal elective government seems to have been required for the administration of a common revenue, and of other business incident to their association.⁰ They became more numerous and more peculiarly commercial after that era, as well from the increase of trade as through imitation of similar fraternities existing in many towns of France. The spirit of monopoly gave strength to those institutions, each class of traders forming itself into a body, in order to exclude competition. Thus were established the companies in corporate towns, that of the Weavers in London being perhaps the earliest;^d and these were suc-

b Madox, *Firraa Burgi*, p. 23. Hickee has given us a bond of fellowship among the thanes of Cambridgeshire, containing several curious particulars. A composition of eight pounds, exclusive, I conceive, of the usual weregild, was to be enforced from the slayer of any fellow; If a fellow (*gilda*) killed a man of 1200 shillings weregild, each of the society was to contribute half a marc; for a ceorl, two ora? (perhaps ten shillings); for a Welshman, one. If however this act was committed wantonly, the fellow had no right to call on the society for contribution. If one fellow killed another, he was to pay the legal weregild to his kindred, and also eight pounds to the society. Harsh words used by one fellow towards another, or even towards a stranger, incurred a fine. No one was to eat or drink in the company of one who had killed his brother fellow, unless in the presence of the king, bishop, or alderman. *Ritisertatio Epistolaris*, p. 21.

We find in Wilkins's Anglo-Saxon Laws, p. 05, a number of ordinances sworn to by persons both of noble and ignoble rank (*ge eorlisc ge ceorlisc*), and confirmed by king Athelstan. These are in the nature of by-laws for the regulation of certain societies that had been formed for the preservation of public order. Their remedy was rather violent:

to kill and seize the effects of all who should rob any member of the association. This property, after deducting the value of the things stolen, was to be divided into two parts; one given to the criminal's wife if not an accomplice, the other shared between the king and the society.

In another fraternity among the clergy and laity of Exeter every fellow was entitled to a contribution in case of taking a journey, or if his house was burned. Thus they resembled, in some degree, our friendly societies; and display an interesting picture of manners, which has induced me to insert this note, though not greatly to the present purpose. See more of the Anglo-Saxon guilds in Turner's History, vol. ii. p. 102. Societies of the same kind, for purposes of religion, charity, or mutual assistance, rather than trade, may be found long afterwards. Blomefield's Hist of Norfolk, vol. iii. p. 494.

^c See a grant from Turstin, archbishop of York, in the reign of Henry I., to the burgesses of Beverley, that they may have their *hanshus* (i. e. guildhall) like those of York, et ibi sua statuta pertractant ad honorem Dei, &c. Rymer, t. i. p. 10, edit. 1816.

^d Madox, *Firma Burgi*, p. 189.

cessively consolidated and sanctioned by charters from the crown. In towns not large enough to admit of distinct companies, one merchant guild comprehended the traders in general, or the chief of them; and this, from the reign of Henry I I. downwards, became the subject of incorporating charters. The management of their internal concerns, previously to any incorporation, fell naturally enough into a sort of oligarchy, which the tenor of the charter generally preserved. Though the immunities might be very extensive, the powers were more or less restrained to a small number. Except in a few places, the right of choosing magistrates was first given by king John; and certainly must rather be ascribed to his poverty than to any enlarged policy, of which he was utterly incapable.⁶

From the middle of the twelfth century to that of the thirteenth the Naders of England became more and more prosperous. The towns on the southern coast exported tin and other metals in exchange for the wines of France; those on the eastern sent corn to Norway—the Cinque Ports bartered wool against the stuffs of Flanders/ Though bearing no comparison with the cities of Italy or the Empire, they increased sufficiently to acquire importance at home. That vigorous prerogative of the Norman monarchs, which kept down the feudal aristocracy, compensated for whatever inferiority there might be in the population and defensible strength of the English towns, compared with those on the continent. They had to fear no petty oppressors, no local hostility; and if they could satisfy the rapacity of the crown, were secure from all other grievances.

London. London, far above the rest, our ancient and noble capital, might, even in those early times, be justly termed a member of the political system. This great city, so admirably situated, was rich and populous long before the Conquest. Bede, at the beginning of the eighth century, speaks of London as a great market, which traders frequented by land and sea.^B It paid 15,000/. out of 82,000/., raised by Canute upon the kingdom.¹¹ If we believe Roger Hoveden, the citizens

^e **Idem**, *passim*. A few of an earlier date may be found in the new edition of Rymer. ^g Macpherson's *Annals of Commerce*, vol. i. p. 331. ^h Macpherson, p. 245.

¹ Lyttelton's *History of Henry II.*, ^h *Id.* p. 282.

of London, on the death of Ethelred II., joined with part of the nobility in raising Edmund Ironside to the throne.¹ Harold I., according to better authority, the Saxon Chronicle and William of Malmesbury, was elected by their concurrence.¹ⁿ Descending to later history, we find them active in the civil war of Stephen and Matilda. The famous bishop of Winchester tells the Londoners that they are almost accounted as noblemen on account of the greatness of their city; into the community of which it appears that some barons had been received.TM Indeed, the citizens themselves, or at least the principal of them, were called barons. It was certainly by far the greatest city in England. There have been different estimates of its population, some of which are extravagant; but I think it could hardly have contained less than thirty or forty thousand souls within its walls; and the suburbs were very populous." These numbers, the

ⁱ Cives Lundinenses, et pars nobilium qui eo tempore consistebont Lundonia?, Clitonem Eadmundum tmanimi consensu in regem levavere. p. 249.

^k Chron. Saxon, p. 154. Malmesbury, p. 76. He says the people of London were become almost barbarians through their intercourse with the Danes; propter frequentem convictum.

^m Lohdinenses, qui sunt quasi optimates pro magnitudinc civitatis in Angliil. llalmsb. p. 189. Thus too Matthew Parish cives Londinenses, quos propter civitatis dignitatem et civium antiquam Kbertatem Barones consuevimus appcllare. p. 744. And in another place: totius civitatis cives, quos barones vocant. p. 835. Spelmau says that the magistrates of several other towns were called barons. Glossary, Barones de London.

A singular proof of the estimation 'in which the citizens of London held themselves in the reign of Richard I. occurs in the Chronicle of Jocelyn de Brake-londe (p. 56 - Camden Society, 1840). They claimed to be free from toll in every part of England, and in every Jurisdiction, resting their immunity on the antiquity of London (which was coeval, they said, with Rome), and on its rank as metropolis of the kingdom. Et dicebant cives Lundonienses fuisse quietos de theloneo in omni foro, et semper et

unique, per totam Angliam, a tempore quo Roma primo fundata fuit, et civita tem Lundonias, eodem tempore fundatam, talem debere habere libertatem per totam Angliam, et ratione civitatis privilegiate quae olim metropolis fuit et caput regni, et ratione antiquitatis. Palgrave inclines to think that London never formed part of any kingdom of the Heptarchy. Introduction to Rot. Cur. Regis, p. 95. But this seems to imply a republican city in the midst of so many royal states, which seems hardly probable. Certainly it seems strange, though I cannot explain it away, that the capital of England should have* fallen, as we generally suppose, to the small and obscure kingdom of Essex. Winchester, indeed, may be considered as having become afterwards the capital during the Anglo-Saxon monarchy, so far as that it was for the most part the residence of our kings. But Londou was always more populous

ⁿ Drake, the historian of York, maintains that Loudon was less populous, about the time of the Conquest, than that city; and quotes Hardyng, a writer of Henry V.'s age, to prove that the interior part of the former was not closely built. Eboracum, p. 91. York however does not appear to have contained more than 10,000 inhabitants at the accession

enjoyment of privileges, and the consciousness of strength, infused a free and even a mutinous spirit into their conduct.^o The Londoners were always on the barons' side in their contests with the crown. They bore a part in deposing William Longehamp, the chancellor and justiciary of Eichard I.^p They were distinguished in the great struggle for Magna Charta; the privileges of their city are expressly confirmed in it; and the mayor of London was one of the twenty-five barons to whom the maintenance of its provisions was delegated. In the subsequent reign the citizens of London were regarded with much dislike and jealousy by the court, and sometimes suffered pretty severely at its hands, especially after the battle of Evesham.^q

Notwithstanding the influence of London in these seasons of disturbance, we do not perceive that it was distinguished from the most insignificant town by greater participation in national councils. Rich, powerful, honourable, and high-spirited as its citizens had become,

of the Conqueror; and the very exaggerations as to the populousness of London prove that it must have far exceeded that number. Fitz-Stephen, the contemporary biographer of Thomas a Becket, tells us of 80,000 men capable of bearing arms within its precincts; where however his translator, Pegge, suspects a mistake of the MS. in the numerals. And this, with similar hyperboles, so imposed on the judicious mind of Lord Lyttelton, that, finding in Peter of Blois the inhabitants of London reckoned at quadragintamillia, he has actually proposed to read quadringenta. Hist Henry II, vol. iv. ad finem. It is hardly necessary to observe that the condition of agriculture and internal communication would not have allowed half that number to subsist.

The subsidy-roll of 1377, published in the Archæologia, vol. vii., would lead to a conclusion that all the inhabitants of London did not even then exceed 35,000. If this be true, they could not have amounted, probably, to so great a number two or three centuries earlier. But the numbers given in that document have been questioned as to Norwich upon very plausible grounds, and seem rather suspicious in the present instance. [NOTE V.]

^o This seditions, or at least refractory character of the Londoners, was displayed in the tumult headed by William Longbeard in the time of Richard I., and that under Constantine in 1222, the patriarchs of a long line of city demagogues. Hoveden, p. 765. M. Paris, p. 154.

^p Hoveden's expressions are very precise, and show that the share taken by the citizens of London (probably the mayor and aldermen) in this measure was no tumultuary acclamation, but a deliberate concurrence with the nobility. Comes Johannes, et fere omnes episcopi, et comite Angliæ eadem die intraverant Londonias; et in crastino prædictus Johannes frater regis, et archiepiscopus Rothomagensis, et omnes episcopi, et comites et barones, et cives Londonienses cum illis convenerunt in atrio ecclesiæ S. Pauli . . . Placuit ergo Johanni fratri regis, et omnibus episcopis, et comitibus et baronibus regni, et civibus Londoniarum, quod cancellarius ille deponeretur, et deposuerunt eum, *ke.* p. 701.

^q The reader may consult, for a more full account of the English towns before the middle of the thirteenth century, Lyttelton's History of Henry II. vol. ii. p. 174; and Macpherson's Annals of Commerce.

it was very long before they found a regular place in parliament. The prerogative of imposing tallages at pleasure, unsparingly exercised by Henry III. even over London/ left the crown no inducement to summon the inhabitants of cities and boroughs. As these indeed were daily growing more considerable, they were certain, in a monarchy so limited as that of England became in the thirteenth century, of attaining, sooner or later, this eminent privilege. Although therefore the object of Simon de Montfort in calling them to his parliament after the battle of Lewes was merely to strengthen his own faction, which prevailed among the commonalty, yet their permanent admission into the legislature may be ascribed to a more general cause. For otherwise it is not easy to see why the innovation of an usurper should have been drawn into precedent, though it might perhaps accelerate what the course of affairs was gradually preparing.

It is well known that the earliest writs of summons to cities and boroughs, of which we can prove the existence, are those of Simon de Montfort, earl of Leicester, bearing date 12th of December, 1264, in the forty-ninth year of Henry III.* After a long controversy almost all judicious inquirers seem to have acquiesced in admitting this origin of popular representation.¹ The argument may be very

First summoning of towns to parliament, in 49 H. III.

¹ Frequent proofs of this may be found in Madox, *Hist. of Exchequer*, c. 17, as well as in Matt. Paris, who laments it with indignation. Gives *Londinenses, contra consuetudinem et libertatem eivitatis, quasi servi ultima¹ conditionis, non sub nomine aut titulo liberi adjutorii, sed tilllagii, quod millturn eos angebat, regi, licet inviti et renitentes, numerare sunt coacti.* p. 492. *Heu ubi est Londinensis, toties ciupta, toties concessa, toties scripta, toties jurata libertas!* *ke.* p. 627. The king sometimes suspended their market, that is, I suppose, their right of toll, till his demands were paid.

These writs are not extant, having perhaps never been returned; and consequently we cannot tell to what particular places they were addressed. It appears however that the assembly was

intended to be numerous; for the entry runs: *scribitur civibus Ebor, civibus Lincoln, et ceteris burgis Anglia?* It is singular that no mention is made of *Ivondon*, which must have had some special summons. Rynier, t. i. p. 803. *l'ugdalc, Summonitiones ad Parliamcuntum*, p. 1.

¹ It would ill repay any reader's diligence to wade through the vapid and diluted pages of Tyrrell; but whoever would know what can be best pleaded for a higher antiquity of our present parliamentary constitution may have recourse to Hody on *Convocations*, and Lord Lyttelton's *History of Henry II* vol. ii. p. 276, and vol. iv. p. 79-106. I do not conceive it possible to argue the question more ingeniously than has been done by the noble writer last quoted. Whitelocke, in his commentary on the

concisely stated. We find from innumerable records that the king imposed tallages upon his demesne towns at discretion." No public? instrument previous to the forty-ninth of Henry III. names the citizens and burgesses as constituent parts of parliament; though prelates, barons, knights, and sometimes freeholders, are enumerated; ^x while, since the undoubted admission of the commons, they are almost invariably mentioned. No historian speaks of representatives appearing for the people, or uses the word citizen or burgess in describing those present in parliament. Such convincing, though negative, evidence is not to be invalidated by some general and ambiguous phrases, whether in writs and records or in historians/ Those monkish annalists are poor authorities upon any point where their language is to be delicately measured. But it is hardly possible that, writing circumstantially, as Roger de Hoveden and Matthew Paris sometimes did, concerning proceedings in parliament, they could have failed to mention the commons in unequivocal expressions, if any representatives from that order had actually formed a part of the assembly.

Two authorities, however, which had been supposed to prove a greater antiquity than we have assigned to the representation of the commons, are deserving of particular consideration; -the cases of St. Albans and Barnstaple. The burgesses of St. Albans complained to the council in the eighth year of Edward II., that, although they held of the king in capite, and ought to attend his parliaments whenever they are summoned, by two of their number, instead of all other services, as had been their custom in all past times, which services the said burgesses and

Authorities
in favour of
an earlier
date.
St Albans.

parliamentary writ, has treated it very much at length, but with no critical discrimination. [NOTE VII.]

^u Madox, Hist of Exchequer, c. 17.

^x The only apparent exception to this is in the letter addressed to the pope by the parliament of 1246; the salutation of which runs thus: Barones, proceres, et magnates, *ac nobiles portuum maris habitatores*, necnon et clerici et populus universus, salutem. Matt Paris, p. 696. It is plain, I think, from these words,

that some of the chief inhabitants of the Cinque Ports, at that time very flourishing towns, were present in this parliament. But whether they sat as representatives, or by a peculiar writ of summons, is not so evident; and the latter may be the more probable hypothesis of the two.

^y Thus Matthew Paris tells us that in 1237 the whole kingdom, regni totius universitas, repaired to a parliament of Henry III. p. 367.

their predecessors had performed as well in the time of the late king Edward and his ancestors as in that of the present king until the parliament now sitting, the names of their deputies having been constantly enrolled in chancery, yet the sheriff of Hertfordshire, at the instigation of the abbot of *tit. Albans*, had neglected to cause an election and return to be made ; and prayed remedy. To this petition it was answered, " Let the rolls of chancery be examined, that it may appear whether the said burgesses were accustomed to come to parliament, or not, in the time of the king's ancestors; and let right be done to them, vocatis evocandis, si necesse fuerit." I do not translate these words, concerning the sense of which there has been some dispute, though not, apparently, very material to the principal subject.²

This is, in my opinion, by far the most plausible testimony for the early representation of boroughs. The burgesses of St. Albans claim a prescriptive right from the usage of all past times, and more especially those of the late Edward and his ancestors. Could this be alleged, it has been said, of a privilege at the utmost of fifty years' standing, once granted by an usurper, in the days of the late king's father, and afterwards discontinued till about twenty years before the date of their petition, according to those who refer the regular appearance of the commons in parliament to the twenty-third of Edward I. ? Brady, who obviously felt the strength of this authority, has shown little of his usual ardour and acuteness in repelling it. It was observed, however, by Madox, that the petition of St. Albans contains two very singular allegations: it asserts that the town was part of the king's demesne, whereas it had invariably belonged to the adjoining abbey ; and that its burgesses held by the tenure of attending parliament, instead of all other services, contrary to all analogy, and without parallel in the condition of any tenant in capite throughout the kingdom. " It is no wonder, therefore," says Hume, " that a petition which advances two falsehoods should contain one historical mistake, which indeed amounts only to an inaccurate expression." But it must be confessed that we cannot so easily set aside the

whole authority- of this record. For whatever assurance the people of St. Albans might show in asserting what was untrue, the king's council must have been aware how recently the deputies of any towns had been admitted into parliament. If the lawful birth of the House of Commons were in 1205, as is maintained by Brady and his disciples, is it conceivable that, in 11315, the council would have received a petition, claiming the elective franchise by prescription, and have referred to the rolls of chancery to inquire whether this had been used in the days of the king's progenitors? I confess that I see no answer which can easily be given to this objection by such as adopt the *latest* epoch of borough representation, namely, the parliament of 23 E. I. But they are by no means equally conclusive against the supposition that the communities of cities and towns, having been first introduced into the legislature during Leicester's usurpation, in the forty-ninth year of Henry III., were summoned, not perhaps uniformly, but without any long intermission, to succeeding parliaments. There is a strong presumption, from the language of a contemporary historian, that they sat in the parliament of 1209, four years after that convened by Leicester.^a It is more unequivocally stated by another annalist that they were present in the first parliament of Edward I. held in 1271,^b Nor does a similar inference want some degree of support from the preambles of the statute of Marlebridge in 51 II. III., of Westminster I. in the third, and of Gloucester in the sixth, year of Edward I.^c And the writs are extant

^a Convocatis universis Angliæ prelatiſ et magnatibus, necnon cunctatum regni ſui civitaturn et burgorum potentiſbus. Wykes, in Gate, XV Scriptorum, t. ii. p. 88. I am indebted to Hody on Convocations for this reference, which ſeems to have eſcaped moſt of our conſtitutional writers.

^b Hoc anno . . . convenerunt archiepiſcopi, epiſcopi, comiteſ et baroneſ, abbateſ et prioreſ, et de quolibet comitatatu quatuor roiliſteſ, et de qualibet civitate quatuor. Annateſ Waverleieneſ in Gale, t. ii. p. 227. I waſ led to thiſ paſſage by Atterbury, Rightſ of Convocations, p. 310, where ſome other au-

thoritieſ leſſ unqueſtionable are adduced for the ſame purpoſe. I thoſt thiſ aſſembly and thai mentioned by Wykeſ in 1269 were certainly parliameſteſ, and acted ad huc, particularly the former, though ſummoned for purpoſeſ riot ſtrictly parliamentary.

^c The ſtatute of Marlebridge iſ ſaid to be made convocaiſ diſcretioribuſ, tam majoribuſ quam minoribuſ; that of Weſtminſter primer, par ſon Conſeil, et par raſſentement deſ arehieveſqueſ, eveaques, abbteſ, prioreſ, counteſ, baroneſ, et tout le coimnality de la terre Illoqueſ ſuramonteſ. The ſtatute of Glouceſter runs, appelleſ lew plug diſcreteſ de Bon

which summon every city, borough, and market town to send two deputies to a council in the eleventh year of his reign. I call this a council, for it undoubtedly was not a parliament. The sheriffs were directed to summon personally all who held more than twenty pounds a year of the crown, as well as four knights for each county invested with full powers to act for the commons thereof. The knights and burgesses thus chosen, as well as the clergy within the province of Canterbury, met at Northampton; those within the province of York, at that city. And neither assembly was opened by the king.^d This anomalous convention was nevertheless one means of establishing the representative system, and, to an inquirer free from technical prejudice, is little less important than a regular parliament. Nor have we long to look even for this. In the same year, about eight months after the councils at Northampton and York, writs were issued summoning to a parliament at Shrewsbury two citizens from London, and as many from each of twenty other considerable towns.' It is a slight cavil

royaume, auxibien des graudes come des meinders. These preambles seem to have satisfied Mr. Pryme that the commons were then represented, though the writs are wanting; and certainly no one could be less disposed to exaggerate their antiquity. 2nd Register, p. 30.

^d Brady's Hist. of England, vol. ii. Appendix; Carte, vol. ii. p. 257.

^e This is commonly denominated the parliament of Acton Burneli; the clergy and commons having sat in that town, while the barons passed judgment upon David prince of Wales at Shrewsbury. The towns which were honoured with the privilege of representation, and may consequently be supposed to have been at that time the most considerable in England, were York, Carlisle, Scarborough, Nottingham, Grimsby, Lincoln, Northampton, Lynn, Yarmouth, Colchester, Norwich, Chester, Shrewsbury, Worcester, Hereford, Bristol, Canterbury, Winchester, and Exeter. Rymer, t. ii. p. 247.

"This [the trial and Judgment of Llewellyn] seems to have been the only business transacted at Shrewsbury; for the bishops and abbots, and four knights

of each shire, and two representatives of London and nineteen other trading towns, summoned to meet the same day in parliament, are said to have sat at Acton Burneli; and thence the law made for the more easy recovery of the debts of merchants is called the Statute of Acton Burneli. It was probably made at the request of the representatives of the cities and boroughs present in that parliament, authentic copies in the king's name being sent to seven of those trading towns; but it runs only in the name of the king and his council." Carte, ii. 195, referring to Rot Wall. 11 Edw. I. m. 2nd.

As the parliament was summoned to meet at Shrewsbury, it may be presumed that the Commons adjourned to Acton Burneli. The word "statute" implies that some consent was given, though the enactment came from the king and council. It is entitled in the Book of the Exchequer—des Estatuz de Slopbury ke sunt appcle Actone Burnel. Ces sunt les Estatuz fez at Salopsebur, al parlement prochein apres la fete Seint Michel, l'an del reigne le Rey Edward, Fitz le Rey Henry, unaïne. Report of

to object that these were not directed as usual to the sheriff of each county, but to the magistrates of each place. Though a very imperfect, this was a regular and unequivocal representation of the commons in parliament. But their attendance seems to have intermitted from this time to the twenty-third year of Edward's reign.¹

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

Lords' Committee, p. 191. The enactment by the king and council founded on the consent of the estates was at Acton Burnell. And the Statute of Merchants, 13 Edw. I., refers to that of the 11th, as made by the king, a son parlement que il tint a Acton Buniell, and again mentions t'avant dit atatut fait a Acton Burnell. This seems to

afford a voucher for what is said in my text, which has been controverted by a learned antiquary.* It is certain that the lords were at Shrewsbury in their judicial character condemning Llewellyn; but whether they proceeded afterwards to Acton Burnell, and joined in the statute, is not quite so clear.

¹ [NOTE VI.]

judice if lie should grant them a fresh charter in terms equally ample with that of his predecessor Athelstan. But the following year we have another writ and another inquest; the former reciting that the second return had been unduly and fraudulently made; and the latter expressly contradicting the previous inquest in many points, and especially finding no proof of Athelstan's supposed charter. Comparing the various parts of this business, we shall probably be induced to agree with Willis, that it was but an attempt of the inhabitants of Barnstaple to withdraw themselves from the jurisdiction of their lord. For the right of returning burgesses, though it is the main point of our inquiries, was by no means the most prominent part of their petition, which rather went to establish some civil privileges of devising their tenements and electing their own mayor. The first and fairest return finds only that they were accustomed to send members to parliament, which an usage of fifty years (from 23 E. 1. to 18 E. 111.) was fully sufficient to establish, without searching into more remote antiquity/

It has, however, probably occurred to tho reader of these two cases, St. Albans and Barnstaple, that the representation of the commons in parliament was not treated as a novelty, even in times little posterior to those in which we have been supposing it to have originated. In this consists, I think, the sole strength of the opposite argument. An act in the fifth year of liichard II. declares that, if any sheriff shall leave out of his returns any cities or boroughs which be bound and of old times were wont to come to the parliament, he shall be punished as was accustomed to be done in the like case in time past.^h In the memorable assertion of legislative right by the commons in the second of Henry V. (which will be quoted hereafter) they affirm that " the commune of the land is, *and ever has been*, a member of parliament."^l And the consenting suffrage of our older law-books must be placed in the same scale. The first gainsayers, I think, were Camden and Sir Henry Spelman, who, upon probing the antiquities of

^g Willis, Notitia Parliamentaria, vol. i1, p. 312; Lyttelton's Hist. of Hon. II., vol. iv. p. 89.

^h 5 Ric. II. stat. 2, c. iv.
i Rot. Tail. vol. iv. p. 22.

our constitution somewhat more exactly than their predecessors, declared that they could find no signs of the commons in parliament till the forty-ninth of Henry III. Prynne, some years afterwards, with much vigour and learning, maintained the same argument, and Brady completed the victory. But the current doctrine of Westminster Hall, and still more of the two chambers of parliament, was certainly much against these antiquaries; and it passed at one time for a surrender of popular principles, and almost a breach of privilege, to dispute the lineal descent of the House of Commons from the witenagemot.^k

The true ground of these pretensions to antiquity was a very well-founded persuasion that no other argument would be so conclusive to ordinary minds, or cut short so effectually all encroachments of the prerogative. The populace of every country, but none so much as the English, easily grasp the notion of right, meaning thereby something positive and definite; while the maxims of expediency or theoretical reasoning pass slightly over their minds. Happy indeed for England that it is so ! But we have here to do with the fact alone. And it may be observed that several pious frauds were practised to exalt the antiquity of our constitutional liberties. These began, perhaps, very early, when the imaginary laws of Edward the Confessor were so earnestly demanded. They were carried further under Edward I. and his successor, when the fable of privileges

^k Though such an argument would not be conclusive, it might afford some ground for hesitation, if the royal burghs of Scotland were actually represented in their parliament more than half a century before the date assigned to the first representation of English towns. Lord Hailes concludes from a passage in Fordun "that as early as 1211 burgesses gave suit and presence in the great council of the king's vassals; though the contrary has been asserted with much confidence by various authors." *Annals of Scotland*, vol. i. p. 139. Fordun's words, however, so far from importing that they formed a member of the legislature, which perhaps Lord Hailes did not mean by the quaint expression "gave suit and presence," do not appear to me conclusive

to prove that they were actually present—*Hoc anno Rex Scotiæ Willelmus magnum tenuit consilium. Ubi, petite ab optimatibus auxilio, promiserunt se daturos decern mille marcas: prater burgenses regni, qui sex mi'llia promiserunt.* Those who know the brief and incorrect style of chronicles will not think it unlikely that the offer of 6000 marks by the burgesses was not made in parliament, but in consequence of separate requisitions from the crown. Pinkerton is of opinion that the magistrates of royal burghs might upon this, and perhaps other occasions, have attended at the bar of parliament with their offers of money. But the deputies of towns do not appear as a part of parliament till 1326. *Hist of Scotland*, vol. L p. 352, 371.

granted by the Conqueror to the men of Kent was devised; when Andrew Horn rilled his *Mirroure of Justices* with fictitious tales of Alfred; and, above all, when the "Method of holding parliaments in the time of Ethelred" was fabricated, about the end of Richard II.'s reign; an imposture which was not too gross to deceive Sir Edward Coke.^m

There is no great difficulty in answering the question why the deputies of boroughs were finally and permanently ingrafted upon parliament by Edward I.ⁿ The government was becoming constantly more attentive to the wealth that commerce brought into the kingdom, and the towns were becoming more flourishing and more independent. But chiefly there was a much stronger spirit of general liberty and a greater discontent at violent acts of prerogative from the era of Magna ('harta; after which authentic recognition of free principles many acts which had seemed before but the regular exercise of authority were looked upon as infringements of the subject's right. Among these the custom of setting tallages at discretion would naturally appear the most intolerable; and men were unwilling to remember that the burgesses who paid them were indebted for the rest of their possessions to the bounty of the crown. In Edward I.'s reign, even before the great act of Confirmation of the Charters had rendered arbitrary impositions absolutely unconstitutional, they might perhaps excite louder murmurs than a discreet administration would risk. Though the necessities of the king, therefore, and his imperious temper often led him to this course,^o it was a

Causes of
summoning
deputies
from
boroughs.

^m [NOTE VII.]

ⁿ These expressions cannot appear too strong. But it is very remarkable that to the parliament of 18 Edward III. the writs appear to have summoned none of the towns, but only the counties. Willis, *Notit Parliament*, vol. i. Preface, p. 13. Prynne's Register, 3rd part, p. 144. Yet the citizens and burgesses are once, but only once, named as present in the parliamentary roll; and there is, in general, a chasm in place of their names, where the different ranks present are enumerated. Rot. Pari. vol. ii. p. 146. A subsidy was granted at this parliament; so

that, if the citizens and burgesses were really not summoned, it is by far the most violent stretch of power during the reign of Edward III. But I know of no collateral evidence to illustrate or disprove it

^o Tallages were imposed without consent of parliament in 17 E. I. Wykes, p. 117; and in 32 E. I. Brady's Hist of Eng. vol. ii. In the latter instance the king also gave leave to the lay and spiritual nobility to set a tallage on their own tenants. This was subsequent to the Confirmation Chartarum, and imoues tionably illegal.

more prudent counsel to try the willingness of his people before he forced their reluctance. And the success of his innovation rendered it worth repetition. Whether it were from the complacency of the commons at being thus admitted among the peers of the realm, or from a persuasion that the king would take their money if they refused it, or from inability to withstand the plausible reasons of his ministers, or from the private influence to which the leaders of every popular assembly have been accessible, much more was granted in subsidies after the representation of the towns commenced than had ever been extorted in tallages.

To grant money was, therefore, the main object of their meeting; and if the exigencies of the administration could have been relieved without subsidies, the citizens and burgesses might still have sat at home and obeyed the laws which a council of prelates and* barons enacted for their government. But it is a difficult question whether the king and the peers designed to make room for them, as it were, in legislation; and whether the power of the purse drew after it immediately, or only by degrees, those indispensable rights of consenting to laws which they now possess. There are no sufficient means of solving this doubt. during the reign of Edward I. The writ in 22 E. I. directs two knights to be chosen cum plena potestate pro se et tota communitate comitatus praedicti ad consulendum et consentiendum pro se et communitate illa, his quae comites, barones, et proceres praedicti concorditer ordinaverint in praemissis. That of the next year runs, ad faciendum tunc quod de communi consilio ordinabitur in praemissis. The same words are inserted in the writ of 26 E. I. In that of 28 E. I. the knights are directed to be sent cum plena potestate audiendi et faciendi quas ibidem ordiuari contigerint pro communi commodo. Several others of the same reign have the words ad faciendum. The difficulty is to pronounce whether this term is to be interpreted in the sense of *performing* or of *enacting*; whether the representatives of the commons were merely to learn from the lords what was to be done, or to bear their part in advising upon it. The earliest writ, that of 22 E. L, certainly implies the latter; and I do not know that any of the rest are conclusive to the contrary.

In the reign of Edward I I. the words *ad consentiendum* alone, or *ad faciendum et consentiendum*, begin; and from that of Edward III. this form has been constantly used.^p It must still, however, be highly questionable whether the commons, who had so recently taken their place in parliament, gave anything more than a constructive assent to the laws enacted during this reign. They are not even named in the preamble of any statute till the last year of Edward I. Upon more than one occasion the sheriffs were directed to return the same members who had sat in the last parliament, unless prevented by death or infirmity.⁴

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

At what time parliament was divided into two houses.

^p Prynne's 2nd Register. It may be remarked that writs of summons to great councils never ran *ad faciendum*, but *ad tractandum, consulendum et consentiendum*; from which some would infer that *faciendum* had the sense of enacting; since statutes could not be passed JII such

assemblies. Id. p. 92.

1 28 E. I. III Prynne's 4th Register, p. 12; 9 E. II. (a great council), p. 48.

^r Brady's Hist of England, vol. ii. p. 40; Parliamentary History, vol. I p. 206; Rot Pari. t. ii. p. 66.

those affecting the lords, or the lords in those of the commons. In fact, however, there is abundant proof of their separate existence long before the seventeenth of Edward III., which is the epoch assigned by Carte," or even the sixth of that king, which has been chosen by some other writers. Tims the commons sat at Acton Burnell in the eleventh of Edward I., while the upper house was at Shrewsbury. In the eighth of Edward I. "the commons of England complain to the king and his council, &c." These must surely have been the commons assembled in parliament, for who else could thus have entitled themselves? In the nineteenth of the same king we find several petitions, evidently proceeding from the body of the commons in parliament, and complaining of public grievances." The roll of 1 E. III., though mutilated, is conclusive to show that separate petitions were then presented by the commons, according to the regular usage of subsequent times.^x And indeed the preamble of 1 E. III., stat. 2, is apparently capable of no other inference.

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

The proper business of the House of Commons was to petition for redress of grievances, as much as to provide for the necessities of the crown. In the prudent fiction of English law no wrong is supposed to proceed from

^s Carte, vol. li. p. 451; Parliamentary History, vol. i. p. 234.

^t Rot Pari. vol. i. p. 289.

^u Id. p. 430.

^x Id. vol. *il* p. 7.

Id. p. 289, 351, 430.

Id. p. 5.

Id. p. 86

the source of right. The throne is fixed upon a pinnacle, which perpetual beams of truth and justice irradiate, though corruption and partiality may occupy the middle region and cast their chill shade upon all below. In his high court of parliament a king of England was to learn where injustice had been unpunished and where right had been delayed. The common courts of law, if they were sufficiently honest, were not sufficiently strong, to redress the subject's injuries where the officers of the crown or the nobles interfered. To parliament he looked as the great remedial court for relief of private as well as public grievances. For this cause it was ordained in the fifth of Edward I. that the king should hold a parliament once, or, if necessary, twice every year; "that the pleas which have been thus delayed, and those where the justices have differed, may be brought to a close."^b And a short act of 4 Edward III., which was not very strictly regarded, provides that a parliament shall be held "every year, or oftener, if need be."^c By what persons, and under what limitations, this jurisdiction in parliament was exercised will come under our future consideration.

The efficacy of a king's personal character in so imperfect a state of government was never more strongly

^b Rot. Pari. vol. i. p. 285.

^c 4 K. III. c. 14. Annual sessions of parliament seem fully to satisfy the words, and still more the spirit, of this act, and of 36 K. III. c. 10; which however are repealed by implication from the provisions of 6 Will. III. c. 2. But it was very rare under the Plantagenet dynasty for a parliament to continue more than a year.

It has been observed that this provision "had probably in view the administration of justice by the king's court in parliament" Report of L. C. p. 301. And in another place:—"It is characteristic that the word parliament in the reign of Edward I. was not used only to describe a legislative assembly, but was the common appellation of the ordinary assembly of the king's great court or council; and that the legislative assembly of the realm, composed generally, in and after the 23rd of Edward I., of lords spiritual and temporal, and representatives, of the com-

mons, was usually convened to meet the king's council in one of these parliaments." p. 171.

Certainly the commons could not desire to have an annual parliament in order to make new statutes, much less to grant subsidies. It was, however, important to present their petitions, and to set forth their grievances to this high court. We may easily reconcile the anxiety so often expressed by the commons to have frequent sessions of parliament, with the individual reluctance of members to attend. A few active men procured these petitions, which the majority could not with decency oppose, since the public benefit was generally admitted. But when the writs came down, every pretext was commonly made use of to avoid a troublesome and ill-remunerated journey to Westminster. For the subject of annual parliaments see a valuable article by Allen in the 28th volume of the *Edinburgh Review*.

exemplified than in the two first Edwards. The father, a little before his death, had humbled his boldest opponents among the nobility; and as for the commons, so far from claiming a right of remonstrating, we have seen cause to doubt whether they were accounted effectual members of the legislature for any purposes but taxation. But in the very second year of the son's reign they granted the twenty-fifth penny of their goods, "upon this condition, that the king should take advice and grant redress upon certain articles wherein they are aggrieved." These were answered at the ensuing parliament, and are entered with the king's respective promises of redress upon the roll. It will be worth while to extract part of this record, that we may see what were the complaints of the commons of England, and their notions of light, in 1309. I have chosen on this as on other occasions to translate very literally, at the expense of some stiffness, and perhaps obscurity, in language.

"The good people of the kingdom who are come hither to parliament pray our lord the king that he will, if it please him, have regard to his poor subjects, who are much aggrieved by reason that they are not governed as they should be, especially as to the articles of the Great Charter; and for this, if it please him, they pray remedy. Besides which, they pray their lord the king to hear what has long aggrieved his people, and still does so from day to day, on the part of those who call themselves his officers, and to amend it, if he pleases." The articles, eleven in number, are to the following purport: — 1. That the king's purveyors seize great quantities of victuals without payment; 2. That new customs are set on wine, cloth, and other imports; 3. That the current coin is not so good as formerly;^d 4, 5. That the steward and marshal enlarge their jurisdiction beyond measure, to the oppression of the people; 6. That the commons find none to receive petitions addressed to the council; 7. That the collectors of the king's dues (pernours des prises) in towns and at fairs take moie than is

^d This article is so expressed as to make it appear that the grievance was the high price of commodities. But as this was the natural effect of a degraded currency, and the whole tenor of these articles relates to abuses of government, I think it must have meant what I have said in the text.

Edward II.
Petitions of
parliament
during his
reign.

lawful; 8. That men are delayed in their civil suits by writs of protection; 9. That felons escape punishment by procuring charters of pardon; 10. That the constables of the king's castles take cognizance of common pleas; 11. That the king's escheators oust men of lands held by good title, under pretence of an inquest of office.⁶

These articles display in a short compass the nature of those grievances which existed under almost all the princes of the Plantagenet dynasty, and are spread over the rolls of parliament for more than a century after this time. Edward gave the amplest assurances of putting an end to them all, except in one instance, the augmented customs on imposts, to which he answered, rather evasively, that he would take them off till he should perceive whether himself and his people derived advantage from so doing, and act thereupon as he should be advised. Accordingly, the next year, he issued writs to collect these new customs again. But the Lords Ordainers superseded the writs, having entirely abrogated all illegal impositions.¹ It does not appear, however, that, regard had to the times, there was anything very tyrannical in Edward's government. He set tallages sometimes, like his father, on his demesne towns, without assent of parliament. In the nineteenth year of his reign the commons show that, "whereas we and our ancestors have given many tallages to the king's ancestors to obtain the charter of the forest, which charter we have had continued by the present king, paying him largely on our part; yet the king's officers of the forest seize on lands, and destroy ditches, and oppress the people, for which they pray remedy, for the sake of God and his father's soul." They complain at the same time of arbitrary imprisonment, against the law of the land.^h To both these petitions the king returned a promise of redress; and they complete the catalogue of customary grievances in this period of our constitution.

During the reign of Edward I. the rolls of parliament are imperfect, and we have not much assistance from other sources. The assent of the commons, which frequently is not specified in the statutes of this age,

^c Prynne's 2nd Register, p. 68.

^f Id. p. 75.

^g Miwlox, Firma Burgi, p. 6; Rot.

Parl. vol. i. p. 449.

^h Rot Parl. vol. i. p. 430.

1 It is however distinctly specified in

appears in a remarkable and revolutionary proceeding, **the** appointment of the Lords Ordainers in 1312.^k In this case it indicates that the aristocratic party then combined against the crown were desirous of conciliating popularity. An historian relates that some of the commons were consulted upon the ordinances to be made for the reformation of government.^m

During the long and prosperous reign of Edward III. the efforts of parliament in behalf of their country were rewarded with success in establishing upon a firm footing three essential principles of our government—the illegality of raising money without consent; the necessity that the two houses should concur for any alterations in the law; and, lastly, the right of the commons to inquire into public abuses, and to impeach public counsellors. By exhibiting proofs of each of these from parliamentary records I shall be able to substantiate the progressive improvement of our free constitution, which was principally consolidated during the reigns of Edward III. and his two next successors. Brady, indeed, Carte, and the authors of the Parliamentary History, have trod already over this ground; but none of the three can be considered as familiar to the generality of readers, and I may at least take credit for a sincerer love of liberty than any of their writings display.

In the sixth year of Edward III. a parliament was called to provide for the emergency of an Irish rebellion, wherein, "because the king could not send troops and money to Ireland without the aid of his people, the prelates, earls, barons, and other great men, and the knights of shires,

Remonstrances against levying money without consent.

stat 7 Edw. II. and in 12 Edw. II., and equivalent words are found in other statutes. Though often wanting, the testimony to the constitution of parliament is sufficient and conclusive.

^k Hot Pari. vol. i. p. 281.

^m Walsingham, p. 97. The Lords' committee "have found no evidence of any writ issued for election of knights, citizens, and burgesses to attend the same meetings; from the subsequent documents it seems probable that none were issued, and that the parliament which assembled at Westminster consisted only

of prelates, earls, and barons." p. 259. We have no record of this parliament; but in that of 5 Edw. II. it is recited—*Come le sezieme jour de Maw l'an de notre regne tierce, a l'honneur de Dieu et pour le bien de nous et de nostre royaume, eussions grante de notre franche votonte', par nos lettres ouvertes aux prelatz, countes, et barons, et cmmunet (te dit royaume, qu'ils pulasent eslire certain persones des prelate, corotes, et barons, &c* Rot. Pari. h 381. The inference, therefore of the committee seems erroneous. [NOTE VIII.,]

and all the commons, of their free will, for the said purpose, and also in order that the king might live of his own, and not vex his people by excessive prises, nor in other manner, grant to him the fifteenth penny, to levy of the commons," and the tenth from the cities, towns, and royal demesnes. And the king, at the request of the same, in ease of his people, grants that the commissions lately made to certain persons assigned to set tallages on cities, towns, and demesnes throughout England shall be immediately repealed; and that in time to come he will not set such tallage, except as it has been done in the time of his ancestors, and as he may reasonably do." °

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

In the thirteenth year of this reign the lords gave their answer to commissioners sent to open the parliament, and to treat with them on the king's part, in a sealed roll. This contained a grant of the tenth sheaf,

° "La communaltee" seems in this place to mean the tenants of land, or commons of the counties, in contradistinction to citizens and burgesses.

° Rot Pari. vol. ii. p. 66. The Lords' committee observe on this passage in the roll of parliament, that "the king's right to tallage his cities, boroughs, and demesnes seems not to have been questioned by the parliament, though the commissions for setting the tallage were objected to." p. 305. But how can we believe that after the representatives of these cities and boroughs had sat, at least at times, for two reigns, and after the explicit renunciation of all right of tallage by Edward I. (for it was never pretended that the king could lay a tallage on any towns which did not hold of himself), there could have been a parliament which did not question the legality of a

tallage set without their consent? The silence of the rolls of parliament would furnish but a poor argument. But in fact their language is expressive enough. The several ranks of lords and commons grant the fifteenth penny from the commonalty, and the tenth from the cities, boroughs, and demesnes of the king, "that our lord the king may live of his own, and pay for his expenses, and not aggrieve his people by excessive (outraiouses) prises, or otherwise." And upon this the king revokes the commission in the words of the text Can any thing be clearer than that the parliament, though in a much gentler tone than they came afterwards to assume, intimate the illegality of the late tallage? As to any other objection to the commissions, which the committee suppose to have been taken, nothing appears on the roll.

fleece, and lamb. But before they gave it they took care to have letters patent showed them, by which the commissioners had power "to grant some graces to the great and small of the kingdom." "And the said lords," the roll proceeds to say, "will that the imposition (male-toste) which now again has been levied upon wool be entirely abolished, that the old customary duty be kept, and that they may have it by charter, and by enrolment in parliament, that such custom be never more levied, and that this grant now made to the king, or any other made in time past, shall not turn hereafter to their charge, nor be drawn into precedent." The commons, who gave their answer in a separate roll, declared that they could grant no subsidy without consulting their constituents; and therefore begged that another parliament might be summoned, and in the mean time they would endeavour, by using persuasion with the people of their respective counties, to procure the grant of a reasonable aid in the next parliament.¹" They demanded also that the imposition on wool and lead should be taken as it used to be in former times, "inasmuch as it is enhanced without assent of the commons, or of the lords, as We understand; and if it be otherwise demanded, that any one of the commons may refuse it (le puisse arester), without being troubled on that account (saunz estre chalange)."^q

Wool, however, the staple export of that age, was too easy and tempting a prey to be relinquished by a prince engaged in an impoverishing war. Seven years afterwards, in 20 E. 111., we find the commons praying that the great subsidy of forty shillings upon the sack of wool be taken off; and the old custom paid as heretofore was assented to and granted. The government spoke this time in a more authoritative tone. "As to this point," the answer runs, "the prelates and others, seeing in what need the king stood of an aid before his passage beyond sea, to recover his rights and defend his kingdom of England, consented, with the concurrence of the merchants, that he should have in aid of his said **war**, and in defence of his said kingdom, forty shillings of subsidy for each sack of wool that should be exported beyond sea for two years to come. And upon this grant

divers merchants have made many advances to our lord the king in aid of his war; for which cause this subsidy cannot be repealed without assent of the king and his lords."

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

Edward was led by the necessities of his unjust and expensive war into another arbitrary encroachment, of which we find as many complaints as of his pecuniary extortions. The commons pray, in the same parliament of 20 E. III., that commissions should not issue for the future out of chancery to charge the people with providing men-at-arms, hobelers (or light cavalry), archers, victuals, or in any other manner, without con-

¹ Rot. Parl. vol. ii. p. 161.

² Case of impositions in Howell's State Trials, vol. ii. p. 371-519; particularly the argument of Mr. Hakewill. Hale's Treatise on the Customs, in Hargrave's Tracts, vol. i.

Edward III. imposed another duty on

cloth exported, on the pretence that, as the wool must have paid a tax, he had a right to place the wrought and un wrought article on an equality. The commons remonstrated against this; but it was not repealed. This took place about 23 E. III. Hale's Treatise, p. 175.

sent of parliament. It is replied to this petition, that " it is notorious how in many parliaments the lords and commons had promised to aid the king in his quarrel with their bodies and goods as far as was in their power; wherefore the said lords, seeing the necessity in which the king stood of having aid of men-at-arms, hobelers, and archers, before his passage to recover his rights beyond sea, and to defend his realm of England, ordained that such as had five pounds a year, or more, in land on this side of Trent should furnish men-at-arms, hobelers, and archers, according to the proportion of the land they held, to attend the king at his cost; and some who would neither go themselves nor find others in their stead were willing to give the king wherewithal he might provide himself with some in their place. And thus the thing has been done, and no otherwise. And the king wills that henceforth what has been thus done in this necessity be not drawn into consequence or example."

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

of great necessity, and for the defence of his kingdom.^y But this more humble language indicates a change in the spirit of government, which, after long fretting impatiently at the curb, began at length to acknowledge the controlling hand of law.

These are the chief instances of a struggle between the crown and commons as to arbitrary taxation; but there are two remarkable proceedings in the 45th and 40th of Edward, which, though they would not have been endured in later times, are rather anomalies arising out of the unsettled state of the constitution and the recency of parliamentary rights than mere encroachments of the prerogative. In the former year parliament had granted a subsidy of fifty thousand pounds, to be collected by an assessment of twenty-two shillings and threepence upon every parish, on a presumption that the parishes in England amounted to forty-five thousand, whereas they were hardly a fifth of that number. This amazing mistake was not discovered till the parliament had been dissolved. Upon its detection the king summoned a great council, consisting of one knight, citizen, and burgess, named by himself out of two that had been returned to the last parliament.^z To this assembly the chancellor set forth the deficiency of the last subsidy, and proved by the certificates of all the bishops in England how strangely the parliament had miscalculated the number of parishes; whereupon they increased the parochial assessment, by their own authority, to one hundred and sixteen shillings.¹ It is obvious that the main intention of parliament was carried into effect by this irregularity, which seems to have been the subject of no complaint. In the next parliament a still more objectionable measure was resorted to; after the petitions of the commons had been answered, and the knights dismissed, the citizens and burgesses were convened before the prince of Wales and the lords in a room near the white chamber, and solicited to renew their subsidy of forty shillings upon the tun of wine, and sixpence in the pound upon other imports, for safe convoy of shipping, during one year more, to which they assented, "and so departed."^b

^y Rot Parl. vol. ii. p. 366.

^z Prymie's 4th Register, p. 289.

^a Rot Parl p. 304.

^b Rot Parl. p. 310. In the mode of levying subsidies a remarkable improvement took place early in the reign of

The second constitutional principle established in the reign of Edward III. was that the king and two houses of parliament, in conjunction, possessed exclusively the right of legislation. Laws were now declared to be made by the king at the request of the commons, and by the assent of the lords and prelates. Such at least was the general form, though for many subsequent ages there was no invariable regularity in this respect. The commons, who till this reign were rarely mentioned, were now as rarely omitted in the enacting clause. In feet, it is evident from the rolls of parliament that statutes were almost always founded upon their petition.^c These petitions, with the respective answers made to them in the king's name, were drawn up after the end of the session in the form of laws, and entered upon the statute-roll. But here it must be remarked that the petitions were often extremely qualified and altered by the answer, insomuch that many statutes of this and some later reigns by no means express the true sense of the commons. Sometimes they contented themselves with showing their grievance, and praying remedy from the king and his council. Of this one eminent instance is the great statute of treasons. In the petition whereon this act is founded it is merely prayed that, "whereas the king's justices in different counties adjudge persons indicted before them to be traitors for sundry matters not known by the commons to be treason, it would please the king by his council, and by the great and wise men of the land, to declare what are treasons in this present parliament." The answer to this petition contains the existing statute, as a declaration on the king's part.^d But there

Edward III. Originally two chief taxors were appointed by the king for each county, who named twelve persons in every hundred to assess the moveable estate of all inhabitants according to its real value. But in 8 E. III., on complaint of parliament that these taxors were partial, commissioners were sent round to compound with every town and parish for a gross sum, which was from thenceforth the fixed quota of subsidy, and raised by the inhabitants themselves. Brady on Boroughs, p. 81.

^c Laws appear to have been drawn up, and proposed to the two houses by the king, down to the time of Edward I. Hale's Hist. of Common Law, p. 16.

Sometimes the representatives of particular places address separate petitions to the king and council; as the citizens of London, the commons of Devonshire, &c. These are intermingled with the general petitions, and both together are for the most part very numerous. In the roll of 50 Edw. 111. they amount to 140.

^d Rot Parl. p. 239.

is no appearance that it received the direct assent of the lower house. In the next reigns we shall find more remarkable instances of assuming a consent which was never positively given.

The statute of treasons, however, was supposed to be declaratory of the ancient law: in permanent and material innovations a more direct concurrence of all the estates was probably required. A new statute, to be perpetually incorporated with the law of England, was regarded as no light matter. It was a very common answer to a petition of the commons, in the early part of this reign, that it could not be granted without making a new law. After the parliament of 14 E. III. a certain number of prelates, barons, and counsellors, with twelve knights and six burgesses, were appointed to sit from day to (lay in order to turn such petitions and answers as were fit to be perpetual into a statute; but for such as wore of a temporary nature the king issued his letters patent." This reluctance to innovate without necessity, and to swell the number of laws which all were bound to know and obey with an accumulation of transitory enactments, led apparently to the distinction between statutes and ordinances. The latter are indeed defined by some lawyers to be regulations proceeding from the king and lords without concurrence of the commons. But if this be applicable to some ordinances, it is certain that the word, even when opposed to statute, with which it is often synonymous, sometimes denotes an act of the whole legislature. In the 37th of Edward III., when divers sumptuary regulations against excess of apparel were made in full parliament, ⁴¹ it was demanded of the lords and commons, inasmuch as the matter of their petitions was novel and unheard of before, whether they would have them granted by way of ordinance or of statute. They answered that it would be best to have them by way of ordinance and not of statute, in order that anything which should need amendment might be amended at the next parliament.'" So much scruple did they entertain about tampering with the statute law of the land.

Statutes distinguished from ordinances.

^e Rot Parl

p.113

^f p. 280.

Ordinances which, if it were not for their partial or temporary operation, could not well be distinguished from laws,^g were often established in great councils. These assemblies, which frequently occurred in Edward's reign, were hardly distinguishable, except in name, from parliaments; being constituted not only of those who were regularly summoned to the house of lords, but of deputies from counties, cities, and boroughs. Several places that never returned burgesses to parliament have sent deputies to some of these councils.^h The most remarkable of these was that held in the 27th of Edward 111., consisting of one knight for each county, and of two citizens or burgesses from every city or borough wherein the ordinances of the staple were established.ⁱ These were previously agreed upon by the king and lords, and copies given, one to the knights, another to the burgesses. The roll tells us that they gave their opinion in writing to the council, after much deliberation, and that this was read and discussed by the great men. These ordinances fix the staple of wool in particular places within England, prohibit English merchants from exporting that article under pain of death, inflict sundry other penalties, create jurisdictions, and in short have the effect of a new and important law. After they were passed the deputies of the commons granted a subsidy for three years, complained of grievances, and received answers, as if in a regular parliament. But they were aware that these proceedings partook of some irregularity, and endeavoured, as was their constant method, to keep up the legal forms of the constitution. In the last petition of this council the commons pray, "because many articles touching the state of the king and common profit of his kingdom have been agreed by him, the prelates, lords, and commons of his land, at this council, that the said articles may be recited at the next parliament, and entered upon the roll; for this cause, that ordinances and

* "If there be any difference between an ordinance and a statute, as some have collected, it is but only this, that an ordinance is but temporary till confirmed and made perpetual, but a statute is perpetual at first, and so have some ordinances also been." Whitelocke on Parliamentary Writ, vol ii. p. 297. See Rot.

Parl vol. Ili. p. 17; vol. iv. p. 35.

^h These may be found in Willis's *Notitia Parliamentaria*. In 28 E 1. the universities were summoned to send members to a great council in order to defend the king's right to the kingdom of Scotland. 1 Prynne.

ⁱ Rot. Parl. ii. 206.

agreements made in council are not of record, as if they had been made in a general parliament." This accordingly was done at the ensuing parliament, when these ordinances were expressly confirmed, and directed to be "holden for a statute to endure always."^k

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

Before we leave this subject it will be proper to take notice of a remarkable stretch of prerogative, which, if drawn into precedent, would have effectually subverted this principle of parliamentary consent in legislation. In the 15th of E'dward III. petitions were presented of a bolder and more innovating cast than was acceptable to the court:—That no peer should be put to answer for any trespass except before his peers; that commissioners should be assigned to examine the accounts of such as had received public moneys; that the judges and ministers should be sworn to observe the Great Charter and other laws; and that they should be appointed in parliament. The last of these was probably the most obnoxious; but the king, unwilling to defer a supply which was granted merely upon condition that these petitions should prevail, suffered them to pass into a statute with an alteration which did not take off much from their efficacy—namely, that these officers should indeed be appointed by the king with the advice of his council, but should surrender their charges at the next parliament, and be there responsible to any who should have cause of complaint against them. The chancellor, treasurer, and judges entered their protestation that they had not assented to the said statutes, nor could they observe them, in case they should prove contrary to the laws and customs of the kingdom, which they were sworn to maintain.¹¹¹ This is the first instance of a protest on the roll of parliament against the.

^k Rot. Parl. it. 253, 257.

^m Id. p. 131;
E 2.

passing of an act. Nevertheless they were compelled to swear on the cross of Canterbury to its observance."

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

Notwithstanding the king's unwillingness to permit this control of parliament over his administration, he suffered, or rather solicited, their interference in matters

ⁿ Rot Parl. ii. p. 128.

^o Rymer, t. r. p. 282. This instrument betrays in its language Edward's consciousness of the violent step he was taking; and his wish to excuse it as much as possible.

^p The commons in the 17th of Edw. III. petition that the statutes made two years before be maintained in their force, having granted for them the subsidies which they enumerate, "which was a great spoiling (rancon) and grievous charge for them." But the king answered that, "perceiving the said statute to be against his oath, and to the blemish

of his crown and royalty, and against the law of the land in many points, he had repealed it. But he would have the articles of the said statute examined, and what should be found honourable and profitable to the king and his people put into a new statute, and observed in future." Rot. Parl. ii. 139. But though this is inserted among the petitions, it appears from the roll a little before (p. 139, n. 23), that the statute was actually repealed by common consent; such consent at least being recited, whether truly or not

which have since been reckoned the exclusive province of the crown. This was an unfair trick of his policy. He was desirous, in order to prevent any murmuring about subsidies, to throw the war upon parliament as their own act, though none could have been commenced more selfishly for his own benefit, or less for the advantage of the people of England. It is called "the war which our lord the king has undertaken against his adversary of France by common assent of all the lords and commons of his realm in divers parliaments."^q And he several times referred it to them to advise upon the subject of peace. But the commons showed their humility or discretion by treating this as an invitation which it would show good manners to decline, though in the eighteenth of the king's reign they had joined with the lords in imploring the king to make an end of the war by a battle or by a suitable peace/ "Most dreaded lord," they say upon one occasion, "as to your war, and the equipment necessary for it, we are so ignorant and simple that we know not how, nor have the power, to devise; wherefore we pray your grace to excuse us in this matter, and that it please you, with advice of the great and wise persons of your council, to ordain what seems best to you for the honour and profit of yourself and your kingdom; and whatever shall be thus ordained by assent and agreement for you and your lords we readily assent to, and will hold it firmly established." * At another time, after their petitions had been answered, "it was shewed to the lords and commons by Bartholomew de Burghersh, the king's chamberlain, how a treaty had been set on foot between the king and his adversary of France; and how he had good hope of a final and agreeable issue with God's help; to which he would not come without assent of the lords and commons. Wherefore the said chamberlain inquired on the king's part of the said lords and commons whether they would assent and agree to the peace, in case it might be had by treaty between the parties. To which the said commons with one voice replied, that whatever end it should please the king and lords to make of the treaty would be agreeable to them. On which answer

Advice of
parliament
required on
matters of
war and
peace.

^q Rymer, t v. p. 165.

^r p. 148.

^s 21 E. III. p. 165.

the chamberlain said to the commons, Then you will assent to a perpetual treaty of peace if it can be had. And the said commons answered at once and unanimously, Yes, yes,"¹ The lords were not so diffident. Their great station as hereditary councillors gave them weight in all deliberations of government; and they seem to have pretended to a negative voice in the question of peace. At least they answer, upon the proposals made by David king of Scots in 1368, which were submitted to them in parliament, that, "saving to the said David and his heirs the articles contained therein, they saw no way of making a treaty which would not openly turn to the disherison of the king and his heirs, to which they would on no account assent; and so departed for that day."^u A few years before they had made a similar answer to some other propositions from Scotland." It is not improbable that, in both these cases, they acted with the concurrence and at the instigation of the king; but the precedents might have been remembered in other circumstances.

A third important acquisition of the house of commons during this reign was the establishment of their right to investigate and chastise the abuses of administration. In the fourteenth of Edward III. a committee of the lords' house had been appointed to examine the accounts of persons responsible for the receipt of the last subsidy; but it does not appear that the commons were concerned in this/ The unfortunate statute of the next year contained a similar provision, which was annulled with, the rest. Many years elapsed before the commons tried the force of their vindictive arm. We must pass onward an entire generation of man, and look at the parliament assembled in the fiftieth of Edward III. Nothing memorable as to the interference of the commons in government occurs before, unless it be their request, in the forty-fifth of the king, that no clergyman should be made chancellor, treasurer, or other great officer; to which the king answered that he would do what best pleased his council.*

t 28 E. III. p. 261. tion of the commons doing this in the
^u 28 E. III. p. 295. Carte says, "the roll of parliament,
 lords and commons, giving this advice ^x Rymer, p. 289.
 separately, declared," &c Hist. of Eng- ^y p. 114.
 land, vol. ii. p. 518. I can find no men- 2 p. 304.

It will be remembered by every one who has read our history that in the latter years of Edward's life his fame was tarnished by the ascendancy of the duke of Lancaster and Alice Ferrers. ^{Parliament of 50 E.III.} The former, a man of more ambition than his capacity seems to have warranted, even incurred the suspicion of meditating to set aside the heir of the crown when the Black Prince should have sunk into the grave. Whether he were wronged or not by these conjectures, they certainly appear to have operated on those most concerned to take alarm at them. A parliament met in April, 1376, wherein the general unpopularity of the king's administration, or the influence of the prince of Wales, led to very remarkable consequences.^a After granting a subsidy, the commons, "considering the evils of the country, through so many wars and other causes, and that the officers now in the king's service are insufficient without further assistance for so great a charge, pray that the council be strengthened by the addition of ten or twelve bishops, lords, and others, to be constantly at hand, so that no business of weight should be despatched without the consent of all; nor smaller matters without that of four or six."^b The king pretended to come with alacrity into this measure, which was followed by a strict restraint on them and all other officers from taking presents in the course of their duty. After this, "the said commons appeared in parliament, protesting that they had the same good will as ever to assist the king with their lives and fortunes; but that it seemed to them, if their said liege lord had always possessed about him faithful counsellors and good officers, he would have been so rich that he would have had no need of charging his commons with subsidy or tallage, considering the great mnsoms of the French and Scotch kings, and of so many other prisoners; and that it appeared to be for the private advantage of some near the king, and of

^a Most of our general historians have slurred over this important session. The best view, perhaps, of its secret history will be found in Lowth's *Life of Wykeham*; an instructive and elegant work, only to be blamed for marks of that academical point of honour which makes a fellow of a college too indiscriminate

others by their collusion, that the king and kingdom are so impoverished, and the commons so ruined. And they promised the king that, if he would do speedy iustice on such as should be found guilty, and take from them what law and reason permit, with what had been already granted in parliament, they will engage that he should be rich enough to maintain his ware for a long time, without much charging his people in any manner."

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

The part which the prince of Wales, who had ever been distinguished for his respectful demeanour towards Edward, bore in this unprecedented opposition, is strong evidence- of the jealousy with which he regarded the duke of Lancaster; and it was led in the house of commons by Peter de la Mare, a servant of the earl of March, who, by his marriage with Philippa, heiress of Lionel duke of Clarence, stood next after the young prince Richard in lineal succession to the crown. The proceedings of this session were indeed highly popular.

^c Rymer, p. 322.

^d p. 329.

But no house of commons would have gone such lengths on the mere support of popular opinion, unless instigated and encouraged by higher authority. Without this their petitions might perhaps have obtained, for the sake of subsidy, an immediate consent; but those who took the lead in preparing them must have remained unsheltered after a dissolution, to abide the vengeance of the crown, with no assurance that another parliament would espouse their cause as its own. Such, indeed, was their fate in the present instance. Soon after the dissolution of parliament, the prince of Wales, who, long sinking by fatal decay, had rallied his expiring energies for this domestic combat, left his inheritance to a child ten years old, Richard of Bordeaux. Immediately after this event Lancaster recovered his influence; and the former favourites returned to court. Peter de la Mare was confined at Nottingham, where he remained two years. The citizens indeed attempted an insurrection, and threatened to burn the Savoy, Lancaster's residence, if de la Mare was not released; but the bishop of London succeeded in appeasing them.⁶ A parliament met next year which overthrew the work of its predecessor, restored those who had been impeached, and repealed the ordinance against Alice Perrers.' So little security will popular assemblies ever afford against arbitrary power, when deprived of regular leaders and the consciousness of mutual fidelity.

The policy adopted by the prince of Wales and earl of March, in employing the house of commons as an engine of attack against an obnoxious ministry, was perfectly novel, and indicates a sensible change in the character of our constitution. In the reign of Edward I. parliament had little share in resisting the government; much more was effected by the barons through risings of their feudal tenantry. Fifty years of authority better respected, of law better enforced, had rendered these more perilous, and of a more violent appearance than formerly. A surer resource presented itself in the increased weight of the lower house in parliament. And

^e Anonym. Hist Edw. Ill. ad calcem Hemingford, p. 444, 448. Waleingham gives a different reason, p. 192.

^f Rot Parl. p. 374. Not more than

six or seven of the knights who had sat in the last parliament were returned to this, as appears by the write in Prymme's 4th Register, p. 302, 311.

this indirect aristocratical influence gave a Surprising impulse to that assembly, and particularly tended to establish beyond question its control over public abuses. It is no less just to remark that it also tended to preserve the relation and harmony between each part and the other, and to prevent that jarring of emulation and jealousy which, though generally found in the division of power between a noble and a popular estate, has scarcely ever caused a dissension, except in cases of little moment, between our two houses of parliament.

The commons had sustained with equal firmness and discretion a defensive war against arbitrary power under Edward I I I , : they advanced with very different steps towards his successor. Upon the king's death, though Richard's coronation took place without delay, and no proper regency was constituted, yet a council of twelve, whom the great officers of state were to obey, supplied *its* place to every effectual intent. Among these the duke of Lancaster was not numbered; and he retired from court in some disgust. In the first parliament of the young king a large proportion of the knights who had sat in that which impeached the Lancastrian party were returned/ Peter de la Mare, now released from prison, was elected speaker; a dignity which, according to some, he had filled in the Good Parliament, as that of the fiftieth of Edward I I I . was popularly styled; though the rolls do not mention either him or any other as bearing that honourable name before Sir Thomas Hungerford in the parliament of the following year.^h The prosecution against Alice Perrers was now revived; not, as far as appears, by direct impeachment of the commons; but articles were exhibited against her in the house of lords on the king's part, for breaking the ordinance made against her. intermeddling at court; upon which she received judgment of banishment and forfeiture.¹ At the request of the lower house, the lords, in the king's name, appointed nine persons of different ranks—three

^g Walsingham, p. 200, says pene omities; but the list published in Prynne's 4th Register induces me to qualify this loose expression. Alice Perrers had bribed, he tells us, many of the lords

and all the lawyers of England; yet by the perseverance of these knights ~~she~~ was convicted,

^h Rot. Parl. vol. ii. p. 374.
i vol. i. ll. p. 12.

bishops, two earls, two bannerets, and two bachelors—to be a permanent council about the king, so that no business of importance should be transacted without their unanimous consent. The king was even compelled to consent that, during his minority, the chancellor, treasurer, judges, and other chief officers, should be made in parliament; by which provision, combined with that of the parliamentary council, the whole executive government was transferred to the two houses: A petition that none might be employed in the king's service, nor belong to his council, who had been formerly accused upon good grounds, struck at lord Latimer, who had retained some degree of power in the new establishment. Another, suggesting that Gaseony, Ireland, Artois, and the Scottish marches were in danger of being lost for want of good officers, though it was so generally worded as to leave the means of remedy to the king's pleasure, yet shows a growing energy and self-confidence in that assembly which not many years before had thought the question of peace or war too high for their deliberation. Their subsidy was sufficiently liberal; but they took care to pray the king that fit persons might be assigned for its receipt and disbursement; lest it should any way be diverted from the purposes of the war. Accordingly Walworth and Philpot, two eminent citizens of London, were appointed to this office, and sworn in parliament to its execution.^k

But whether through the wastefulness of government, or rather because Edward's legacy, the French war, like a ruinous and interminable lawsuit, exhausted all public contributions, there was an equally craving demand for subsidy at the next meeting of parliament. The commons now made a more serious stand. The speaker, Sir James Pickering, after the protestation against giving offence which has since become more matter of form than, perhaps, it was then considered, reminded the lords of the council of a promise made to the last parliament, that, if they would help the king for once with a large subsidy, so as to enable him to undertake an expedition against the enemy, he trusted not to call on them again, but to support the war from his own revenues; in faith

^k Rot Parl. vol iii. p. 12.

of which promise there had been granted the largest sum that any king of England had ever been suffered to levy within so short a time, to the utmost loss and inconvenience of the commons, part of which ought still to remain in the treasury, and render it unnecessary to burthen anew the exhausted people. To this Scrope, lord steward of the household, protesting that he knew not of any such promise, made answer by order of the king, that, " saving the honour and reverence of our lord the king, and the lords there present, the commons did not speak truth in asserting that part of the last subsidy should be still in the treasury; it being notorious that every penny had gone into the hands of Walworth and Philpot, appointed and sworn treasurers in the last parliament, to receive and expend it upon the purposes of the war, for which they had in effect disbursed the whole." Not satisfied with this general justification, the commons pressed for an account of the expenditure. Scrope was again commissioned to answer, that, " though it had never been seen that of a subsidy or other grant made to the king in parliament or out of parliament by the commons any account had afterwards been rendered to the commons, or to any other except the king and his officers, yet the king, to gratify them, of his own accord, without doing it by way of right, would have Walworth along with certain persons of the council exhibit to them in writing a clear account of the receipt and expenditure, upon condition that this should never be used as a precedent, nor inferred to be done otherwise than by the king's spontaneous command." The commons were again urged to provide for the public defence, being their own concern as much as that of the king. But they merely shifted their ground and had recourse to other pretences. They requested that five or six peers might come to them, in order to discuss this question of subsidy. The lords entirely rejected this proposal, and affirmed that such a proceeding had never been known except in the three last parliaments; but allowed that it had been the course to elect a committee of eight or ten from each house, to confer easily and without noise together. The commons acceded to this, and a committee of conference was appointed, though no result of their discussion appears upon the roll.

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

The necessities of government, however, let their cause be what it might, were by no means feigned ; and a new parliament was assembled about seven months after the last, wherein the king, without waiting for a petition, informed the commons that the treasurers were ready to exhibit their accounts before them. This was a signal victory after the reluctant and ungracious concession made to the last parliament. Nine persons of different ranks were appointed at the request of the commons to investigate the state of the revenue and the disposition which had been made of the late king's personal estate. They ended by granting a poll-tax, which they pretended to think adequate to the supply required." But in those times no one possessed any statistical knowledge, and every calculation which required it was subject to enormous error, of which we have already seen an eminent example.^o In the next parliament (3 Ric. II.) it was set forth that only 22,000*l.* had been collected by the poll-tax, while the pay of the king's troops hired for the expedition to Britany, the pretext of the grant, had amounted for but half a year to 50,000*l.* The king, in short, was more straitened than ever. His distresses gave no small advantage to the commons. Their speaker was instructed

^m Rot Parl. p. 36-38.ⁿ Id. p. 67.^o See p. 4? of this volume

to declare that, as it appeared to them, if the affairs of their liege lord had been properly conducted at home and abroad, he could not have wanted aid of his commons, who now are poorer than before. They pray that, as the king was so much advanced in age and discretion, his perpetual council (appointed in his first parliament) might be discharged of their labours, and that, instead of them, the five chief officers of state, to wit, the chancellor, treasurer, keeper of the privy seal, chamberlain, and steward of the household, might be named in parliament, and declared to the commons, as the king's sole counsellors, not removable before the next parliament. They required also a general commission to be made out, similar to that in the last session, giving powers to a certain number of peers and other distinguished persons to inquire into the state of the household, as well as into all receipts and expenses since the king's accession. The former petition seems to have been passed over;^p but a commission as requested was made out to three prelates, three earls, three bannerets, three knights, and three citizens.¹ After guarding thus, as they conceived, against malversation, but in effect rather protecting their posterity than themselves, the commons prolonged the last imposition on wool and leather for another year.

It would be but repetition to make extracts from the rolls of the two next years; we have still the same tale—demand of subsidy on one side, remonstrance and endeavours at reformation on the other. After the tremendous insurrection of the villeins in 1382 a parliament was convened to advise about repealing the charters of general manumission, extorted from the king by the pressure of circumstances. In this measure all concurred; but the commons were not afraid to say that the late risings had been provoked by the burthens which a prodigal court had called for in the preceding session. Their language is unusually bold. "It seemed to them, after full deliberation," they said, "that, unless the administration of the kingdom were

^p Nevertheless, the commons repeated it in their schedule of petitions; and received an evasive answer, referring to an ordinance made in the first parliament of the king, the application of which is indefinite. Bot. Parl p. 83.

^q p. 73. In Rymer, t viii p. 250, the archbishop of York's name appears among these commissioners, which makes their number sixteen. But it is plain by the Instrument that only fifteen were meant to be appointed

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

about the king, and of his council, the best lords and knights that can be found in the kingdom.

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

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

grace) till they had done what they ought. They renewed, at length the usual tax on wool and leather.

This extraordinary assumption of power by the commons was not merely owing to the king's poverty. It was encouraged by the natural feebleness of a disunited government. The high rank and ambitious spirit of Lancaster gave him no little influence, though contending with many enemies at court as well as the ill-will of the people. Thomas of Woodstock, the king's youngest uncle, more able and turbulent than Lancaster, became, as he grew older, an eager competitor for power, which he sought through the channel of popularity. The earls of March, Arundel, and Warwick bore a considerable part, and were the favourites of parliament. Even Lancaster, after a few years, seems to have fallen into popular courses, and recovered some share of public esteem. He was at the head of the reforming commission in the fifth of Richard II., though he had been studiously excluded from those preceding. We cannot hope to disentangle the intrigues of this remote age, as to which our records are of no service, and the chroniclers are very slightly informed. So far as we may conjecture, Lancaster, finding his station insecure at court, began to solicit the favour of the commons, whose hatred of the administration abated their former hostility towards him.¹

The character of Richard II. was now developing itself, and the hopes excited by his remarkable presence of mind in confronting the rioters on Blackheath were rapidly destroyed. Not that he was wanting in capacity, as has been sometimes imagined. For if we measure intellectual power by the greatest exertion it ever displays, rather than by its average results, Richard II. was a man of considerable talents. He possessed, along with much dissimulation, a decisive promptitude in seizing the critical moment for action. Of this quality, besides his celebrated behaviour towards the insurgents, he gave striking evidence in several

Rot Parl. 5 R.H. p. 104.

¹ The commons granted a subsidy, 7 R. 11., to support Lancaster's war in Castile. R. P. p. 284. Whether the populace changed their opinion of him I know not. He was still disliked by them two

years before. The insurgents of 1382 are said to have compelled men to swear that they would obey king Richard and the commons, and that they would accept no king named John. Walsingham, p. 248

circumstances which we shall have shortly to notice. But his ordinary conduct belied the abilities which on these rare occasions shone forth, and rendered them ineffectual for his security. Extreme pride and violence, with an inordinate partiality for the most worthless favourites, were his predominant characteristics. In the latter quality, and in the events of his reign, he forms a pretty exact parallel to Edward I. Scrope, lord chancellor, who had been appointed in parliament, and was understood to be irremovable without its concurrence, lost the great seal for refusing to set it to some prodigal grants. Upon a slight quarrel with archbishop Courtney the king ordered his temporalities to be seized, the execution of which, Michael de la Pole, his new chancellor, and a favourite of his own, could hardly prevent. This was accompanied with indecent and outrageous expressions of anger, unworthy of his station and of those whom he insulted."

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

^u Waking, p. 290, 315, 317.

^x Rot. Parl. 5 R. II. p. 100; 6, R. II. p. 134.

^y p. 145.

^z Rot. Parl. 9 It. II. p. 209.

^a lb. p. 213. It is however asserted

There is nothing, however, more deceitful to a monarch, -unsupported by an armed force, and destitute of wary advisers, than this submission of his people. A single effort was enough to overturn his government. Parliament met in the tenth year of his reign, steadily determined to reform the administration, and especially to punish its chief leader, Michael de la Pole, earl of Suffolk and lord chancellor. According to the remarkable narration of a contemporary historian,^b too circumstantial to be rejected, but rendered somewhat doubtful by the silence of all other writers and of the parliamentary roll, the king was loitering at his palace at Eltham when he received a message from the two houses, requesting the dismissal of Suffolk, since they had matter to allege against him that they could not move while he kept the office of chancellor. Richard, with his usual intemperance, answered that he would not for their request remove the meanest scullion from his kitchen. They returned a positive refusal to proceed on any public business until the king should appear personally in parliament and displace the chancellor. The king required forty knights to be deputed from the rest to inform him clearly of their wishes. But the commons declined a proposal in which they feared, or affected to fear, some treachery. At length the duke of Gloucester and Arundel bishop of Ely were commissioned to speak the sense of parliament; and they delivered it, if we may still believe what we read, in very extraordinary language, asserting that there was an ancient statute, according to which, if the king absented himself from parliament without just cause during forty days, which he had now exceeded, every man might return without permission to his own country; and, moreover, there was another statute, and (as they might more truly say) a precedent of no remote date, that if a king, by bad counsel, or his own folly and obstinacy, alienated himself from his people, and would not govern according to

Proceedings
of parliament in the
tenth of
Richard.

in the articles of impeachment against Suffolk, and admitted by his defence, that nine lords had been appointed in the last parliament, viz, 9 R. II., to inquire into the state of the house- hold, and reform whatever was amiss. But nothing of this appears in the roll ^b kayghton, in Twysden x. Script col, 2680.

the laws of the land and the advice of the peers, but madly and wantonly followed his own single will, *it* should be lawful for them, with the common assent of the people, to expel him from his throne, and elevate to it some near kinsman of the royal blood. By this discourse the king was induced to meet his parliament, where Suffolk was removed from his office,⁴ and the impeachment against him commenced.^c

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

This was the second precedent of that grand constitutional resource, parliamentary impeachment: and more remarkable from the eminence of the person attacked than that of lord Latimer in the fiftieth year of Edward III.⁰ The commons were content to waive the prosecution of any other ministers; but they rather chose a scheme of reforming the administration, which should avert both the necessity of punishment and the malversations that provoked it.

^c Upon full consideration, I am much inclined to give credit to this passage of Knyghton, as to the main facts; and perhaps even the speech of Gloucester and the bishop of Ely is more likely to have been made public by them than invented by so jejune an historian. Walsingham Indeed says nothing of the matter; but he is so unequally informed and BO frequently defective, that we can draw no strong inference from his silence. What most weighs with me is that parliament met on Oct. 1, 1381, and was not dissolved till Nov. 28; a longer period than the business done in it seems to have required; and also that Suffolk, who opened the session as chancellor, it styled "darrein chancellor" in the articles of impeachment against him; so that he must have been removed in the interval, which tallies with Knyghton's

Besides, it is* plain, from the questions subsequently put by the king to his judges at Nottingham, that both the right of retiring without a regular dissolution, and the precedent of Edward II., had been discussed in parliament, which does not appear anywhere else than in Knyghton.

^d Rot. Parl. vol. iii. p. 219.

^e Articles had been exhibited by the chancellor before the peers, in the seventh of the king, against Spencer, bishop of Norwich, who had led a considerable army in a disastrous expedition against the Flemings, adherents to the anti-pope Clement in the schism. This crusade had been exceedingly popular, but its ill success had the usual effect. The commons were not parties in this proceeding. Rot. Parl. p. 153.

They petitioned the king to ordain in parliament certain chief officers of his household and other lords of his council, with power to reform those abuses, by which his crown was so much blemished that the laws were not kept and his revenues were dilapidated, confirming by a statute a commission for a year, and forbidding, under heavy penalties, any one from opposing, in private or openly, what they should advise/ With this the king complied, and a commission founded upon the prayer of parliament was established by statute. It comprehended fourteen persons of the highest eminence for rank and general estimation; princes of the blood and ancient servants of the crown, by whom its prerogatives were not likely to be unnecessarily impaired. In fact the principle of this commission, without looking back at the precedents in the reign of John, Henry III., and Edward I., which yet were not without their weight as constitutional analogies, was merely that which the commons had repeatedly maintained during the minority of the present king, and which had produced the former commissions of reform in the third and fifth years of his reign. These were upon the whole nearly the same in their operation. It must be owned there was a more extensive sway virtually given to the lords* now appointed, by the penalties imposed on any who should endeavour to obstruct what they might advise; the design as well as tendency of which was no doubt to throw the *J&ole administration into their hands during the period of this commission.

Those who have written our history with more or less of a Tory bias exclaim against this parliamentary commission as an unwarrantable violation of the king's sovereignty, and even impartial men are struck at first sight by a measure that seems to upset the natural balance of our constitution. But it would be unfair to blame either those concerned in this commission, some of whose names at least have been handed down with unquestioned respect, or those high-spirited representatives of the people whose patriot firmness has been hitherto commanding all our sympathy and gratitude, unless we could distinctly pronounce by what gentler

^f Rot. Parl. p. 221.

means they could restrain the excesses of government. Thirteen parliaments had already met since the accession of Richard; in all the same remonstrances had been repeated, and the same promises renewed. Subsidies, more frequent than in any former reign, had been granted for the supposed exigencies of the war ; but this was no longer illuminated by those dazzling victories which give to fortune the mien of wisdom; the coasts of England were perpetually ravaged, and her trade destroyed; while the administration incurred the suspicion of diverting to private uses that treasure which they so feebly and unsuccessfully applied to the public service. No voice of his people, until it spoke in thunder, would stop an intoxicated boy in the wasteful career of dissipation. He loved festivals and pageants, the prevailing folly of his time, with unusual frivolity; and his ordinary living is represented as beyond comparison more showy and sumptuous than even that of his magnificent and chivalrous predecessor. Acts of parliament were no adequate barriers to his misgovernment. "Of what avail are statutes," says Walsingham, "since the king with his privy council is wont to abolish what parliament has just enacted?"^g The constant prayer of the commons in every session, that former statutes might be kept in force, is no slight presumption that they were not secure of being regarded. It may be true that Edward III.'s government had been full as arbitrary, though not so unwise, as his grandson's; but this is the strongest argument that nothing less than an extraordinary remedy could preserve the still unstable liberties of England.

The best plea that could be made for "Richard was his inexperience, and the misguided suggestions of favourites. This, however, made it more necessary to remove those false advisers, and to supply that inexperience. Unquestionably the choice of ministers is reposed in the sovereign; a trust, like every other attribute of legitimate power, for the public good ; not, what no legitimate power can ever be, the instrument of selfishness or caprice. There is something more sacred than the prerogative, or even than the constitution; the public weal, for which all powers are granted, and to which they must all be

^g Rot. Parl. p. 281

referred. For this public weal it is confessed to be sometimes necessary to shake the possessor of the throne out of his seat; could it never be permitted to suspend, though but indirectly and for a time, the positive exercise of misapplied prerogatives? He has learned in a very different school from myself, who denies to parliament at the present day a preventive as well as vindictive control over the administration of affairs; a right of resisting, by those means which lie within its sphere, the appointment of unfit ministers. These means are now indirect; they need not to be the less effectual, and they are certainly more salutary on that account. But we must not make our notions of the constitution in its perfect symmetry of manhood the measure of its infantine proportions, nor expect from a parliament just struggling into life, and "pawing to get free its hinder parts," the regularity of definite and habitual power.

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

Before the dissolution of parliament Richard made a verbal protestation that nothing done therein should be

in prejudice of his rights; a reservation not unusual when any remarkable concession was made, but which could not decently be interpreted, whatever he might mean, as a dissent from the statute just passed. Some months had intervened when the king, who had already released Suffolk from prison and restored him to his favour, procured from the judges, whom he had summoned to Nottingham, a most convenient set of answers to questions concerning the late proceedings in parliament. Tresilian and Belknap, chief justices of the King's Bench and Common Pleas, with several other judges, gave it under their seals that the late statute and commission were derogatory to the prerogative; that all who procured it to be passed, or persuaded or compelled the king to consent to it, were guilty of treason; that the king's business must be proceeded upon before any other in parliament; that he may put an end to the session at his pleasure; that his ministers cannot be impeached without his consent; that any members of parliament contravening the three last articles incur the penalties of treason, and especially he who moved for the sentence of deposition against Edward I I. to be read; and that the judgment against the earl of Suffolk might be revoked as altogether erroneous.

These answers, perhaps extorted by menaces, as all the judges, except Tresilian, protested before the next parliament, were for the most part servile and unconstitutional. The indignation which they excited, and the measures successfully taken to withstand the king's designs, belong to general history; but I shall pass slightly over that season of turbulence, which afforded no legitimate precedent to our constitutional annals. Of the five lords appellants, as they were called, Gloucester, Derby, Nottingham, Warwick, and Arundel, the three former, at least, have little claim to our esteem; but in every age it is the sophism of malignant and peevish men to traduce the cause of freedom itself, on account of the interested motives by which its ostensible advocates have frequently been actuated. The parliament, who had the country thoroughly with them, acted no doubt honestly, but with an inattention to the rules of law, culpable indeed, yet from which the most

Answers of
the judges to
Richard's
questions.

subsequent
revolution.

civilized of their successors, in the heat of passion and triumph, have scarcely been exempt. Whether all with whom they dealt severely, some of them apparently of good previous reputation, merited such punishment, is more than, upon uncertain evidence, a modern writer can profess to decide.*

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

There was now a more apparent harmony between the court and the parliament. It seems to have been tacitly agreed that they should not interfere with the king's household expenses; and they gratified him in a point where his honour had been most wounded, declaring his prerogative to be as high and unimpaired as that of his predecessors, and repealing the pretended statute by virtue of which Edward I I. was said to have been deposed.¹ They were provident enough, however, to grant conditional

Greater
harmony
between the
king and
parliament.

^h The Judgment against Simon de IV.; a fair presumption of its injustice. Burtsey, one of those who were executed on this occasion, upon impeachment of the commons, was reversed under Henry

Rot. Parl. vol. iii. p. 464.

¹ Rot. Parl. 14 R. II. p- 279; 15 R. II p. 286.

subsidies, to be levied only in case of a royal expedition against the enemy; and several were accordingly remitted by proclamation, this condition not being fulfilled, Richard never ventured to recall his favourites, though he testified his unabated affection for Vere by a pompous funeral. Few complaints, unequivocally affecting the ministry, were presented by the commons. In one parliament the chancellor, treasurer, and counsel resigned their offices, submitting themselves to its judgment in case any matter of accusation should be alleged against them. The commons, after a day's deliberation, probably to make their approbation appear more solemn, declared in full parliament that nothing amiss had been found in the conduct of these ministers, and that they held them to have faithfully discharged their duties. The king reinstated them accordingly, with a protestation that this should not be made a precedent, and that it was his right to change his servants at pleased

But this summer season was not to last for ever.

Richard had but dissembled with those concerned in the transactions of 1388, none of whom he could ever forgive. These lords in lapse of time were divided among each other.

The earls of Derby and Nottingham were brought into the king's interest. The earl of Arundel came to an open breach with the duke of Lancaster, whose pardon he was compelled to ask for an unfounded accusation in parliament.¹ⁿ Gloucester's ungoverned ambition, elated by popularity, could not brook the ascendancy of his brother Lancaster, who was much less odious to the king. He had constantly urged and defended the concession of Guienne to this prince to be held for life, reserving only his liege homage to Richard as king of France;ⁿ a grant as unpopular among the natives of that country as it was derogatory to the crown; but Lancaster was not much indebted to his brother for assistance which was only given in order to diminish his influence in England. The truce with France, and the king's French marriage, which Lancaster supported, were passionately opposed by Gloucester. And the latter had given keener provocation by speaking contemptuously of that misalliance

Disunion
among some
leading
peers.

^k Rot Parl. 13 R. II. p. 268.

^m 17 R. II. p. 313.

ⁿ Rymer, t vii p. 583, 659.

with Katherine Swineford which contaminated the blood of Plantagenet. To the parliament summoned in the 20th of Richard, one object of which was to legitimate the duke of Lancaster's ante-nuptial children by this lady, neither Gloucester nor Arundel would repair. There passed in this assembly something remarkable, as it exhibits not only the arbitrary temper of the king, a point by no means doubtful, but the inefficiency of the commons to resist it without support from political confederacies of the nobility. The circumstances are thus related in the record.

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

Upon this information the king declared to the lords that through God's gift he is by lineal right of inheritance king of England, and will have the royalty and freedom of his crown, from which some of these articles derogate. The first petition, that sheriffs should never remain in office beyond a year, he rejected; but, passing lightly over the rest, took most offence' that the com-

^o Hume has represented this as if the commons had petitioned for the continuance of sheriffs beyond a year, and grounds upon this mistake part of his defence of Richard II. (Note to vol. ii. p. 270, 4to. edit.) For this he refers to Cotton's Abridgment; whether rightly or not I cannot say, being little acquainted with that inaccurate book, upon which it

is unfortunate that Hume relied so much. The passage from Walsingham in the same note is also wholly perverted; as the reader will discover without further observation. An historian must be strangely warped who quotes a passage explicitly complaining of illegal acts in order to infer that those very acts were legal.

mons, who are his lieges, should take on themselves to make any ordinance rtfpipeotng his royal person or household, or those whom life might please to have about him. He enjoined therefore the lords to declare plainly to the commons his pleasure in this matter; and especially directed the duke of Lancaster to make the speaker give up the name of the person who presented a bill for this last article in the lower house.

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

This was an open defiance of parliament, and a declaration of arbitrary power. For it would be impossible to contend that, after the repeated instances of control over public expenditure by the commons since the 50th of Edward III., this principle was novel and unautho-

P The church would perhaps have interfered in behalf of Haxeý if he had only received the tonsure. But it *seems* that he was actually in orders; for the record calls him Sir Thomas Haxeý, a title at that time regularly given to the parson of a parish. If this be so, it is a remarkable authority for the dergy's capacity of sitting in parliament

^q Rot Parl. 20 R. II p. 339. In Henry IV.'s first parliament the commons petitioned for Haxeý's restoration, and truly say that his sentence was en aneantisement des custumes de la commune, p. 434. His judgment was reversed by both houses, as having passed

de volonte du roy Richard en contre droit et la course quel avoit este devant en parlement p. 480. There can be no doubt with any man who looks attentively at the passages relative to Haxeý that he was a member of parliament; though this was questioned a few years ago by the committee of the house of commons, who made a report on the right of the dergy to be elected; a right which, I am inclined to believe, did exist down to the Reformation, as the grounds alleged for Nowell's expulsion in the first, of Mary, besides this instance of Haxeý conspire to prove, though it has since been lost by disuse.

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

Arbitrary
measures of
the king.

In the fervour of prosecution this parliament could hardly go beyond that whose acts they were annulling; and each is alike unworthy to be remembered in the way of precedent. But the leaders of the former, though vindictive and turbulent, had a concern for the public interest; and, after punishing their enemies, left the government upon its right foundation. In this all re-

^r This assembly, if we may trust the anonymous author of the *Life of Richard II.*, published by Hearne, was surrounded by the king's troops, p. 133. Rot. Parl. 21 R. II p. 347.

gard for liberty was extinct; and the commons set the dangerous precedent of granting the king a subsidy upon wool during his life. Their remarkable act of severity was accompanied by another, less unexampled, but, as it proved, of more ruinous tendency. The petitions of the commons not having been answered during the session, which they were always anxious to conclude, a commission was granted for twelve peers and six commoners to sit after the dissolution, and "examine, answer, and fully determine, as well all the said petitions, and the matters therein comprised, as all other matters and things moved in the king's presence, and all things incident thereto not yet determined, as shall seem best to them." The "other matters" mentioned above were, I suppose, private petitions to the king's council in parliament, which had been frequently despatched after a dissolution. For in the statute which establishes this commission, 21 R. II. c. 16, no powers are committed but those of examining petitions: which, if it does not confirm the charge afterwards alleged against Richard, of falsifying the parliament roll, must at least be considered as limiting and explaining the terms of the latter. Such a trust had been committed to some lords of the council eight years before, in very-peaceful times; and it was even requested that the same might be done in future parliaments.¹¹ But it is obvious what a latitude this gave to a prevailing faction. These eighteen commissioners, or some of them (for there were who disliked the turn of affairs), usurped the full rights of the legislature, which undoubtedly were only delegated in respect of business already commenced/ They imposed a perpetual oath on prelates

¹ 21 R. II. p. 369.

^u 13 R. II. p. 256.

^x This proceeding was made one of the articles of charge against Richard in the following terms: Item, in parlamento ultimo celebrate apud Salopiam, idem rex proponens opprimere populum suum procuravit subtiliter et fecit concedi, quod potestas parliament de consensu omnium statuum regni sui remaneret apud quasdam certas personam ad terminandum, dissolute parlamento, certas petitiones in eodem parlamento prorectas protunc

minime expeditas. Cujus ooncessionif colore personae sic deputatae processerunt ad alia generaliter parliamontum iilud tangentia; et hoc de vol un ta te regis; in derogationera status parliament, et in magnum incommodiim totius regni et perniciosum exempium. Et ut super factis eonim hujusmodi aliquem colorem et auctoritatem viderentur habere, rex fecit rotulos parliament! pro voto suo mutari et deleri, contra effectum consenslonis praedictae. Rot Parl. 1 H. IV. vol ill p. 418. Whether the last accusa-

and lords for all time to come, to be taken before obtaining livery of their lands, that they would maintain the statutes and ordinances made by this parliament, or "afterwards by the lords and knights having power committed to them by the same." They declared it high treason to disobey their ordinances. They annulled the patents of the dukes of Hereford and Norfolk, and adjudged Henry Bowet, the former's chaplain, who had advised him to petition for his inheritance, to the penalties of treason.⁷ And thus, having obtained a revenue for life, and the power of parliament being notoriously usurped by a knot of his creatures, the king was little likely to meet his people again, and became as truly absolute as his ambition could require.

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

Quarrel of
the dukes of
Hereford
and Norfolk.

tion, of altering the parliamentary roll, bo true of not, there is enough left in it to prove everything I have inserted in the text. From this it is sufficiently manifest how unfairly Carte and Hume

have drawn a parallel between this self-deputed legislative commission and that appointed by parliament to reform the administration eleven years before.

^y Rot Parl, p. 372,385.

charge and throw his gauntlet at the accuser. It was referred to the eighteen commissioners who sat after the dissolution, and & trial by combat was awarded. But when this, after many delays, was about to take place at Coventry, Richard interfered and settled the dispute by condemning Hereford to banishment for ten years and Norfolk for life. This strange determination, which treated both as guilty where only one could be so, seems to admit no other solution than the king's desire to rid himself of two peers whom he feared and hated at a blow. But it is difficult to understand by what means he drew the crafty Bolingbroke into his snare.^z However this might have been, he now threw away all appearance of moderate government. The indignities he had suffered in the eleventh year of his reign were still at his heart, a desire to revenge which seems to have been the mainspring of his conduct. Though a general pardon of those proceedings had been granted, not only at the time, but in his own last parliament, he made use of them as a pretence to extort money from seventeen counties, to whom he imputed a share in the rebellion. He compelled men to confess under their seals that they had been guilty of treason, and to give blank obligations, which his officers filled up with large sums.^a Upon the death of the duke of Lancaster, who had passively complied throughout all these transactions, Richard refused livery of his inheritance to Hereford, whose exile implied no crime, and who had letters patent enabling him to make his attorney for that purpose during its continuance. In short, his government for nearly two years was altogether tyrannical; and, upon the same principles that cost James I. his throne, it was unquestionably far more necessary, unless our fathers would have abandoned all

^z Besides the contemporary historians, we may read a full narrative of these proceedings in the *Rolls of Parliament*, vol. iii. p. 382. It appears that Mowbray was the most offending party, since, independently of Hereford's accusation, he is charged with openly maintaining the appeals made in the false parliament of the eleventh of the king. But the banishment of his accuser was wholly unjustifiable by any motives that we can

discover. It is strange that Carte should express surprise at the sentence upon the duke of Norfolk, while he seems to consider that upon Hereford as very equitable. But he viewed the whole of this reign, and of those that ensued, with the Jaundiced eye of Jacobitism.

^a Rot. Parl. 1 H. IV. p. 420, 426; Walsingham, p. 853, 357; Otterburn, p. 199; Vita Ric. II. p. 147.

thought of liberty, to expel Richard II. Far be it from us to extenuate the treachery of the Percies towards this unhappy prince, or the cruel circumstances of his death, or in any way to extol either his successor or the chief men of that time, most of whom were ambitious and faithless; but after such long experience of the king's arbitrary, dissembling, and revengeful temper, I see no other safe course, in the actual state of the constitution, than what the nation concurred in pursuing.

The reign of Richard II. is, in a constitutional light, the most interesting part of our earlier history; and it has been the most imperfectly written. Some have misrepresented the truth through prejudice, and others through carelessness. It is only to be understood, and, indeed, there are great difficulties in the way of understanding it at all, by a perusal of the rolls of parliament, with some assistance from the contemporary historians, Walsingham, Knyghton, the anonymous biographer published by Hearne, and Froissart. These, I must remark, except occasionally the last, are extremely hostile to Richard; and although we are far from being bound to acquiesce in their opinions, it is at least unwarrantable in modern writers to sprinkle their margins with references to such authority in support of positions decidedly opposite.^{1*}

The revolution which elevated Henry IV. to the throne was certainly so far accomplished by force, that the king was in captivity, and those who might still adhere to him in no condition to support his authority. But the sincere concurrence which most of the prelates and nobility, with the mass of the people, gave to changes that could not have been otherwise effected by one so unprovided with foreign support as Henry, proves this revolution to have been, if not an indispensable, yet a national act, and should prevent our considering the Lancastrian kings as usurpers of the throne. Nothing indeed looks so much like usurpation in the whole transaction as Henry's

Circumstances attending Henry IV.'s accession.

^b It is fair to observe that Froissart's testimony makes most in favour of the king, or rather against his enemies, where it is most valuable; that is, in his account of what he heard in the English court in

1395, 1. iv. c. 62, where he gives a very indifferent character of the duke of Gloucester. In general this writer is ill-informed of English affairs, and undeserving to be quoted as an authority.

remarkable challenge of the crown, insinuating, though not avowing, as Hume has justly animadverted upon it, a false and ridiculous title by right line of descent, and one equally unwarrantable by conquest. The course of proceedings is worthy of notice. As the renunciation of Richard might well pass for the effect of compulsion, there was a strong reason for propping up its instability by a solemn deposition from the throne, founded upon specific charges of misgovernment. Again, as the right of dethroning a monarch was nowhere found in the law, it was equally requisite to support this assumption of power by an actual abdication. But as neither one nor the other filled up the duke of Lancaster's wishes, who was not contented with owing a crown to election, nor seemed altogether to account for the exclusion of the house of March, he devised this claim, which was preferred in the vacancy of the throne, Richard's cession having been read and approved in parliament, and the sentence of deposition, "out of abundant caution, and to remove all scruple," solemnly passed by seven commissioners appointed out of the several estates. "After which challenge and claim," says the record, "the lords spiritual and temporal, and all the estates there present, being asked, separately and together, what they thought of the said challenge and claim, the said estates, with the whole people, without any difficulty or delay, consented that the said duke should reign over them."^c The claim of Henry, as opposed to that of the earl of March, was indeed ridiculous; but it is by no means evident that, in such cases of extreme urgency as leave no security for the common weal but the deposition of a reigning prince, there rests any positive obligation upon the estates of the realm to fill his place with the nearest heir. A revolution of this kind seems rather to defeat and confound all prior titles; though in the new settlement it will commonly be prudent, as well as equitable, to treat them with some regard. Were this otherwise it would be hard to say why William III. reigned to the exclusion of Anne, or even of the Pretender, who had surely committed no offence at that time; or why (if **such** indeed be the true construction of the Act of Settle-

^c *Rot. Parl* p. 423.

ment) the more distant branches of the royal stock, descendants of Henry VII. and earlier kings, have been cut off from their hope of succession by the restriction to the heirs of the princess Sophia.

In this revolution of 1399 there was as remarkable an attention shown to the formalities of the constitution, allowance made for the men and the times, as in that of 1688. The parliament was not opened by commission; no one took the office of president; the commons did not adjourn to their own chamber; they chose no speaker; the name of parliament was not taken, but that only of estates of the realm. But as it would have been a violation of constitutional principles to assume a parliamentary character without the king's commission, though summoned by his writ, so it was still more essential to limit their exercise of power to the necessity of circumstances. Upon the cession of the king, as upon his death, the parliament was no more; its existence, as the council of the sovereign, being dependent upon* his will. The actual convention summoned by the writ of Richard could not legally become the parliament of Henry; and the validity of a statute declaring it to be such would probably have been questionable in that age, when the power of statutes to alter the original principles of the common law was by no means so thoroughly recognised as at the Restoration and Revolution. Yet Henry was too well pleased with his friends to part with them so readily; and he had much to effect before the fervour of their spirits should abate. Hence an expedient was devised of issuing writs for a new parliament, returnable in six days. These neither were nor could be complied with; but the same members as had deposed Richard sat in the new parliament, which was regularly opened by Henry's commissioner as if they had been duly elected.^d In this contrivance, more than in all the rest, we may trace the hand of lawyers.

If we look back from the accession of Henry IV. to that of his predecessor, the constitutional authority of the house of commons will be perceived to have made surprising progress during the course of twenty-two

^d If proof could be required of anything so self-evident as that these assemblies consisted of exactly the same persons, it **may** be found in their writ of expenses, as published by Prynne, 4th Register, p. 450.

years. Of the three capital points in contest while

Retrospect
of the pro-
gress of the
constitution
under
Richard II.

Edward reigned, that money could not be levied, or laws enacted, without the commons' consent, and that the administration of government was subject to their inspection and control, the first was absolutely decided in their favour, the second was at least perfectly admitted in principle, and the last was confirmed by frequent exercise. The commons had acquired two additional engines of immense efficiency; one, the right of directing the application of subsidies, and calling accountants before them; the other, that of impeaching the king's ministers for misconduct. All these vigorous shoots of liberty throve

Its advances
under the
house of
Lancaster.

more and more under the three kings of the house of Lancaster, and drew such strength and nourishment from the generous heart of England, that in after-times, and in a less prosperous season, though checked and obstructed in their growth, neither the blasts of arbitrary power could break them off, nor the mildew of servile opinion cause them to wither. I shall trace the progress of parliament till the civil wars of York and Lancaster: 1. in maintaining the exclusive right of taxation; 2. in directing and checking the public expenditure; 3. in making supplies depend on the redress of grievances; 4. in securing the people against illegal ordinances and interpolations of the statutes; 5. in controlling the royal administration; 6. in punishing bad ministers; and lastly, in establishing their own immunities and privileges,

1. The pretence of levying money without consent of parliament expired with Edward III., who had asserted it, as we have seen, in the *very* last year of his reign. A great council of lords and prelates, summoned in the second year of his successor, declared that they could advise no remedy for the king's necessities without laying taxes on the people, which could only be granted in parliament.^e Nor was Richard ever accused of illegal tallages, the frequent theme of remonstrance under Edward, unless we may conjecture that this charge is implied in an act (11 E. II. c. 9) which annuls all

impositions on wool and leather, without consent of parliament, *if any there be* ^f Doubtless his innocence in this respect was the effect of weakness; and if the revolution of 1399 had not put an end to his newly acquired despotism, this, like every other right of his people, would have been swept away. A less palpable means of evading the consent of the commons was by the extortion of loans, and harassing those who refused to pay by summonses before the council. These loans, the frequent resource of arbitrary sovereigns in later times, are first complained of in an early parliament of Richard I. ; and a petition is granted that no man shall be compelled to lend the king money.^g But how little this was regarded we may infer from a writ directed, in 1386, to some persons in Boston, enjoining them to assess every person who had goods and chattels to the amount of twenty pounds, in his proportion of two hundred pounds, which the town had promised to lend the king; and giving an assurance that this shall be deducted from the next subsidy to be granted by parliament. Among other extraordinary parts of this letter is a menace of forfeiting life, limbs, and property, held out against such as should not obey these commissioners.^h After his triumph over the popular party towards the end of his reign, he obtained large sums in this way.

Under the Lancastrian kings there is much less appearance of raising money in an unparliamentary course. Henry IV. obtained an aid from a great council in the year 1400; but they did not pretend to charge any besides themselves; though it seems that some towns afterwards gave the king a contribution.ⁱ A few years afterwards he directs the sheriffs to call on the richest men in their counties to advance the money voted by parliament. This, if any compulsion was threatened, is an instance of over-strained prerogative, though consonant to the practice of the late reign.^k There is, how-

It is positively laid down by the asserters of civil liberty, in the great case of impositions (Howell's State Trials, vol. ii. p. 443, 507), that no precedents for arbitrary taxation of exports or imports occur from the accession of Richard I. to the reign of Mary.

^g 2 R. II p. 62. This did not find its

way to the statute-book.

^h Rymer, t. vii. p. 644.

ⁱ Carte, vol. ii. p. 640. Sir M. Hale observes that he finds no complaint of illegal impositions under the kings of the house of Lancaster. Hargrave's Tracts, vol. i. p. 184.

^k Rymer, t. viii. p. 412, 488.

ever, an instance of very arbitrary conduct with respect to a grant of money in the *minority* of Henry VI. A subsidy had been granted by parliament upon goods imported tinder certain restrictions in favour of the merchants, with a provision that, if these conditions be not observed on the king's part, then the grant should be void and of no effect.^m But an entry is made on the roll of the next parliament, that, "whereas some disputes have arisen about the grant of the last subsidy, it is declared by the duke of Bedford and other lords in parliament, with advice of the judges and others learned in the law, that the said subsidy was at all events to be collected and levied for the king's use; notwithstanding any conditions in the grant of the said subsidy contained."ⁿ The commons, however, in making the grant of a fresh subsidy in this parliament, renewed their former conditions, with the addition of another, that "it ne no part thereof be beset ne dispensed to no other use, but only in and for the defense of the said roialme."^o

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

3. The commons made a bold attempt in the second year of Henry IV. to give the strongest security to their claims of redress, by inverting the usual course of parliamentary proceedings. It has been usual to answer their petitions on the last day of the session, which put an end to all further discussion

^m Rot Parl, vol. iv. p. 210.

ⁿ Id. p. 301.

^o Id. p. 302.

^p Id. vol. III. p. 546. ^q Id. p. 568.

upon them, and prevented their making the redress of grievances a necessary condition of supply. They now requested that an answer might be given before they made their grant of subsidy. This was one of the articles which Richard II's judges had declared^r it high treason to attempt. Henry was not inclined to make a concession which would virtually have removed the chief impediment to the ascendancy of parliament. He first said that he would consult with the lords, and answer according to their advice. On the last day of the session the commons were informed that "it had never been known in the time of his ancestors that they should have their petitions answered before they had done all their business in parliament, whether of granting money or any other concern; wherefore the king will not alter the good customs and usages of ancient times."^r

Notwithstanding the just views these parliaments appear generally to have entertained of their power over the public purse, that of the third of Henry V. followed a precedent from the worst times of Richard II., by granting the king a subsidy on wool and leather during his life. This, an historian tells us, Henry IV. had vainly laboured to obtain ;^r but the taking of Harleur intoxicated the English with new dreams of conquest in France, which their good sense and constitutional jealousy were not firm enough to resist. The continued expenses of the war, however, prevented this grant from becoming so dangerous as it might have been in a season of tranquillity* Henry V., like his father, convoked parliament almost in every year of his reign.

4. It had long been out of all question that the legislature consisted of the king, lords, and commons ; or, in stricter language, that the king could not make or repeal statutes without the consent of parliament. But this fundamental maxim was still frequently defeated by various acts of evasion or violence; which, though protested against as illegal, it was a difficult task to prevent. The king sometimes exerted a power of suspending the observance of statutes, as in the ninth of Richard II., when a petition

Legislative
rights of the
commons
established.

^r Bot. Parl. vol. ill. p. 453.

• Id. vol. iv. p. 63.

^t Walsingham, p. 379.

that all statutes might be confirmed is granted, with an exception as to one passed in the last parliament, forbidding the judges to take fees, or give couiael in eases where the king was a party; which, "because it was too seveffc and needs declaration, the king would have of no effect till it should be declared in parliament."^u The apprehension of the dispensing prerogative and sense of its illegality are manifested by the wary terms wherein the commons, in one of Richard's parliaments, "assent that the king make such sufferance respecting the statute of provisors as shall seem reasonable to him, so that the said statute be not repealed; and, moreover, that the commons may disagree thereto at the next parliament, and resort to the statute;" with a protestation that this assent, which is a novelty and never done before, shall not be drawn into precedent; praying the king that this protestation may be entered on the roll of parliament.* A petition, in one of Henry IV.'s parliaments, to limit the number of attorneys, and forbid filazers and protho-notaries from practising, having been answered favourably as to the first point, we find a marginal entry in the roll that the prince and council had respited the execution of this act.^y

The dispensing power, as exercised in favour of individuals, is quite of a different character from this general suspension of statutes, but indirectly weakens the sovereignty of the legislature. This power was exerted, and even recognised, throughout all the reigns of the Plantagenets. *In* the first of Henry V. the commons pray that the statute for driving aliens out of the kingdom be executed. The king assents, saving his prerogative and his right of dispensing with it when he pleased. To which the commons replied that their intention was never otherwise, nor, by God's help, ever should be. At the same time one Bees ap Thomas petitions the king to modify or dispense with the statute prohibiting Welchmen from purchasing lands in England, or the English towns in

^u Walsingham, p. 210. Ruff head ob-^x 15 R. II. p. 285. See, too, 16 R. II. serves the margin upon this statute, p. 301, where the same power is renewed 8 R. H; c; 3, that it is repealed, but in H. IV.'s parliaments. does not take notice what sort of repeal^y 13 H. IV. p. 643 it had.

Wales ; which the king grants. In the same parliament the commons pray that no grant or protection be made to any one in contravention of the statute of provisors, saving the king's prerogative. He merely answers, " Let the statutes be observed:" evading any allusion to his dispensing power.²

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

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

This commendable reluctance of the commons to let the clergy forge chains for them produced, as there is much appearance, a similar violation of their legislative rights in the next reign. The statute against heresy in the second of Henry IV. is not grounded upon any

² Rot Parl. v. 4 H. V. p. 6, 9.

^a 5 R. II. stat 2, c 5; Rot Parl. 6 R. II. p. 141. Some other instances of the commons attempting to prevent these unfair practices are adduced by Ruffhead, in his preface to the Statutes, and in Prynne's preface to Cotton's Abridgment of the Records. The act

13 R II. atat. 1, c. 15, that the king's castles and gaols which had been separated from the body of the adjoining counties should be reunited to them, is not founded upon any petition that appears on the roll; and probably, by making search, other instances equally flagrant might be discovered.

petition of the commons, but only upon one of the clergy. it is said to be enacted by consent of the lords, but no notice is taken of the lower house in the parliament roll, though the statute reciting the petition asserts the commons to have joined in it.^b The petition and the statute are both in Latin, which is unusual in the laws of this time. In a subsequent petition of the commons this act is styled "the statute made in the second year of your majesty's reign at the request of the prelates and clergy of your kingdom;" which affords a presumption that it had no regular assent of parliament.¹ And the spirit of the commons during this whole reign being remarkably hostile to the church, it would have been hardly possible to obtain their consent to so penal a law against heresy. Several of their petitions seem designed indirectly to weaken its efficacy.^d

These infringements of their most essential right were resisted by the commons in various ways, according to the measure of their power. In the fifth of Richard II. they request the lords to let them see a certain ordinance before it is engrossed.⁸ At another time they procured some of their own members, as well as peers, to be present at engrossing the roll. At length they spoke out unequivocally in a memorable petition, which, besides its intrinsic importance, is deserving of notice as the earliest instance in which the house of commons adopted the English language. I shall present its venerable orthography without change.

"Oure soverain lord, youre humbly and trewe lieges that ben come for the comune of youre lond bysechyn onto youre rizt riztwesnesse, That so as hit hath ever be thair libte and fredom, that thar sholde no statut no lawe be made offlasse than they yaf therto their assent; consideringe that the comune of youre lond, the whiche that

^b There had been, however, a petition of the commons on the same subject, expressed in very general terms, on which this terrible superstructure might artfully be raised, p. 474.

^c p. 626.

^d We find a remarkable petition in 8 H. IV., professedly aimed against the Lollards, but intended, as I strongly suspect, in their favour. It condemns persons preaching against the catholic faith

or sacraments to imprisonment till the next parliament, where they were to abide such judgment as should be rendered by the king and peers of the realm. This seems to supersede the burning statute of 2 H. IV., and the spiritual cognizance of heresy. Rot. Parl. p. 583. See, too, p. 626. The petition was expressly granted; but the clergy, I suppose, prevented its appearing on the statute roll.

^e Rot. Parl. vol. iii. p. 102.

is, and ever hath be, a membre of youre parlemente, ben as well assenters as petitioners, that fro this tyme forward, by compleynte of the comune of any myschief axknyge remedie by mouthe of their speker for the comune, other ellys by petition writen, that ther never be no lawe made theruppon, and engrossed as statut and lawe, nother by addicions, nother by diminucions, by no manner of terme ne termes, the whiche that sholde chaunge the sentence, and the entente axked by the speker mouthe, or the petitions beforesaid yeven up yn writyng by the manere forsaid, withoute assent of the forsaid comune. Consideringo, oure soverain lord, that it is not in no wyse the entente of youre eonmnes, zif yet be so that they axke you by spekyng, or by writyng, two thynges or three, or as manye as theym lust: But that ever it stande in the fredom of youre hie regalie, to graunte whiche of thoo that you lust, and to werune the remanent.

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

Notwithstanding the fulness of this assent to so important a petition we find no vestige of either among the statutes, and the whole transaction is unnoticed by those historians who have not looked into our original records. If the compilers of the statute-roll were able to keep out of it the very provision that was intended to check their fraudulent machinations, it was in vain to hope for redress without altering the established practice in this respect; and indeed, where there was no design to falsify the roll it was impossible to draw up statutes which should be in truth the acts of the whole legislature, so long as the king continued to grant petitions in part, and to engraft new matter upon them. Such was

^f Rot Parl. vol. iv. p. 22. It is curious that the authors of the Parliamentary History say that the roll of this parliament is lost, and consequently suppress altogether this important petition. Instead of which they give, as their fashion is, impertinent speeches out of Holingshed, which are certainly not genuine, and would be of no value if they were so.

still the case till the commons hit upon an effectual expedient for screening themselves against these encroachments, which has lasted without alteration to the present day. This was the introduction of complete statutes under the name of bills, instead of the old petitions; and these containing the royal assent and the whole form of a law, it became, though not quite immediately,* a constant principle that the king must admit or reject them without qualification. This alteration, which wrought an extraordinary effect on the character of our constitution, was gradually introduced in Henry VI.'s reign.^h

From the first years of Henry V., though not, I think, earlier, the commons began to concern themselves with the petitions of individuals to the lords or council. The nature of the jurisdiction exercised by the latter will be treated more fully hereafter; it is only necessary to mention in this place that many of the requests preferred to them were such as could not be granted without transcending the boundaries of law. A just inquietude as to the encroachments of the king's council had long been manifested by the commons; and finding remonstrances ineffectual, they took measures for preventing such usurpations of legislative power by introducing their own consent to private petitions. These were now presented by the hands of the commons, and in very many instances

* Henry VI. and Edward IV. in some cases passed bills with sundry provisions annexed by themselves. Thus the act for resumption of grants, 4 E. IV., was encumbered with 289 clauses in favour of so many persons whom the king meant to exempt from its operation; and the same was done in other acts of the same description. Rot Parl. vol. v. p. 617.

b The variations of each statute, as now printed, from the parliamentary roll, whether in form or substance, are noticed in Cotton's Abridgment. It may be worth while to consult the preface to Ruffhead's edition of the Statutes, where this subject is treated at some length.

Perhaps the triple division of our legislature may be dated from this **innovation**. For as it is impossible to deny that, while the king promulgated a

statute founded upon a mere petition, he was himself the real legislator, so I think it is equally fair to assert, notwithstanding the formal preamble of our statutes, that laws brought into either house of parliament in a perfect shape, and receiving first the assent of lords and commons, and finally that of the king, who has no power to modify them, must be deemed to proceed, and derive their efficacy, from the joint concurrence of all the three. It *fa* said, indeed, at a much earlier time, that *le ley de la terre est fait en parlement par le roi, et les seigneurs espirituels et temporels, et tout la communaulte' du royaume*. Rot JParl vol. iii. p. 293. But this, I must allow, was in the violent session of 11 Ric. II., the constitutional authority of which is not to be highly prized.

passed in the form of statutes with the express assent of all parts of the legislature. Such was the origin of private bills, which occupy the greater part of the rolls in Henry V. and VI.'s parliament. The commons once made an ineffectual endeavour to have their consent to all petitions presented to the council in parliament rendered necessary by law; if I rightly apprehend the meaning of the roll in this place, which seems obscure or corrupt.'

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

i 8 H. V. vol. iv. p. 127.

whom, as it proved, he had just cause to suspect. 5 H. IV. p. 525.

^k The house of commons thanked the king for pardoning Northumberland,

^m 5 H. IV. p. 505.

Interference
of parliament
with the royal
expenditure.

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

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

But no parliament came near, in the number and boldness of its demands, to that held in the eighth year of Henry IV. The commons presented thirty-one articles, none of which the king ventured to refuse, though pressing very severely upon his prerogative. He was to name sixteen counsellors, by whose advice he was solely to be guided, none of them to be dismissed without conviction of misdemeanor. The chancellor and privy seal to pass no grants or other matter contrary to law. Any persons about the court stirring up the king or queen's minds against their subjects, and duly convicted thereof, to lose their offices and be fined. The king's ordinary revenue

^z Rot. Parl. vol. iii. p. 529, 558. 573.

^pp.

547.

P 13 H IV. p 624.

was wholly appropriated to his household and the payment of his debts; no grant of wardship or other profit to be made thereout, nor any forfeiture to be pardoned. The king, "considering the wise government of other Christian princes, and conforming himself thereto," was to assign two days in the week for petitions, "it being an honourable and necessary thing that his lieges, who desired to petition him, should be heard." No judicial officer, nor any in the revenue or household, to enjoy his place for life or term of years. No petition to be presented to the king, by *my* of his household, at times when the council were not fitting. The council to determine nothing cognizable at common law, unless for a reasonable cause and with consent of the judges. The statutes regulating purveyance were affirmed—abuses of various kinds in the council and in courts of justice enumerated and forbidden—elections of knights for counties put under regulation. The council and officers of state were sworn to observe the common law and all statutes, those especially just enacted.^q

It must strike every reader that these provisions were of themselves a noble febric of constitutional liberty, and hardly perhaps inferior to the petition of right under Charles I. We cannot account for the submission of Henry to conditions far more derogatory than ever were imposed on Richard, because the secret politics of his reign are very imperfectly understood. Towards its close he manifested more vigour. The speaker, Sir Thomas Chaucer, having made the usual petition for liberty of speech, the king answered that he might speak as others had done in the time of his (Henry's) ancestors, and his own, but not otherwise; for he would by no means have any innovation, but be as much at his liberty as any of his ancestors had ever been. Some time after he sent a message to the commons, complaining of a law passed at the last parliament infringing his liberty and prerogative, which he requested their consent to repeal. To this the commons agreed, and received the king's thanks, who declared at the same time that he would keep as much freedom and prerogative as any of his ancestors. It does not appear what was the particular subject of complaint;

^q Rot Parl. 8 IL IV. p. 585.

but there had been much of the same remonstrating spirit in the last parliament that was manifested on preceding occasions. The commons, however, for reasons we cannot explain, were rather dismayed. Before their dissolution they petition the king, that, whereas he was reported to have offended at some of his subjects in this and in the preceding parliament, he would openly declare that he field them all for loyal subjects. Henry granted this "of his special grace;" and thus concluded his reign more triumphantly with respect to his domestic battles than he had gone through it.'

Power deemed to be ill gotten is naturally precarious; and the instance of Henry IV. has been well
Henry V.
His popularity. quoted to prove that public liberty flourishes with a bad title in the sovereign. None of our kings seem to have been less beloved; and indeed lie had little claim to affection. But what men denied to the reigning king they poured in full pleasure upon the heir of his throne. The virtues of the prince of Wales are almost invidiously eulogized by those parliaments who treat harshly his father;' and these records afford a strong presumption that some early petulance or riot has been much exaggerated by the vulgar minds of our chroniclers. One can scarcely understand at least that a prince who was three years engaged in quelling the dangerous insurrection of Glendower, and who in the latter time of his father's reign presided at the council, was so lost in a cloud of low debauchery as common fame represents.' Loved he certainly was throughout his life, as so intrepid, affable, and generous a temper well deserved; and this sentiment was heightened to admiration by successes still more rapid and dazzling than those of Edward III. During his reign there scarcely appears any vestige of dissatisfaction in parliament—a circumstance very honourable, whether we ascribe it to the justice of his administration or to the affection of his people. Perhaps two exceptions, though they are rather one in spirit, might be made: the first, a petition to the duke of Gloucester, then holding parliament as guardian

^r 13 H. IV. p. 648, 658.

^z Rot Parl. vol. iii. p. 549, 568, 574,
611

¹ This passage was written before I was

aware that the same opinion had been elaborately maintained by Mr. Luders, in one of his valuable essays upon points of constitutional history.

of England, that he would move the king and queen to return, as speedily as might please them, in relief and comfort of the commons;^u the second, a request that their petitions might not be sent to the king beyond sea, but altogether determined "within this kingdom of England, during this parliament," and that this ordinance might be of force in all future parliaments to be held in England." This prayer, to which the guardian declined to accede, evidently sprang from the apprehensions, excited in their minds by the treaty of Troyes, that England might become a province of the French crown, which led them to obtain a renewal of the statute of Edward III., declaring the independence of this kingdom/

It has been seen already that even Edward III. consulted his parliament upon the expediency of negociations for peace, though at that time the commons had Jiot acquired boldness enough to tender their advice. In Richard II's reign they answered to a similar proposition with a little more confidence, that the dangers each way were so considerable they dared not decide, though an honourable peace would be the greatest comfort they could have, and concluded by hoping that the king would not engage to do homage for Calais or the conquered country." The parliament of the tenth of his reign was expressly summoned in order to advise concerning the king's intended expedition beyond sea—a great council, which had previously been assembled at Oxford, having declared their incompetence to consent to this measure without the advice of parliament.¹ Yet a few years afterwards, on a similar reference, the commons rather declined to give any opinion.^b They confirmed the league of Henry V. with the emperor Sigismund;^c and the treaty of Troyes, which was so fundamentally to change the situation of Henry and his successors, obtained, as it evidently required, the sanction of both houses of parliament.⁴¹ These precedents conspiring with the weakness of the executive government, in the minority of Henry VI., to fling an increase of influence into the scale of the commons, they made their

Parliament
consulted
on all public
affairs.

^u Rot Parl. 8 H. V. vol. iv. p. 126.

^x p. 128.

^y p. 130.

^z 7 R. II. vol. iii. p. 170.

^a p. 215.

^b 17 R. II. p. 315.

^c 4 H. V. vol. iv. p. 98.

^d p. 136.

concurrence necessary to all important business both of a foreign and domestic nature. Thus commissioners were appointed to treat of the deliverance of the king of Scots, the duchesses of Bedford and Gloucester were made denizens, and mediators were appointed to reconcile the dukes of Gloucester and Burgundy, by authority of the three estates assembled in parliament.^e Leave was given to the dukes of Bedford and Gloucester, and others in the king's behalf, to treat of peace with France, by both houses of parliament, in pursuance of an article in the treaty of Troyes, that no treaty should be set on foot with the dauphin without consent of the three estates of both realms/ This article was afterwards repealed.^g

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

6, But before this time the sky had begun to darken, and discontent with the actual administration pervaded every rank. The causes of this are familiar—the unpopularity of the king's marriage with Margaret of Anjou, and her impolitic violence

^e Rot Parl. 4.H.V, vol iv. p. 211, 242, 277.

^t p. 371.

^g 23 H. VI. vol v. p. 102. There is rather a curious instance in 3 H. VI. of the Jealousy with which the commons regarded 'any proceedings in parliament where they were Bot concerned. A controversy arose between the earls marshal and of Warwick respecting their **precedence**; founded upon the royal blood

of the first, and long possession of **the** second. In this the commons could not affect to interfere Judicially; but they found a singular way of meddling, by petitioning the king to confer the dukedom of Norfolk on the earl marshal. vol. iv. p. 273.

^h Rot Parl, 1 H. VI. p. 189; 3 H VI. p. 292; 8H. VI p. 343.

ⁱ vol. v. 18 H. VI p. 17.

^k 28 H. VI. p. 185.

in the conduct of affairs, particularly the imputed murder of the people's favourite, the duke of Gloucester. This provoked an attack upon her own creature, the duke of Suffolk. Impeachment had lain still, like a sword in the scabbard, since the accession of Henry IV., when the commons, though not preferring formal articles of accusation, had petitioned the king that Justice Rickhill, who had been employed to take the former duke of Gloucester's confession at Calais, and the lords appellants of Richard II.'s last parliament, should be put on their defence before the lords.^m In Suffolk's case the commons seem to have proceeded by bill of attainder, or at least to have designed the judgment against that minister to be the act of the whole legislature; for they delivered a bill containing articles against him to the lords, with a request that they would pray the king's majesty to enact that bill in parliament, and that the said duke might be proceeded against upon the said articles in parliament according to the law and custom of England. These articles contained charges of high treason, chiefly relating to his conduct in France, which, whether treasonable or not, seems to have been grossly against the honour and advantage of the crown. At a later day the commons presented many other articles of misdemeanor. To the former he made a defence, in presence of the king as well as the lords both spiritual and temporal; and indeed the articles of impeachment were directly addressed to the king, which gave him a reasonable pretext to interfere in the judgment. But from apprehension, as it is said, that Suffolk could not escape conviction upon at least some part of these charges, Henry anticipated with no slight irregularity the course of legal trial, and, summoning the peers into a private chamber, informed the duke of Suffolk, by mouth of his chancellor, that, inasmuch as he had not put himself upon his peerage, but submitted wholly to the royal pleasure, the king, acquitting him of the first articles containing matter of treason, by his own advice and not that of the lords, nor by way of judgment, not being in a place where judgment could be delivered, banished him for five years from his dominions. The lords then present besought

^m Rot Parl. vol. iii. p. 430, 449.

the king to let their protest appear on record, that neither they nor their posterity might lose their rights of peerage by this precedent. It was justly considered as an arbitrary stretch of prerogative, in order to defeat the privileges of parliament and screen a favourite minister from punishment. But the course of proceeding by bill of attainder, instead of regular impeachment, was not judiciously chosen by the commons.¹¹

7. Privilege of parliament, an extensive and singular branch of our constitutional law, begins to attract attention under the Lancastrian princes. It is true indeed that we can trace long before by records, and may infer with probability as to times whose records have not survived, one considerable immunity—a freedom from arrest for persons transacting the king's business in his national council.⁰ Several authorities may be found in Mr. Hatsell's *Precedents*; of which one, in the 9th of Edward II., is conclusive.^p But in those rude times members of parliament were not always respected by the officers executing legal process, and still less by the violators of law. After several remonstrances, which the crown had evaded,^q the commons obtained the statute 11 Henry VI. c. 11, for the punishment of such as assault any on their way to the parliament, giving double damages to the party/ They had more difficulty in establishing, notwithstanding the old precedents in their favour, an immunity from all criminal process except in charges of treason, felony, and breach of the peace, which is their present measure of privilege. The truth was, that, with a right pretty clearly recognised, as is admitted by the judges in Thorp's case; the house of commons had no regular compulsory process at their command. In the cases of Lark, servant of a member, in the 8th of Henry VI.,⁸ and of Clerke, himself a burgess, in the 39th of the same king,¹ it was thought necessary to effect their

ⁿ Rot Parl 28 H. VI vol. v. p. 176.

⁰ If this were to rest upon antiquity of precedent, one might be produced that would challenge all competition. In the laws of Ethelbert, the first Christian king of Kent, at the end of the sixth century, we find this provision: " If the king call his people to him (i. e. in the witenagemot), and any one does an injury to one of them, let him pay a fine.'

Wilkins, *Leges Anglo-Saxon*, p. 2.

^p Hatsell, vol. i. p. 12.

^q Rot. Parl. 5 H. IV. p. 641.

^r The clergy had got a little precedence in this. An act passed 8 H. VI. c. 1, granting privilege from arrest for themselves and servants on their way to convocation.

Rot. Parl. vol. iv. p. 357.

¹ vol. v. p. 374

release from a civil execution by special acts of parliament. The commons, in a former instance, endeavoured to make the law general that no members nor their servants might be taken except for treason, felony, and breach of peace; but the king put a negative upon this part of their petition.

The most celebrated, however, of these early cases of privilege is that of Thomas Thorp, speaker of the commons in 31 Henry VI. This person, who was moreover a baron of the exchequer, had been imprisoned on an execution at suit of the duke of York. The commons sent some of their members to complain of a violation of privilege to the king and lords in parliament, and to demand Thorp's release. It was alleged by the duke of York's counsel that the trespass done by Thorp was since the beginning of the parliament, and the judgment thereon given in time of vacation, and not during the sitting. The lords referred the question to the judges, who said, after deliberation, that "they ought not to answer to that question, for it hath not be used aforetyme that the judges should in any wise determine the privilege of this high court of parliament; for it is so high and so mighty in his nature that it may make law, and that that is law it may make no law; and the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the justices." They went on, however, after observing that a general writ of supersedeas of all processes upon ground of privilege had not been known, to say that, "if any person that is a member of this high court of parliament be arrested in such cases as be not for treason, or felony, or surety of the peace, or for a condemnation had before the parliament, it is used that all such persons should be released of such arrests and make an attorney, so that they may have their freedom and liberty freely to intend upon the parliament."

No twithstanding this answer of the judges, it was concluded by the lords that Thorp should remain in prison, without regarding the alleged privilege; and the commons were directed in the king's name to proceed "with all goodly haste and speed" to the election of a new speaker. It is curious to observe that the commons, forgetting their grievances, or content to drop them,

made such haste and speed according to this command, that they presented a new speaker for approbation the next day.^u

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

No privilege of the commons can be so fundamental as liberty of speech. This is claimed at the opening of every parliament by their speaker, and could never be infringed without shaking the ramparts of the constitution. Richard II.'s attack upon Haxey has been already mentioned as a flagrant evidence of his despotic intentions. No other case occurs until the 33rd year of Henry VI., when Thomas Young, member for Bristol, complained to the commons, that, "for matters by him showed in the house accustomed for the commons in the said parliaments, he was therefore taken, arrested, and rigorously in open wise led to the Tower of London, and there grievously in great duress long time imprisoned against the said freedom and liberty;" with much more to the like effect. The commons transmitted this petition to the lords, and the king "willed that the lords of his council do and provide for the said suppliant as in their discretions shall be thought convenient and reasonable." This imprisonment of Young, however, had happened six years before, in consequence of a motion made by him that, the king then having no issue, the duke of York might be declared heir-apparent to the crown. In the present session, when the duke was protector, he thought it well-timed to prefer his claim to remuneration.^y

^u Rot Parl vol. v. p. 239; Hatsell's *have recourse to Hatsell's Precedents, vol. 1. chap. 1.*
Precedents, p. 29.

^x Upon this subject the reader should ^y Rot Parl, vol v. p. 337; W. Wor-

There is a remarkable precedent in the 9th of Henry IV., and perhaps the earliest authority for two eminent maxims of parliamentary law—that the commons possess an exclusive right of originating money bills, and that the king ought not to take notice of matters pending in parliament. A quarrel broke out between the two houses upon this ground; and as we have not before seen the commons venture to clash openly with their superiors, the circumstance is for this additional reason worthy of attention. As it has been little noticed, I shall translate the whole record.

" Friday the second day of December, which was the last day of the parliament, the commons came before the king and the lords in parliament, and there, by command of the king, a schedule of indemnity touching a certain altercation moved between the lords and commons was read; and on this it was commanded by our said lord the king that the said schedule should be entered of record in the roll of parliament; of which schedule the tenor is as follows: Be it remembered, that on Monday the 21st day of November, the king our sovereign lord being in the council-chamber in the abbey of Gloucester,¹ the lords spiritual and temporal for this present parliament assembled being then in his presence, a debate took place among them about the state of the kingdom, and its defence to resist the malice of the enemies who on every side prepare to molest the said kingdom and its faithful subjects, and how no man can resist this malice, unless, for the safeguard and defence of his said kingdom, our sovereign lord the king has some notable aid and subsidy granted to him in his present parliament. And therefore it was demanded of the said lords by way of question what aid would be sufficient and requisite in these circumstances? To which question it was answered by the said lords severally, that, considering the necessity of the king on one side, and the poverty of his people on the other, no less aid could be sufficient than one tenth and a half from cities and towns, and one fifteenth and a half from all other lay persons; and, besides, to grant a continuance of the subsidy on wool, woolfells, and

cester, p. 475. Mr. Hatsell seems to have overlooked this case, for he mentions that of Strickland, in 1571, as the earliest Instance of the crown's interference with freedom of speech in parliament vol. i. p. 85. This parliament sat at Gloucester.

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

said lord the king. Our said lord the king willing moreover, by the consent of the said lords, that the communication had in this present parliament as above be not drawn into precedent in time to come, nor be turned to the prejudice or derogation of the liberty of the estate for which the said commons are now come, neither in this present parliament nor in any other time to come. But wills that himself and all the other estates should be as free as they were before. Also, the said last day of parliament, the said speaker prayed our said lord the king, on the part of the said commons, that he would grant the said commons that they should depart in as great liberty as other commons had done before. To which the king answered that this pleased him well, and that at all times it had been his desire."^a

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

^a Rot Parl. vol. iii. p. 611.

^b A notion is entertained by many people, and not without the authority of some very respectable names, that the king is one of the three estates of the realm, the lords spiritual and temporal forming together the second, as the com-

mons in parliament do the third. This is contradicted by the general tenor of our ancient records and law-books; and Indeed the analogy of other governments ought to have the greatest weight, even if more reason for doubt appeared upon the face of our own authorities. But the

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

It was not only in money bills that the originating power was supposed to reside in the commons. The course of proceedings in parliament, as has been seen, from the commencement at least of Edward III.'s reign,

instances where the three estates are declared or implied to be the nobility, clergy, and commons, or at least their representatives in parliament, are too numerous for insertion. This land standeth, says the Chancellor Stillington, in 7 th Edward IV., by three states, and above that one principal, that is to wit, lords spiritual, lords temporal, and commons, and over that, state royal, as our sovereign lord the king. *Rot. Part. vol. v. p. 622.* Thus, too, it is declared that the treaty of Staples in 1492 was to be confirmed per tres status regni Anglie rite et debite convocatos, videlicet per prelates et clerum, nobiles et communitates ejusdem regni. *Rymer, t xii. p. 508.*

I will not, however, suppress one passage, and the only instance that has occurred in my reading, where the king does appear to have been reckoned among the three estates. The commons say, in the 2nd of Henry IV., that the states of the realm may be compared to a trinity, that is, the king, the lords spiritual and temporal, and the commons. *Rot. Parl. vol. lit. p. 459.* In this expression, however, the sense shows that by estates of the realm they meant members, or necessary parts, of the parliament

Whitelocke, on the Parliamentary Writ, vol. ii. p. 43, argues at length, that the three estates are king, lords, and commons, which seems to have been a current doctrine among the popular lawyers of the seventeenth century. His reasoning is chiefly grounded on the baronial tenure of bishops, the validity of acts passed

against their consent, and other arguments of the same kind; which might go to prove that there are only at present two estates, but can never turn the king into one.

The source of this error is an inattention to the primary sense of the word estate (status), which means an order or condition into which men are classed by the institutions of society. It is only in a secondary, or rather an elliptical application, that it can be referred to their representatives in parliament or national councils. The lords temporal, indeed, of England are identical with the estate of the nobility; but the house of commons is not, strictly speaking, the estate of commonalty, to which its members belong, and from which they are deputed. So the whole body of the clergy are properly speaking one of the estates, and are described as such in the older authorities, 21 Ric. 11. *Rot. Parl. vol. iii. p. 348,* though latterly the lords spiritual in parliament acquired, with less correctness, that appellation. *Hody on Convocations, p. 426.* The bishops, indeed, may be said, constructively, to represent the whole of the clergy, with whose grievances they are supposed to be best acquainted, and whose rights it is their peculiar duty to defend. And I do not find that the inferior clergy had any other representation in the cortes of Castile and Aragon, where the ecclesiastical order was always counted among the estates of the realm.

^c *Rot. Parl. vol. iii. p. 623.*

was that the commons presented petitions, which the lords, by themselves, or with the assistance of the council, having duly considered, the sanction of the king was notified or withheld. This was so much according to usage, that, on one occasion, when the commons requested the advice of the other house on a matter before them, it was answered that the ancient custom and form of parliament had ever been for the commons to report their own opinion to the king and lords, and not to the contrary; and the king would have the ancient and laudable usages of parliament maintained.* It is singular that in the terror of innovation the lords did not discover how materially this usage of parliament took off from their own legislative influence. The rule, however, was not observed in succeeding times; bills originated indiscriminately in either house; and indeed some acts of Henry V., which do not appear to be grounded on any petition, may be suspected, from the manner of their insertion in the rolls of parliament, to have been proposed on the king's part to the commons.^e But there is one manifest instance in the 18th of Henry VI, where the king requested the commons to give their authority to such regulations^f as

^d Rot Parl. 5 R. II. p. 100.

^e Stat 2 H. V. c 6, 7, 8, 9; 4 H. VI c. 7.

^f Rot Pari. vol. v. p. 7. It appears by a case in the Year Book of the 33rd of Henry VI., that, where the lords made only some minor alterations in a bill sent up to them from the commons, even if it related to a grant of money, the custom was not to remand it for their assent to the amendment Brooke's Abridgment: Parliament 4. The passage is worth extracting, in order to illustrate the course of proceeding in parliament at that time. Case fuit que Sir J. P. fuit attainé de certeyn trespas par acte de parliament dont les commons furent assentus, que sil ne vient eins per tiel Jour que il forfeytera tiel somme, et les seigneurs done plus longe jour, et le bil ment rebaile al commons arriere; et per Kirby, clerk des roles del parliament, Piwe del parliament est, que si bil vient primes a les commons, et ils passent ceo, il est use d'endorser ceo en tiel forme,

Soit bayle as seigniors; et si les seigniors *ne le roy* ne alteront le bil, donques est use a liverer ceo al clerke del parliamentedestre enrol saunz endorser ceo. . . Et si les seigniors voient alter un bil in ceo que poetestoyer ore le bil, ils poycnt saunz remandre ceo al commons, come si les commons graunte poundage, pur quatuor aus, et les grantent nisi par deux ans, ceo ne serra rebayle al commons; mes si les commons grauntent nisi pur deux ans, et les seigneurs pur quatre ans, la ceo serra reliver al commons, et en cest case les seigniors doyent faire un sedule de lour intent, ou d'endorser le bil en ceste forme, Les seigneurs ceo assentent pur durer par quatuor ans; et quant les commons ount le bil arriere, et ne voient assenter a ceo, ceo ne poet estreun actre; mes si les commons voient asaenter, donques ils indorse leur resposna sur le mergent ne basse deins le bil en tiel forme, Les commons sont assentans al sedul des seigniors, a mesme cesty bil annexe, et donques sera bayle ad clerke

his council might provide for redressing the abuse of purveyance; to which they assented.

If we are to choose constitutional precedents from seasons of tranquillity rather than disturbance, which surely is the only means of preserving justice or consistency, but little intrinsic authority can be given to the following declaration of parliamentary law in the 11th of Richard II. : " In this parliament (the roll says) all the lords as well spiritual and temporal there present claimed as their liberty and privilege, that the great matters moved in this parliament, and to be moved in other parliaments for time to come, touching the peers of the land, should be treated, adjudged, and debated according to the course of parliament, and not by the civil law nor the common law of the land, used in the other lower courts of the kingdom ; which claim, liberty, and privileges, the king graciously allowed and granted them in full parliament."⁸ It should be remembered that this assertion of paramount privilege was made in very irregular times, when the king was at the mercy of the duke of Gloucester and his associates, and that it had a view to the immediate object of justifying their violent proceedings against the opposite party, and taking away the restraint of the common law. It stands as a dangerous rock to be avoided, not a lighthouse to guide us along the channel. The law of parliament, as determined by regular custom, is incorporated into our constitution ; but not so as to warrant an indefinite, uncontrollable assumption of power in any case, least of all in judicial procedure, where the form and the essence of justice are inseparable from each other. And, in fact, this claim of the lords, whatever gloss Sir E. Coke may put upon it, was never intended to bear any relation to the privileges of the lower house. I should not, perhaps, have noticed this passage so strongly if it had not

del parliament, ut supra. Et si un bil soit primes liver al seigniors, et le bil passe eux, ils ne usont de fayre ascun endorsement, mess de mitter le bil as commons; et donques, si le bil passe les commons, il est use destre issint endoree, Les commons sont assentants; et ceo prove que il ad passe les seigniors devant, et lour assent est a cast passer del seig-

niors; et ideo cest acte supra nest bon, pur ceo que ne fill rebaile as commons.

A singular assertion is made in the Year Book 21 E. IV. p. 48 (Maynard's edit.), that a subsidy granted by the commons without assent of the peers is good enough. This cannot surely have been law at that time.

⁸ Rot. Parl. vol. iii. p. 244.

been made the basis of extravagant assertions as to the privileges of parliament;^h the spirit of which exaggerations might not be ill adapted to the times wherein Sir E. Coke lived, though I think they produced at several later periods no slight mischief, some consequences of which we may still have to experience.

The want of all judicial authority, either to issue process or to examine witnesses, together with the usual shortness of sessions, deprived the house of commons of what is now considered one of its most fundamental privileges, the cognizance of disputed elections. ^{Contested elections how determined.} Upon a false return by the sheriff, there was no remedy but through the king or his council. Six instances only, I believe, occur, during the reigns of the Plantagenet family, wherein the misconduct or mistake of the sheriff is recorded to have called for a specific animadversion, though it was frequently the ground of general complaint, and even of some statutes. The first is in the 12th of Edward II., when a petition was presented to the council against a falso return for the county of Devon, the petitioner having been duly elected. It was referred to the court of exchequer to summon the sheriff before them.¹ The next occurs in the 36th of Edward III., when a writ was directed to the sheriff of Lancashire, after the dissolution of parliament, to inquire at the county-court into the validity of the election; and upon his neglect a second writ issued to the justices of the peace to satisfy themselves about this in the best manner they could, and report the truth into chancery. This inquiry after the dissolution was on account of the wages for attendance, to which the knights unduly returned could have no pretence.^k We find a third case in the 7th of Richard II., when the king took notice that Thomas de Camoys, who was summoned by writ to the house of peers, had been elected knight for SuiTey, and directed the sheriff to return another.TM In the same year the town of Shaftesbury petitioned the king, lords, and commons against a false return of the sheriff of Dorset, and prayed them to order remedy. Nothing further appears respecting this

^h Coke's 4th Institute, p. 15.

^k 4 Prynne, p. 261.

¹ Glanvil's Reports of Elections, edit. 1774; Introduction, p. 12.

^m Glanvil's Reports, *ibid*, from Prynne.

petition." This is the first instance of the commons being noticed in matters of election. But the next case is more material; in the 5th of Henry IV. the commons prayed the king and lords in parliament, that, because the writ of summons to parliament was not sufficiently returned by the sheriff of Rutland, this matter might be examined in parliament, and in case of default found therein an exemplary punishment might be inflicted; whereupon the lords sent for the sheriff and Oneby, the knight returned, as well as for Thorp, who had been duly elected, and, having examined into the facts of the case, directed the return to be amended, by the insertion of Thorp's name, and committed the sheriff to the Fleet till he should pay a fine at the king's pleasure.^o The last passage that I can produce is from the roll of 18 H. VI., where "it is considered by the king, with the advice and assent of the lords spiritual and temporal," that, whereas no knights have been returned for Cambridge-shire, the sheriff shall be directed, by another writ, to hold a court and to proceed to an election, proclaiming that no person shall come armed, nor any tumultuous proceeding take place; something of which sort appears to have obstructed the execution of the first writ. It is to be noticed that the commons are not so much as named in this entry,^p But several provisions were made by statute under the Lancastrian kings, when seats in parliament became much more an object of competition than before, to check the partiality of the sheriffs in making undue returns. One act (11 II. IV. c. 1) gives the justices of assise power to inquire into this matter, and inflicts a penalty of one hundred pounds on the sheriff. Another (6 H. VI. c. 4) mitigates the rigour of the former, so far as to permit the sheriff or the knights returned by him to traverse the inquests before the justices; that is, to be heard in their own defence, which, it seems, had not been permitted to them. Another (23 H. VI. c. 14) gives an additional penalty upon false returns to the party aggrieved. These statutes conspire with many other testimonies to manifest the rising importance of the house of commons, and the eagerness with which gentlemen of landed estates

^o Glanvil's Reports, *ibid*, from Prynne. ° Id. *ibid*, and Bot Put vol. ill. p. 530.
^p Rot Parl. vol. v. p. 7.

(whatever might be the case in petty boroughs) sought for a share in the national representation.

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

The representation of towns in parliament was founded upon two principles—of consent to public burthens, and of advice in public measures,

In whom
the right of
voting for
knights
resided.

Elections of
burgesses.

^q 3 Prynne's Register, p. 187. This hypothesis, though embraced by Prynne, is, I confess, much opposed to general opinion; and a very respectable living writer treats such an interpretation of the statute 7 H. IV. as chimerical. The words cited in the text, "as others," mean only, according to him, suitors not duly summoned. Heywood on Elections, vol. i. p. 20. But, as I presume, the summons to freeholders was by general proclamation; so that it is not easy to perceive what difference there could be between summoned and unsummoned suitors. And if the words are supposed to glance at the private summonses to a few friends, by means of which the sheriffs were accustomed to procure a clandestine election, one can hardly imagine that such persons would be styled "duly summoned." It is not unlikely, however, that these large expressions were inadvertently used, and that they

led to that inundation of voters without property which rendered the subsequent act of Henry VI. necessary. That of Henry IV. had itself been occasioned by an opposite evil, the close election of knights by a few persons in the name of the county.

• Yet the consequence of the statute of Henry IV. was not to let in too many voters, or to render elections tumultuous, in the largest of English counties, whatever it might be in others. Prynne has published some singular sheriff's indentures for the county of York, all during the interval between the acts of Henry IV. and Henry VI., which are sealed by a few persons calling themselves the attorneys of some peers and ladies, who, as far as appears, had solely returned the knights of that shire. 3 Prynne, p. 162. What degree of weight these anomalous returns ought to possess I leave to the reader.

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

Besides these respectable towns, there were some of a less eminent figure which had writs directed to them as ancient demesnes of the crown. During times of arbitrary taxation the crown had set tallages alike upon its chartered boroughs and upon its tenants in demesne. When parliamentary consent became indispensable, the free tenants in ancient demesne, or rather such of them as inhabited some particular vills, were called to parliament among the other representatives of the commons. They are usually specified distinctly from the other classes of representatives in grants of subsidies throughout the parliaments of the first and second Edwards,

^r The majority of prescriptive boroughs have prescriptive corporations, which carry the legal, which is not always the moral, presumption of an original charter. But "many boroughs and towns in England have burgesses by prescription, that never were incorporated." Ch. J. Hobart in *Dungannon Case*, Hobart's Reports, p. 15. And Mr. Luders thinks, I know not how justly, that in the age of Edward I., which is most to our immediate purpose, "there were not perhaps thirty corporation* in the kingdom." Reports of Elections, vol. i. p. 98. But I must allow that, in the opinion of many sound lawyers, the representation of unchartered, or at least unincorporated boroughs

was rather a *real* privilege, and founded upon (enure, than one arising out of their share in public contributions. Ch. J. Holt in *Ashby v. White*, 2 Ld. Raymond, 951. Heywood on Borough Elections, p. 11. This inquiry is very obscure; and perhaps the more so, because the learning directed towards it has more frequently been that of advocates pleading for their clients than of unbiassed antiquaries. If this be kept in view, the lover of constitutional history will find much information in several of the reported cases on controverted elections; particularly those of *Tewksbury* and *Liskeard*, in Peckwell's Reports, vol. i

till, about the beginning of the third's reign, they were confounded with ordinary burgesses.' This is the foundation of that particular species of elective franchise incident to what we denominate burgage tenure; which, however, is not confined to the ancient demesne of the crown.'

The proper constituents therefore of the citizens and burgesses in parliament appear to have been—1. All chartered boroughs, whether they derived their privileges from the crown, or from a mesne lord, as several in Cornwall did from Richard king of the Romans;^u 2. All towns which were the ancient or the actual demesne of the crown; 3. All considerable places, though unincorporated, which could afford to defray the expenses of their representatives, and had a notable interest in the public welfare. But no parliament ever perfectly corresponded with this theory. The writ was addressed in general terms to the sheriff, requiring him to cause two knights to be elected out of the body of the county, two citizens from every city, and two burgesses from every borough. It rested altogether upon him to determine what towns should exercise this franchise; and it is really incredible, with all the carelessness and ignorance of those times, what frauds the sheriffs ventured to commit in executing this trust. Though parliaments met almost every year, and there could be no mistake in so notorious a fact, it was the continual practice of sheriffs to omit boroughs that had been in recent habit of electing members, and to return upon the writ that there were no more within their county. Thus in the 12th of Edward III. the sheriff of Wiltshire, after returning two citizens for Salisbury, and burgesses for two boroughs, concludes with these words:—"There are no other cities or boroughs within my bailiwick." Yet in fact eight other towns had sent members to preceding parliaments. So in the 6th of Edward II. the sheriff of Bucks declared that he had no borough within his county except Wycomb; though Wendover, Agmondesham, and Marlow had twice made returns since that

Power of
the sheriff
to omit
boroughs.

^s Brady on Boroughs, p. 75, 80, and ^t Littleton, s.162,163, 163. Case of Tewksbury, in Peckwell's ^u Brady, p. 97. Reports, vol. i. p. 178.

king's accession,^x And from this cause alone it has happened that many towns called boroughs, and having a charter and constitution as such, have never returned members to parliament; some of which are now among the most considerable in England, as Leeds, Birmingham, and Macclesfield.^y

It has been suggested, indeed, by Brady,¹ that these returns may not appear so false and collusive if we suppose the sheriff to mean only that there were no resident burgesses within these boroughs fit to be returned, or that the expense of their wages would be too heavy for the place to support. And no doubt the latter plea, whether implied or not in the return, was very frequently an inducement to the sheriffs to spare the smaller boroughs. The wages of knights were four shillings a lay, levied on all freeholders, or at least on all holding by knight-service, within the county.* Those of burgesses were half that sum;^b but even this pittance

^x Brady on Boroughs, p. 110. 3 Prynne, p. 231. The latleff even argues that this power of omitting ancient boroughs was legally vested in the sheriff before the 5th of Richard I I. ; and though the language of that act implies the contrary of this position, yet it is more than probable that most of our parliamentary boroughs by prescription, especially such as were then unincorporated, are indebted for their privileges to the exercise of the sheriffs discretion; not founded on partiality, which would rather have led him to omit them, but on the broad principle that they were sufficiently opulent and important to send representatives to parliament.

^y Willis, *Notitia Parliamentaria*, vol. i. preface, p. 35.

* p. 117.

¹ it is a perplexing question whether freeholders in socage were liable to contribute towards the wages of knights; and authorities might be produced on both sides. The more probable supposition is, that they were not exempted. See the various petitions relating to the payment of wages in Prynne's fourth Register. This is not unconnected with the question as to their right of suffrage. See p. 115 of this volume. Freeholders within franchises made repeated endea-

vours to exempt themselves from payment of wages. Thus in 9 H. IV. it was settled by parliament that, to put an end to the disputes on this subject between the people of Cambridgeshire and those of the Isle of Ely, the latter should pay 2002. and be quit in future of all charges on that account. Rot Parl. vol. iv. p. 383. By this means the inhabitants of that franchise seem to have purchased the right of suffrage, which they still enjoy, though not, I suppose, suitors to the county-court. In most other franchises, and in many cities erected into distinct counties, the same privilege of voting for knights of the shire is practically exercised; but whether this has not proceeded as much from the tendency of returning officers and of parliament to favour the right of election in doubtful cases, as from the merit of their pretensions, may be a question.

^b The wages of knights and burgesses were first reduced to this certain sum by the writs *De levandis expensis*, 16 E. II. Prynne's fourth Register, p. 53. These were issued at the request of those who had served, after the dissolution of parliament, and included a certain number of days, according to the distance of the county whence they came, for going and returning. It appears by these that

was raised with reluctance and difficulty from miserable burghers, little solicitous about political franchises. Poverty, indeed, seems to have been accepted as a legal excuse. In the 6th of E. I I . the sheriff of Northumberland returns to the writ of summons that all his knights are not sufficient to protect the county; and in the 1st of E. I I I . that they were too much ravaged by their enemies to send any members to parliament.^c The sheriffs of Lancashire, after several returns that they had no boroughs within their county, though Wigan, Liverpool, and Preston were such, alleged at length that none ought to be called upon on account of their poverty. This return was constantly made, from 36 E. I I I . to the reign of Henry VI .⁴

The elective franchise was deemed by the boroughs no privilege or blessing, but rather, during the chief part of this period, an intolerable grievance. Where they could not persuade the sheriff to omit sending his writ to them, they set it at defiance by sending no return. And this seldom failed to succeed, so that, after one or two refusals to comply, which brought no punishment upon them, they were left in quiet enjoyment of their insignificance. The town of Torrington, in Devonshire, went further, and obtained a charter of exemption from sending burgesses, grounded upon what the charter asserts to appear on the rolls of chancery, that it had never been represented before the 21st of E. 111. This is absolutely false, and is a proof how little we can rely upon the voracity of records, Torrington having made not less than twenty-two returns before that time. It is curious that in spite of this charter the town sent members to the two ensuing

Reluctance
of boroughs
to send
members.

thirty-five or forty miles were reckoned a day's journey; which may correct the exaggerated notions of bad roads and tardy locomotion that are sometimes entertained. See Prynne's fourth Register, and Willis's *Notitia Parliamentaria* passim.

The latest entries of writs for expenses in the close rolls are of 2 H. V. ; but they may be proved to have issued much longer; and Prynne traces them to the end of Henry VIII.'s reign, p. 495. Without the formality of this writ a very few instances of towns remunerating their

burghesses for attendance in parliament are known to have occurred in later times. Andrew Marvel is commonly said to have been the last who received this honourable salary. A modern book asserts that wages were paid in some Cornish boroughs as late as the eighteenth century. Lysons's *Cornwall*, preface, p. xxxii.; but the passage quoted in proof of this is not precise enough to support so unlikely a fact

^c 3 Prynne, p. 165.

^d 4 Prynne, p. 317.

parliaments, and then ceased for ever.^e Richard II. gave the inhabitants of Colchester a dispensation from returning burgesses for five years, in consideration of the expenses they had incurred in fortifying the town.^f But this immunity, from whatever reason, was not regarded, Colchester having continued to make returns as before.

The partiality of sheriffs in leaving out boroughs, which were accustomed in old time to come to the parliament, was repressed, as far as law could repress it, by a statute of Richard II., which imposed a fine on them for such neglect, and upon any member of parliament who should absent himself from his duty.^g But it is, I think, highly probable that a great part of those who were elected from the boroughs did not trouble themselves with attendance in parliament. The sheriff even found it necessary to take sureties for their execution of so burthensome a duty, whose names it was usual, down to the end of the fifteenth century, to endorse upon the writ along with those of the elected.^h This expedient is not likely to have been very successful; and the small number, comparatively speaking, of writs for expenses of members for boroughs, which have been published by Prynne, while those for the knights of shires are almost complete, leads to a strong presumption that their attendance was very defective. This statute of Richard II. produced no sensible effect.

By what persons the election of burgesses was usually made is a question of great obscurity, which is still occasionally debated before committees of parliament. It appears to have been the common practice for a very few of the principal members of the corporation to make the election in the county-court, and their names, as actual electors, are generally returned upon the writ by the sheriff.* But we cannot surely be warranted by this to infer that they acted in any other capacity than as deputies of *the* whole body, and indeed it is frequently expressed that they chose

^e 4 Prynne, p. 320.

^f 3 Prynne, p. 241.

^g 5 R. II. stat ii. c. 4.

^h Luders's Reports, vol i. p. 15. Sometimes an elected burgees absolutely re-

fused to go to parliament, and drove his constituents to a fresh choice. 3 Prynne, p. 271

ⁱ 3 Prynne, p. 252.

such and such persons by the assent of the community ;^k by which word, in an ancient corporate borough, it seems natural to understand the freemen participating in its general franchises, rather than the ruling body, which, in many instances at present, and always perhaps in the earliest age of corporations, derived its authority by delegation from the rest. The consent, however, of the inferior freemen we may easily believe to have been merely nominal; and, from being nominal, it would in many places come by degrees not to be required at all; the corporation, specially so denominated, or municipal government, acquiring by length of usage an exclusive privilege in election of members of parliament, as they did in local administration. This, at least, appears to me a more probable hypothesis than that of Dr. Brady, who limits the original right of election in all corporate boroughs to the aldermen or other capital burgesses.^m

The members of the house of commons, from this occasional disuse of ancient boroughs as well as from the creation of new ones, underwent some fluctuation during the period subject to our review. Two hundred citizens and burgesses sat in the parliament held by Edward I. in his twenty-third year, the earliest epoch of acknowledged representation. But in the reigns of Edward III. and his three successors about ninety places, on an average, returned members, so that we may reckon this part of the commons at one

Members of
the house of
commons.

^k 3 Prynne, p. 257, de assensu totius communitatis praxiictae elegerunt R. W. ; so in several other instances quoted in the ensuing pages.

^m Brady on Boroughs, p. 132, &c Mr. Alien, than whom no one of equal learning was ever less inclined to depreciate popular rights, inclines more than we should expect to the school of Brady in this point. "There is reason to believe that originally the right of election in boroughs was vested in the governing part of these communities, or in a select portion of the burgesses; and that, in the progress of the house of commons to power and importance, the tendency has been in general to render the elections more popular. It is certain that for many years burgesses were **fleeted** in the county courts, and appa-

rently by delegates from the boroughs, who were authorised by their fellow-burgesses to elect representatives for them in parliament In the reigns of James I. and Charles I, when popular principles were in their greatest vigour, there was a strong disposition in the house of commons to extend the right of suffrage in boroughs, and in many instances these efforts were crowned with success." Edin. Rev. xxviii. 145. But an election by delegates chosen for that purpose by the burgesses at large is very different from one by the governing part of the community. Even in the latter case, however, this part had generally been chosen, at a greater or less interval of time, by the entire body. Sometimes, indeed, corporations fell into self-election and became close.

hundred and eighty.¹¹ These, if regular in their duties, might appear an over-balance for the seventy-four knights who sat with them. But the dignity of ancient lineage, territorial wealth, and military character, in times when the feudal spirit was hardly extinct and that of chivalry at its height, made these burghers vail their heads to the landed aristocracy. It is pretty manifest that the knights, though doubtless with some support from the representatives of towns, sustained the chief brunt of battle against the crown. The rule and intention of our old constitution was, that each county, city, or borough, should elect deputies out of its own body, resident among themselves, and consequently acquainted with their necessities and grievances.^o It would be very interesting to discover at what time, and by what degrees, the practice of election swerved from this strictness. But I have not been able to trace many steps of the transition. The number of practising lawyers who sat in parliament, of which there are several complaints, seems to afford an inference that it had begun in the reign of Edward I I I. Besides several petitions of the commons that none but knights or reputable squires should be returned for shires, an ordinance was made in the forty-sixth of his reign that no lawyer practising in the king's court, nor sheriff during his shrievalty, be returned knight for a county ; because these lawyers put forward many petitions in the name of the commons which only concerned their clients.^{1*} This probably was truly alleged, as we may guess from the vast number of proposals for changing the course of legal process which fill the rolls during this reign. It is not to be doubted, however, that many practising lawyers were men of landed estate in their respective counties.

An act in the first year of Henry V. directs that none be chosen knights, citizens, or burgesses, who are not resident within the place for which they are returned on

¹¹ Willis, *Notitia Parliamentaria*, vol. iii. p. 96, &c.; 3 Prynne, p. 224, &c.

^o In 4 Edw. I I. the sheriff of Rutland made this return: *Eligi feci in pleno comitatu, loco duorum millium turn, eo quod milites non sunt in hoc comitatu commorantes, duos homines de comitatu Rutland, de discretioribus et ad laborandum potentioribus*, &c. 3 Prynne, p. 170. But this deficiency of actual knights soon

became very common. In 19 E. II. there were twenty-eight members returned from shires who were not knights, and but twenty-seven who were such. The former had at this time only two shillings or three shillings a day for their wages, while the real knights had four shillings. 4 Prynne, p. 53. 74. But in the next reign their wages were put on a level
^p Rot Parl. vol. ii. p. 310.

the day of the date of the writ.^q This statute apparently indicates a point of time when the deviation from the line of law was frequent enough to attract notice, and yet not so established as to pass for an unavoidable irregularity. It proceeded, however, from great and general causes, which new laws, in this instance very fortunately, are utterly incompetent to withstand. There cannot be a more apposite proof of the inefficacy of human institutions to struggle against the steady course of events than this unlucky statute of Henry V., which is almost a solitary instance in the law of England wherein the principle of desuetude has been avowedly set up against an unrepealed enactment. I am not aware, at least, of any other, which not only the house of commons, but the court of king's bench, has deemed itself at liberty to declare unfit to be observed/ Even at the time when it was enacted, the law had probably, as such, very little effect. But still the plurality of elections were made according to ancient usage, as well as statute, out of the constituent body. The contrary instances were exceptions to the rule; but exceptions increasing continually, till they subverted the rule itself. Pryime has remarked that we chiefly find Cornish surnames among the representatives of Cornwall, and those of northern families among the returns from the North. Nor do the members for shires and towns seem to have been much interchanged; the names of the former belonging to the most ancient families, while those of the latter have a more plebeian cast/ In the reign of Edward IV., and not before, a very few of the burgesses bear the addition of esquire in the returns, which became universal in the middle of the succeeding century/

^q Rot Parl. 1 H. V. c. 1.

^r See the case of Dublin university in the first volume of Peckwell's Reports of contested elections. Note I), p. 53. The statute itself was repealed by 14 G. III. C 68.

^z By 23 H. VI. c 15, none but gentlemen born, generosi a nativitate, are capable of sitting in parliament as knights of counties; an election was set aside 39 H. VI. because the person returned was not of gentle birth. Prynne's third Register, p. 161.

^t Willis, Notitia Parliamentary, Prynnes fourth Register, p. 1184. A letter in that authentic and interesting accession to our knowledge of ancient times, the Paston collection, shows that eager canvass was sometimes made by country gentlemen in Edward I Wa reign to represent boroughs. This letter throws light at the same time ou the creation or revival of boroughs. The writer tells Sir John Paston, " If ye miss to be burgess of Maiden, and my lord chamberlain will, ye may be in another

Even comity elections seem in general, at least in the fourteenth century, to have been ill-attended and left to the influence of a few powerful and active persons. A petitioner against an undue return in the 12th of Edward I. complains that, whereas he had been chosen knight for Devon by Sir William Martin, bishop of Exeter, with the consent of the county, yet the sheriff had returned another.¹¹ In several indentures of a much later date a few persons only seem to have been concerned in the election, though the assent of the community be expressed/ These irregularities, which it would be exceedingly erroneous to convert, with Hume, into lawful customs, resulted from the abuses of the sheriff's power, which, when parliament sat only for a few weeks with its hands full of business, were almost sure to escape with impunity. They were sometimes also countenanced, or rather instigated, by the crown, which, having recovered in Edward II.'s reign the prerogative of naming the sheriffs, surrendered by an act of his father/ filled that office with its creatures, and constantly disregarded the statute forbidding their continuance beyond a year. Without searching for every passage that might illustrate the interference of the crown in elections, I will mention two or three leading instances. When Richard II. was meditating to overturn the famous commission of reform, he sent for some of the sheriffs, and required them to permit no knight or burgess to be elected to the next parliament without the approbation of the king and his council. The sheriffs replied that the commons would maintain their ancient privilege of electing their own representatives.¹² The parliament of 1397, which attainted his enemies and left the constitution at his mercy, was chosen, as we are told, by dint of intimidation and influence.¹³ Thus also that of Henry VI., held at Coventry

place; there be a dozen towns in England that chouse no burgess, which ought to do it: ye may be set in for one of those towns an' ye be friended." This was in 1472 vol. ii. p. 107.

¹¹ Glanvil's Reports of Elections, ed 1774, Introduction, p. xii.

^x Frynae's third Register, p. 171.

^y 28 E. I. c 8; 9 E. H It is said that the sheriff was elected by the people of

his county in the Anglo-Saxon period; no instance of this however, according to lord Lyttelton, occurs after the Conquest Shrievalties weiv commonly sold by the Norman kings. Hist. of Henry II. vol ii. p. 921.

^z Vita Ricardi II. p. 85.

^a Otterbourne, p. 191. He says of the knights returned on this occasion, that they were not elected per communitakw,

in 1460, wherein the duke of York and his party were attainted, is said to have been unduly returned by the like means. This is rendered probable by a petition presented to it by the sheriffs, praying indemnity for all which they had done in relation thereto contrary to law.^b An act passed according to their prayer, Mid in confirmation of elections. A few years before, in 1455, a singular letter under the king's signet is addressed to the sheriffs, reciting that " we be enfourmed there is busy labour made in sondry wises by certaine persons for the chesying of the said knights, . . . of which labour we marvaille greatly, insomuche as it is nothing to the honour of the laborers, but ayenst their worship ; it is also ayenst the lawes of the lande," with more to that effect; and enjoining the sheriff to let elections be free and the peace kept.^c There was certainly no reason to wonder that a parliament, which was to shift the virtual sovereignty of the kingdom into the hands of one whose claims were known to extend much further, should be the object of tolerably warm contests. Thus in the Pauton letters we find several proofs of the importance attached to parliamentary elections by the highest nobility.^d

The house of lords, as we left it in the reign of Henry III., wan entirely composed of such persons holding lands by barony as were summoned by particular writ of parliament.^e

Constitution
of the house
of lords.

Tenure and summons were both essential at this time in order to render any one a lord of parliament—the first by the ancient constitution of our feudal monarchy from the Conquest, the second by some regulation or usage of doubtful origin, which was thoroughly established before the conclusion of Henry III's reign. This-produced, of course, a very marked difference between the greater and the lesser or unparliamentary barons. The tenure of the latter, however, still subsisted, and, though too incon-

at mos exigit, sed per regiam voluntatem.

^b Prynn's second Reg. p. 141; Rot Parl. vol. v. p. 36t. -

^c Prynn's second Reg. p. 450.

^d vol. i. p. 96, 98; vol. ii. p. 99, 105; vol. iii. p. 243.

^e Upon this dry and obscure subject of Inquiry, the nature and constitution of the house of lords during this period, J

have been much indebted to the first part of Prynn's Register, and to West's Inquiry into the Manner of creating Peers; which, though written with a party motive, to serve the ministry of 1719 in the peerage MB, deserves, for the perspicuity of the method and style, to be reckoned among the best of our constitutional dissertations.

siderable to be members of the legislature, they paid relief as barons, they might be challenged on juries, and, as I presume, by parity of reasoning, were entitled to trial by their peerage. These lower barons, or more commonly tenants by parcels of baronies/ may be dimly traced to the latter years of Edward 111.* But many of them were successively summoned to parliament, and thus recovered the former lustre of their rank, while the rest fell gradually into the station of commoners, as tenants by simple knight-service.

As tenure without summons did not entitle any one to the privileges of a lord of parliament, so no spiritual person at least ought to have been summoned without baronial tenure. The prior of St. James at Northampton, having been summoned in the twelfth of Edward 11., was discharged upon his petition, because he held nothing of the king by barony, but only in frankalmoign. The prior of Bridlington, after frequent summonses, was finally left out, with an entry made in the roll that he held nothing of the king. The abbot of Leicester had been called to fifty parliaments; yet, in the 25th of Edward 111., he obtained a charter of perpetual exemption, reciting that he held no lands or tenements of the crown by barony or any such service as bound him to attend parliaments or councils.¹¹ But great irregularities prevailed in the rolls of chancery, from which the writs to spiritual and temporal peers were taken—arising in part, perhaps, from

Baronial
tenure
required
for lords
spiritual.

^t Baronies were often divided by descent among females into many parts, each retaining its character as a fractional member of a barony. The tenants in such case were said to hold of the king by the third, fourth, or twentieth part of a barony, and did service or paid relief in such proportion.

⁸ Madox, *Baronia Anglica*, p. 42 and 58; West's *Inquiry*, p. 28, 33. That a baron could only be tried by his fellow barons was probably a rule as old as the trial per pairs of a commoner. In 4 E 111. Sir Simon Hereford having been accused before the lords in parliament of aiding and advising Mortimer in his treasons, they declared with one voice that he WAS not their peer; wherefore they were not bound to judge him as a peer of the

land; but inasmuch as it was notorious that he had been concerned in usurpation of royal powers and murder of the liege lord (as they styled Edward H.), the lords, as judges of parliament, by assent of the king in parliament, awarded and adjudged him to be hanged. A like sentence with a like protestation was passed on Mautravers and Gournay. There is a very remarkable anomaly in the case of Lord Berkley, who, though undoubtedly a baron, his ancestors having been summoned from the earliest date of write, put himself on his trial in parliament, by twelve knights of the county of Gloucester. Bot. Parl. vol. II p. 63; Rymer, t. iv. p. 734.

^h Prynne, p. 142, &c; West's *Inquiry*.

negligence, in part from wilful perversion; so that many abbots and priors, who like these had no baronial tenure, were summoned at times and subsequently omitted, of whose actual exemption we have no record. Out of one hundred and twenty-two abbots and forty-one priors who at some time or other sat in parliament, but twenty-five of the former and two of the latter were constantly summoned: the names of forty occur only once, and those of thirty-six others not more than five times.¹ Their want of baronial tenure, in all probability, prevented the repetition of writs which accident or occasion had caused to issued.^k

The ancient temporal peers are supposed to have been intermingled with persons who held nothing of the crown by barony, but attended in parliament solely by virtue of the king's prerogative exercised in the writ of summons."^l Barons called by writ. These have been called barons by writ; and it seems to be denied by no one that, at least under the first three Edwards, there were some of this description in parliament. But after all the labours of Dugdale and others in tracing the genealogies of our ancient aristocracy, it is a problem of much difficulty to distinguish these from the territorial barons. As the latter honours descended to female heirs, they passed into new families and new names, so that we can hardly decide of one summoned for the first time to parliament that he did not inherit the possession of a feudal barony. Husbands of baronial heiresses were frequently summoned in their wives' right, but by their own names.

ⁱ Prynne, p. 141.

^k It is worthy of observation that the spiritual peers summoned to parliament were in general considerably more numerous than the temporal. Prynne, p. 114. This appears, among other causes, to have saved the church from that sweeping reformation of its wealth, and perhaps of its doctrines, which the commons were thoroughly inclined to make under Richard II. and Henry IV. Thus the reduction of the spiritual lords by the dissolution of monasteries was indispensably required to bring the ecclesiastical order into due subjection to the state.

^m Perhaps it can hardly be said that

the king's prerogative compelled the party summoned, not being a tenant by barony, to take his seat. But though several spiritual persons appear to have been discharged from attendance on account of their holding nothing by barony, as has been justly observed, yet there is, I believe, no instance of any layman's making such an application. The terms of the ancient writ of summons, however, in *fide et homagio quibus nobis tenemini*, afford a presumption that a feudal tenure was, in construction of law, the basis of every lord's attendance in parliament. This form was not finally changed to the present, in *fide et ligeantid*, till the 46th of Edw. III. Prynne's first Register, p. 206.

They even sat after the death of their wives, as tenants by the courtesy.ⁿ Again, as lands, though not the subject of frequent transfer, were, especially before the statute de donis, not inalienable, we cannot positively assume that all the right heirs of original barons had preserved those estates upon which their barony had depended.^o If we judge, however, by the lists of those summoned, according to the best means in our power, it will appear, according at least to one of our most learned investigators of this subject, that the regular barons by tenure were all along very far more numerous than those called by writ; and that from the end of Edward III.'s reign no spiritual persons, and few if any laymen, except peers created by patent, were summoned to parliament who did not hold territorial baronies.^p

With respect to those who were indebted for their seats among the lords to the king's writ, there are two material questions: whether they acquired an hereditary nobility by virtue of the writ; and, if this be determined against them, whether they had a decisive or merely a deliberative voice in the house. Now, for the first question, it seems that, if the writ of summons conferred an estate of inheritance, it must have done so either by virtue of its terms or by established construction and precedent. But the writ contains no words by which such an estate can in law be limited; it summons the person addressed to attend in parliament in order to give his advice on the public business, but by no means implies that his advice will be required of his heirs, or even of himself on any other occasion. The strongest expression is "*vobiscum et ceteris pnelatis, magnatibus et proceribus*," which appears to place the party on a sort of level with the peers. But the words *magnates* and *proceres* are used very largely in ancient language, and, down to the time of Edward III., comprehend the king's ordinary council,

ⁿ Collra's Proceedings on Claims of Baronies, p. 24 and 73.

^o Prynne speaks of "the alienation of baronies by sale, gift, or marriage, after which the new purchasers were summoned instead," as if it frequently happened. First Register, p. 239. And several instances are mentioned in the Bergavenny case (Collins's Proceedings, p. 113) where, land-baronies having been

entailed by the owners on their heirs male, the heirs general have been excluded from inheriting the dignity.

^p Prynne's first Register, p. 237. This must be understood to mean that no new families were summoned; for the descendants of some who are not supposed to have held land-baronies may constantly be found in later lists. [NOTE IX.]

as well as his barons. Nor can these, at any rate, be construed to pass an inheritance, which in the grant of a private person, much more of a king, would require express words of limitation. In a single instance, the writ of summons to Sir Henry de Bromflete (27 H. VI.), we find these remarkable words: *Volumus enim vos et haeredes vestros masculos de corpore vestro legitime exeuntes barones de Vescy existere.* But this Sir Henry de Bromflete was the lineal heir of the ancient barony de Vesei.^q And if it were true that the writ of summons conveyed a barony of itself, there seems no occasion to have introduced these extraordinary words of creation or revival. Indeed there is less necessity to urge these arguments from the nature of the writ, because the modern doctrine, which is entirely opposite to what has here been suggested, asserts that no one is ennobled by the mere summons unless he has rendered it operative by taking his seat in parliament; distinguishing it in this from a patent of peerage, which requires no act of the party for its completion.^r But this distinction could be supported by nothing except long usage. If, however, we recur to the practice of former times, we shall find that no less than ninety-eight laymen were summoned once only to parliament, none of their names occurring afterwards; and fifty others two, three, or four times. Some were constantly summoned during their lives, none of whose posterity ever attained that honour.* The course of proceeding, therefore, previous to the accession of Henry VII., by no means warrants the doctrine which was held in the latter end of Elizabeth's reign, and has since been too fully established by repeated precedents to be shaken by any reasoning. The foregoing observa-

^q West's Inquiry. Prynne, who takes rather lower ground than West, and was not aware of Sir Henry de Bromflete's descent, admits that a writ of summons to any one, naming him baron, or dominus, an Baroni de Greystoke, domino de Furnival, did give an inheritable peerage; not so a writ generally worded, naming the party knight or esquire, unless lie held by barony.

^r Lord Abergavenny's case, 12 Coke's Reports; and Collins's Proceedings on Claims of Baronies by Writ, p. 61.

Prynne's first Register, p. 232. El-

synge, who strenuously contends against the writ of summons conferring an hereditary nobility, is of opinion that the party summoned was never omitted in subsequent parliaments, and consequently was a peer for life. p. 43. But more regard is due to Prynne's later inquiries.

¹ Case of Wilioughby, Collins, p. 8; of Dacres, p. 41; of Abergavenny, p. 119. But see the case of Grey de Ruthin, p. 222 and 230, where the contrary position is stated by Selden upon better grounds.

tions relate to the more ancient history of our constitution, and to the plain matter of fact as to those times, without considering what political cause there might be to prevent the crown from introducing occasional counsellors into the house of lords.^u

It is manifest by many passages in these records that bannerets were frequently summoned to the upper house of parliament, constituting a distinct class inferior to barons, though generally named together, and ultimately confounded, with them.^x Barons are distinguished by the appellation of Sire, bannerets have only that of Monsieur, as le Sire de Berkeley, le Sire de Fitzwalter, Monsieur Richard Scrop, Monsieur Richard Stafford. In the 7th of Richard II. Thomas Camoys having been elected knight of the shire for Surrey, the king addresses a writ to the sheriff, directing him to proceed to a new election, cum hnjusmodi banneretti ante heec tempora in milites comitatus ratione alicujus parliamenti eligi minime consueverunt. Camoys was summoned by writ to the same parliament. It has been inferred from hence by Selden that he was a baron, and that the word banneret is merely synonymous,^y But this is contradicted by too many passages. Bannerets had so far been considered as commoners some years before that they could not be challenged on juries.^z But they seem to have been more highly estimated at the date of this writ.

^u It seems to have been admitted by Lord Redesdale, in the case of the barony of L'Isle, that a writ of summons, with sufficient proof of having sat by virtue of it in the house of lords, did in fact create an hereditary peerage from the fifth year of Richard II., though he re* (dated this with respect to claimants who could only deduce their pedigree from an ancestor summoned by one of the three Edwards. *Nicolas's Case of Barony of L'Isle*, p. 200. The theory, therefore, of West, which denies peerage by writ even to those summoned in several later reigns, must be taken with limitation. "I am informed," it is said by Mr. Hart, *arguendo*, "that every person whose name appears in the writ of summons of 5 Ric. II was again summoned to the following parliament, and their pos-

terity have sat in parliament as peers." p. 283.

^x Rot Parl. vol. ii. p. 147, 300; vol. Jit p. 100, 386, 424; vol. iv. p. 374. Rymer, t vii. p. 101.

^y Seidell's Works, vol. iii. p. 764. Selden's opinion that bannerets in the lords' house were the same as barons may seem to call on me for some contrary authorities, in order to support my own assertion, besides the passages above quoted from the rolls, of which he would naturally be supposed a more competent Judge. I refer therefore to Spelman's Glossary, p. 74; Whitelocke on Parliamentary Writ, vol. i. p. 313; and Elsynges Method of holding Parliaments, p. 65.

^z Puis un fut challenge' puree qu'il tat a banniere, et non allocatur; cor s'il soit

The distinction, however, between barons and bannerets died away by degrees. In the 2nd of Henry VI.^a Serop of Bolton is called *le Sire de Scrop*; a proof that he was then reckoned among the barons. The bannerets do not often appear afterwards by that appellation as members of the upper house. Bannerets, or, as they are called, *banrents*, are enumerated among the orders of Scottish nobility in the year 1428, when the statute directing the common lairds or tenants in capite to send representatives was enacted; and a modern historian justly calls them an intermediate order between the peers and lairds.^b Perhaps a consideration of these facts, which have frequently been overlooked, may tend in some measure to explain the occasional discontinuance, or sometimes the entire cessation, of writs of summons to an individual or his descendants; since we may conceive that bannerets, being of a dignity much inferior to that of barons, had no such inheritable nobility in their blood as rendered their parliamentary privileges a matter of right. But whether all those who without any baronial tenure received their writs of summons to parliament belonged to the order of bannerets I cannot pretend to affirm; though some passages in the rolls might rather lead to such a supposition.^c

The second question relates to the right of suffrage possessed by these temporary members of the upper house. It might seem plausible certainly to conceive that the real and ancient aristocracy would not permit their powers to be impaired by numbering the votes of such as the king might please to send among them, however they might allow them to assist in their debates. But I am much more inclined to suppose that they were

a banniere, et ne tient pas par baronie, il sera en l'assise. Year-book 22 Edw. I I I. fol. 18 a. apud West's Inquiry, p. 22.

^a Rot Parl. vol. iv. p. 201.

^b Pinkerton's Hist of Scotland, vol. i. p. 357 and 365.

^c The lords' committee do not like, apparently, to admit that bannerets were summoned to the house of lords as a distinct class of peers. "It is observable," they say, "that this statute (5 Ric. I I. c 4) speaks of bannerets as well as of dukes, earls, and barons, as persons bound to attend the parliament; but it

does not follow that banneret was then considered as a name of dignity distinct from that honourable knighthood under the king's banner in the field of battle, to which precedence of all other knights was attributed." p. 342. But did the committee really believe that all the bannerets of whom we read in the reigns of Richard I I. and afterwards had been knighted at Crecy and Poitiers? The name is only found in parliamentary proceedings during comparatively pacific times.

in all respects on an equality with other peers during their actual attendance in parliament. For,—1. They are summoned by the same writ as the rest, and their names are confused among them in the lists; whereas the judges and ordinary counsellors are called by a separate writ, *vobiscum et caeteris de consilio nostro*, and their names are entered after those of the peers,^d 2. Some, who do not appear to have held land-baronies, were constantly summoned from father to son, and thus became hereditary lords of parliament through a sort of prescriptive right, which probably was the foundation of extending the same privilege afterwards to the descendants of all who had once been summoned. There is no evidence that the family of Scrope, for example, which was eminent under Edward III. and subsequent kings, and gave rise to two branches, the lords of Bolton and Masharn, inherited any territorial honour.^e 3. It is very difficult to obtain any direct proof as to the right of voting, because the rolls of parliament do not take notice of any debates; but there happens to exist one remarkable passage in which the suffrages of the lords are individually specified. In the first parliament of Henry IV. they were requested by the earl of Northumberland to declare what should be done with the late king Richard. The lords

^d West, whose business it was to represent the barons by writ as mere assistants without suffrage, cites the writ to them rather disingenuously, as if it ran *vobiscum et cum prelatibus, magnatibus ac proceribus*, omitting the important word *electis*. p. 35. Prynne, however, from whom West has borrowed a great part of his arguments, does not seem to go the length of denying the right of suffrage to persons so summoned. First Register, p. 237.

^e These descended from two persons, each named Geoffrey le Scrope, chief Justices of K.B. and C.B. at the beginning of Edward III's reign. The name of one of them is once found among the barons, but I presume this to have been an accident, or mistake in the roll; as he is frequently mentioned afterwards among the Judges. Scrope, chief justice of K.B., was made a banneret in 14 E. III. He was the father of Henry Scrope of Masharn, a considerable person in Ed-

ward III. and Richard II's government, whose grandson, Lord Scrope of Masharn, was beheaded for a conspiracy against Henry V. There was a family of Scrope as old as the reign of Henry II.; but it is not clear, notwithstanding Digdale's assertion, that the Scropes descended from them, or at least that they held the same lands: nor were the Scropes barons, as appears by their paying a relief of only sixty marks for three knights' fees. Digdale's Baronage, p. 654.

The want of consistency in old records throws much additional difficulty over this intricate subject. Thus Scrope of Masharn, though certainly a baron, and tried next year by the peers, is called chevalier in an instrument of 1 H. V. Rymer, t. ix. p. 13. So in the indictment against Sir John Oldcastle he is constantly styled knight, though he had been summoned several times as lord Cobham, in right of his wife, who inherited that barony. Rot Parl, vol. iv. p. 107.

then present agreed that he should be detained in safe custody; and on account of the importance of this matter it seems to have been thought necessary to enter their names upon the roll in these words:—The names of the lords concurring in their answer to the said question here follow; to wit, the archbishop of Canterbury and fourteen other bishops; seven abbots; the prince of Wales, the duke of York, and six earls; nineteen barons, styled thus—le Sire de Roos, or, le Sire de Grey de Ruthyn. Thus far the entry has nothing singular; but then follow these nine names: Monsieur Henry Percy, Monsieur Richard Scrop, le Sire Fitz-hugh, le Sire de Bergeveny, le Sire de Lomley, le Baron de Greystock, le Baron de Hilton, Monsieur Thomas Erpyngham, chamberlayn, Monsieur Mayhewe Gournay. Of these nine five were undoubtedly barons, from whatever cause misplaced in order. Scrop was summoned by writ; but his title of Monsieur, by which he is invariably denominated, would of itself create a strong suspicion that he was no baron, and in another place we find him reckoned among the bannerets. The other three do not appear to have been summoned, their writs probably being lost. One of them, Sir Thomas Erpyngham, a statesman well known in the history of those times, is said to have been a banneret;^f certainly he was not a baron. It is not unlikely that the two others, Henry Percy (Rotspur) and Gournay, an officer of the household, were also bannerets; they cannot at least be supposed to be barons, neither were they ever summoned to any subsequent parliament. Yet in the only record we possess of votes actually given in the house of lords they appear to have been reckoned among the rest.^g

The next method of conferring an honour of peerage was by creation in parliament. This was adopted by Edward III. in several instances, Creation of peereby statute. though always, I believe, for the higher titles of duke or earl. It is laid down by lawyers that whatever the king is said in an ancient record to have done in full parliament must be taken to have proceeded from the whole legislature. As a question of fact, indeed, it might be doubted whether, in many proceedings

^f Blomefield's Hist of Norfolk, vol lit p. 645 (folio edit.).

^g Rot. Parl vol. iil. p. 127.

where this expression is used, and especially in the creation of peers, the assent of the commons was specifically and deliberately given. It seems hardly consonant to the circumstances of their order under Edward III. to suppose their sanction necessary in what seemed so little to concern their interest. Yet there is an instance in the fortieth year of that prince where the lords individually, and the commons with one voice, are declared to have consented, at the king's request, that the lord de Coucy, who had married his daughter, and was already possessed of estates in England, might be raised to the dignity of an earl, whenever the king should determine what earldom he would confer upon him.^b Under Richard II. the marquise of Dublin is granted to Vere by full consent of all the estates. But this instrument, besides the unusual name of dignity, contained an extensive jurisdiction and authority over Ireland.¹ In the same reign Lancaster was made duke of Guienne, and the duke of York's son created earl of Rutland, to hold during his father's life. The consent of the lords and commons is expressed in their patents, and they are entered upon the roll of parliament.^k Henry V. created his brothers dukes of Bedford and Gloucester by request of the lords and commons.^m But the patent of Sir John Cornwall, in the tenth of Henry VI., declares him to be made lord Fanhope, "by consent of the lords, in the presence of the three estates of parliament;" as if it were designed to show that the commons had not a legislative voice in the creation of peers.ⁿ

The mention I have made of creating peers by act of parliament has partly anticipated the modern form of letters patent, with which the other was nearly allied. The first instance of a barony conferred by patent was in the tenth year of Richard II., when Sir John Holt, a judge of the Common Pleas, was created lord Beauchamp of Kidderminster. Holt's patent, however, passed while Richard was endeavouring to act in an arbitrary manner; and in fact he never sat in parliament, having been attainted in that of the **next** year by the name of Sir John Holt. In a number of subsequent patents down to the reign of Henry VII.

fa Bot Ptol vol. ii. p. 290. i vol. iii. p. 209, ^k Id. p. 263, 264.
^m vol. iv. p. 17. ⁿ Id. p. 401.

the assent of parliament is expressed, though it frequently happens that no mention of it occurs in the parliamentary roll. And in some instances the roll speaks to the consent of parliament where the patent itself is silent.^o

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

Clergy
summoned
to attend
parliament

The first unequivocal instance of representatives appearing for the lower clergy is in the year 1255, when they are expressly named by the author of the *Annals of Burton*.^q They preceded, therefore, by a few years the house of commons; but the introduction of each was founded upon the same principle. The

^o West's Inquiry, p. 65. This writer does not allow that the king possessed the prerogative of creating new peers without consent of parliament. But Prynne (1st Itinerary, p. 225), who generally adopts the same theory of peerage as West, strongly asserts the contrary; and the party views of the latter's treatise, which I mentioned above, should be kept in sight. It was his object to prove that the pending bill to limit the numbers of the peerage was conformable to the original constitution.

^p Hody's History of Convocations,

p. 12. *Dissertatio de antiqua et moderna Synodi Anglicani Constitutione*, prefixed to Wilkins's *Concilia*, t. i.

^q 2 Gale, *Scriptores Ker. Anglic.* t. ii. p. 355; Hody, p. 345. Atterbury (*Rights of Convocations*, p. 295, 315) endeavours to show that the clergy had been represented in parliament from the Conquest as well as before it. Many of the passages he quotes are very inconclusive; but possibly there may be some weight in one from Matthew Paris, ad ann. 1247 and two or three writs of the reign of Henry III.

king required the clergy's money, but dared not take it without their consent/ In the double parliament, if so we may call it, summoned in the eleventh of Edward I. to meet at Northampton and York, and divided according to the two ecclesiastical provinces, the proctors of chapters for each province, but not those of the diocesan clergy, were summoned through a royal writ addressed to the archbishops. Upon account of the absence of any deputies from the lower clergy these assemblies refused to grant a subsidy. The proctors of both descriptions appear to have been summoned by the *præmunientes* clause in the 22nd, 23rd, 24th, 28th, and 35th years of the same king; but in some other parliaments of his reign the *præmunientes* clause is omitted. The same irregularity continued under his successor; and the constant usage of inserting this clause in the bishop's writ is dated from the twenty-eighth of Edward III.'^r

It is highly probable that Edward I., whose legislative mind was engaged in modelling the constitution on a comprehensive scheme, designed to render the clergy an effective branch of parliament, however their continual resistance may have defeated the accomplishment of this intention." We find an entry upon the roll of his parliament at Carlisle, containing a list of all the proctors deputed to it by the several dioceses of the kingdom. This may be reckoned a clear proof of their parliamentary attendance during his reign under the *præmunientes* clause; since the province of Canterbury could not have been present in convocation at a city beyond its limits.^x And indeed, if we were to found our judgment merely on the language used in these writs, it would be hard to resist a very strange paradox', that the clergy were not only one of the three estates of the realm, but as essential a member of the legislature by their representatives as the commons.^y They are sum-

^r Hody, p. 381; *Atterbury's Rights of Convocations*, p. 221.

^s Hody, p. 386; *Atterbury*, p. 222.

^t Hody, p. 391

^u *Gilbert's Hist of Exchequer*, p. 47.

^x *Rot Parl* vol. i. p. 189; *Atterbury*, p. 229.

^y The lower house of convocation, in 1547, terrified at the progress of reform-

ation, petitioned that, " according to the tenor of the king's writ and the ancient customs of the realm, they might have room and place and be associated with the commons in the nether bouse of this present parliament as members of the commonwealth and the king's most humble subjects." *Burnet's Hist of Reformation*, vol ii; Appendix. No. 17.

moned in the earliest year extant (23 E. I.) *ad tractandum, ordinandum et faciendum nobiscum, et cum ceteris pralatis, proceribus, ac aliis incolis regni nostri*; in that of the next year, *ad ordinandum de quantitate et modo subsidii*; in that of the twenty-eighth, *ad faciendum et consentiendum* *Ins, quae tunc de communi consilio ordinari contigeiit*. In later times it ran sometimes *ad faciendum et consentiendum*, sometimes only *ad consentiendum*; which, from the fifth of Hichard II., has been the term invariably adopted.^z Now, as it is usual to infer from the same words, when introduced into the writs for election of the commons, that they possessed an enacting power, implied in the words *ad faciendum*, or at least to deduce the necessity of their assent from the words *ad consentiendum*, it should seem to follow that the clergy were invested, as a branch of the parliament, with rights no less extensive. It is to be considered how we can reconcile these apparent attributes of political power with the unquestionable facts that almost all laws, even while they continued to attend, were passed without their concurrence, and that, after some time, they ceased altogether to comply with the writ.^a

The solution of this difficulty can only be found in that estrangement from the common law and the temporal courts which the clergy throughout Europe were disposed to effect. In this country their ambition defeated its own ends: and while they endeavoured by privileges and immunities to separate themselves from the people, they did not perceive that the line of demarcation thus strongly traced would cut them off from the sympathy of common interests. Everything which they could call of ecclesiastical cognizance was drawn into their own courts; while the administration of what

Tiris assertion that the clergy had ever been associated as one body with the commons is not borne out by anything that appears on our records, and *te* contradicted by many passages. I But it is said that the clergy were actually so united with the commons in the Irish parliament till the Reformation. Gilbert's *Hist of the Exchequer*, p. 5t.

^z Hody, p. 392.

^a The *praemunientes* clause in a bi-

shop's writ of summons was so far regarded down to the Reformation, that proctors were elected, and their names returned upon the writ; though the clergy never attended from the beginning of the fifteenth century, and gave their money only in convocation. Since the Reformation the clause has been preserved for form merely in the writ Wilkins, *Dissertation*, ubi *supra*.

they contemned as a barbarous system, the temporal law of the land, fell into the hands of lay judges. But these were men not less subtle, not less ambitious, not less attached to their profession than themselves ; and wielding, as they did in the courts of Westminster, the delegated sceptre of judicial sovereignty, they soon began to control the spiritual jurisdiction, and to establish the inherent supremacy of the common law. From this time an inveterate animosity subsisted between the two courts, the vestiges of which have only been effaced by the liberal wisdom of modern ages. The general love of the common law, however, with the great weight of its professors in the king's council and in parliament, kept the clergy in surprising subjection. None of our kings after Henry III. were bigots; and the constant tone of the commons serves to show that the English nation was thoroughly averse to ecclesiastical influence, whether of their own church or the see of Rome.

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

^b *Hody*, p. 396, 403, &c In 1314 the clergy protest even against the recital of the king's writ to the archbishop directing him to summon the clergy of his province in his letters mandatory, declaring

that the English clergy had not been accustomed, nor ought by right, to be convoked by the king's authority. *Atterbury*, p. 230.

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

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

^c Hody, p. 425. Atterbury, p. 42, 233. The latter seems to think that the clergy of both provinces never actually met in a national council or house of parliament, under the *præmunientes* writ, after the reign of Edward II, though the proctors were duly returned. But Hody does not go quite so far, and Atterbury had a particular motive to enhance the influence of the convocation of Canterbury.

d Atterbury, p. 46.

^e Rot Parl, vol ii p. 64, 65.

^f 18 E. III. stat. 3. Rot Parl, vol. ii. p. 151. This is the parliament in which it is very doubtful whether any deputies from cities and boroughs had a place. The pretended statutes were therefore every way null; being falsely imputed to an incomplete parliament

be granted till he and his council should have considered whether it would turn to the prejudice of the lords or commons.^g

A series of petitions from the clergy, in the twenty-fifth of Edward III., had not probably any real assent of the commons, though it is once mentioned in the enacting words, when they were drawn into a statute.^{h*} Indeed the petitions correspond so little with the general sentiment of hostility towards ecclesiastical privileges manifested by the lower house of parliament, that they would not easily have obtained its acquiescence. The convocation of the province of Canterbury presented several petitions in the fiftieth year of the same king, to which they received an assenting answer; but they are not found in the statute-book. This, however, produced the following remonstrance from the commons at the next parliament: "Also the commons beseech their lord the king, that no statute nor ordinance be made at the petition of the clergy, unless by assent of your commons; and that your commons be not bound by any constitutions which they make for their own profit without the commons' assent. For they will not be bound by any of your statutes or ordinances made without their assent."ⁱ The king evaded a direct answer to this petition. But the province of Canterbury did not the less present their own grievances to the king in that parliament, and two among the statutes of the year seem to be founded upon no other authority.^k

In the first session of Richard II. the prelates and clergy of both provinces are said to have presented their schedule of petitions which appear upon the roll, and Richard three of which are the foundation of statutes unassented to in all probability by the commons.^m If the clergy of both provinces were actually present, as is here asserted, it must of course have been as a house of parliament, and not of convocation. It rather seems, so far as we

^g Rot Parl. vol. II. p. 151.

^h 25 E. III. stat. 3.

p. 368. The word *they* is ambiguous; Whitelocke (on Parliamentary Writ, vol. ii. p. 346) interprets it of the commons: I should rather suppose it to mean the clergy. ^k 50 E. III. c. 4 & 5.

^m Rot Parl. vol. iii. p. 25. A nostre tres excellent seigneur le roy supplent humblement ses devotea oratoun, les prelate et la clergie de la province de (knterbirsetd'Everwyk. Stat. 1 Richard II. c. 13, 14, 15. But see Hody, p. 425; Atterbury, p. 329.

can trust to the phraseology of records, that the clergy sat also in a national assembly under the king's writ in the second Year of the same king.⁰ Upon other occasions during the same reign, where the representatives of the clergy are alluded to as a deliberative body, sitting at the same time with the parliament, it is impossible to ascertain its constitution; and, indeed, even from those already cited we cannot draw any positive inference.⁰ But whether in convocation or in parliament, they certainly formed a legislative council in ecclesiastical matters by the advice and consent of which alone, without that of the commons (I can say nothing as to the lords), Edward III. and even Richard II. enacted laws to bind the laity. I have mentioned in a different place a still more conspicuous instance of this assumed prerogative; namely, the memorable statute against heresy in the second of Henry IV.; which can hardly be deemed anything else than an infringement of the rights of parliament, more clearly established at that time than at the accession of Billiard H. Petitions of the commons relative to spiritual matters, however frequently proposed, in few or no instances obtained the king's assent

⁰ Rot. Parl. vol. iii. p. 37.

⁰ It might be argued, from a passage in the parliament-roll of 21 R. H, that the clergy of both provinces were not only present, but that they were accounted an essential part of parliament in temporal matters, which is contrary to the whole tenor of our laws. The commons are there said to have prayed that, "whereas many judgments and ordinances formerly made in parliament had been annulled *because the estate of clergy had not been present thereat*, the prelates and clergy might make a proxy with sufficient power to consent in their name to all things done in this parliament" Whereupon the spiritual lords agreed to intrust their powers to Sir Thomas Percy, and gave him a procuracion commencing in the following words: "Nos Thomas Cantuar' et Robertas Ebor' archiepiscopi, ac prelati et citius utriusque provincie Cantuar' et Ebor' jure ecclesiarum nostrarum et temporalium earundem habentes jus intuenti in singulis parlaments domini nostri regis et regni Anglie pro

tempore celebrandis, necnon traandi et expediendi in eisdem quantum ad singula in instant! parlamento pro statu et honore domini nostri regis, necnon regalie sue, ac quiete, pace, et tranquillitate regni judicialiter justificandis, venerabili viro domino Thomea de Percy rniliti, nostram plenarie committimus potestatem." It may be perceived by these expressions, and more unequivocally by the nature of the case, that it was the judicial power of parliament which the spiritual lords delegated to their proxy. Many impeachments for capital offences were coming on, at which, by their canons, the bishops could not assist. But it can never be conceived that the inferior clergy had any share in this highjudicature. And, upon looking attentively at the words above printed in italics, it will be evident that the spiritual lords holding by barony are the only persona designated; whatever may have been meant by the singular phrase, as applied to them, clerus utriusque provincie?. Rot. Parl. vol. iii. p. 348.

so as to pass into statutes, unless approved by the convocation.^p But, on the other hand, scarcely any temporal laws appear to have passed by the concurrence of the clergy. Two instances only, so far as I know, are on record: the parliament held in the eleventh of Richard II. is annulled by that in the twenty-first of his reign, "with the assent of the lords spiritual and temporal, *and the proctors of the clergy*, and the commons;"^q and the statute entailing the crown on the children of Henry IV. is said to be enacted on the petition of the prelates, nobles, clergy, and commons/ Both these were stronger exertions of legislative authority than ordinary acts of parliament, and were very likely to be questioned in succeeding times.

The supreme judicature, which had been exercised by the king's court, was diverted, about the reign of John, into three channels; the tribunals of King's Bench, Common Pleas, and the Exchequer.^r These became the regular fountains of justice, which soon almost absorbed the provincial jurisdictions of the sheriff and lord of manor. But the original institution, having been designed for ends of state, police, and revenue, full as much as for the determination of private suits, still preserved the most eminent parts of its authority. For the king's ordinary or privy council, which is the usual style from the reign of Edward I, seems to have been no other than the king's court (*curia regis*) of older times, being composed of the same persons, and having, in a principal degree, the same subjects of deliberation. It consisted of the chief ministers; as the chancellor, treasurer, lord steward, lord admiral, lord marshal, the keeper of the privy seal, the chamberlain, treasurer, and comptroller of the household, the chancellor of the exchequer, the master of the wardrobe; and of the judges, king's serjeant, and attorney-general, the master of the rolls, and justices in eyre, who at that time were not the same as the judges

^p Atterbury, p. 346.

^q 21 R. II. c. 12. Burnet's Hist of Reformation (vol. ii. p. 47) led me to this act, which I had overlooked.

^r Rot Parl vol iii p. 582. Atterbury, p. 61.

The ensuing sketch of the Jurisdiction exercised by the king's council has been chiefly derived from Sir Matthew Hale's Treatise of the Jurisdiction of the Lords' House in Parliament, published by Mr. Hargrave.

at Westminster. When all these were called together, it was a full council; but where the business was of a more contracted nature, those only who were fittest to advise were summoned; the chancellor and judges for matters of law; the officers of state for what concerned the revenue or household.¹

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

The coercive authority exercised by this standing council of the king was far more important. It may be divided into acts, legislative and judicial. As for the first, many ordinances were made in council; sometimes upon request of the commons in parliament, who felt themselves better qualified to state a grievance than a remedy; sometimes without any pretence, unless the usage of government, in the infancy of our constitution,

t The words "privy council" are said not to be used till after the reign of Henry VI.; the former style was "ordinary" or "continual council." But a distinction had always been made, according to the nature of the business; the great officers of state, or, as we might now say, the ministers, had no occasion for the presence of Judges or any lawyers in the secret councils of the crown. They

become, therefore, a council of government, though always members of the *consilium ordinatum*; and, in the former capacity, began to keep formal records of their proceedings. The acts of this council, though, as I have just said, it bore as yet no distinguishing name, are extant from the year 1386, and for seventy years afterwards are known through the valuable publication of Sir Harris Nicolas.

may be thought to afford one. These were always of a temporary or partial nature, and were considered as regulations not sufficiently important to demand a new statute. Thus, in the second year of Richard I L, the council, after hearing read the statute-roll of an act recently passed, confirming a criminal jurisdiction in certain cases upon justices of the peace, declared that the intention of parliament, though not clearly expressed therein, had been to extend that jurisdiction to certain other cases omitted, which accordingly they cause to be inserted in the commissions made to these justices under the great seal.^u But they frequently so much exceeded what the growing spirit of public liberty would permit, that it gave rise to complaint in parliament. The commons petition in 13 B. IL that "neither the chancellor nor the king's council, after the close of parliament, may make any ordinance against the common law, or the ancient customs of the land, or the statutes made heretofore or to be made in this parliament; but that the common law have its course for all the people, and no judgment be rendered without due legal process." The king answers, "Let it be done as has been usual heretofore, saving the prerogative; and if any one is aggrieved, let him show it specially, and right shall be done him." * This unsatisfactory answer proves the arbitrary spirit in which Richard was determined to govern.

The judicial power of the council was in some instances founded upon particular acts of parliament, giving it power to hear and determine certain causes. Many petitions likewise were referred to it from parliament, especially where they were left unanswered by reason of a dissolution. But, independently of this delegated authority, it is certain that the king's council did anciently exercise, as well out of parliament as in it, a very great jurisdiction, both in causes criminal and civil. Some, however, have contended, that whatever they did in this respect was illegal, and an encroachment upon the common law and Magna Charta. And be the common law what it may, it seems an indisputable violation of the charter in its most adimirable and essential article, to drag men in questions of their freehold or liberty before a

^u Rot Parl vol. ill p. 84. ^u Ibid p. 266.

tribunal which neither granted them a trial by their peers nor always respected the law of the land. Against this usurpation the patriots of those times never ceased to lift their voices. A statute of the fifth year of Edward III. provides that no man shall be attached, nor his property seized into the king's hands, against the form of the great charter and the law of the land. In the twenty-fifth of the same king it was enacted, that "none shall be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment, or by writ original at the common law, nor shall be put out of his franchise or freehold, unless he be duly put to answer, and forejudged of the same by due course of law."^y This was repeated in a short act of the twenty-eighth of his reign;^z but both, in all probability, were treated with neglect; for another was passed some years afterwards, providing that no man shall be put to answer without presentment before justices, or matter of record, or by due process and writ original according to the old law of the land. The answer to the petition whereon this statute is grounded, in the parliament-roll, expressly declares this to be an article of the great charter.^a [Nothing, however, would prevail on the council to surrender so eminent a power, and, though usurped, yet of so long a continuance. Cases of arbitrary imprisonment frequently occurred, and were remonstrated against by the commons. The right of every freeman in that cardinal point was as undubitable, legally speaking, as at

^y 25 E. III. stat 5, c. 4. Probably this fifth statute of the 25 th of Edward III. is the most extensively beneficial act in the whole body of our laws. It established certainty in treasons, regulated purveyance, prohibited arbitrary imprisonment and the determination of pleas of freehold before the council, took away the compulsory finding of men-at-arms and other troops, confirmed the reasonable aid of the king's tenants fixed by 3 E I., and provided that the king's protection should not hinder civil process or execution.

^z 28 E. III. c. 3.

^a 42 E. III. c. 3. and Rot Parl. vol. it p. 295. It is not surprising that the king's council should have persisted in these

transgressions of their lawful authority, when we find a similar jurisdiction usurped by the officers of inferior persons. Complaint is made in the 18th of Richard II that men were compelled to answer before *the council of divers lords and ladies*, for their freeholds and other matters cognizable at common law, and a remedy for this abuse is given by petition in chancery, stat 15 R. II c 12. This act is confirmed with a penalty on its contraveners the next year, 16 R. II c 2. The private gaols which some lords were permitted by law to possess, and for which there was always a provision in their castles, enabled them, to render this oppressive jurisdiction effectual.

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

Such was the nature of the king's ordinary council in itself, as the organ of his executive sovereignty, and such the jurisdiction which it habitually exercised. But

^b Rot Parl. 17 R. H. vol. iii. p. 319; 4 H. IV. p. 507; 1 H. VI. vol. iv. p. 189; 5 H. VI. p. 292; 8 H. VI. p. 343; 10 H. VI. p. 403; 15 H. VI. p. 501. To one of these (10 H. VI.), "that none should be put to answer for his freehold in parliament, nor before any court or council where such things are not cognizable by the law of the land," the king gave a denial. As it was less usual to refuse promises of this kind than to forget them afterwards, I do not understand the motive of this.

^c Hale's Jurisdiction of Lords' House, p. 46. Coke, 2 Inst. p. 553. The last author places this a little later. There it a petition of the commons, in the roll of the 4th of Henry IV. p. 511. that, whereas many grantees and feoffees in

trust for their grantors and feoffers alienate or charge the tenements granted, *in which out Oiere is no remedy untea one is ordered by parliament*, that the king and lords would provide a remedy. This petition is referred to the king's council to advise of a remedy against the ensuing parliament. It may perhaps be inferred from hence that the writ of subpoena out of chancery had not yet been applied to protect the cestui que use. But it is equally possible that the commons, being disinclined to what they would deem an illegal innovation, were endeavouring to reduce these fiduciary estates within the pale of the common law, as was afterwards done by the statute of uses. [Nora X.]

it is also to be considered in its relation to the parliament, during whose session, either singly or in conjunction with the lords' house, it was particularly conspicuous. The great officers of state, whether peers or not, the judges, the king's serjeant, and attorney-general, were, from the earliest times, as the latter still continue to be. summoned by special writs to the upper house. But while the writ of a peer runs *ad tractandum nobiscum et cum caeteris prselatis, magnatibus et proceribus*, that directed to one of the judges is only *ad tractandum nobiscum et cum caeteris de consilio nostro*; and the seats of the latter are upon the woolsacks at one extremity of the house.

In the reigns of Edward I. and II. the council appear to have been the regular advisers of the king in passing lawn to which the houses of parliament had assented. The preambles of most statutes during this period express their concurrence. Thus the statute Westm. I. is said to be the act of the king by his council, and by the assent of archbishops, bishops, abbots, priors, earls, barons, and all the commonalty of the realm being hither summoned. The statute of escheators, 29 E. I., is said to be agreed by the council, enumerating their names, all whom appear to be judges or public officers. Still more striking conclusions are to be drawn from the petitions' addressed to the council by both houses of parliament. In the eighth of Edward II. there are four petitions from the commons to the king and his council, one from the lords alone, and one in which both appear to have joined. Later parliaments of the same reign present us with several more instances of the like nature. Thus in 18 E. II. a petition begins, " To our lord the king, and to his council, the archbishops, bishops, prelates, earls, barons, and others of the commonalty of England, show," &c.^d

But from the beginning of Edward III.'s reign it seems that the council and the lords' house in parliament were often blended together into one assembly. This was denominated the great council, being the lords spiritual and temporal, with the king's ordinary council annexed to them, as a council within a council. And even in

^d Rot Parl, vol 1. p. 416.

much earlier times the lords, as hereditary counsellors, were, either whenever they thought fit to attend, or on special summonses by the king (it is hard to say which), assistant members of this council, both for advice and for jurisdiction. This double capacity of the peerage, as members of the parliament or legislative assembly and of the deliberative and judicial council, throws a very great obscurity over the subject. However, we find that private petitions for redress were, even under Edward I, presented to the lords in parliament as much as to the ordinary council. The parliament was considered a high court of justice, where relief was to be given in cases where *the* course of law was obstructed, as well as where it was defective. Hence the intermission of parliaments was looked upon as a delay of justice, and their annual meeting is demanded upon that ground. "The king," says Fleta, "has his court in his council, in his parliaments, in the presence of bishops, earls, barons, lords, and other wise men, where the doubtful cases of judgments are resolved, and new remedies are provided against new injuries, and justice is rendered to every man according to his desert."⁶¹ In the third year of Edward I. receivers of petitions began to be appointed at the opening of every parliament, who usually transmitted them to the ordinary, but in some instances to the great council. These receivers were commonly three for England, and three for Ireland, Wales, Gascony, and other foreign dominions. There were likewise two corresponding classes of auditors or triers of petitions. These consisted partly of bishops or peers, partly of judges and other members of the council; and they seem to have been instituted in order to disburtnen the council by giving answers to some petitions. But about the middle of Edward III.'s time they ceased to act juridically in this respect, and confined themselves to transmitting petitions to the lords of the council.

The great council, according to *the* definition wo have given, consisting of the lords spiritual and temporal, in conjunction with the ordinary council, or, in other words, of all who were severally summoned to parliament, exercised a considerable jurisdiction, as welksivil as criminal.

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

Those statutes which restrain the king's ordinary council from disturbing men in their freehold rights, or questioning them for misdemeanours, have an equal application to the lords' house in parliament, though we do not frequently meet with complaints of the encroachments made by that assembly. There was, however, one class of cases tacitly excluded from the operation of those acts, in which the coercive jurisdiction of this high tribunal had great convenience; namely, where the ordinary course of justice was so much obstructed by the defending party, through riots, combinations of maintenance, or overawing influence, that no inferior court would find its process obeyed. Those ages, disfigured in their quietest season by rapine and oppression, afforded no small number of cases that called for this interposition of a paramount authority.^g Another indubitable branch

f [NOTE XI.]

^g This is remarkably expressed in one of the articles agreed in parliament 8 H. VI. for the regulation of the council. "Item, that alle the billea that comprehend matters terminable atte the common lawc shall be remitted ther to be determined; but if so be that the discretion of the counseill fele to greve myght on that syde, and unmyghi on that other, or elles other cause reaosaable yat shal move him." Rot Parl, fol. iv. p. 343. Mr. Bruce has well observed of the articles agreed upon in 8 Hen. VI., or rather of "those in 5 Hen. VI, which were VOL. III.

nearly the same, that in theory nothing could be more excellent. In turbulent times, it is scarcely necessary to remark, great men were too apt to weigh out Justice for themselves, and with no great nicety; a court, therefore, to which the people might fly for relief against powerful oppressors, was most especially needful. Law charges also were considerable; and this, the poor man's court, in which he might have right without paying any money' (Sir T. Smith's Commonwealth, book iii. ch. 7), was an institution apparently calculated to be of unquestionable utility. It was
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of this jurisdiction was in writs of error; but it may be observed that their determination was very frequently left to a select committee of peers and councillors. These, too, cease almost entirely with Henry IV.; and were scarcely revived till the accession of James I.

Some instances occur in the reign of Edward III. where records have been brought into parliament, and annulled with assent of the commons as well as the rest of the legislature.*¹ But these were attainders of treason, which it seemed gracious and sotemn to reverse in the most authentic manner. Certainly the commons had neither by the nature of our constitution nor the practice of parliament any right of intermeddling in judicature, save where something was required beyond the existing law, or where, as in the statute of treasons, an authority of that kind was particularly reserved to both houses. This is fully acknowledged by themselves in the first year of Henry IV.¹ But their influence upon the balance

the comprehensiveness of the last clause—the 'other cause reasonable'—which was its ruin." *Archæologia*, vol. xxv. p. 348. The statute 31 Hen. VI. c. 2, which is art printed In Ruff head's edition, is very important, as giving a legal authority to the council, by write under the great seal, and by writs of proclamation to the sheriffs, on parties making default, to compel the attendance of any persona complained of for "great riots, extortions, oppressions, and grievous offences," under heavy penalties; in case of a peer, "the loss of his estate, and name of lord, and his place in parliament," and all his lands for the term of his life; and fine at discretion in the case of other persons. A proviso is added that no matter determinable by the law of the realm should be determined in other form than after the course of law in the king's court. Sir Francis Palgrave (*Essay on the King's Council*, p. 84) observes that this proviso "would in no way interfere with the effective Jurisdiction of the council, inasmuch as it could always be alleged in the bills which were preferred before it that the oppressive and grievous offences of which they complained were not determinable by the ordinary course of the common law" p. 86. But this takes the word "determinable" to mean *in fact*; whereat I

apprehend that the proviso must be understood to mean cases legally determinable; the words, I think, will bear no other construction. But as all the offences enumerated were indictable, we must either hold the proviso to be utterly inconsistent with the rest of the statute, or suppose that the Words "other form" were intended to prohibit the irregular process usual with the council; secret examination of witnesses, torture, neglect of technical formality in specifying charges, punishments not according to the course of law, and other violations of fair and free trial, which constituted the greatest grievance in the proceedings of the council.

^h The Judgment against Mortimer was reversed at the suit of his son, 28 E. III., because he had not been put on his trial. The peers had adjudged him to death in his absence, upon common notoriety of his guilt. 4 E. III. p. 63. In the same session of 28 E. III. the earl of Arundel's attainer was also reversed, which had passed in 1 E. III., when Mortimer was at the height of his power. These precedents taken together seem to have resulted from no partiality, but a true sense of Justice in respect of treasons, animated by the recent statute, Rot. Parl. vol. ii. p. 256.

ⁱ Rot. Parl. vol. liii. p. 427.

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

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

General
character
of the
government
in these
ages.

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

lature, the testimony of historians and lawyers, before we could assert that England acquiesced in those abuses and oppressions which it must be confessed she was unable fully to prevent.

The word prerogative is of a peculiar import, and scarcely understood by those who come from the studies of political philosophy. We cannot define it by any theory of executive functions. All these may be comprehended in it; but also a great deal more. It is best, perhaps, to be understood by its derivation, and has been said to be that law in case of the king which is law in no case of the subjects. Of the higher and more sovereign prerogatives I shall here say nothing; they result from the nature of a monarchy, and have nothing very peculiar in their character. But the smaller rights of the crown show better the original lineaments of our constitution. It is said commonly enough that all prerogatives are given for the subject's good. I must confess that no part of this assertion corresponds with my view of the subject. It neither appears to me that these prerogatives were ever given nor that they necessarily redound to the subject's good. Prerogative, in its old sense, might be defined an advantage obtained by the crown over the subject, in cases where their interests came into competition, by reason of its greater strength. This sprang from the nature of the Norman government, which rather resembled a scramble of wild beasts, where the strongest takes the best share, than a system founded upon principles of common utility. And, modified as the exercise of most prerogatives has been by the more liberal tone which now pervades our course of government, whoever attends to the common practice of courts of justice, and, still more, whoever consults the law-books, will not only be astonished at their extent and multiplicity, but very frequently at their injustice and severity.

The real prerogatives that might formerly be exerted were sometimes of so injurious a nature, that **Purveyance.** we can hardly separate them from their abuse: a striking instance is that of purveyance, which will at once illustrate the definition above given of a prerogative, the limits within which it was to be exercised, and its

^k Blackstones Comment from Finch, vol. 1. c 7.

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

The right of purchasing men's goods for the use of the king was extended by a sort of analogy' to their labour. Thus Edward III. announces to all sheriffs that William of Walsingham had a commission to collect as many painters as might suffice for "our works in St. Stephen's chapel, Westminster, to be at our wages as long as shall be necessary," and to arrest and keep in prison all who should refuse or lie refractory; and enjoins them to lend their

^m Letters are directed to all the sheriffs, 2 E. I., enjoining them to send up a certain number of beeves, sheep, capons, &c., for the king's coronation. Rymer, vol ii. p. 21. By the statute 21 E. III. c. 12, goods taken by the purveyors were to be paid for on the spot if under twenty shillings' value, or within three months' time if above that value. But it is not to be imagined that this law was or could be observed.

Edward III., impelled by the exigen-

cies of his French war, went still greater lengths, and seized larger quantities of wool, which he sold beyond sea, as well as provisions for the supply of his army. In both cases the proprietors had tallies, or other securities; but their despair of obtaining payment gave rise, in 1338, to an insurrection. There is a singular apologetical letter of Edward to the archbishops on this occasioa Rymer, t v. p. 10; see also p. 73, and Knyghton, cot 2570.

assistance." Windsor Castle owes its massive magnificence to labourers impressed from every part of the kingdom. There is even a commission from Edward IV. to take as many workmen in gold as were wanting, and employ them at the king's cost upon the trappings of himself and his household.⁰

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

The charter of the forests, granted by Henry III. along with Magna Charta,^p had been designed to crush the flagitious system of oppression which prevailed in those favourite haunts of the Norman kings. They had still, however, their peculiar jurisdiction, though, from the time at least of Edward III., subject in some measure to the control of the King's Bench.^q The foresters, I suppose, might find a compensation for

⁰ Rymer, t. vi. p. 417.

^o Idem, t. xi. p. 862.

^p Matthew Paris asserts that John granted a separate forest-charter, and supports his position by asserting that of Henry III. at full length. In fact, the clauses relating to the forest were incorporated with the great charter of John. Such an error as this shows the precariousness of historical testimony, even where it seems to be best grounded.

^q Coke, fourth Inst. p. 294. The forest

domain of the king, says the author of the Dialogue on the Exchequer under Henry II., is governed by its own laws, not founded on the common law of the land, but the voluntary enactment of princes: so that whatever is done by that law is reckoned not legal in itself, but legal according to forest law, p. 29, non justum absolute, sed Justum secundum legem forestae dicatur. I believe my translation of *justum* is right; for he is not writing satirically.

their want of the common law in that easy and licentious way of life which they affected; but the neighbouring cultivators frequently suffered from the king's officers who attempted to recover those adjacent lands, or, as they were called, purlieus, which had been disafforested by the charter and protected by frequent perambulations. Many petitions of the commons relate to this grievance.

The constable and marshal of England possessed a jurisdiction, the proper limits whereof were sufficiently narrow, as it seems, to have extended only to appeals of treason committed beyond sea, which were determined by combat, and to military offences within the realm. But these high officers frequently took upon them to inquire of treasons and felonies cognizable at common law, and even of civil contracts and trespasses. This is no bad illustration of the state in which our constitution stood under the Plantagenets. No colour of right or of supreme prerogative was set up to justify a procedure so manifestly repugnant to the great charter. For all remonstrances against these encroachments the king gave promises in return; and a statute was enacted, in the thirteenth of Richard II., declaring the bounds of the constable and marshal's jurisdiction/ It could not be denied, therefore, that all infringements of these acknowledged limits were illegal, even if they had a hundred fold more actual precedents in their favour than can be supposed. But the abuse by no means ceased after the passing of this statute, as several subsequent petitions that it might be better regarded will evince. One, as it contains a special instance, I shall insert. It is of the fifth year of Henry IV.: " On several supplications and petitions made by the commons in parliament to our lord the king for Bennet Wilman, who is accused by certain of his ill-wishers and detained in prison, and put to answer before the constable and marshal, against the statutes and the common law of England, our said lord the king, by the advice and assent of the lords in parliament, granted that the said Bennet should be treated according to the statutes and common law of England, notwithstanding any commission to the contrary, or accusation against him made before the con-

stable and marshal." And a writ was sent to the justices of the King's Bench with a copy of this article from the roll of parliament, directing them to proceed as they shall see fit according to the laws and customs of England.⁸

It must appear remarkable that, in a case so manifestly within their competence, the court of King's Bench should not have issued a writ of habeas corpus, without waiting for what may be considered as a particular act of parliament. But it is a natural effect of an arbitrary administration of government to intimidate courts of justice.¹ A negative argument, founded upon the want of legal precedent, is certainly not conclusive when it relates to a distant period, of which all the precedents have not been noted; yet it must strike us that in the learned and zealous arguments of Sir Robert Cotton, Mr. Selden, and others, against arbitrary imprisonment, in the great case of the habeas corpus, though the statute law is full of authorities in their favour, we find no instance adduced earlier than the reign of Henry VII., where the King's Bench has released, or even bailed, persons committed by the council or the constable, though it is unquestionable that such committals were both frequent and illegal."

⁸ Rot Parl. vol. iii. p. 530.

¹ The apprehension of this compliant spirit in the ministers of justice led to an excellent act in 2 E. III. c. 8, that the judges shall not omit to do right for any command under the great or privy seal. And the conduct of Richard II., who sought absolute power by corrupting or intimidating them, produced another statute in the eleventh year of his reign (c. 10), providing that neither letters of the king's signet nor of the privy seal should from thenceforth be sent in disturbance of the law. An ordinance of Charles V., king of France, in 1369, directed the parliament of Paris to pay no regard to any letters under his seal suspending the course of legal procedure, but to consider them as surreptitiously obtained. Villaret, t. x. p. 116. This ordinance, which was sedulously observed, tended very much to confirm the independence and integrity of that tribunal.

^u Cotton's Posthuma, p. 221. Howell's

State Trials, vol. iii. p. 1. Hume quotes a grant of the office of constable to the earl of Rivers in 7 E. IV., and infers, unwarrantably enough, that "its authority was in direct contradiction to Magna Charta; and it is evident that no regular liberty could subsist with it. It involved a full dictatorial power, continually subsisting in the state." Hist. of England, C. 22. But by the very words of this patent the jurisdiction given was only over such causes quæ in curia constabularii Angliæ ab antiquo, vii. tempore dicti Gulielmi conquestoræ, seu aliquo tempore dictæ tractari, audiri, examinari, aut decidi contraeverunt aut jure debuerant aut debent. These are expressed, though not very perspicuously, in the statute 13 R. II. c. 2, that declares the constable's Jurisdiction. And the chief criminal matter reserved by law to the court of this officer was treason committed out of the kingdom. In violent and revolutionary seasons, such as the

If I have faithfully represented thus far the history of our constitution, its essential character will appear to be a monarchy greatly limited by law, though retaining much power that was ill calculated to promote the public good, and swerving continually into an irregular course* which there was no restraint adequate to correct. But of all the notions that have been advanced as to the theory of this constitution, the least consonant to law and history is that which represents the king as merely an hereditary executive magistrate, the first officer of the state. What advantages might result from such a form of government this is not the place to discuss. But it certainly was not the ancient constitution of England. There was nothing in this, absolutely nothing, of a republican appearance. All seemed to grow out of the monarchy, and was referred to its advantage and honour. The voice of supplication, even in the stoutest disposition of the commons, was always humble; the prerogative was always named in large and pompous expressions. Still more naturally may we expect to find in the law-books even an obsequious deference to power, from judges who scarcely ventured to consider it as their duty to defend the subject's freedom, and who beheld the gigantic image of prerogative, in the full play of its hundred arms, constantly before their eyes. Through this monarchical tone, which certainly pervades all out legal authorities, a writer like Hume, accustomed to philosophical liberality as to the principles of government, and to the demoeratical language which the modern aspect of the constitution and the liberty of printing have produced, fell hastily into the error of believing that all limitations of royal power during the fourteenth and fifteenth centuries were as much unsettled in law and in public opinion as they were liable to be violated by force. Though a contrary position has been sufficiently demonstrated, I conceive, by the series of parliamentary proceedings which I have already produced, yet there is a passage in Sir John Fortescue's treatise *De Laudibus Legum Angliae*, so explicit and weighty, that

commencement of Edward IV.'s reign, tribunal, though one of the abuses of the
 Borne persons were tried by martial law times, cannot be said to warrant the strong
 before the constable. But, in general, language adopted by Hume.
 the exercise of criminal Justice by this

no writer on the English constitution can be excused from inserting it. This eminent person, having been chief justice of the King's Bench under Henry VI., was governor to the young prince of Wales during his retreat in France, and received at his hands the office of chancellor. It must never be forgotten that, in a treatise purposely composed for the instruction of one who hoped to reign over England, the limitations of government are enforced as strenuously by Fortescue, as some succeeding lawyers have inculcated the doctrines of arbitrary prerogative.

" A king of England cannot at his pleasure make any alterations in the laws of the land, for the nature of his government is not only regal, but political. Had it been merely regal, he would have a power to make what innovations and alterations he pleased in the laws of the kingdom, impose tallages and other hardships upon the people whether they would or no, without their consent, which sort of government the civil laws point out when they declare *Quod principi placuit, legis habet vigorem*. But it is much otherwise with a king whose government is political, because he can neither make any alteration or change in the laws of the realm without the consent of the subjects, nor burthen them, against their wills with Strange impositions, so that a people governed by such laws as are made by their own consent and approbation enjoy their properties securely, and without the hazard of being deprived of them, either by the king or any other. The same things may be effected under an absolute prince, provided he do not degenerate into the tyrant. Of such a prince, Aristotle, in the third of his *Politics*, says, ' It is better for a city to be governed by a good man than by good laws.' But because it does not always happen that the person presiding over a people is so qualified, St. Thomas, in the book which he writ to the king of Cyprus, *De Regimine Principum*, wishes that a kingdom could be so instituted as that the king might not be at liberty to tyrannize over his people; which only comes to pass in the present cause; that is, when the sovereign power is restrained by political laws. Rejoice, therefore, my good prince, that such is the law of the kingdom which you are to inherit, because it will

Sir John
Fortescue's
doctrine as to
the English
constitution.

afford, both to yourself and subjects, the greatest security and satisfaction."^x

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

It would occupy too much space to quote every other passage of the same nature in this treatise of Fortescue, and in that entitled, *Of the Difference between an Absolute and Limited Monarchy*, which, so far as these points are concerned, is nearly a translation from the former.^x But these, cor-

Erroneous
views taken
by Hume,

^x Fortescue, *De Laudibus Legum Angliæ*, c. 9.

^y *id.* c. 13.

^z The latter treatise having been written under Edward IV., whom Fortescue, as a restored Lancastrian, would

be anxious not to offend, and whom in fact he took some pains to conciliate both in this and other writings, it is evident that the principles of limited monarchy were as fully recognised in his reign, whatever particular acts of violence

roborated as they are by the statute-book and by the rolls of parliament, are surely conclusive against the notions which pervade Mr. Hume's History. I have already remarked that a sense of the glaring prejudice by which some Whig writers had been actuated, in representing the English constitution from the earliest times as nearly arrived at its present perfection, conspired with certain prepossessions of his own to lead this eminent historian into an equally erroneous system on the opposite side. And as he traced the stream backwards, and came last to the times of the Plantagenet dynasty, with opinions already biassed and even pledged to the world in his volumes of earlier publication, he was prone to seize hold of, and even exaggerate, every circumstance that indicated immature civilization, and law perverted or infringed.^a To this his ignorance of English jurisprudence which certainly in some measure disqualified him from writing our history, did not a little contribute; misrepresentations frequently occurring in his work, which a moderate acquaintance with the law of the land would have prevented.⁵

It is an honourable circumstance to England that the history of no other country presents so few instances of illegal condemnations upon political charges. The judicial torture was hardly known and never recognised by law.^c The

Instances of
illegal con-
demnation
rare.

might occur, as they had been under the Lancastrian princes.

* The following is one example of these prejudices: In the 9th of Richard II. a tax on wool granted till the ensuing feast of St John Baptist was to be intermitted from thence to that of St. Peter, and then to recommence; that it might not be claimed as a right. Itot Parl, vol. iii. p. 214. Mr. Hume has noticed this provision, as "showing an accuracy beyond what was to be expected in those rude times." In this epithet we see the foundation of his mistakes. The age of Richard II. might perhaps be called rude in some respects. But assuredly in prudent and circumspect perception of consequences, and an accurate use of language, there could be no reason why it should be deemed inferior to our own. If Mr. Hume had ever deigned to glance at the legal decisions reported in the

Year-books of those times, he would have been surprised, not only at the utmost accuracy, but at a subtle refinement in verbal logic, which none of his own metaphysical treatises could surpass.

b [NOTE XII.]

^c During the famous process against the knights templars in the reign of Edward II., the archbishop of York, having taken the examination of certain templars in his province, felt some doubts which he propounded to several monasteries and divines. Most of these relate to the main subject. But one question, fitter indeed for lawyers than theologians, was, whereas many would not confess without torture, whether he might make use of this means, *licet hoc in regno Anglie nunquam visum fuerit bel auditum?* Et si torqueudi sunt, utrum per clericos vel laicos? Et dato, quid nullus omnino tortor inveniri

sentence in capital crimes, fixed unalterably by custom, allowed nothing to vindictiveness and indignation. There hardly occurs an example of any one being notoriously put to death without form of trial, except in moments of flagrant civil war. If the rights of juries were sometimes evaded by irregular jurisdictions, they were at least held sacred by the courts of law: and through all the vicissitudes of civil liberty, no one ever questioned the primary right of every freeman, handed down from his Saxon forefathers, to the trial by his peers. A just regard for public safety prescribes the necessity of severe penalties against rebellion and conspiracy; but the interpretation of these offences, when intrusted to sovereigns and their counsellors, has been the most tremendous instrument of despotic power. In rude ages, even though a general spirit of political liberty may prevail, the legal character of treason will commonly be undefined; nor is it the disposition of lawyers to give greater accuracy to this part of criminal jurisprudence. The nature of treason appears to have been subject to much uncertainty in England before the statute of Edward III. If that memorable law did not give all possible precision to the offence, which we must certainly allow, it prevented at least those stretches of vindictive tyranny which disgrace the annals of other countries. The praise, however, must be understood as comparative. Some cases of harsh if not illegal convictions could hardly fail to occur in times of violence and during changes of the reigning family. Perhaps the circumstances have now and then been aggravated by historians. Nothing could be more illegal than the conviction of the earl of Cambridge and lord Scrope in 1415, if it be true, according to Carte and Hume, that they were not heard in their defence. But whether this is to be absolutely inferred from the record^d is perhaps open to question. There seems at least to have been no sufficient motive for such an irregularity; their participation in a treasonable conspiracy being manifest from their own

vateat in Anglia, utram pro tortoribus mittendum sit ad partes transmarinas? learned 'Reading on the Use of Tortur in the Criminal Law of England, b; Walt. Hemingford, p. 256. Instances, David Jardine, Esq., 1837.' however, of its use are said to have ^d Rot Parl. vol. iv p. 65. occurred in the 15th century. See a

confession. The proceedings against Sir John Mortimer in the 2nd of Henry VI.^e are called by Hume highly irregular and illegal. They were, however, by act of attainder, which cannot well be styled illegal. Nor are they to be considered as severe. Mortimer had broken out of the Tower, where he was confined on a charge of treason. This was a capital felony at common law; and the chief irregularity seems to have consisted in having recourse to parliament in order to attain him of treason, when he had already forfeited his life by another crime.

I would not willingly attribute to the prevalence of Tory dispositions what may be explained otherwise, the progress which Mr. Hume's historical theory as to our constitution has been gradually making since its publication. The tide of opinion, which since the Revolution, and indeed since the reign of James I., had been flowing so strongly in favour of the antiquity of our liberties, now seems, among the higher and more literary classes, to set pretty decidedly the other way. Though we may still sometimes hear a demagogue chattering about the witenagemot, it is far more usual to find sensible and liberal men who look on Magna Charta itself as the result of an uninteresting squabble between the king and his barons. Acts of force and injustice, which strike the cursory inquirer, especially if he derives his knowledge from modern compilations, more than the average tenor of events, are selected and displayed as fair samples of the law and of its administration. We are deceived by the comparatively perfect state of our present liberties, and forget that our superior security is far less owing to positive law than to the control which is exercised over government by public opinion through the general use of printing, and to the diffusion of liberal principles in policy through the same means. Thus disgusted at a contrast which it was hardly candid to institute, we turn away from the records that attest the real, though imperfect, freedom of our ancestors; and are willing to be persuaded that the whole scheme of English polity, till the commons took on themselves to **assert their natural** rights against James I., was at befit

but a mockery of popular privileges, hardly recognised in theory, and never regarded in effect/

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

By what means the English acquired and preserved this political liberty, which, even in the fifteenth century, was the admiration of judicious foreigners/ is a very rational and interesting inquiry. Their own serious and steady attachment to the laws must always be reckoned among the principal causes of this blessing. The civil equality of all freemen below the rank of peerage, and the subjection of peers themselves to the impartial arm of justice, and to a due share in contribution to public burthens, advantages unknown to other countries, tended to identify the interests and to assimilate the feelings of the aristocracy with those of the people; classes whose dissension and jealousy has been in many instances the surest hope of sovereigns aiming at arbitrary power. This freedom from the oppressive superiority of a privileged order was peculiar to England. In many kingdoms the royal prerogative was at least equally limited. The statutes of Aragon are more full of remedial provisions. The right of opposing a tyrannical government by arms was more frequently asserted in Castile. But nowhere else did the people possess by law, and I think, upon the whole, in effect, so much security for

Causes
tending to
form the
constitution.

^f This was written In 1811 or 1812; and is among many passages which the progress of time has somewhat falsified.

^g Philip de Comines takes several opportunities of testifying his esteem for the English government. See particularly L. iv. c. i. and 1. v. c. xix.

their personal freedom and property. Accordingly, the middling ranks flourished remarkably, not only in commercial towns, but among the cultivators of the soil. "There is scarce a small village," says Sir J. Fortescue, "in which you may not find a knight, an esquire, or some substantial householder (*paterfamilias*), commonly called a frankleyn,¹¹ possessed of considerable estate; besides others who are called freeholders, and many yeomen of estates sufficient to make a substantial gentry." I would, however, point out more particularly two causes which had a very leading efficacy in the gradual development of our constitution; first, the schemes of continental ambition in which our government was long engaged; secondly, the manner in which feudal principles of insubordination and resistance were modified by the prerogatives of the early Norman kings.

1. At the epoch when William the Conqueror ascended the throne, hardly any other power was possessed by the king of France than what he inherited from the great fiefs of the Capetian family. War with such a potentate was not exceedingly to be dreaded, and William, besides his immense revenue, could employ the feudal services of his vassals, which were extended by him to continental expeditions. These circumstances were not essentially changed till after the loss of Normandy; for the acquisitions of Henry II. kept him fully on an equality with the French crown, and the dilapidation which had taken place in the royal demesnes was compensated by several arbitrary resources that filled the exchequer of these monarchs. But in the reigns of John and Henry III., the position of England, or rather of its sovereign, with respect to France, underwent a very disadvantageous change. The loss of Normandy severed the connexion between the English nobility and the continent; they had no longer estates to defend, and took not sufficient

¹¹ By a frankleyn in this place we are to understand what we call a country squire, like the frankleyn of *Cliaucer*; for the word *esquire* in Fortescue's time was only used in its limited sense, for the sons of peers and knights, or such as had obtained the title by creation or some other legal means.

The mention of Chaucer leads me to

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

interest in the concerns of Guienne to fight for that province at their own cost. Their feudal service was now commuted for an escuage, which fell very short of the expenses incurred in a protracted campaign. Tallages of royal towns and demesne lands, extortion of money from the Jews, every feudal abuse and oppression, were tried in vain to replenish the treasury, which the defence of Eleanor's inheritance against the increased energy of France was constantly exhausting. Even in the most arbitrary reigns, a general tax upon landholders, in any cases but those prescribed by the feudal law, had not been ventured ; and the standing bulwark of Magna Charta, as well as the feebleness and unpopularity of Henry III., made it more dangerous to violate an established principle. Subsidies were therefore constantly required ; but for these it was necessary for the king to meet parliament, to hear their complaints, and, if he could not elude, to acquiesce in their petitions. These necessities came still more urgently upon Edward I., whose ambitious spirit could not patiently endure the encroachments of Philip the Fair, a rival not less ambitious, but certainly less distinguished by personal prowess, than himself. What advantage the friends of liberty reaped from this ardour for continental warfare is strongly seen in the circumstances attending the Confirmation of the Charters.

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

freedom; and acquiring self-confidence by mutual intercourse, and sense of the public opinion, they became able, before the end of Edward's reign, and still more in that of his grandson, to control, prevent, and punish the abuses of administration. Of all these proud and sovereign privileges, the right of refusing supply was the key-stone. But for the long wars in which our kings were involved, at first by their possession of Guienne, and afterwards by their pretensions upon the crown of France, it would have been easy to suppress remonstrances by avoiding to assemble parliament. For it must be confessed that an authority was given to the king's proclamations, and to ordinances of the council, which differed but little from legislative power, and would very soon have been interpreted by complaisant courts of justice to give them the full extent of statutes.

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

2. The relation established between a lord and his vassal by the feudal tenure, far from containing principles of any servile and implicit obedience, permitted the compact to be dissolved in case of its violation by either party. This extended as much to the sovereign as to inferior lords; the authority of the former in France, where the system most flourished, being for several *ages* rather feudal than political. If a vassal

was aggrieved, and if justice was denied him, he sent a defiance, that is, a renunciation of fealty to the king, and was entitled to enforce redress at the point of his sword. It then became a contest of strength as between two independent potentates, and was terminated by treaty, advantageous or otherwise, according to the fortune of war. This privilege, suited enough to the situation of France, the great peers of which did not originally intend to admit more than a nominal supremacy in the house of Capet, was evidently less compatible with the regular monarchy of England. The stern natures of William the Conqueror and his successors kept in control the mutinous spirit of their nobles, and reaped the profit of feudal tenures without submitting to their reciprocal obligations. They counteracted, if I may so say, the centrifugal force of that system by the application of a stronger power; by preserving order, administering justice, checking the growth of baronial influence and riches, with habitual activity, vigilance, and severity. Still, however, there remained the original principle, that allegiance depended conditionally upon good treatment, and that an appeal might be lawfully made to arms against an oppressive government. Nor was this, we may be sure, left for extreme necessity, or thought to require a long enduring forbearance. In modern times a king compelled by his subjects' swords to abandon any pretension would be supposed to have ceased to reign; and the express recognition of such a right as that of insurrection has been justly deemed inconsistent with the majesty of law. But ruder ages had ruder sentiments. Force was necessary to repel force; and men accustomed to see the king's authority defied by private riot were not much shocked when it was resisted in defence of public freedom.

The Great Charter of John was secured by the election of twenty-five barons as conservators of the compact. If the king, or the justiciary in his absence, should transgress any article, any four might demand reparation, and on denial carry their complaint to the rest of their body.⁴⁴ And those barons, with all the commons of the land, shall distrain and annoy us by every means in their power; that is, by seizing our castles, lands, and possessions, and every other mode, till the wrong shall be

repaired to their satisfaction; saving our person, and our queen and children. And when it shall be repaired they shall obey us as before."^l It is amusing to see the common law of distress introduced upon this gigantic scale; and the capture of the king's castles treated as analogous to impounding a neighbour's horse for breaking fences.

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

These feudal notions, which placed the moral obligation of allegiance very low, acting under a weighty pressure from the real strength of the crown, were favourable to constitutional liberty. The great vassals of France and Germany aimed at living independently on their fiefs, with no further concern for the rest than as useful allies having a common interest against the crown. But in England, as there was no prospect of throwing off subjection, the barons endeavoured only to lighten its burthen, fixing limits to prerogative by law, and securing their observation by parliamentary remonstrances or by

^l Brady's Hist. vol. i.; Appendix, p. 148.

^k Matt Parls, p. 330; Lyttelton's Hist of Henry I I . vol lv. p. 41.

dint of arms. Hence, as all rebellions in England were directed only to coerce the government, or at the utmost to change the succession of the crown, without the smallest tendency to separation, they did not impair the national strength nor destroy the character of the constitution. In all these contentions it is remarkable that the people and clergy sided with the nobles against the throne. No individuals are so popular with the monkish annalists, who speak the language of the populace, as Simon earl of Leicester, Thomas earl of Lancaster, and Thomas duke of Gloucester, all turbulent opposers of the royal authority, and probably little deserving of their panegyrics. Very few English historians of the middle ages are advocates of prerogative. This may be ascribed both to the equality of our laws and to the interest which the aristocracy found in courting popular favour, when committed against so formidable an adversary as the king. And even now, when the stream that once was hurried along gullies and dashed down precipices hardly betrays upon its broad and tranquil bosom the motion that actuates it, it must still be accounted a singular happiness of our constitution that, all ranks graduating harmoniously into one another, the interests of peers and commoners are radically interwoven; each in a certain sense distinguishable, but not balanced like opposite weights, not separated like discordant fluids, not to be secured by insolence or jealousy, but by mutual adherence and reciprocal influences.

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

Influence
which the
state of
manners
gave the
nobility.

who were fed at the castle in time of peace, refuse to carry their pikes and staves into the field of battle. Many devices were used to preserve this aristocratic influence, which riches and ancestry of themselves rendered so formidable. Such was the maintenance of suits, or confederacies for the purpose of supporting each other's claims in litigation, which was the subject of frequent complaints in parliament, and gave rise to several prohibitory statutes. By help of such confederacies parties were enabled to make violent entries upon the lands they claimed, which the law itself could hardly be said to discourage.^m Even proceedings in courts of justice were often liable to intimidation and influence." A practice much allied to confederacies of maintenance, though ostensibly more harmless, was that of giving liveries to all retainers of a noble family; but it had an obvious tendency to preserve that spirit of factious attachments and animosities which it is the general policy of a wise government to dissipate. From the first year of Richard I I. we find continual mention of this custom, with many legal provisions against it, but it was never abolished till the reign of Henry VII.^o

^m If a man was disseised of his land, he might enter upon the disseisor and reinstate himself without course of law. In what case this right* of entry was taken away, or *toll'd*, as it was expressed, by the death or alienation of the disseisor, is a subject extensive enough to occupy two chapters of Littleton. What pertains to our inquiry is, that by an entry in the old law-books we must understand an actual repossession of the disseisee, not a suit in ejectment, as it is now interpreted, but which is a comparatively modern proceeding. The first remedy, says Britton, of the disseisee is to collect a body of his friends (*recoiller amys et force*), and without delay to cast oat the disseisors, or at least to maintain himself in possession along with them. c. 44. This entry ought indeed by 5 R. H. stat i. c. 8, to be made peaceably; and the justices might assemble the posse comitatus to imprison persons entering on lands by violence (15 R. H. c. 2), but these laws imply the fact that made them necessary.

ⁿ **Ko lord, or other person, by 20**

R. II. c. 3, was permitted to sit on the bench with the justices of assise. Trials were sometimes overawed by armed parties, who endeavoured to prevent their adversaries from appearing. Paston Letters, vol iii. p. li».

^o From a passage in the Paston Letters (vol. ii. p. 23) it appears that, far from these acts being regarded, it was considered as a mark of respect to the king, when he came into a county, for the noblemen and gentry to meet him with as many attendants in livery as they could muster. Sir John Paston was to provide twenty men in their livery-gowns, and the duke of Norfolk two hundred. This illustrates the well-known story of Henry VII. and the earl of Oxford, and shows the mean and oppressive conduct of the king in that affair, which Hume has pretended to justify.

In the first of Edward IV. it is said in the roll of parliament (vol. v. p. 407), that, " by yeiving of liveries and signets, contrary to the statutes and ordinances made aforetyme, maintenauace of quar-

These associations under powerful chiefs were only incidentally beneficial as they tended to withstand the abuses of prerogative. In their more usual course they were designed to thwart the legitimate exercise of the king's government in the administration of the laws. All Europe was a scene of intestine anarchy during the middle ages; and though England was far less exposed to the scourge of private war than most nations on the continent, we should find, could we recover the local annals of every country, such an accumulation of petty rapine and tumult as would almost alienate us from the liberty which served to engender it. This was the common tenor of manners, sometimes so much aggravated as to find a place in general history/ more often attested by records during the three centuries that the house of Plantagenet sat on the throne. Disseisin, or forcible dispossession of freeholds, makes one of the most considerable articles in our law-books.¹ Highway robbery was from the earliest

Prevalent
habits of
rapine.

rels, extortions, robberies, murders been multiplied and continued within this reame, to the grete disturbance and inquietatiou of the same."

P Thus to select one passage out of many t Endem anno (1332) quidam maligni, fuiti quorundam magnatum pnesidio, regis adolescentiam spermentes, et regnum perturbare intendentes, in tantam trnrbam creverunt, nemora et saltus occupavcrunt, ita quod toti regno terrori essent. Walsingbam, p. 132.

¹ I am aware that in many, probably a great majority of reported cases, this word was technically used, where some unwarranted conveyance, such as a feoffment by the tenant for life, was held to have wrought a disseisin; or where the plaintiff was allowed, for the purpose of a more convenient remedy, to feign himself disseised, which was called disseisin by election. But several proofs might be brought from the parliamentary petitions, and I doubt not, if nearly looked at, from the Year-books, that in other cases there was an actual and violent expulsion. And the definition of disseisin in all the old writers, such as Britton and Littleton, is obviously framed upon its primary meaning of violent dispo-
meition, which the word had probably

acquired long before the more peaceable disseisins, if I may use the expression, became the subject of the remedy by assise.

I would speak with deference of Lord Mansfield's elaborate judgment in *Taylor dem. Atkins v. Horde*, 1 Burrow, 107, &c.; but some positions in it appear to me rather too strongly stated; and particularly that the acceptance of the disseisor as tenant by the lord was necessary to render the disseisin complete; a condition which I have not found hinted in any law-book. See Butler's note on *Co. Litt* p. 330; where that eminent lawyer expresses similar doubts as to Lord Mansfield's reasoning. It may however be remarked, that constructive or elective disseisins, being of a technical nature, were more likely to produce cases in the Year-books than those accompanied with actual violence, which would commonly turn only on matters of fact, and be determined by a jury.

A remarkable instance of violent disseisin, amounting in effect to a private war, may be found in the Paston Letters, occupying most of the fourth volume. One of the Paston family, claiming & right to Caistor Castle, kept possession against the duke of Norfolk, who brought

times a sort of national crime. Capital punishments, though very frequent, made little impression on a bold and a licentious crew, who had at least the sympathy of those who had nothing to lose on their side, and flattering prospects of impunity. We know how long the outlaws of Sherwood lived in tradition—men, who, like some of their betters, have been permitted to redeem by a few acts of generosity the just ignominy of extensive crimes. These, indeed, were the heroes of vulgar applause; but when such a judge as Sir John Fortescue could exult that more Englishmen were hanged for 'rubbery in one year than French in seven, and that, "if an Englishman be poor, and see another having riches which may be taken from him by might, he will not spare to do so,"^r it may be perceived how thoroughly these Sentiments had pervaded the public mind.

Such robbers, I have said, had flattering prospects of impunity. Besides the general want of communication, which made one who had fled from his own neighbourhood tolerably secure, they had the advantage of extensive forests to facilitate their depredations and prevent detection. When outlawed or brought to trial, the worst offenders could frequently purchase charters of pardon, which defeated justice in the moment of her blow/ Nor

a large force, and laid a regular siege to the place, till it surrendered for want of provisions. Two of the besiegers were killed. It does not appear that any legal measures were taken to prevent or punish this outrage.

^r Difference between an Absolute and Limited Monarchy, p. 99.

^s The manner in which these were obtained, in spite of law, may be noticed among the violent courses of prerogative. By statute 2 E. III. c. 2, confirmed by 10 E. III. c. 2, the king's power of granting pardons was taken away, except in cases of homicide per infortunium. Another act, U E. i. c. 15, reciting that the former laws in this respect have not been kept, declares that all pardons contrary to them shall be holden as null. This however was disregarded like the rest; and the commons began tacitly to recede from them, and endeavoured to compromise the question with the crown. By 27 E. III. stat 1, c 2, without advert-

ing to the existing provisions, which may therefore seem to be repealed by implication, it is enacted that in every charter of pardon, granted at any one's suggestion, the suggestor's name and the grounds of his suggestion shall be expressed, that if the same be found untrue it may be disallowed. And in 13 R. H. stat. 2, c. 1, we are surprised to find the commons requesting that pardons might not be granted, as if the subject were wholly unknown to the law; the king protesting in reply that he will save his liberty and regality, as his progenitors had done before, but conceding some regulations, far less remedial than what were provided already by the 27th of Edward I. Pardons make a pretty large head in Brooke's Abridgment, and were undoubtedly granted without scruple by every one of our kings. A pardon obtained in a case of peculiar atrocity is the subject of a specific remonstrance in 23 H. VI. RotParl. vol. v. p. III.

were the nobility ashamed to patronise men guilty of every crime. Several proofs of this occur in the rolls. Thus, for example, in the 22nd of Edward III., the commons pray that, "whereas it is notorious how robbers and malefactors infest the country, the king would charge the great men of the land that none such be maintained by them, privily or openly, but that they lend assistance to arrest and take such ill-doers."^t

It is perhaps the most meritorious part of Edward I.'s government that he bent all his power to restrain these breaches of tranquillity. One of his salutary provisions is still in constant use, the statute of coroners. Another, more extensive, and, though partly obsolete, the foundation of modern laws, is the statute of Winton, which, reciting that "from day to day robberies, murders, burnings, and theft be more often used than they have been heretofore, and felons cannot be attainted by the oath of jurors which had rather suffer robberies on strangers to pass without punishment than indite the offenders, of whom great part be people of the same country, or at least, if the offenders be of another country, the receivers be of places near," enacts that hue and cry shall be made upon the commission of a robbery, and that the hundred shall remain answerable for the damage unless the felons be brought to justice. It may be inferred from this pro-

^t Rot. Parl. toi. ii. p. 201. A strange policy, for which no rational cause can be alleged, kept Wales and even Cheshire distinct from the rest of the kingdom. Nothing could be more injurious to the adjacent counties. Upon the credit of their immunity from the jurisdiction of the king's courts, the people of Cheshire broke with armed bards into the neighbouring counties, and perpetrated all the crimes in their power. Rot. Parl. vol. Hi. p. 81, 20], 440; Stat. I H. IV. c. 18. As to the Welsh frontier, it was constantly almost in a state of war, which a very little good sense and benevolence in any one of our shepherds would have easily prevented, by admitting the conquered people to partake in equal privileges with their fellow-subjects. Instead of this, they satisfied themselves with aggravating the mischief by granting legal reprisals upon Welshmen. Stat 2 H. IV. c. 16. Welshmen were absolutely

excluded from bearing offices in Wales. The English living in the English towns of Wales earnestly petition, 23 H. VI. Rot. Parl. vol. v. "p. 104, 154, that this exclusion may be kept in force. Complaints of the disorderly state of the Welsh frontier are repeated as late as 12 E. IV. vol. vi. p. 8.

It is curious that, so early as 15 E. I., a writ was addressed to the earl of Arundel, justiciary of Wales, directing him to cause twenty-four discreet persons to be chosen from the north, and as many from the south of that principality, to serve in parliament. Rot. Parl. vol. i. p. 456. And we find a similar writ in the 20th of the same king. Prynuels Register, 4th part, p. 60. Willis says that he has seen a return to one of these precepts, much obliterated, but from which it appears that Conway, Beaumaris, and Carnarvon returned members. *Notitia Parliamentaria*, vol. i. preface, p. 16.

vision that the ancient law of frank-pledge, though retained longer in form, had lost its efficiency. By the same act, no stranger or suspicious person was to lodge even in the suburbs of towns; the gates were to be kept locked from sunset to sunrising; every host to be answerable for his guest; the highways to be cleared of trees and underwood for two hundred feet on each side; and every man to keep arms according to his substance in readiness to follow the sheriff on hue and cry raised after felons.^u The last provision indicates that the robbers plundered the country in formidable bands. One of these, in a subsequent part of Edward's reign, burned the town of Boston during a fair, and obtained a vast booty, though their leader had the ill fortune not to escape the gallows.

The preservation of order throughout the country was originally intrusted not only to the sheriff, coroner, and constables, but to certain magistrates called conservators of the peace. These, in conformity to the democratic character of our Saxon government, were elected by the freeholders in their county court.^x But Edward I. issued commissions to carry into effect the statute of Winton; and from the beginning of Edward III.'s reign the appointment of conservators was vested in the crown, their authority gradually enlarged by a series of statutes, and their titles changed to that of justices. They were empowered to imprison and punish all rioters and other offenders, and such as they should find by indictment or suspicion to be reputed thieves or vagabonds, and to take sureties for good behaviour from persons of evil fame.^y Such a jurisdiction was hardly more arbitrary than, in a free and civilized age, it has been thought fit to vest in magistrates; but it was ill endured by a people who placed their notions of liberty in personal exemption from restraint rather than any political theory. An act having been passed (2 R. II. stat. 2, c. 6), in consequence of unusual riots and outrages, enabling magistrates to

^u The statute of Winton was confirmed, and proclaimed afresh by the sheriffs, 7 R. II. c. 6, after an era of great disorder.

^x Blackatone, vol. i. c. 9; Carte, vol. ii. p. 203.

^y *I E III* stat 2, c. 16; 4 E. III. c. 2;

34 E. III. c. 1; 7 R. II. c. 5. The institution excited a good deal of ill-will, even before these strong acts were passed. Many petitions of the commons in the 28th E. III., and other years, complain of it Rot. Parl. vol. ii

commit the ringleaders of tumultuary assemblies without waiting for legal process till the next arrival of justices of gaol delivery, the commons petitioned next year against this "horrible grievous ordinance," by which "every freeman in the kingdom would be in bondage to these justices," contrary to the great charter, and to many statutes, which forbid any man to be taken without due course of law.² So sensitive was their jealousy of arbitrary imprisonment, that they preferred enduring riot and robbery to chastising them by any means that might afford a precedent to oppression, or weaken men's reverence for Magna Charta.

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

In a former passage I have remarked of the Anglo-Saxon ceorls that neither their situation nor that of their descendants for the earlier reigns after the Conquest appears to have been mere servitude. But from the time of Henry II., as we learn from Glanvil, the villein, so called, was absolutely dependent upon his lord's will, compelled to unlimited services, and destitute of property, not only in the land he held for his maintenance, but in his own acquisitions." If a villein purchased or inherited land, the lord might seize it; if he accumulated stock, its possession was equally precarious. Against his lord he had no right of action; because his indem-

Villanage
of the
peasantry.
Its nature
and gradual
extinction.

² Rot. Parl. vol. ill. p. 65. It may be observed that this act, 2 E. II. c. 16, was not founded on a petition, but on the king's answer; so that the commons were not real parties to it, and accord-

ingly call it an ordinance in their present petition. This naturally increased their animosity in treating it as an infringement of the subject's right.

^a Glanvil, l v. c. 5

nity in damages, if he could have recovered any, might have been immediately taken away. If he fled from his lord's service, or from the land which he held, a writ issued *de nativitate probanda*, and the master recovered his fugitive by law. His children were born to the same state of servitude; and, contrary to the rule of the civil law, where one parent was free and the other in villenage, the offspring followed their father's condition.^b

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

^b According to Bracton, the bastard of a nief, or female villein, was born in servitude; and where the parents lived on a villein tenement, the children of a uief, even though married to a freeman, were villeins, 1. i. v. c. 21; and see Beames's translation of Glanvil, p. 109. But Littleton lays down an opposite doctrine, that a bastard was necessarily free; because, being the child of no father in the contemplation of law, he could not be presumed to inherit servitude from any one; and makes no distinction as to the parent's residence. Sect. 188. I merely take notice of this change in the law between the reigns of Henry III. and Edward IV. as an instance of the bias which the judges showed in favour of personal freedom. Another, if we can rely upon it, is more important. In the reign of Henry II. a freeman marrying a nief, and settling on a villein tenement, lost the privileges of freedom during the time of his occupation; *legem terra* } *quasi*
nativus amittit Glanvil, 1. v. c. 6. This was consonant to the customs of some other countries, some of which went urther, and treated such a person for

ever as a villein. But, on the contrary, we find in Britton, a century later, that the nief herself by such a marriage became free during the coverture, c. 31. [NOTE XIII]

^c I must confess that I have some doubts how far this was law at the epoch of Magna Charta. Glanvil and Bracton both speak of the *status villenagii*, as opposed to that of liberty, and seem to consider it as a civil condition, not a merely personal relation. The civil law and the French treatise of Beaumanoir hold the same language. And Sir Robert Cotton maintains without hesitation that villeins are not within the 29th section of Magna Charta, "being excluded by the word *liber*." Cotton's Posthuma, p. 223. Britton, however, a little after Bracton, says that in an action the villein is answerable to all men, and all men to him. p. 79. And later judges, in favorem libertatis, gave this construction to the villein's situation, which must therefore be considered as the clear law of England in the fourteenth and fifteenth centuries.

^d Littleton, sect. 189, 190, speaks only of an appeal in the two former cases;

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

but an indictment is a fortiori; and he Bays, sect. 194, that an indictment, though not an appeal, lies against the lord for maiming his villein.

^c Gurdon, on Courts Baron, p. 592, supposes the villein in gross to have been the Lazzus or Servus of early times, a domestic serf, and of an inferior species to the cultivator, or villein regardant. Unluckily Bracton and Littleton do not confirm this notion, which would be convenient enough; for in Domesday Book there is a marked distinction between the Servi and Villani. Blackstone expresses himself inaccurately when he says the villein in gross was annexed to the person of the lord, and transferable by deed from one owner to another. By this means indeed a villein regardant would become a villein in gross, but all villeins were alike liable to be sold by **their** owners. Littleton, sect. 181. Blome-

field's Norfolk, vol. iii. p. 860. Mr. Hargrave supposes that villeins in gross were never numerous (Case of Somerset, Howell's State Trials, vol. xx. p. 42); drawing this inference from the few cases relative to them that occur in the Year-books. And certainly the form of a writ *de nativitate probanda*, and the peculiar evidence it required, which may be found in Fitzherbert's *Natura Brevium*, or in Mr. H.'s argument, are only applicable to the other species. It is a doubtful point whether a freeman could, in contemplation of law, become a villein in gross; though his confession in a court of record, upon a suit already commenced (for this was requisite), would estop him from claiming his liberty; and hence Bracton speaks of this proceeding as a mode by which a freeman might fall into servitude,

^f [NOTE XIV.]

were secure from seizure, his person from injury, and he might leave the land whenever he pleased.^g

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

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

If we take what may be considered as the simplest case, that of a manor divided into demesne lands of the lord's occupation and those in the tenure of his villeins, performing all the services of agriculture for him, it is obvious that his interest was to maintain just so many of these as his estate required for its cultivation. Land, the cheapest of articles, was the price of their labour; and though the law did not compel him to pay this or any other price, yet necessity, repairing in some degree

^g Bracton, 1. ii. c. 8; 1. iv. c. 28; Littleton, sect. 172

^h Glanvil, 1. iv. c. 5.

the law's injustice, made those pretty secure of food and dwellings who were to give the strength of their arms for his advantage. But in course of time, as alienations of small parcels of manors to free tenants came to prevail, the proprietors of land were placed in a new situation relatively to its cultivators. The tenements in villenage, whether by law or usage, were never separated from the lordship, while its domain was reduced to a smaller extent through subinfeudations, sales, or demises for valuable rent. The purchasers under these alienation¹ had occasion for labourers; and these would be free servants in respect of such employers, though in villenage to their original lord. As he demanded less of their labour, through the diminution of his domain, they had more to spare for other masters; and retaining the character of villeins and the lands they held by that tenure, became hired labourers in husbandry for the greater part of the year. It is true that all their earnings were at the lord's disposal, and that he might have made a profit of their labour when he ceased to require it for his own land. But this, which the rapacity of more commercial times would have instantly suggested, might escape a feudal superior, who, wealthy beyond his wants, and guarded by the haughtiness of ancestry against the desire of such pitiful gains, was better pleased to win the affection of his dependants than to improve his fortune at their expense.

The services of villenage were gradually rendered less onerous and uncertain. Those of husbandry, indeed, are naturally uniform, and might be anticipated with no small exactness. Lords of generous tempers granted indulgences which were either intended to be or readily became perpetual. And thus, in the time of Edward 1., we find the tenants in some manors bound only to stated services, as recorded in the lord's book.¹ Some of these, perhaps, might be villeins by blood; but free tenants in villenage were still more likely to obtain this precision

¹ Dugdale's Warwickshire, apud Eden's State of the Poor, vol. i. p. 13. A passage in another local history rather seems to indicate that some kind of delinquency was usually alleged, and some ceremony employed, before the lord entered on the villain's land. In Gissing manor, 39 E.

III., the jury present, that W. G., a villain by blood, was a rebel and ungrateful toward his lord, for which all his tenements were seized. His offence was the having said that the lord kept four stolen sheep in his field. Blomefield's Norfolk, vol. i. p. 114.

in their services; and from claiming a customary right to be entered in the court-roll upon the same terms as their predecessors, prevailed at length to get copies of it for their security.^k Proofs of this remarkable transformation from tenants in villenage to copyholders are found in the reign of Henry III. I do not know, however, that they were protected, at so early an epoch, in the possession of their estates. But it is said in the Year-book of the 42nd of Edward III. to be "admitted for clear law, that, if the customary tenant or copyholder does not perform his services, the lord may seize his land as forfeited."^l It seems implied herein, that, so long as the copyholder did continue to perform the regular stipulations of his tenure, the lord was not at liberty to divest him of his estate; and this is said to be confirmed by a passage in Britton, which has escaped my search; though Littleton intimates that copyholders could have no remedy against their lord." However, in the reign of Edward IV. this was put out of doubt by the judges, who permitted the copyholder to bring his action of trespass against the lord for dispossession.

While some of the more fortunate villeins crept up into property as well as freedom under the name of copyholders, the greater part enfranchised themselves in a different manner. The law, which treated them so harshly, did not take away the means of escape; nor was this a matter of difficulty in such a country as England. To this, indeed, the unequal progression of agriculture and population in different counties would have naturally contributed. Men emigrated, as they always must, in search of cheapness or employment,

^k Gurdon on Courts Baron, p. 574.

^m Brooke's Abridgm. Tenant par copie, l. By the extent-roll of the manor of Brisingham in Norfolk, in 1254, it appears that there were then ninety-four copyholders and six cottagers in villenage; the former performing many, but determinate services of labour for the lord. Blomefield's Norfolk, vol. i. p. 34.

ⁿ Littl sect. 77. A copyholder without legal remedy may seem little better than a tenant in mere villenage, except in name. But though, from the relation between the lord and copyholder, the

latter might not be permitted to sue his superior, yet it does not follow that he might not bring his action against any person acting under the lord's direction, in which the defendant could not set up an illegal authority; just as, although no writ runs against the king, his ministers or officers are not justified in acting under his command contrary to law. I wish this note to be considered as correcting one in my first volume, p. 200, where I have said that a similar law in France rendered the distinction between a serf and a *homme de poote* little more than theoretical.

according to the tide of human necessities. But the villein, who had no additional motive to urge his steps away from his native place, might, well hope to be forgotten or undiscovered when he breathed a freer air, and engaged his voluntary labour to a distant master. The lord had indeed an action against him; but there was so little communication between remote parts of the country, that it might be deemed his fault or singular ill-fortune if he were compelled to defend himself. Even in that case the law inclined to favour him; and so many obstacles were thrown in the way of these suits to reclaim fugitive villeins, that they could not have operated materially to retard their general enfranchisement.^o In one case, indeed, that of unmolested residence for a year and a day within a walled city or borough, the villein became free, and the lord was absolutely barred of his remedy. This provision is contained even in the laws of William the Conqueror, as contained in Hoveden, and, if it be not an interpolation, may be supposed to have had a view to strengthen the population of those places which were designed for garrison[^]. This law, whether of William or not, is unequivocally mentioned by Glanvil.^p Nor was it a mere letter. According to a record in the sixth of Edward I., Sir John Clavering sued eighteen villeins of his manor of Cossey, for withdrawing themselves therefrom with their chattels; whereupon a writ was directed to them; but six of the number claimed to be freemen, alleging the Conqueror's charter, and offering to prove that they had lived in Norwich, paying scot and lot, about thirty years; which claim was admitted.*¹

By such means a large proportion of the peasantry before the middle of the fourteenth century had become hired labourers instead of villeins. We first hear of them on a grand scale in an ordinance made by Edward III. in the twenty-third year of his reign. This was just after the dreadful pestilence of 1348, and it recites that, the number of workmen and servants having been

^o See the rules of pleading and evidence in questions of villenage fully stated in Mr. Hargrove's argument in the case of Somerset. Howell's State Trials, vol. xx. p. 38.

^p l. v. c v.

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^q Blomefield's Norfolk, vol. i. p. 657. I know not how far this privilege was supposed to be impaired by the statute 34 E. III. c 11; which however might, I should conceive, very well stand along with it.

greatly reduced by that calamity, the remainder demanded excessive wages from their employers. Such an enhancement in the price of labour, though founded exactly on the same principles as regulate the value of any other commodity, is too frequently treated as a sort of crime by lawgivers, who seem to grudge the poor that transient* melioration of their lot which the progress of population, or other analogous circumstances, will, without any interference, very rapidly take away. This ordinance therefore enacts that every man in England, of whatever condition, bond or free, of able body, and within sixty years of age, not living of his own, nor by any trade, shall be obliged, when required, to serve any master who is willing to hire him at such wages as were usually paid three years since, or for some time preceding; provided that the lords of villeins or tenants in villenage shall have the preference of their labour, so that they retain no more than shall be necessary for them. More than these old wages is strictly forbidden to be offered, as well as demanded. No one is permitted, under colour of charity, to give alms to a beggar. And, to make some compensation to the inferior classes for these severities, a clause is inserted, as wise, just, and practicable as the rest, for the sale of provisions at reasonable prices/

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

* Stat. 23 E. III.

ment of competence, and security for the fruits of their labour, which the inhabitants of towns so fully possessed. The fourteenth century was, in many parts of Europe, the age when a sense of political servitude was most keenly felt. Thus the insurrection of the Jacquerie in France about the year 1358 had the same character, and resulted in a great measure from the same causes, as that of the English peasants in 1382. And we may account in a similar manner for the democratical tone of the French and Flemish cities, and for the prevalence of a spirit of liberty in Germany and Switzerland.⁸

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

⁸ [NOTE XV.]

t I have been more influenced by natural probabilities than testimony in

ascribing this effect to Wicliffe's innovations, because the historians are prejudiced witnesses against him. Several of

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

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

them depose to the connexion between his opinions and the rebellion of 1382; especially Walsingham, p. 288. This implies no reflection upon Wicliffe, any more than the crimes of the anabaptists in Munster do upon Luther. Every one knows the distich of John Ball, which comprehends the essence of religious democracy:

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

The sermon of tills priest, as related by Walsingham, p. 275, derives its argument for equality from the common origin of the species. He is said to have been a disciple of Wicliffe. Turner's *Hist of England*, vol. ii. p. 420.

^u Stat. I R. H. c. 6; Rot. Parl. vol. iii. p. 21.

^x 30 E. I., in Fitzherbert. Villenage, apud Lombard's *Perambulation of Kent*, p. 632. Somner on Gavelkind, p. 72.

After this tremendous rebellion it might be expected that the legislature would use little indulgence towards the lower commons. Such unhappy tumults are doubly mischievous, not more from the immediate calamities that attend them than from the fear and hatred of the people which they generate in the elevated classes. The general charter of manumission extorted from the king by the rioters of Blackheath was annulled by proclamation to the sheriffs/ and this revocation approved by the lords and commons in parliament; who added, as was very true, that such enfranchisement could not be made without their consent; " which they would never give to save themselves from perishing all together in one day."^z Riots were turned into treason by a law of the same parliaments.^a By a very harsh statute in the 12th of Richard II. no servant or labourer could depart, even at the expiration of his service, from the hundred in which he lived without permission under the king's seal; nor might any who had been bred to husbandry till twelve years old exercise any other calling.^b A few years afterwards the commons petitioned that villeins might not put their children to school in order to advance them by the church; " and this for the honour of all the freemen of the kingdom." In the same parliament they complained that villeins fly to cities and boroughs, whence their masters cannot recover them"; and, if they attempt it, are hindered by the people; and prayed that the lords might seize their villeins in such places without regard to the franchises thereof. But on both these petitions the king put in a negative.^c

From henceforward we find little notice taken of villenage in parliamentary records, and there seems to have been a rapid tendency to its entire abolition. But the

^y Rymer, t vii. p. 316, &c. The king holds this bitter language to the villeins of Essex, after the death of Tyler and execution of the other leaders had disconcerted them: *Rustici quidem fuistis et estis, in bondageo permanebitis, non lit hactenus, sed incomparabiliter viliori*, &c. Walsingham, p. 269.

^z Rot Parl. vol. iii. p. 100.

^a 5 R II. c. 7. The words are, riot et rumour *n' autres semblables*; rather a general way of creating a new treason; but panic puts an end to jealousy.

^b 12 R II. c. 3.

^c Rot Parl. 16 R. II. vol iii. p. 294, 296. The statute 7 H. IV. c. 17, enacts that no one shall put his son or daughter apprentice to any trade in a borough, unless he have land or rent to the value of twenty shillings a year, but that any one may put his children to school. The reason assigned is the scarcity of labourers in husbandry, in consequence of people living in *Upland* apprenticing their children.

fifteenth century is barren of materials; and we can only infer that, as the same causes which in Edward III.'s time had converted a large portion of the peasantry into free labourers still continued to operate, they must silently have extinguished the whole system of personal and territorial servitude. The latter, indeed, was essentially changed by the establishment of the law of copyhold.

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

^d Blomefield's Norfolk, vol. iii. p. 571.

^e Rymer, t. v. p. 44.

^f Gurdon on Courts Baron, p. 596; Madox, *Formulare Anglicanum*, p. 420; Barrington on Ancient Statutes, p. 278. It is said in a modern book that villenage was very rare in Scotland, and even

that no instance exists in records of an estate sold with the labourers and their families attached to the soil. Pinkerton's *Hist. of Scotland*, vol. i. p. 147. But Mr. Chalmers, in his *Caledonia*, has brought several proofs that this assertion is too general.

fine, is the last unequivocal testimony to the existence of villenage;^g though it is highly probable that it existed in remote parts of the country some time longer.^h

From this general view of the English constitution, as it stood about the time of Henry VI., we must turn our eyes to the political revolutions which ^{Reign of Henry VI.} clouded the latter years of his reign. The minority of this prince, notwithstanding the vices and dissensions of his court and the inglorious discomfiture of our arms in France, was not perhaps a calamitous period. The country grew more wealthy; the law was, on the whole, better observed; the power of parliament more complete and effectual than in preceding times. But Henry's weakness of understanding, becoming evident as he reached manhood, rendered his reign a perpetual minority. His marriage with a princess of strong mind, but ambitious and vindictive, rather tended to weaken the government and to accelerate his downfall; a certain reverence that had been paid to the gentleness of the king's disposition being overcome by her unpopularity. By degrees Henry's natural feebleness degenerated almost into fatuity; and this unhappy condition seems to have overtaken him nearly about the time when it became an arduous task to withstand the assault in preparation against his government. This may properly introduce a great constitutional subject, to which some peculiar circumstances of our own age have imperiously directed the consideration of parliament. Though the proceedings of 1788 and 1810 are undoubtedly precedents of far more authority than any that can be derived from our ancient history, yet, as the seal of the legislature has not yet been set upon this controversy, it is not perhaps altogether beyond the possibility of future discussion; and at least it cannot be uninteresting to look back on those parallel or analogous cases by which the deliberations of parliament upon the question of regency were guided.

^g Barrington, ubi supra, from Rymer.

^h There are several later cases reported wherein villenage was pleaded, and one of them as late as the 15th of James I. (Noy, p. 27.) See Hargrave's argument, *State Trials*, vol. xx. p. 41. But these are so briefly stated, that it is difficult in general to understand them. It is obvious, however, that judg-

ment was in no case given in favour of the plea; so that we can infer nothing as to the actual continuance of villenage.

It is remarkable, and may be deemed by some persons a proof of legal pedantry, that Sir E. Coke, while he dilates on the law of villenage, never intimates that it was become antiquated.

While the kings of England retained their continental dominions, and were engaged in the wars to which those gave birth, they were of course frequently absent from this country. Upon such occasions the administration seems at first to have devolved officially on the justiciary, as chief servant of the crown. But Henry III. began the practice of appointing lieutenants, or guardians of the realm (*custodes regni*), as they were more usually termed, by way of temporary substitutes. They were usually nominated by the king without consent of parliament; and their office carried with it the right of exercising all the prerogatives of the crown. It was of course determined by the king's return; and a distinct statute was necessary in the reign of Henry V. to provide that a parliament called by the guardian of the realm during the king's absence should not be dissolved by that event.ⁱ The most remarkable circumstance attending those lieutenantancies was that they were sometimes conferred on the heir apparent during his infancy. The Black Prince, then duke of Cornwall, was left guardian of the realm in 1339, when he was but ten years old;^k and Richard his son, when still younger, in 1372, during Edward III.'s last expedition into France.^l These do not however bear a very close analogy to regencies in the stricter sense, or substitutions during the natural incapacity of the sovereign. Of such there had been several instances before it became necessary to supply the deficiency arising from Henry's derangement. 1. At the death of John, William earl of Pembroke assumed the title of rector of the realm, with the consent of the loyal barons who had just proclaimed the young king, and probably conducted the government in a great measure by their advice.ⁿ But the circumstances were too critical, and the time is too remote, to give this precedent any material weight. 2. Edward I. being in Sicily at his father's death, the nobility met at the Temple of Edward I. ;

ⁱ 8 H. V. c. 1.

13 E. III. vol. ii. p. 107.

^k This prince having been sent to Antwerp, six commissioners were appointed to open parliament Rot. Parl.^m Rymer, t. vi. p. 748.ⁿ Matt. Paris, p. 243.

church, as we are informed by a contemporary writer, and, after making a new great seal, appointed the archbishop of York, Edward earl of Cornwall, and the earl of Gloucester, to be ministers and guardians of the realm ; who accordingly conducted the administration in the king's name until his return.⁰ It is here observable that the earl of Cornwall, though nearest prince of the blood, was not supposed to enjoy any superior title to the regency, wherein he was associated with two other persons. But while the crown itself was hardly acknowledged to be unquestionably hereditary, it would be strange if any notion of such a right to the regency had been entertained. 3. At the accession of Edward III., then fourteen years old, the parliament, which ^{of Edward 111;} was immediately summoned, nominated four bishops, four earls, and six barons as a standing council, at the head of which the earl of Lancaster seems to have been placed, to advise the king in all business of government. It was an article in the charge of treason, or, as it was then styled, of accroaching royal power, against Mortimer, that he intermeddled in the king's household without the assent of this councils. They may be deemed therefore a sort of parliamentary regency, though the duration of their functions does not seem to be defined. 4. The proceedings at the commencement of ^{of Richard II.;} the next reign are more worthy of attention. Edward III. dying June 21, 1377, the keepers of the great seal next day, in absence of the chancellor beyond sea, gave it into the young king's hands before his council. He immediately delivered it to the duke of Lancaster, and the duke to Sir Nicholas Bode for safe custody. Four days afterwards the king in council delivered the seal to the bishop of St. David's, who affixed it the same day to divers letters patent.⁹ Richard was at this time ten years and six months old; an age certainly very unfit for the personal execution of sovereign authority. Yet he was supposed capable of reigning without the aid of a regency. This might be in virtue of a sort of magic ascribed by lawyers to the great seal, the possession of which bars all further inquiry, and renders any government legal. The practice of modern times requiring the

Matt. WeRmonast ap. Brady's History of England, vol. ii. p. 1.
^p Rot. Parl. vol. ii. p. 52. ^q Rymer, t vii. p. 171.

constant exercise of the sign manual has made a public confession of incapacity necessary in many cases where it might have been concealed or overlooked in earlier periods of the constitution. But though no one was invested with the office of regent, a council of twelve was named by the prelates and peers at the king's coronation, July 16, 1377, without whose concurrence no public measure was to be carried into effect. I have mentioned in another place the modifications introduced from time to time by parliament, which might itself be deemed a great council of regency during the first years of Richard.

5. The next instance is at the accession of Henry VI. This prince was but nine months old at his father's death; and whether from a more evident incapacity for the conduct of government in his case than in that of Richard II., or from the progress of constitutional principles in the forty years elapsed since the latter's accession, far more regularity and deliberation were shown in supplying the defect in the executive authority. Upon the news arriving that Henry V. was dead, several lords spiritual and temporal assembled, on account of the imminent necessity, in order to preserve peace, and provide for the exercise of officers appertaining to the king. These peers accordingly issued commissions to judges, sheriffs, escheators, and others, for various purposes, and writs for a new parliament. This was opened by commission under the great seal directed to the duke of Gloucester, in the usual form, and with the king's teste. Some ordinances were made in this parliament by the duke of Gloucester as commissioner, and some in the king's name. The acts of the peers who had taken on themselves the administration, and summoned parliament, were confirmed. On the twenty-seventh day of its session, it is entered upon the roll that the king, "considering his tender age, and inability to direct in person the concerns of his realm, by assent of lords and commons, appoints the duke of Bedford, or, in his absence beyond sea, the duke of Gloucester, to be protector and defender of the kingdom and English church, and the king's chief counsellor."

^r Rot Parl. vol. iv. p. 169.

Letters patent were made out to this effect, the appointment being however expressly during the king's pleasure. Sixteen councillors were named in parliament to assist the protector in his administration; and their concurrence was made necessary to the removal and appointment of officers, except some inferior patronage specifically reserved to the protector. In all important business that should pass by order of council, the whole, or major part, were to be present; "but if it were such matter that the king hath been accustomed to be counselled of, that then the said lords proceed not therein without the advice of my lords of Bedford or Gloucester."⁸ A few more councillors were added by the next parliament, and divers regulations established for their observance.¹

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

^u Rot. Parl. vol. iv. p. III, 176.

^t Ibid. p. 201.

^u I follow the orthography of the roll, which I hope will not be inconvenient to the reader. Why this orthography, from obsolete and difficult, so frequently becomes almost modern, as will appear

in the course of these extracts, I cannot conjecture. The usual irregularity of ancient spelling is hardly sufficient to account for such variations; but if there be any error, it belongs to the superintendents of that publication, and is not mine.

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

of Glocester, as other lords be, and not otherwise, we know no power nor authority that ye have, other than ye as duke of Glocester should have, the king being in parliament, at years of mest discretion: We marvailing with all our hearts that, considering the open declaration of the authority and power belonging to my lord of Bedford and to you in his absence, and also to the king's council subscribed purely and simply by' my said lord of Bedford and by you, that you should in any wise be stirred or moved not to content you therewith or to pretend you any other; Namely, considering that the king, blessed be our Lord, is, sith the time of the said power granted unto you, far gone and grown in person, in wit, and understanding, and like with the grace of God to occupy his own royal power within few years : and forasmuch considering the things and causes abovesaid, and other many that long were to write, We lords aforesaid pray, exhort, and require you to content you with the power abovesaid and declared, of the which my lord your brother of Bedford, the king's eldest uncle, contented him : and that ye none larger power desire, will, nor use; giving you this that is aboven written for our answer to your foresaid demand, the which we will dwell and abide with, withouten variance or changing. Over this beseeching and praying you in our most humble and lowly wise, and also requiring you in the king's name, that ye, according to the king's commandment, contained in his writ sent unto you in that behalf, come to this his present parliament, and intend to the good effect and speed of matters' to be demesned and treted in the same, like as of right ye owe to do." ^x

It is evident that this plain, or rather rude address to the duke of Gloucester, was dictated by the prevalence of cardinal Beaufort's party in council and parliament. But the transactions in the former parliament are not unfairly represented'; and, comparing them with the passage extracted above, we may perhaps be entitled to infer: 1. That the king does not possess any constitutional prerogative of appointing a regent during the minority of his successor; and 2. That neither the heir presumptive, nor any other person, is entitled to exercise

^x Rot. Parl. 6 H. VI. vol. iv. p. 326.

the royal prerogative during the king's infancy (or, by parity of reasoning, his infirmity), nor to any title that conveys them; the sole right of determining the persons by whom, and fixing the limitations under which, the executive government shall be conducted in the king's name and behalf, devolving upon the great council of parliament.

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

In the year 1454, the thirty-second of Henry's reign, his unhappy malady, transmitted perhaps from his maternal grandfather, assumed so decided a character of derangement or imbecility, that parliament could no longer conceal from itself the necessity of a more efficient ruler. This assembly, which had been continued by successive prorogations for nearly a year, met at Westminster on the 14th of February, when the session was opened by the duke of York, as king's commissioner. Kemp, archbishop of Canterbury and chancellor of England, dying soon afterwards, it was judged proper to acquaint the king at Windsor by a deputation of twelve lords with this and other subjects concerning his government. In fact, perhaps, this was a pretext chosen in order to ascertain his real condition. These peers reported to the lords' house, two days afterwards, that they had opened to his majesty the several articles of their message, but " could get no answer ne

Henry's
mental de-
rangement.

sign for no prayer ne desire," though they repeated their endeavours at three different interviews. This report, with the instruction on which it was founded, was, at their prayer, entered of record in parliament. Upon so authentic a testimony of their sovereign's infirmity, the peers, adjourning two days for solemnity or deliberation, "elected and nominated Richard duke of York to be protector and defender of the realm of England during the king's pleasure." The duke, protesting his insufficiency, requested "that in this present parliament, and by authority thereof, it be enacted that, of yourself and of your ful and mere disposition, ye desire, name, and call me to the said name and charge, and that of any presumption of myself I take them not upon me, but only of the due and humble obeisance that I owe to do unto the king our most dread and sovereign lord, and to you the peerage of this land, in whom by the occasion of the infirmity of our said sovereign lord resteth the exercise of his authority, whose noble commandments I am as ready to perform and obey as any of his liegemen alive, and that, at such time as it shall please our blessed Creator to restore his most noble person to healthful disposition, it shall like you so to declare and notify to his good grace." To this protestation the lords answered that, for his and their discharge, an act of parliament should be made conformably to that enacted in the king's infancy, since they were compelled by an equal necessity again to choose and name a protector and defender. And to the duke of York's request to be informed how far the power and authority of his charge should extend, they replied that he should be chief of the king's council, and "devised therefore to the said duke a name different from other counsellors, not the name of tutor, lieutenant, governor, nor of regent, nor no name that shall import authority of governance of the land; but the said name of protector and defensor;" and so forth, according to the language of their former address to the duke of Gloucester. An act was passed accordingly, constituting the duke of York protector of the church and kingdom, and chief counsellor of the king, during the latter's pleasure; or until the prince of Wales should attain years of discretion, on whom the said dignity was

Duke of
York made
protector.

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

It may be conjectured, by the provision made in favour of the prince of Wales, then only two years old, that the king's condition was, supposed to be beyond hope of restoration. But in about nine months he recovered sufficient speech and recollection to supersede the duke of York's protectorate.* The succeeding transactions are matter of familiar, though not, perhaps, very perspicuous history. The king was a prisoner in his enemies' hands after the affair at St. Albans,^b when parliament met in July, 1455. In this session little was done, except renewing the strongest oaths of allegiance to Henry and his family. But the two houses meeting again after a prorogation to November 12, during which time the duke of York had strengthened his party, and was appointed by commission the king's lieutenant to open the parliament, a proposition was made by the commons that, "whereas the king had deputed the duke of York as his commissioner to proceed in this parliament, it was thought by the commons that, if the king hereafter could not attend to the protection of the country, an able person should be appointed protector, to whom they might have recourse for redress of injuries; especially as great disturbances had lately arisen in the west through the feuds of the earl of Devonshire and Lord Bonville."^c The archbishop of Canterbury answered for the lords that they would take into consideration what the commons had suggested. Two days

^z Bot Parl. vol. v. p. 241.

^a Paston Letters, vol. i. p. 81. The proofs of sound mind given in this letter are not very decisive, but the wits of sovereigns are never weighed in golden scales.

^b This may seem an improper appellation for what is usually termed a battle, wherein 5000 men are said to have fallen. But I rely here upon my faithful guide, the Paston Letters, p. 100, one of which, written immediately after the engagement, says that only sixscore were killed. Surely this testimony outweighs a thousand ordinary chroniclers.

And the nature of the action, which was a sudden attack on the town of St. Albans, without any pitched combat, renders the larger number improbable. Whethamstede, himself abbot of St. Albans at the time, makes the duke of York's army but 3000 fighting men. p. 352. This account of the trifling loss of life in the battle of St. Albans is confirmed by a contemporary letter, published in the *Archaeologia* (xx. 519). The whole number of the slain was but forty-eight, including, however, several lords.

^c See some account of these in Paston Letters, vol i. p. 114

afterwards the latter appeared again with a request conveyed nearly in the same terms. Upon their leaving the chamber, the archbishop, who was also chancellor, moved the peers to answer what should be done in respect of the request of the commons; adding that "it is understood that they will not further proceed in matters of parliament, to the time that they have answer to their desire and request." This naturally ended in the reappointment of the duke of York to his charge of protector. The commons indeed were determined to bear no delay. As if ignorant of what had been resolved in consequence of their second request, they urged it a third time, on the next day of meeting; and received for answer that "the king our said sovereign lord, by the advice and assent of his lords spiritual and temporal being in this present parliament, had named and desired the duke of York to be protector and defensor of this land." It is worthy of notice that in these words, and indeed in effect, as appears by the whole transaction, the house of peers assumed an exclusive right of choosing the protector, though, in the act passed to ratify their election, the commons' assent, as a matter of course, is introduced. The last year's precedent was followed in the present instance, excepting a remarkable deviation; instead of the words "during the king's pleasure," the duke was to hold his office "until he should be discharged of it by the lords in parliament."^d

This extraordinary clause, and the slight allegations on which it was thought fit to substitute a vicegerent for the reigning monarch, are sufficient to prove, even if the common historians were silent, that whatever passed as to this second protectorate of the duke of York was altogether of a revolutionary complexion. In the actual circumstances of civil blood already spilled and the king in captivity, we may justly wonder that so much regard was shown to the regular forms and precedents of the constitution. But the duke's natural moderation **will** account for part of this, and the temper of the lords for much more. That assembly appears for the most part to have been faithfully attached to the house of Lancaster. The partisans of Richard were found in

^d Rot. Parl. vol. v. p. 284-290.

the commons and among the populace. Several months elapsed after the victory of St. Albans before an attempt was thus made to set aside a sovereign, not labouring, so far as we know, under any more notorious infirmity than before. It then originated in the commons, and seems to have received but an unwilling consent from the upper house. Even in constituting the duke of York protector over the head of Henry, whom all men despaired of ever seeing in a state to face the dangers of such a season, the lords did not forget the rights of his son. By this latter instrument, as well as by that of the preceding year, the duke's office was to cease upon the prince of Wales arriving at the age of discretion.

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

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

The duke of York preserved through the critical season of rebellion such moderation and humanity that we may pardon him that bias in favour of his own pretensions to which he became himself a victim. Margaret perhaps, by her sanguinary violence in the Coventry parliament of 1460, where the duke and all his adherents were attainted, left him not the choice of remaining a subject with impunity. But with us, who are to weigh these ancient factions in the balance of wisdom and justice, there should be no hesitation in deciding that the house of Lancaster were lawful sovereigns of England. I am, indeed, astonished that not only such historians as Carte, who wrote undisguisedly upon a Jacobite system, but even men of juster principles, have been inadvertent enough to mention the right of the house of York. If the original consent of the nation, if three descents of the crown, if repeated acts of parliament, if oaths of allegiance from the whole kingdom, and more particularly from those who now advanced a contrary pretension, if undisturbed, unquestioned possession during sixty years, could not secure the reigning family against a mere defect in their genealogy, when were the people to expect tranquillity? Sceptres were committed, and governments were instituted, for public protection and public happiness, not certainly for the benefit of rulers, or for the security of particular dynasties. No prejudice has less in its favour, and none has been more fatal to the peace of mankind, than that

^f The ill-will of York and the queen an unequivocal testimony; a letter of that began as early as 1449, as we learn from date in the Paston collection, vol. i. p. 26.

which regards a nation of subjects as a family's private inheritance. For, as this opinion induces reigning princes and their courtiers to look on the people as made only to obey them, so, when the tide of events has swept them from their thrones, it begets a fond hope of restoration, a sense of injury and of imprescriptible rights, which give the show of justice to fresh disturbances of public order, and rebellions against established authority. Even in cases of unjust conquest, which are far stronger than any domestic revolution, time heals the injury of wounded independence, the forced submission to a victorious enemy is changed into spontaneous allegiance to a sovereign, and the laws of God and nature enjoin the obedience that is challenged by reciprocal benefits. But far more does every national government, however violent in its origin, become legitimate, when universally obeyed and justly exercised, the possession drawing after it the right; not certainly that success can alter the moral character of actions, or privilege usurpation before the tribunal of human opinion, or in the pages of history, but that the recognition of a government by the people is the binding pledge of their allegiance so long as its corresponding duties are fulfilled.^g And thus the law of England has been held to annex the subject's fidelity to the reigning monarch, by whatever title he may have ascended the throne, and whoever else may be its claimant.^h But the statute of 11th of Henry VII. c. 1, has furnished an unequivocal commentary upon this principle, when, alluding to the condemnations and forfeitures by which those alternate successes of the white and red roses had almost exhausted the noble blood of England, it enacts that "no man for doing true and faithful service to the king for the time being be convict or attain of high treason, nor of other offences, by act of parliament or otherwise."

Though all classes of men and all parts of England were divided into factions by this unhappy contest, yet the strength of the Yorkists lay in London and the neighbouring counties, and generally among the mid-

^g Upon this great question the fourth discourse in Sir Michael Foster's Reports ought particularly to be read.

^h Hale's Pleas of the Crown, vol. i. p. 61, 101 (edit. 1736).

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

War of the
Lancas-
trians and
Yorkists.

ⁱ Rot. Parl. vol. v. p. 351.

^k Id p. 375. Tills entry in the roll is highly interesting and important. It ought to be read in preference to any of our historians. Hume, who drew from inferior sources, is not altogether accurate. Yet one remarkable circumstance, told by Hall and other chroniclers, that the duke of York stood by the throne, as if

to claim it, though omitted entirely in the roll, is confirmed by Whethamstede, abbot of St. Albans, who was probably then present, (p. 484, edit Hearne.) This shows that we should only doubt, and not reject, unless upon real grounds of suspicion, the assertions of secondary writers.

^m The abbey of St. Albans was stripped

reflecting men that it were better to risk the chances of a new dynasty than trust the kingdom to an exasperated faction.

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

by the queen and her army after the second battle fought at that place, Feb. 17, 1461; which changed Whethamstede the abbot and historiographer from a violent Lancastrian into a Yorkist. His change of party is quite sudden, and amusing enough. See too the Fasten Letters, vol. i. p. 206. Yet the Paston family were originally Lancastrian, and returned to that side in 1470.

" There are sevens! instances of violence and oppression apparent on the rolls during this reign, but not proceeding from the crown. One of a remarkable nature (vol. v. p. 173) was brought forward to throw an odium on the duke of Clarence, who had been concerned in it. Several passages indicate the character of the duke of Gloucester.

Besides the severe proceedings against the Lancastrian party, which might be extenuated by the common pretences, retaliation of similar proscriptions, security for the actual government, or just punishment of rebellion against a legitimate heir, there are several reputed instances of violence and barbarity in the reign of Edward IV. which have not such plausible excuses. Every one knows the common stories of the citizen who was attainted of treason for an idle speech that he would make his son heir to the crown, the house where he dwelt; and of Thomas Burdett, who wished the horns of his stag in the belly of him who had advised the king to shoot it. Of the former I can assert nothing, though I do not believe it to be accurately reported. But certainly the accusation against Burdett, however iniquitous, was not confined to these frivolous words; which indeed do not appear in his indictment,⁰ or in a passage relative to his conviction in the roll of parliament. Burdett was a servant and friend of the duke of Clarence, and sacrificed as a preliminary victim. It was an article of charge against Clarence that he had attempted to persuade the people that "Thomas Burdett his servant, which was lawfully and truly attainted of treason, was wrongfully put to death."^p There could indeed be no more oppressive usage inflicted upon meaner persons than this attainder of the duke of Clarence—an act for which a brother could not be pardoned had he been guilty, and which deepens the shadow of a tyrannical age, if, as it seems, his offence toward Edward was but levity and rashness.

But whatever acts of injustice we may attribute, from authority or conjecture, to Edward's government, it was very far from being unpopular. His love of pleasure, his affability, his courage and beauty, gave him a credit with his subjects which he had no real virtue to challenge. This restored him to the throne, even against the prodi-

⁰ See in Cro. Car. 120, the indictment against Burdett for compassing the king's death, and for that purpose conspiring with Stacie and Blake to calculate his nativity and his son's, ad sciendum quando iidem rex et Edwardus ejus Alius morientur: Also for the same end dispersing divers rhymes and ballads de murmurationibus, seditionibus et proditoriis ex-

citationibus, factas et fabricatas apud Holbourn, to the intent that the people might withdraw their love from the king and desert him, ac erga ipsum regem insurgerent, et guerram erga ipsum regem levarent, ad finalem destructionem ipsorum regis ac domini principis, &c.

P Rot Parl. vol. vi. p. 193.

gious influence of Warwick, and compelled Henry VII. to treat his memory with respect, and acknowledge him as a lawful king.^q The latter years of his reign were passed in repose at home after scenes of unparalleled convulsions, and in peace abroad after more than a century of expensive warfare. His demands of subsidy were therefore moderate, and easily defrayed by a nation which was making rapid advances towards opulence. According to Sir John Fortescue, nearly One fifth of the whole kingdom had come to the king's hand by forfeiture at some time or other since the commencement of his reign/ Many indeed of these lands had been restored, and others lavished away in grants, but the surplus revenue must still have been considerable.

Edward IV. was the first who practised a new method of taking his subjects' money without consent of parliament, under the plausible name of benevolences. These

^q The rolls of Henry VII.'s first parliament are full of an absurd confusion in thought and language, which is rendered odious by the purposes to which it is applied. Both Henry VI. and Edward IV. are considered as lawful kings; except in one instance, where Alan Cotterell, petitioning for the reversal of his attainder, speaks of Edward, "late called Edward IV." (vol. iv. p. 290.) But this is only the language of a private Lancastrian. And Henry VI. passes for having been king during his short restoration in 1470, when Edward had been nine years upon the throne. For the earl of Oxford is said to have been attainted "for the true allegiance and service he owed and did to Henry VI. at Barnet field and otherwise." (p. 281.) This might be reasonable enough on the true principle that allegiance is due to a King *de facto*; if indeed we could determine who was the king *de facto* on the morning of the battle of Barnet. But this principle was not fairly recognised. Richard III. is always called, "in deed and not in right king of England." Nor was this merely founded on his usurpation as against his nephew. For that unfortunate boy is little better treated, and in the act of resumption, J. H. VII., while Edward IV. is styled "late king," appears only with the denomination of "Edward his son, late called Edward V." (p. 330.) Who

then was king after the death of Edward IV.? And was his son really illegitimate, as an usurping uncle pretended? Or did the crime of Richard, though punished in him, enure to the benefit of Henry? These were points which, like the fate of the young princes in the Tower, he chose to wrap in discreet silence. But the first question he seems to have answered in his own favour. For Richard himself, Howard duke of Norfolk, Lord Lovel, and some others, are attainted (p. 276) for "traiterously intending, compassing, and imagining" the death of Henry; of course before or at the battle of Bosworth; and while his right, unsupported by possession, could have rested only on an hereditary title which it was an insult to the nation to prefer. These monstrous proceedings explain the necessity of that conservative statute to which I have already alluded, which passed in the eleventh year of his reign, and afforded as much security for men following the plain line of rallying round the standard of their country as mere law can offer. There is some extraordinary reasoning upon this act in Carte's History (vol. ii. p. 844), for the purpose of proving that the adherents of George II. would not be protected by it on the restoration of the true blood.

^r Difference of Absolute and Limited Monarchy, p. 83.

came in place of the still more plausible loans of former monarchs, and were principally levied on the wealthy traders. Though no complaint appears in the parliamentary records of his reign, which, as has been observed, complain of nothing, the illegality was undoubtedly felt and resented. In the remarkable address to Richard by that tumultuary meeting which invited him to assume the crown, we find, among general assertions of the state's decay through misgovernment, the following strong passage:—"For certainly we be determined rather to adventure and committe us to the perill of owre lyfs and jopardie of deth, than to lyve in such thraldome and bondage as we have lyved long tyme heretofore, oppressed and injured by extortions and newe impositions ayenst the lawes of God and man, and the libertie, old polieie, and lawes of this realme, whereyn every Englishman is inherited." Accordingly, in Richard III.'s only parliament an act was passed which, after reciting in the strongest terms the grievances lately endured, abrogates and annuls for ever all exactions under the name of benevolence.^t The liberties of this country were at least not directly impaired by the usurpation of Richard. But from an act so deeply tainted with moral guilt, as well as so violent in all its circumstances, no substantial benefit was likely to spring. Whatever difficulty there may be in deciding upon the fate of Richard's nephews after they were immured in the Tower, the more public parts of the transaction bear unequivocal testimony to his ambitious usurpation." It would therefore be foreign to the purpose of this chapter to dwell upon his assumption of the regency, or upon the sort of election, however curious and remarkable, which gave a pretended authority to his usurpation of the throne. Neither of these has ever been alleged by any party in the way of constitutional precedent.

At this epoch I terminate these inquiries into the English constitution; a sketch very imperfect, I fear, and

^s Rot. Parl. vol. vi. p. 241.

^t i R. III. c. 2.

^u The long-debated question as to the murder of Edward and his brother seems to me more probably solved on the common supposition that it was really perpetrated by the orders of Richard, than

on that of Walpole, Carte, Henry, and Laing, who maintain that the duke of York, at least, was in some way released from the Tower, and reappeared as Perkin Warbeck. But a very strong conviction either way is not readily attainable.

unsatisfactory, but which may at least answer the purpose of fixing the reader's attention on the principal objects, and of guiding him to the purest fountains of constitutional knowledge. From the accession of the house of Tudor a new period is to be dated in our history, far more prosperous in the diffusion of opulence and the preservation of general order than the preceding, but less distinguished by the spirit of freedom and jealousy of tyrannical power. "We have seen, through the twilight of our Anglo-Saxon records, a form of civil policy established by our ancestors, marked, like the kindred governments of the continent, with aboriginal Teutonic features ; barbarous indeed, and insufficient for the great ends of society, but capable and worthy of the improvement it has received, because actuated by a sound and vital spirit, the love of freedom and of justice. From these principles arose that venerable institution, which none but a free and simple people could have conceived, trial by peers—an institution common in some degree to other nations, but which, more widely extended, more strictly retained, and better modified among ourselves, has become perhaps the first, certainly among the first, of our securities against arbitrary government. We have seen a foreign conqueror and his descendants trample almost alike upon the prostrate nation and upon those who had been companions of their victory, introduce the servitudes of feudal law with more than their usual rigour, and establish a large revenue by continual precedents upon a system of universal and prescriptive extortion. But the Norman and English races, each unfit to endure oppression, forgetting their animosities in a common interest, enforce by arms the concession of a great charter of liberties. Privileges wrested from one faithless monarch are preserved with continual vigilance against the machinations of another; the rights of the people become *more* precise, and their spirit more magnanimous, during the long reign of Henry III. With greater ambition and greater abilities than his father, Edward I. attempts in vain to govern in an arbitrary manner, and has the mortification of seeing his prerogative fettered by still more important limitations. The great council of the nation is opened to the representatives of the commons. They proceed by slow and cautious

steps to remonstrate against public grievances, to check the abuses of administration, and sometimes to chastise public delinquency in the officers of the crown. A number of remedial provisions are added to the statutes; every Englishman learns to remember that he is the citizen of a free state, and to claim the common law as his birthright, even though the violence of power should interrupt its enjoyment. It were a strange misrepresentation of history to assert that the constitution had attained anything like a perfect state in the fifteenth century; but I know not whether there are any essential privileges of our countrymen, any fundamental securities against arbitrary power, so far as they depend upon positive institution, which may not be traced to the time when the house of Plantagenet filled the English throne.

NOTES TO CHAPTER VIII.

(PART III.)

NOTE I . Page 5.

IT is rather a curious speculative question, and such only, we may presume, it will long continue, whether bishops are entitled, on charges of treason or felony, to a trial by the peers. If this question be considered either theoretically or according to ancient authority, I think the affirmative proposition is beyond dispute. Bishops were at all times members of the great national council, and fully equal to lay lords in temporal power as well as dignity. Since the Conquest they have held their temporalities of the crown by a baronial tenure, which, if there be any consistency in law, must unequivocally distinguish them from commoners—since any one holding by barony might be challenged on a jury, as not being the peer of the party whom he was to try. It is true that they take no share in the judicial power of the house of lords in cases of treason or felony; but this is merely in conformity to those ecclesiastical canons which prohibited - the clergy from partaking in capital judgment, and they have always withdrawn from the house on such occasions under a protestation of their right to remain. Had it not been for this particularity, arising wholly out of their own discipline, the question of their peerage could never have come into dispute. As for the common argument that they are not tried as peers because they have no inheritable nobility, I consider it as very frivolous, since it takes for granted the precise matter in controversy, that an inheritable nobility is necessary to the definition of peerage, or to its incidental privileges.

If we come to constitutional precedents, by which,

when sufficiently numerous and unexceptionable, all questions of this kind are ultimately to be determined, the weight of ancient authority seems to be in favour of the prelates. In the fifteenth year of Edward III. (1340), the king brought several charges against archbishop Stratford. He came to parliament with a declared intention of defending himself before his peers. The king insisted upon his answering in the court of exchequer. Stratford however persevered, and the house of lords, by the king's consent, appointed twelve of their number, bishops, earls, and barons, to report whether peers ought to answer criminal charges in parliament, and not elsewhere. This committee reported to the king in full parliament that the peers of the land ought not to be arraigned, nor put on trial, except in parliament and by their peers. The archbishop upon this prayed the king, that, inasmuch as he had been notoriously defamed, he might be arraigned in full parliament before the peers, and there make answer; which request the king granted. (*Hot. Parl.* vol. ii. p. 127. *Collier's Eccles. Hist.* vol. i. p. 543.) The proceedings against Stratford went no further; but I think it impossible not to admit that his right to trial as a peer was fully recognised both by the king and lords.

This is, however, the latest, and perhaps the only instance of a prelate's obtaining so high a privilege. In the preceding reign of Edward II., if we can rely on the account of Walsingham (p. 119), Adam Orleton, the factious bishop of Hereford, had first been arraigned before the house of lords, and subsequently convicted by a common jury; but the transaction was of a singular nature, and the king might probably be influenced by the difficulty of obtaining a conviction from the temporal peers, of whom many were disaffected to him, in a case where privilege of clergy was vehemently claimed. But about 1357 a bishop of Ely, being accused of harbouring one guilty of murder, though he demanded a trial by the peers, was compelled to abide the verdict of a jury. (*Collier*, p. 557.) In the 31st of Edw. III. (1358) the abbot of Missenden was hanged for coining. (2 *Inst.* p. 635.) The abbot of this monastery appears from Dugdale to have been summoned by writ in the 49th of Henry III. If he actually held by barony, I do

not perceive any strong distinction between his case and that of a bishop. The leading precedent, however, and that upon which lawyers principally found their denial of this privilege to the bishops, is the case of Fisher, who was certainly tried before an ordinary jury; nor am I aware that any remonstrance *wai* made by himself, or complaint by his friends, upon this ground. Cranmer was treated in the same manner; and from these two, being the most recent precedents, though neither of them in the belt of times, the great plurality of law-books have drawn a conclusion that bishops are not entitled to trial by the temporal peers. Nor can there be much doubt that, whenever the occasion shall occur, this will be the decision of the house of lords.

There are two peculiarities, as it may naturally appear, in the above-mentioned resolution of the lords in Stratford's case. The first is, that they claim to be tried, not only before their peers, but in parliament. And in the case of the bishop of Ely it is said to have been objected to his claim of trial by his peers, that parliament was not then sitting. (Collier, *ubi sup.*) It is most probable, therefore, that the court of the lord high steward, for the special purpose of trying a peer, was of more recent institution—as appears also from Sir E. Coke's expressions. (4 Inst. p. 58.) The second circumstance that may strike a reader is, that the lords assert their privilege in all criminal cases, not distinguishing misdemeanors from treasons and felonies. But in this they were undoubtedly warranted by the clear language of Magna Charta, which makes no distinction of the kind. The practice of trying a peer for misdemeanors by a jury of commoners, concerning the origin of which I can say nothing, is one of those anomalies which too often render our laws capricious and unreasonable in the eyes of impartial men.

Since writing the above note I have read Stillingfleece's treatise on the judicial power of the bishops in capital cases—a right which, though now, I think, abrogated by non-claim and a course of contrary precedents, he proves beyond dispute to have existed by the common law and constitutions of Clarendon, to have been occasionally exercised, and to have been only suspended by their voluntary act. In the course of this argument he treats of the peerage of the bishops, and produces abundant

evidence from the records of parliament that they were styled peers, for which, though convinced from general recollection, I had not leisure or disposition to search. But if any doubt should remain, the statute 25 E. III. c. 6, contains a legislative declaration of the peerage of bishops. The whole subject is discussed with much perspicuity and force by Stillingfleet, who seems however not to press very greatly the right of trial by peers, aware, no doubt of the weight of opposite precedents. (Stillingfleet's Works, vol. iii. p. 820.) In one distinction, that the bishops vote in their judicial functions as tjarons, but in legislation as magnates, which Warburton has brought forward as his own in the Alliance of Church and State, Stillingfleet has perhaps not taken the strongest ground, nor sufficiently accounted for their right of sitting in judgment on the impeachment of a commoner. Parliamentary impeachment, upon charges of high public crimes, seems to be the exercise of a right inherent in the great council of the nation, some traces of which appear even before the Conquest (Chron. Sax. p. 164, 169), independent of and superseding that of trial by peers, which, if the 29th section of Magna Charta be strictly construed, is only required upon indictments at the king's suit. And this consideration is of great weight in the question, still unsettled, whether a commoner can be tried by the lords upon an impeachment for treason.

The treatise of Stillingfleet was written on occasion of the objection raised by the commons to the bishops voting on the question of Lord Danby's pardon, which he pleaded in bar of his impeachment. Burnet seems to suppose that their right to final judgment had never been defended, and confounds judgment with sentence. Mr. Hargrave, strange to say, has made a much greater blunder, and imagined that the question related to their right of voting on a bill of attainder, which no one, I believe, ever disputed. (Notes on Co. Litt. 134 b.)

NOTE I I . Page 9.

The constitution of parliament in this period, antecedent to the Great Charter, has been minutely and scrupulously investigated by the Lords' Committee on

the Dignity of a Peer in 1819. Two questions may be raised as to the lay portion of the great council of the nation from the Conquest to the reign of John :—first, Did it comprise any members, whether from the counties or boroughs, not holding themselves, nor deputed by others holding in chief of the crown by knight-service or grand serjeanty? secondly, Were all such tenants *in capite* personally, or in contemplation of law, assisting, by advice and suffrage, in councils held for the purpose of laying on burthens, or for permanent and important legislation?

The former of these questions they readily determine. The committee have discovered no proof, nor any likelihood from analogy, that the great council, in these Norman reigns, was composed of any who did not hold in chief of the crown by a military tenure, or one in grand serjeanty; and they exclude, not only tenants in petty serjeanty and socage, but such as held of an escheated barony, or, as it was called, *de honore*.

They found more difficulty in the second question. It has generally been concluded, and I may have taken it for granted in my text, that all military tenants *in capite* were summoned, or ought to have been summoned, to any great council of the realm, whether for the purpose of levying a new tax, or any other affecting the public weal. The committee, however, laudably cautious in drawing any positive inference, have moved step by step through this obscure path with a circumspection as honourable to themselves as it renders their ultimate judgment worthy of respect.

" The council of the kingdom, however composed (they are adverting to the reign of Henry I.), must have been assembled by the king's command; and the king, therefore, may have assumed the power of selecting the persons to whom he addressed the command, especially if the object of assembling such a council was not to impose any burthen on any of the subjects of the realm exempted from such burthens except by their own free grants. Whether the king was at this time considered as bound by any constitutional law to address such command to any particular persons, designated by law as essential parts of such an assembly for all purposes, the committee have been unable to ascertain. It has

generally been considered as the law of the land that the king had a right to require the advice of any of his subjects, and their personal services, for the general benefit of the kingdom; but as, by the terms of the charters of Henry *and* of his father, no aid could be required of the immediate tenants of the crown by military service, beyond the obligation of their respective tenures, if the crown had occasion for any extraordinary aid from those tenants, it must have been necessary, according to law, to assemble all persons so holding, to give their Consent to the imposition. Though the numbers of such tenants of the crown were not originally very great, as far as appears from Domesday, yet, if it was necessary to convene all to form a constitutional legislative assembly, the distances of their respective residences, and the inconvenience of assembling at one time, in one spot, all those who thus held of the crown, and upon whom the maintenance of the Conquest itself must for a considerable time have importantly depended, must have produced difficulties, even in the reign of the Conqueror; and the increase of their numbers by subdivision of tenures must have greatly increased the difficulty in the reign of his son Henry: and at length, in the reigns of his successors, it must have been almost impossible to have convened such an assembly, except by general summons of the greater part of the persons who were to form it; and unless those who obeyed the summons could bind those who did not, the powers of the assembly when convened must have been very defective." (p. 40.)

Though I do not perceive why we should assume any great subdivision of tenures before the statute of *Quia Emptores*, in 18 Edw. I., which prohibited subinfeudation, it is obvious that the committee have pointed out the inconvenience of a scheme which gave all tenants *in capite* (more numerous in Domesday than they perhaps were aware) a right to assist at great councils. Still, as it is manifest from the early charters, and explicitly admitted by the committee, that the king could raise no extraordinary contribution from his immediate vassals by his own authority, and as there was no feudal subordination between one of these and another, however differing in wealth, it is clear that they were legally

entitled to a voice, be it through general or special summons, In the imposition of taxes which they were to pay. It will not follow that they were summoned, or had an acknowledged right to be summoned, on the few other occasions when legislative measures were in contemplation, or in the determinations taken by the king's great council. This can only be inferred by presumptive proof or constitutional analogy.

The eleventh article of the Constitutions of Clarendon in 1164 declares that archbishops, bishops, and all persons of the realm who hold of "die king *in capite*, possess their lands as a barony, and are bound to attend in the judgments of the king's court like other barons. It is plain, from the general tenor of these constitutions, that "universe personam regni" must be restrained to ecclesiastics; and the only words which can be important in the present discussion are "sicut barones caeteri." "It seems," says the committee, "to follow that all those termed the king's barons were tenants in chief of the king; but it does not follow that all tenants in chief of the king were the king's barons, and as such bound to attend his court. They might not be bound to attend unless they held their lands of the king in chief 'sicut baroniam,' as expressed in this article with respect to the archbishops and other clergy." (p. 44.) They conclude, however, that "upon the whole the Constitutions of Clarendon, if the existing copies be correct, afford strong ground for presuming that owing suit to the king's great court rendered the tenant one of the king's barons or members of that court, though probably in general none attended who were not specially summoned. It has been already observed that this would not include all the king's tenants in chief, and particularly those who did not hold of him as of his crown, or even to all who did hold of him as of his crown, but not by knight-service or grand serjeanty, which were alone deemed military and honourable tenures; though, whether all who held of the king as of his crown, by knight-service or grand serjeanty, did originally owe suit to the king's court, or whether that obligation was confined to persons holding by a particular tenure, called *tenure per baroniam*^ as has been asserted, the Constitutions of Clarendon do not assist to ascertain." (p. 45.) But this, as they point out,

involves the question whether the *Curia Regis*, mentioned in these constitutions, was not only a judicial but a legislative assembly, or one competent to levy a tax on military tenants, since by the terms of the charter of Henry I., confirmed by that of Henry II., all such tenants were clearly exempted from taxation, except by their own consents.

They touch slightly on the reign of Richard I. with the remark that "the result of all which they have found with respect to the constitution of the legislative assemblies of the realm still leaves the subject in great obscurity." (p. 49.) But it is remarkable that they have never alluded to the presence of tenants in chief, knights as well as barons, at the parliament of Northampton under Henry II. They come, however, rather suddenly to the conclusion that "the records of the reign of John seem to give strong ground for supposing that all the king's tenants in chief by military tenure, if not all the tenants in chief,^a were at one time deemed necessary members of the common councils of the realm, when summoned for extraordinary purposes, and especially for the purpose of obtaining a grant of any extraordinary aid to the king; and this opinion accords with what has generally been deemed originally the law in France, or other countries where what is called the feudal system of tenures has been established." (p. 54.) It cannot surely admit of a doubt, and has been already affirmed more than once by the committee, that for an extraordinary grant of money the consent of military tenants in chief was required long before the reign of John. Nor was that a reign, till the enactment of the Great Charter, when any fresh extension of political liberty was likely to have become established. But the difficulty may still remain with respect to "extraordinary purposes" of another description.

They observe afterwards that "they have found no document before the Great Charter of John in which the term 'maiores barones' has been used, though in some

This hypothetical clause is somewhat remarkable. Grand serjeanty is of course included by parity under military service. But did any hold of the king in socage, except on his demesne lands? There might be some by petty serjeanty. Yet the committee, as we have just seen, absolutely exclude these from any share in the great councils of the Conqueror and his immediate descendants.

subsequent documents words of apparently similar import have been used. From the instrument itself it might be presumed that the term 'maiores barones' was then a term in some degree understood; and that the distinction had, therefore, an earlier origin, though the committee have not found the term in any earlier instrument." (p. 67.) But though the Dialogue on the Exchequer, generally referred to the reign of Henry I L, is not an instrument, it is a law-book of sufficient reputation, and in this we read—"Quidam de rege tenent in capite quæ ad coronam pertinent; baronias scilicet majores seu minores." (Lib. ii. cap. 10.) It would be trifling to dispute that the tenant of a *baronia major* might be called a *baro major*. And what could the *secundæ dignitatis barones* at Northampton have been but tenants *in capite* holding fiefs by some line or other distinguishable from a superior class?^b

It appears, therefore, on the whole, that in the judgment of the committee, by no means indulgent in their requisition of evidence, or disposed to take the more popular side, all the military tenants *in capite* were constitutionally members of the *commune concilium* of the realm during the Norman constitution. This *commune concilium* the committee distinguish from a *magnum concilium*, though it seems doubtful whether there were any very definite line between the two. But that the consent of these tenants was required for taxation they repeatedly acknowledge. And there appears sufficient evidence that they were occasionally present for other important purposes. It is, however, very probable that writs of summons were actually addressed only to those of distinguished name, to those resident near the place of meeting, or to the servants and favourites of the crown. This seems to be deducible from the words in the Great Charter, which limit the king's engagement to summon all tenants in chief, through the sheriff, to the case of his requiring an aid or scutage, and still more from the withdrawing of

Mr. Spence has ingeniously conjectured, observing that in some passages of Domesday (he quotes two, but I only find one) the barons who held more than six manors paid their relief directly to the king, while those who had six or less paid theirs to the sheriff (Yorkshire, 298, b), that "this may tend to solve the disputed question as to what constituted one

of the greater barons mentioned in the Magna Charta of John and other early Norman documents; for, by analogy to the mode in which the relief was paid, the greater barons were summoned by particular writs, the rest by one general summons through the sheriff." History of Equitable Jurisdiction, p. 40.

this promise in the first year of Henry III. The privilege of attending on such occasions, though legally general, may never have been generally exercised.

The committee seem to have been perplexed about the word *magnates* employed in several records to express part of those present in great councils. In general they interpret it, as well as the word *proceres*, to include persons not distinguished by the name "*barones*;" a word which in the reign of Henry III. seems to have been chiefly used in the restricted sense it has latterly acquired. Yet in one instance, a letter addressed to the justiciar of Ireland, 1 Hen. III., they suppose the word *magnates* to "exclude those termed therein '*alii quamplurimi*;' and consequently to be confined to prelates, earls, and barons. This may be deemed important in the consideration of many other instruments in which the word *magnates* has been used to express persons constituting the '*commune concilium regni*.'" But this strikes me as an erroneous construction of the letter. The words are as follows:—"Convenerunt apud Glocestriam plures regni nostri magnates, episcopi, abbates, comites, et barones, qui patri nostro viventi semper astiterunt fideliter et devote, et alii quamplurimi; applaudentibus clero et populo, &c, publice fuimus in regem Angliæ imincti et coronati." (p. 77.) I think that *magnates* is a collective word, including the "*alii quamplurimi*." It appears to me that *magnates*, and perhaps some other Latin words, correspond to the witan of the Anglo-Saxons, expressing the legislature in general, under which were comprised those who held peculiar dignities, whether lay or spiritual. And upon the whole we may be led to believe that the Norman great council was essentially of the same composition as the witenagemot which had preceded it; the king's thanes being replaced by the barons of the first or second degree, who, whatever may have been the distinction between them, shared one common character, one source of their legislative rights—the derivation of their lands as immediate fiefs from the crown.

The result of the whole inquiry into the constitution of parliament down to the reign of John seems to be—
1. That the Norman kings explicitly renounced all prerogative of levying money on the immediate military tenants of the crown, without their consent given in a

great council of the realm; this immunity extending also to their sub-tenants and dependants. 2. That all these tenants in chief had a constitutional right to attend, and ought to be summoned; but whether they could attend without a summons is not manifest. 3. That the summons was usually directed to the higher barons, and to such of a second class as the king pleased, many being omitted for different reasons, though all had a right to it. 4. That on occasions when money was not to be demanded, but alterations made in the law, some of these second barons, or tenants in chief, were at least occasionally summoned, but whether by strict right or usage does not fully appear. 5. That the irregularity of passing many of them over when councils were held for the purpose of levying money, led to the provision in the Great Charter of John by which the king promises that they shall all be summoned through the sheriff on such occasions; but the promise does not extend to any other subject of parliamentary deliberation. 6. That even this concession, though but the recognition of a known right, appeared so dangerous to some in the government that it was withdrawn in the first charter of Henry III.

The charter of John, as has just been observed, while it removes all doubt, if any could have been entertained, as to the right of every military tenant *in capite* to be summoned through the sheriff, when an aid or scutage was to be demanded, will not of itself establish their right of attending parliament on other occasions. We cannot absolutely assume any to have been, in a general sense, members of the legislature except the prelates and the *majores barones*. But who were these, and how distinguished? For distinguished they must now have become, and that by no new provision, since none is made. The right of personal summons did not constitute them, for it is on *majores barones*, as already a determinate rank, that the right is conferred. The extent of property afforded no definite criterion; at least some baronies, which appear to have been of the first class, comprehended very few knights' fees; yet it seems probable that this was the original ground of distinction.^c

^c See quotation from Spence's *Equitable Jurisdiction*, a little above. The barony of Berkeley was granted in 1 Ric. I, to be holden by the service of five knights, which was afterwards reduced to three. Nicolas's *Report of Claim to Barony of Lisle*, Appendix, p. 318.

The charter, as renewed in the first year of Henry III., does not only omit the clause prohibiting the imposition of aids and scutages without consent, and providing for the summons of all tenants *in capite* before either could be levied, but gives the following reason for suspending this and other articles of king John's charter:—"Quia vero quosedam capitula in priori carta continebantur, quae gravia et dubitabilia videbantur, *sicut de scutagiis et auxiliis astsidendis* . . . placuit supra-dictis praelatis et magnatibus ea esse in respectu, quousque plenius consilium habuerimus, et tunc faciemus plurissimfe, tarn de his quam de aliis quae occurrerint emendanda, quae ad communem omnium utilitatem pertinuerint, et pacem et statum nostrum et regni nostri." This charter was made but twenty-four days after the death of John; and we may agree with the committee (p. 77) in thinking it extraordinary that these deviations from the charter of Eunnymede, in such important particulars, have been so little noticed. It is worthy of consideration in what respects the provisions respecting the levying of money could have appeared grave and doubtful. We cannot believe that the earl of Pembroke, and the other barons who were with the young king, himself a child of nine years old and incapable of taking a part, meant to abandon the constitutional privilege of not being taxed in aids without their consent. But this they might deem sufficiently provided for by the charters of former kings and by general usage. It is not, however, impossible that the government demurred to the prohibition of levying scutage, which stood on a different footing from extraordinary aids; for scutage appears to have been formerly taken without consent of the tenants; and in the second charter of Henry III. there is a clause that it should be taken as it had been in the time of Henry II. This was a certain payment for every knight's fee; but if the original provision of the Runnymede charter had been maintained, none could have been levied without consent of parliament.

It seems also highly probable that, before the principle of representation had been established, the greater barons looked with jealousy on the equality of suffrage claimed by the inferior tenants *in capite*. That these were constitutionally members of the great council, at least in respect of taxation, has been sufficiently shown;

but they had hitherto come in small numbers, likely to act always in subordination to the more potent aristocracy. It became another question whether they should all be summoned, in their own counties, by a writ selecting no one through favour, and in its terms compelling all to obey. And this question was less for the crown, which might possibly find its advantage in the disunion of its tenants, than for the barons themselves. They would naturally be jealous of a second order, whom in their haughtiness they held much beneath them, yet by whom they might be outnumbered in those councils where they had bearded the king. No effectual or permanent compromise could be made but by representation, and the hour for representation was not come.

NOTE III. Page 19.

The Lords' committee, though not very confidently, take the view of Brady and Blackstone, confining the electors of knights to tenants *in capite*. They admit that "the subsequent usage, and the subsequent statutes founded on that usage, afford ground for supposing that in the 49th of Henry III. and in the reign of Edward I. the knights of the shires returned to parliament were elected at the county courts and by the suitors of those courts. If the knights of the shires were so elected in the reigns of Henry III. and Edward I., it seems important to discover, if possible, who were the suitors of the county courts in these reigns" (p. 149). The subject, they are compelled to confess, after a discussion of some length, remains involved in great obscurity, which their industry has been unable to disperse. They had, however, in an earlier part of their report (p. 30), thought ^{fr}tr^{ighly} probable that the knights of the shires in the reign of Edward III. represented a description of persons who might in the reign of the Conqueror have been termed barons. And the general spirit of their subsequent investigation seems to favour this result, though they finally somewhat recede from it, and admit at least that, before the close of Edward III.'s reign, the elective franchise extended to freeholders.

The question, as the committee have stated it, will turn on the character of those who were suitors to the

county court. And, if this may be granted, I must own that to my apprehension there is no room for the hypothesis that the county court was differently constituted in the reign of Edward I. or of Edward III. from what it was very lately, and what it was long before those princes sat on the throne. In the Anglo-Saxon period we find this court composed of thanes, but not exclusively of royal thanes, who were comparatively few. In the laws of Henry I. we still find sufficient evidence that the suitors of the court were all who held freehold lands, *terrarum domini*; or, even if we please to limit this to lords of manors, which is not at all probable, still without distinction of a mesne or immediate tenure. Vavassors, that is, mesne tenants, are particularly mentioned in one enumeration of barons attending the court. In some counties a limitation to tenants *in capite* would have left this important tribunal very deficient in numbers. And as in all our law-books we find the county court composed of freeholders, we may reasonably demand evidence of two changes in its constitution, which the adherents to the theory of restrained representation must combine—one which excluded all freeholders except those who held immediately of the crown; another which restored them. The notion that the county court was the king's court baron (Report, p. 150), and thus bore an analogy to that of the lord in every manor, whether it rests on any modern legal authority or not, seems delusive. The court baron was essentially a feudal institution; the county court was from a different source; it was old Teutonic, and subsisted in this and other countries before the feudal jurisdictions had taken root. It is a serious error to conceive that, because many great alterations were introduced by the Normans, there was nothing left of the old system of society.^d

It may, however, be naturally inquired why, if the

^d A charter of Henry I., published in the new edition of Rymer (i. p. 12), fully confirms what is here said. *Solatia quod concedo et precepicio, ut a modo comitatus mei et hundreda in illis locis et iisdem terminis sedeant, sicut sederunt in tempore regis Edwardi, et non aliter. Ego enirn, quando voluero, faciara ea satis summoned propter mea dominica necessaria ad voluntatem meam. Et si modo exurgat placituin de divisiuue ter-*

rarum, si est inter barones meos dominicos, tractetur placitum in curea mea. Et si est inter vavassores duorum dominorum, tractetur in comitatu. Et hoc duello fiat, nisi in els remanserit. Et volo et precepicio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerunt in tempore regis Edwardi. But it is also easily proved from the *Leges Henriti Primi*.

king's tenants in chief were exclusively members of the national council before the era of county representation, they did not retain that privilege; especially if we conceive, as seems on the whole probable, that the knights chosen in 38 Henry III. were actually representatives of the military tenants of the crown. The answer might be that these knights do not appear to have been elected in the county court; and when that mode of choosing knights of the shire was adopted, it was but consonant to the increasing spirit of liberty, and to the weight also of the barons, whose tenants crowded the court, that no freeholder should be debarred of his equal suffrage. But this became the more important, and we might almost add necessary, when the feudal aids were replaced by subsidies on movables; so that, unless the mesne freeholders could vote at county elections, they would have been taxed without their consent and placed in a worse condition than ordinary burgesses. This of itself seems almost a decisive argument to prove that they must have joined in the election of knights of the shire after the *Confirmatio Chartarum*. If we were to go down so late as Richard II., and some pretend that the mesne freeholders did not vote before the reign of Henry IV., we find Chaucer's franklin, a vavassor, capable even of sitting in parliament for his shire. For I do not think Chaucer ignorant of the proper meaning of that word. And Allen says (Edinb. Rev. xxviii. 145)—"In the earliest records of the house of commons we have found many instances of sub-vassals who have represented their counties in parliament."

If, however, it should be suggested that the practice of admitting the votes of mesne tenants at county elections may have crept in by degrees, partly by the constitutional principle of common consent, partly on account of the broad demarcation of tenants *in capite* by knight-service from barons, which the separation of the houses of parliament produced, thus tending, by diminishing the importance of the former, to bring them down to the level of other freeholders; partly, also, through the operation of the statute *Quia Emptores* (18 Edward I.), which, by putting an end to subinfeudation, created a new tenant of the crown upon every alienation of land, however partial, by one who was such already,

and thus both multiplied their numbers and lowered their dignity ; this supposition, though incompatible with the argument built on the nature of the county court, would be sufficient to explain the facts, provided we do not date the establishment of the new usage too low. The Lords' committee themselves, after much wavering, come to the conclusion that " at length, if not always, two persons were elected by all the freeholders of the county, whether holding in chief of the crown or of others " (p. 331). This they infer from the petitions of the commons that the mesne tenants should be charged with the wages of knights of the shire; since it would not be reasonable to levy such wages from those who had no voice in the election. They ultimately incline to the hypothesis that the change came in silently, favoured by the growing tendency to enlarge the basis of the constitution, and by the operation of the statute *Quia Emptores*, which may not have been of inconsiderable influence. It appears by a petition in 51 Edward III. that much confusion had arisen with respect to tenures; and it was frequently disputed whether lands were held of the king or of other lords. This question would often turn on the date of alienation; and, in the hurry of an election, the bias being always in favour of an extended suffrage, it is to be supposed that the sheriff would not reject a claim to vote which he had not leisure to investigate.

NOTE IV. Page 21.

It now appears more probable to me than it did that some of the greater towns, but almost unquestionably London, did enjoy the right of electing magistrates with a certain jurisdiction before the Conquest. The notion which I found prevailing among the writers of the last century, that the municipal privileges of towns on the continent were merely derived from charters of the twelfth century, though I was aware of some degree of limitation which it required, swayed me too much in estimating the condition of our own burgesses. And I must fairly admit that I have laid too much stress on the silence of Domesday Book; which, as has been justly pointed out, does not relate to matters of internal

government, unless when they involve some rights of property.

I do not conceive, nevertheless, that the municipal government of Anglo-Saxon boroughs was analogous to that generally established in our corporations from the reign of Henry II. and his successors. - The real presumption has been acutely indicated by Sir F. Palgrave, arising from the "universal institution of the court-] eet, which gave to an alderman, or otherwise denominated officer, chosen by the suitors, a jurisdiction, in conjunction with themselves as a jury, over the greater part of civil disputes and criminal accusations, as well as general police, that might arise within the hundred. Wherever the town or borough was too large to be included within a hundred, this would imply a distinct jurisdiction, which may of course be called municipal. It would be similar to that which, till lately, existed in some towns—an elective high bailiff or principal magistrate, without a representative body of aldermen and councillors. But this is more distinctly proved with respect to London, which, as is well known, does not appear in Domesday, than as to any other town. It was divided into wards, answering to hundreds in the county; each having its own wardmote, or leet, under its elected alderman. " The city of London, as w^ell within the walls, as its liberties without the walls, has been divided from time immemorial into wards, bearing nearly the same relation to the city that the hundred anciently did to the shire. Each ward is, for certain purposes, a distinct jurisdiction. The organisation of the existing municipal constitution of the city is, and always has been, as far as can be traced, entirely founded upon the ward system." (Introduction to the French Chronicle of London. — (Jamden Society, 1844.)

Sir F. Palgrave extends this much further:—" There were certain districts locally included within the hundreds, which nevertheless constituted independent bodies politic. The burgesses, the tenants, the resiants of the king's burghs and manors in ancient demesne, owed neither suit nor service to the hundred leet. They attended at their own leet, which differed in no essential respect from the leet of the hundred. The

principle of frank-pledge required that each friborg should appear by its head as its representative; and consequently, the jurymen of the leet of the burgh or manor are usually described under the style of the twelve chief pledges. The legislative and remedial assembly of the burgh or manor was constituted by the meeting of the heads of its component parts. The portreeve, constable, headborough, bailiff, or other the chief executive magistrate, was elected or presented by the leet jury. Offences against the law were repressed by their summary presentments. They who were answerable to the community for the breach of the peace punished the crime. Eesponsibility and authority were conjoined. In their legislative capacity they bound their fellow-townsmen by making by-laws." (Edin. Itév. xxxvi. 309.) "Domesday Book," he says afterwards, "does not notice the hundred court, or the county-court: because it was unnecessary to inform the king or his justiciaries of the existence of the tribunals which were in constant action throughout all the land. It was equally unnecessary to make a return of the leets which they knew to be inherent in every burgh. Where any special municipal jurisdiction existed, as in Chester, Stamford, and Lincoln, then it became necessary that the franchise should be recorded. The twelve lagemen in the two latter burghs were probably hereditary aldermen. In London and in Canterbury aldermen occasionally held their sokes by inheritance.⁶ The negative evidence extorted out of Domesday has, therefore, little weight." (p. 313.)

It seems, however, not unquestionable whether this representation of an Anglo-Saxon and Anglo-Norman municipality is not urged rather beyond the truth. The portreeve of London, their principal magistrate, appears to have been appointed by the crown. It was not till 1188 that Henry Fitzalwyn, ancestor of the present Lord Beaumont/ became the first mayor of London. But

^c See the ensuing part of this note.

^f This pedigree is elaborately, and with pious care, traced by Mr. Stapleton, in his excellent Introduction to the old chronicle of London, already quoted.

The name Alwyn appears rather Saxon than Norman, so that we may presume the first mayor to have been of English descent; but whether he were a merchant, or a landholder living in the city, must be undecided.

he also was nominated by the crown, and remained twenty-four years in office. In the same year the first sheriffs are said to have been made (*facti*). But John, immediately after his accession in 1199, granted the citizens leave to choose their own sheriffs. And his charter of 1215 permits them to elect annually their mayor. (Maitland's Hist. of London, p. 74, 76.) We read, however, under the year 1200, in the ancient chronicle lately published, that twenty-five of the most discreet men of the city were chosen and sworn to advise for the city, together with the mayor. These were evidently different from the aldermen, and are the original common council of the city. They were perhaps meant in a later entry (1229):—"Omnes aldermanni et magnates civitatis per assensum universorum civium," who are said to have agreed never to permit a sheriff to remain in office during two consecutive years.

The city and liberties of London were not wholly under the jurisdiction of the several wardmotes and their aldermen. Landholders, secular and ecclesiastical, possessed their exclusive sokes, or jurisdictions, in parts of both. One of these has left its name to the ward of Portsoken. The prior of the Holy Trinity, in right of this district, ranked as an alderman, and held a regular wardmote. The wards of Farringdon are denominated from a family of that name, who held a part of them by hereditary right as their territorial franchise. These sokes gave way so gradually before the power of the citizens, with whom, as may be supposed, a perpetual conflict was maintained, that there were nearly thirty of them in the early part of the reign of Henry III., and upwards of twenty in that of Edward I. With the exception of Portsoken, they were not commensurate with the city wards, and we find the juries of the wards, in the third of Edward I., presenting the sokes as liberties enjoyed by private persons or ecclesiastical corporations, to the detriment of the crown. But, though the lords of these sokes trenched materially on the exclusive privileges of the city, it is remarkable that, no condition but inhabitancy being required in the thirteenth century for civic franchises, both they and their tenants were citizens, having individually a voice in

municipal affairs, though exempt from municipal jurisdiction. I have taken most of this paragraph from a valuable though short notice of the state of London in the thirteenth century, published in the fourth volume of the *Archaeological Journal* (p. 273).

The inference which suggests itself from these facts is that London, for more than two centuries after the Conquest, was not so exclusively a city of traders, a democratic municipality, as we have been wont to conceive. And as this evidently extends back to the Anglo-Saxon period, it both lessens the improbability that the citizens bore at times a part in political affairs, and exhibits them in a new light, as lords and tenants of lords, as well as what of course they were in part, engaged in foreign and domestic commerce. It will strike every one, in running over the list of mayors and sheriffs in the thirteenth century, that a large proportion of the names are French; indicating, perhaps, that the territorial proprietors whose sokes were intermingled with the city had influence enough, through birth and wealth, to obtain an election. The general polity, Saxon and Norman, was aristocratic; whatever infusion there might be of a more popular scheme of government, and much certainly there was, could not resist, even if resistance had been always the people's desire, the joint predominance of rank, riches, military habits, and common alliance, which the great baronage of the realm enjoyed. London, nevertheless, from its populousness, and the usual character of cities, was the centre of a democratic power, which, bursting at times into precipitate and needless tumult easily repressed by force, kept on its silent course till, near the end of the thirteenth century, the rights of the citizens and burgesses in the legislature were constitutionally established. [1848.]

NOTE V. Page 26.

If Fitz-Stephen rightly informs us that in London there were 126 parish churches, besides 13 conventual ones, we may naturally think the population much

underrated at 40,000. But the fashion of building churches in cities was so general, that we cannot apply a standard from modern times. Norwich contained sixty parishes.

Even under Henry I L, as we find by Fitz-Stephen, the prelates and nobles had town houses. " Ad hæc omnes lere episcopi, abbates, et magnates Anglise, quasi cives et municipes sunt urbis Lundoniae; sua ibi habentes aedificia prseclara; ubi se recipiunt, ubi divites impensas faciunt, ad concilia, ad conventus celebres in urbem evocati, a domino rege vel metropolitano suo, seu propriis tracti negotiis." The eulogy of London by this writer is very curious; its citizens were thus early distinguished by their good eating, to which they added amusements less congenial to later liverymen, hawking, cock-fighting, and much more. The word *cockney* is not improbably derived from *cocayne*, the name of an imaginary land of ease and jollity.

The city of London within the walls was not wholly built, many gardens and open spaces remaining. And the houses were never more than a single story above the ground-floor, according to the uniform type of English dwellings* in the twelfth and following centuries. On the other hand, the liberties contained many inhabitants; this' streets were narrower than since the fire of 1666; and the vast spaces now occupied by warehouses might have been covered by dwelling-houses. Forty thousand, on the whole, seems rather a low estimate for these two centuries; but it is impossible to go beyond the vaguest conjecture.

The population of Parls in the middle ages has been estimated with as much diversity as that of London. M. Dulaure, on the basis of the *taille* in 1313, reckons the inhabitants at 49,110.^g But he seems to have made unwarrantable assumptions where his data were deficient. M. Guerard, on the other hand (*Documens Inedits*, 1841), after long calculations, brings the population of the city in 1292 to 215,861. This is certainly very much more than we could assign to London, or probably any European city; and, in fact, his estimate goes on two arbitrary postulates. The

^g *Hist de Paris*, vol. iii. p. 231.

extent of Paris in that age, which is tolerably known, must be decisive against so high a population.^h

The Winton Domesday, in the possession of the Society of Antiquaries of London, furnishes some important information as to that city, which, as well as London, does not appear in the great Domesday Book. This record is of the reign of Henry I. Winchester had been, as is well known, the capital of the Anglo-Saxon kings. It has been observed that "the opulence of the inhabitants may possibly be gathered from the frequent recurrence of the trade of goldsmith in it, and the populousness of the town from the enumeration of the streets." (Cooper's Public Records, i. 226.) Of these we find sixteen. "In the petition from the city of Winchester to king Henry VI. in 1450, no less than nine of these streets are mentioned as having been ruined." As York appears to have contained about 10,000 inhabitants under the Confessor, we may probably compute the population of Winchester at nearly twice that number.

NOTE VI. Page 32.

The Lords' committee extenuate the presumption that either knights or burgesses sat in any of these parliaments. The "*cunctarum regni civitatum pariter et burgorum potentiores*," mentioned by Wikes in 1269 or 1270, they suppose to have been invited in order to witness the ceremony of translating the body of Edward the Confessor to his tomb newly prepared in Westminster Abbey (p. 161). It is evident, indeed, that this assembly acted afterwards as a parliament in levying money. But the burgesses are not mentioned in this. It cannot, nevertheless, be presumed from the silence of the historian, who had previously informed us of their presence at Westminster, that they took no part. It may be,

^h John of Troyes says, in 1467, that from sixty to eighty thousand men appeared in arms. Dulaure (*Hist de Paris*, vol. iii. p. 605) says this gives 120,000 for the whole population; but it gives double, which is incredible. In the

thirteenth and fourteenth centuries the houses were still cottages: only four streets were paved; they were very narrow and dirty, and often inundated by the Seine. *Ib.* p. 198.

perhaps, more doubtful whether they were chosen by their constituents or merely summoned as "potentiores."

The words of the statute of Marlbridge (51 Hen. III.), which are repeated in French by that of Gloucester (6 Edw. I.), do not satisfy the committee that there was any representation either of counties or boroughs. "They rather import a selection by the king of the most discreet men of every degree" (p. 183). And the statutes of 13 Edw. I., referring to this of Gloucester, assert it to have been made by the king, "with prelates, earls, barons, and his council," thus seeming to exclude what would afterwards have been called the lower house. The assembly of 1271, described in the Annals of Waverley, "seems to have been an extraordinary convention, warranted rather by the particular circumstances under which the country was placed than by any constitutional law" (p. 173). It was, however, a case of representation; and following several of the like nature, at least as far as counties were concerned, would render the principle familiar. The committee are even unwilling to admit that "*la commune de la terre illoques* summons" in the statute of Westminster I., though expressly distinguished from the prelates, earls, and barons, appeared in consequence of election (p. 173). But, if not elected, we cannot suppose less than that all the tenants in chief, or a large number of them, were summoned; which, after the experience of representation, was hardly a probable course.

The Lords' committee, I must still incline to think, have gone too far when they come to the conclusion that, on the whole view of the evidence collected on the subject, from the 49th of Hen. III., to the 18th of Edw. I., there seems strong ground for presuming that, after the 49th of Hen. III., the constitution of the legislative assembly returned generally to its old course; that the writs issued in the 49th of Henry III., being a novelty, were not afterwards precisely followed, as far as appears, in any instance; and that the writs issued in the 11th of Edw. I., "for assembling two conventions, at York and Northampton, of knights, citizens, burgesses, and representatives of towns, without prelates, earls, and barons, were an extraordinary measure, probably adopted for the occasion, and never afterwards followed; and that the

writs issued in the 18th of Edw. I., for electing two or three knights for each shire without corresponding writs for election of citizens or "burgesses, and not directly founded on or conformable to the writs issued in the 49th of Henry III., were probably adopted for a particular purpose, possibly to sanction one important law [the statute *Quia Emptores*], and because the smaller tenants in chief of the crown rarely attended the ordinary legislative assemblies when summoned, or attended in such small numbers that a representation of them by knights chosen for the whole shire was deemed advisable, to give sanction to a law materially affecting all the tenants in chief, and those holding under them" (p. 204).

The election of two or three knights for the parliament of 18th Edw. I., which I have overlooked in my text, appears by an entry on the close roll of that year, directed to the sheriff of Northumberland; and it is proved from the same roll that similar writs were directed to all the sheriffs in England. We do not find that the citizens and burgesses were present in this parliament; and it is reasonably conjectured that, the object of summoning it being to procure a legislative consent to the statute *Quia Emptores*, which put an end to the subinfeudation of lands, the towns were thought to have little interest in the measure. It is, however, another early precedent for county representation; and that of 22nd of Edw. I. (see the writ in Eeport of Committee, p. 209) is more regular. We do not find that the citizens and burgesses were summoned to either parliament.

But, after the 23rd of Edward I., the legislative constitution seems not to have been unquestionably settled, even in the essential point of taxation. The Confirmation of the Charters, in the 25th year of that reign, while it contained a positive declaration that no "aids, tasks, or prises should be levied in future, without assent of the realm," was made in consideration of a grant made by an assembly in which representatives of cities and boroughs do not appear to have been present. Yet, though the words of the charter or statute are prospective, it seems to have long before been reckoned a clear right of the subject, at least by himself, not to be taxed without his consent. A tallage on royal towns and demesnes, nevertheless, was set without authority of parliament four

years afterwards. This " seems to show, either that the king's right to tax his demesnes at his pleasure was not intended to be included in the word tallage in that statute [meaning the supposed statute *de tallagio non conoedendo*], or that the king acted in contravention of it. But if the king's cities and boroughs were still liable to tallage at the will of the crown, it may not have been deemed inconsistent that they should be required to send representatives for the purpose of granting a general aid to be assessed on the same cities and boroughs, together with the rest of the kingdom, when such general aid was granted, and yet should be liable to be tallaged at the will of the crown when no such general aid was granted" (p. 244).

If in these later years of Edward's reign the king could venture on so strong a measure as the imposition of a tallage without consent of those on whom it was levied, it is less surprising that no representatives of the commons appear to have been summoned to one parliament, or perhaps two, in his twenty-seventh year, when some statutes were enacted. But, as this is merely inferred from the want of any extant writ, which is also the case in some parliaments where, from other sources, we can trace the commons to have been present, little stress should be laid upon it.

In the remarks which I have offered in these notes on the Report of the Lords' Committee, I have generally abstained from repeating any which Mr. Allen brought forward. But the reader should have recourse to his learned criticism in the *Edinburgh Review*. It will appear that the committee overlooked not a few important records, both in the reign of Edward I. and that of his son.

NOTE VII. Page 35.

Two considerable authorities have, since the first publication of this work, placed themselves, one very confidently, one much less so, on the side of our older lawyers and in favour of the antiquity of borough representation. Mr. Allen, who, in his review of my volumes (*Edinb. Rev.* xxx. 169), observes, as to this point,—
" We are inclined, in the main, to agree with Mr.

Hallam," lets us know, two or three years afterwards, that the scale was tending the other way, when, in his review of the Report of the Lords' Committee, who give a decided opinion that cities and boroughs were on no occasion called upon to assist at legislative meetings before the forty-ninth of Henry III., and are much disposed to believe that none were originally summoned to parliament, except cities and boroughs of ancient demesne, or in the hands of the king at the time when they received the summons, he says,— "We are inclined to doubt the first of these propositions, and convinced that the latter is entirely erroneous." (Edinb. Rev. xxxv. 30.) He allows, however, that our kings had no motive to summon their cities and boroughs to the legislature, for the purpose of obtaining money, "this being procured through the justices in eyre, or special commissioners; and therefore, if summoned at all, it is probable that the citizens and burgesses were assembled on particular occasions only, when their assistance or authority was wanted to confirm or establish the measures in contemplation by the government." But as he alleges no proof that this was ever done, and merely descants on the importance of London and other cities both before and after the Conquest, and as such an occasional summons to a great council, for the purpose of advice, would by no means involve the necessity of legislative consent, we can hardly reckon this very acute writer among the positive advocates of a high antiquity for the commons in parliament.

Sir Francis Palgrave has taken much higher ground, and his theory, in part at least, would have been hailed with applause by the parliaments of Charles I. According to this, we are not to look to feudal principles for our great councils of advice and consent. They were the aggregate of representatives from the courts-leet of each shire and each borough, and elected by the juries to present the grievances of the people and to suggest their remedies. The assembly summoned by William the Conqueror appears to him not only, as it did to lord Hale, "a sufficient parliament," but a regular one; "proposing the law and giving the initiation to the bill which required the king's consent." (Ed. Rev. xxxvi. 327.) "We cannot," he proceeds, "discover any essen-

tial difference between the powers of these juries and the share of the legislative authority which was enjoyed by the commons at a period when the constitution assumed a more tangible shape and form." This is supported with that copiousness and variety of illustration which distinguish his theories, even when there hangs over them something not quite satisfactory to a rigorous inquirer, and when their absolute originality on a subject so beaten is of itself reasonably suspicious. Thus we come in a few pages to the conclusion—"Certainly there is no theory so improbable, so irreconcilable to general history or to the peculiar spirit of our constitution, as the opinions which are held by those who deny the substantial antiquity of the house of commons. No paradox is so startling as the assumption that the knights and burgesses who stole into the great council between the close of the reign of John and the beginning of the reign of Edward should convert themselves at once into the third estate of the realm, and stand before the king and his peers in possession of powers and privileges which the original branches of the legislature could neither dispute nor withstand" (p. 332). "It must not be forgotten that the researches of all previous writers have been directed wholly in furtherance of the opinions which have been held respecting the feudal origin of parliament. No one has considered it as a common-law court."

I do not know that it is necessary to believe in a properly feudal *origin* of parliament, or that this hypothesis is generally received. The great council of the Norman kings was, as in common with Sir F. Palgrave and many others I believe, little else than a continuation of the witenagemot, the immemorial organ of the Anglo-Saxon aristocracy in their relation to the king. It might be composed, perhaps, more strictly according to feudal principles; but the royal thanes had always been consenting parties. Of the representation of courts-leet we may require better evidence: aldermen of London, or persons bearing that name, perhaps as landowners rather than citizens (see a former note), may possibly have been occasionally present; but it is remarkable that neither in historians nor records do we find this mentioned; that aldermen, in the municipal sense, are never enumerated among the constituents of a witenagemot or a council,

though they must, on the representative theory, have composed a large portion of both. But, waiving this hypothesis, which the author seems not here to insist upon, though he returns to it in the *Rise and Progress of the English Commonwealth*, why is it "a startling paradox to deny the substantial antiquity of the house of commons" ? By this I understand him to mean that representatives from counties and boroughs came regularly, or at least frequently, to the great councils of Saxon and Norman kings. Their indispensable consent in legislation I do not apprehend him to affirm, but rather the reverse :—"The supposition that in any early period the burgesses had a voice in the solemn acts of the legislature is untenable." (*Rise and Progress, &c.*, i. 314.) But they certainly did, at one time or other, obtain this right, "or convert themselves," as he expresses it, "into the third estate of the realm;" so that upon any hypothesis a great constitutional change was wrought in the powers of the commons. The revolutionary character of Montfort's parliament in the 49th of Hen. III. would sufficiently account both for the appearance of representatives from a democracy so favourable to that bold reformer and for the equality of power with which it was probably designed to invest them. But whether in the more peaceable times of Edward I. the citizens or burgesses were recognised as essential parties to every legislative measure, may, as I have shown, be open to much doubt.

I cannot upon the whole overcome the argument from the silence of all historians, from the deficiency of all proof as to any presence of citizens and burgesses, in a representative character as a house of commons, before the 49th year of Henry III.; because after this time historians and chroniclers exactly of the same character as the former, or even less copious and valuable, do not omit to mention it. We are accustomed in the sister kingdoms, so to speak, of the continent, founded on the same Teutonic original, to argue against the existence of representative councils, or other institutions, from the same absence of positive testimony. No one believes that the three estates of France were called together before the time of Philip the Fair. No one strains the representation of cities in the cortes of Castile beyond the

date at which we discover its existence by testimony. It is true that unreasonable inferences may be made from what is usually called negative evidence; but how readily and how often are we deceived by a reliance on testimony! In many instances the negative conclusion carries with it a conviction equal to a great mass of affirmative proof. And such I reckon the inference from the language of Roger Hoveden, of Matthew Paris, and so many more who speak of councils and parliaments full of prelates and nobles, without a syllable of the burgesses. Either they were absent, or they were too insignificant to be named; and in that case it is hard to perceive any motive for requiring their attendance.

NOTE VIII. Page 42.

A record, which may be read in Brady's History of England (vol. ii. Append, p. 66) and in Rymer (t. iv. p. 1237), relative to the proceedings on Edward H.'s flight into Wales and subsequent detention, recites that, "the king having left his kingdom without government, and gone away with notorious enemies of the queen, prince, and realm, divers prelates, earls, barons, and knights, then being at Bristol in the presence of the said queen and duke (prince Edward, duke of Cornwall), *by the assent of the whole commonalty of the realm there being*, unanimously elected the said duke to be guardian of the said kingdom; so that the said duke and guardian should rule and govern the said realm in the name and by the authority of the king his father, he being thus absent." But the king being taken and brought back into England, the power thus delegated to the guardian ceased of course; whereupon the bishop of Hereford was sent to press the king to permit that the great seal, which he had with him, the prince having only used his private seal, should be used in all things that required it. Accordingly the king sent the great seal to the queen and prince. The bishop is said to have been thus commissioned to fetch the seal by the prince and queen, and by the said prelates and peers, *with the assent of the said commonalty then being at Hereford*. It is plain that these were mere words of course; for no parliament had been convoked, and no

proper representatives could have been either at Bristol or Hereford. However, this is a very curious record, inasmuch as it proves the importance attached to the forms of the constitution at this period.

The Lords' committee dwell much on an enactment in the parliament held at York in 15 Edw. II. (1322), which they conceived to be the first express recognition of the constitutional powers of the lower house. It was there enacted that "for ever thereafter all manner of ordinances or provisions made by the subjects of the king or his heirs, by any power or authority whatsoever, concerning the royal power of the king or his heirs, or against the estate of the crown, should be void and of no avail or force whatsoever; but the matters to be established for the estate of the king and of his heirs, and for the estate of the realm and of the people, should be treated, accorded, and established in parliament by the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm, according as had been before accustomed. This proceeding, therefore, declared the legislative authority to reside only in the king, with the assent of the prelates, earls, and barons, and commons assembled in parliament; and that every legislative act not done by that authority should be deemed void and of no effect. By whatever violence this statute may have been obtained, it declared the Constitutional law of the realm on this important subject." (p. 282.) The violence, if resistance to the usurpation of a subject is to be called such, was on the part of the king, who had just sent the earl of Lancaster to the scaffold, and the present enactment was levelled at the ordinances which had been forced upon the crown by his faction. The lords ordainers, nevertheless, had been appointed with consent of the commons, as has been mentioned in the text; so that this provision in 15 Edward II. seems rather to limit than to enhance the supreme power of parliament, if it were meant to prohibit any future enactment of the same kind by its sole authority. But the statute is declaratory in its nature; nor can we any more doubt that the legislative authority was reposed in the king, lords, and commons before this era than that it was so ever afterwards. Unsteady as the constitutional usage had been through the reign of Edward I., and willing as

both he and his son may have been to prevent its complete establishment, the necessity of parliamentary consent both for levying money and enacting laws must have become an article of the public creed before his death. If it be true that even after this declaratory statute laws were made without the assent or presence of the commons, as the Lords' committee incline to hold (p. 285, 286, 287), it was undeniably an irregular and unconstitutional proceeding; but this can only show that we ought to be very slow in presuming earlier proceedings of the same nature to have been more conformable to the spirit of the existing constitution. The Lords' committee too often reason from the fact to the right, as well as from the words to the fact; both are fallacious, and betray them into some vacillation and perplexity. They do not, however, question, on the whole, but that a new constitution of the legislative assemblies of the realm had been introduced before the 15th year of Edward II, and that "the practice had prevailed so long before as to give it, in the opinion of the parliament then assembled, the force and effect of a custom, which the parliament declared should thereafter be considered as established law." (p. 293.) This appears to me rather an inadequate exposition of the public spirit, of the tendency towards enlarging the basis of the constitution, to which the "practice and custom" owed its origin; but the positive facts are truly stated.

NOTE IX. Page 124.

Writs are addressed in 11th of Edw. II. "*comitibus, majoribus baronibus, et prselatis*," whence the Lords' committee infer that the style used in John's charter was still preserved (Report, p. 277). And though in those times there might be much irregularity in issuing writs of summons, the term "*majores barones*" must have *had* an application to definite persons. Of the irregularity we may judge by the fact that under Edward I. about eighty were generally summoned; under his son never so many as fifty, sometimes less than forty, as may be seen in Dugdale's *Summonitiones ad Parliamentum*. The committee endeavour to draw an inference from this against a subsisting right of tenure. But if it is meant

that the king had an acknowledged prerogative of omitting any baron at his discretion, the higher English nobility must have lost its notorious privileges, sanctioned by long usage, by the analogy of all feudal governments, and by the charter of John, which, though not renewed in terms, nor intended to be retained in favour of the lesser barons, or tenants *in capite*, could not, relatively to the rights of the superior order, have been designedly relinquished.

The committee wish to get rid of tenure as conferring a right to summons; they also strongly doubt whether the summons conferred an hereditary nobility; but they assert that, in the 15th of Edward III., "those who may have been deemed to have been in the reign of John distinguished as *majores barones* by the honour of a personal writ of summons, or by the extent and influence of their property, from the other tenants in chief of the crown, were now clearly become, with the earls and the newly created dignity of duke, a distinct body of men denominated peers of the land, and having distinct personal rights; while the other tenants in chief, whatsoever their rights may have been in the reign of John, sunk into the general mass." (p. 314.)

The appellation "peers of the land" is said to occur for the first time in 14 Edw. II. (p. 281), and we find them very distinctly in the proceedings against Bedford and others at the beginning of the next reign. They were, of course, entitled to trial by their own order. But whether all laymen summoned by particular writs to parliament were at that time considered as peers, and triable by the rest as such, must be questionable, unless we could assume that the writ of summons already ennobled the blood, which is at least not the opinion of the committee. If, therefore, the writ did not constitute an hereditary peer, nor tenure in chief by barony give a right to sit in parliament, we should have a difficulty in finding any determinate estate of nobility at all, exclusive of earls, who were, at all times and without exception, indisputably noble; an hypothesis manifestly paradoxical, and contradicted by history and law. If it be said that prescription was the only title, this maybe so far granted that the *majores barones* had by prescription, antecedent to any statute or charter, been summoned to parliament;

but this prescription would not be broken by the omission, through negligence or policy, of an individual tenant by barony in a few parliaments. The prescription was properly in favour of the class, the *majores barones* generally, and as to them it was perfect, extending itself in right, if not always in fact, to every one who came within its scope.

In the Third Report of the Lords' Committee, apparently drawn by the same hand as the Second, they "conjecture that after the establishment of the commons' house of parliament as a body by election, separate and distinct from the lords,* all idea of a right to a writ of summons to parliament by reason of tenure had ceased, and that the dignity of baron, if not conferred by patent, was considered as derived only from the king's writ of summons." (Third Report, p. 226.) Yet they have not only found many cases of persons summoned by writ several times whose descendants have not been summoned, and hesitate even to approve the decision of the house on the Clifton barony in 1673, when it was determined that the claimant's ancestor, by writ of summons and sitting in parliament, was a peer, but doubt whether "even at this day the doctrine of that case ought to be considered as generally applicable, or may be limited by time and circumstances."¹ (p. 33.)

It seems, with much deference to more learned investigators, rather improbable that, either before or after the regular admission of the knights and burgesses by representation, and consequently the constitution of a distinct lords' house of parliament, a writ of summons could have been lawfully withheld at the king's pleasure from any one holding such lands by barony as rendered him notoriously one of the *majores barones*. Nor will this be much

¹ This doubt was soon afterwards changed into a proposition, strenuously maintained by the supposed compiler of these Reports, lord Redesdale, on the claim to the barony of L'Isle in 1829. The ancestor had been called by writ to several parliaments of Edw. III.; and having only a daughter, the negative argument from the omission of his posterity is of little value; for though the husbands of heiresses were frequently summoned, this does not seem to have

been an universal practice. It was held by lord Redesdale, that, at least until the statute of 5 Richard II. c. 4, no hereditary or even personal right to the peerage was created by the writ of summons. The house of lords rejected the claim, though the language of their resolution is not conclusive as to the principle. The opinion of lord R. has been ably impugned by Sir Harris Nicolas, in his Report of the L'Isle Peerage, 1829.

affected by arguments from the inexpediency or supposed anomaly of permitting the right of sitting as a peer of parliament to be transferred by alienation. The Lords' committee dwell at length upon them. And it is true that, in our original feudal constitution, the fiefs of the crown could not be alienated without its consent. But when this was obtained, when a barony had passed by purchase, it would naturally draw with it, as an incident of tenure, the privilege of being summoned to parliament, or, in language more accustomed in those times, the obligation of doing suit and service to the king in his high court. Nor was the alienee, doubtless, to be taxed without his own consent, any more than another tenant *in capite*. What incongruity, therefore, is there in the supposition that, after tenants in fee simple acquired by statute the power of alienation without previous consent of the crown, the new purchaser stood on the same footing in all other respects as before the statute? It is also much to be observed that the claim to a summons might be gained by some methods of purchase, using that word, of course, in, the legal sense. Thus the husbands of heiresses of baronies were frequently summoned, and sat as tenants by courtesy after the wife's death; though it must be owned that the committee doubt, in their Third Report (p. 47), whether tenancy by courtesy of a dignity was ever allowed as a right. Thus, too, every estate created in tail male was a diversion of the inheritance by the owner's sole will from its course according to law. Yet in the case of the barony of Abergavenny, even so late as the reign of James I., the heir male, being in seisin of the lands, was called by writ as baron, to the exclusion of the heir general. Surely this was an authentic recognition, not only of baronial tenure as the foundation of a right to sit in parliament, but of its alienability by the tenant.^k

If it be asked whether the posterity of a baron aliening the lands which gave him a right to be summoned to the king's court would be entitled to the privileges of peerage by nobility of blood, it is true that, according

The Lords' committee (Second Report, p. 436) endeavour to elude the force of this authority; but it manifestly appears that the Nevilles were preferred to

the Fanes for the particular barony in question; though some satisfaction was made to the claimant of the latter family by calling her to a different peerage*

to Collins, whose opinion the committee incline to follow, there are instances of persons in such circumstances being summoned. But this seems not to prove anything to the purpose. The king, no one doubts, from the time of Edward I., used to summon by writ many who had no baronial tenure; and the circumstance of having alienated a barony could not render any one incapable of attending parliament by a different title. It is very hard to determine any question as to times of much irregularity; but it seems that the posterity of one who had parted with his baronial lands would not, in those early times, as a matter of course, remain noble. A right by tenure seems to exclude a right by blood; not necessarily, because two collateral titles may co-exist, but in the principle of the constitution. A feudal principle was surely the more ancient; and what could be more alien to this than a baron, a peer, an hereditary counsellor, without a fief? Nobility, that is, gentility of birth, might be testified by a pedigree or a bearing; but a peer was to be in arms for the crown, to grant his own money as well as that of others, to lead his vassals, to advise, to exhort, to restrain the sovereign. The new theory came in by degrees, but in the decay of every feudal idea; it was the substitution of a different pride of aristocracy for that of baronial wealth and power; a pride nourished by heralds, more peaceable, more indolent, more accommodated to the rules of fixed law and vigorous monarchy. It is difficult to trace the progress of this theory, which rested on nobility of blood, but yet so remarkably modified by the original principle of tenure, that the privileges of this nobility were ever confined to the actual possessor, and did not take his kindred out of the class of commoners. This sufficiently demonstrates that the phrase is, so to say, catachrestic, not used in a proper sense; inasmuch as the actual seisin of the peerage as an hereditament, whether by writ or by patent, is as much requisite at present for nobility, as the seisin of an estate by barony was in the reign of Henry III.

Tenure by barony appears to have been recognised by the house of lords in the reign of Henry VI., when the earldom of Arundel was claimed as annexed to the "**castle, honour, and lordship** aforesaid." The Lords'

committee have elaborately disproved the allegations of descent and tenure, on which this claim was allowed. (Second Eeport, p. 406-426.) But all with which we are concerned is the decision of the crown and of the house in the 11th year of Henry VI., whether it were right or wrong as to the particular facts of the case.. And here we find that the king, by the advice and assent of the lords, " considering that Richard Fitzalan, &c, was seised of the castle, honour, and lordship in fee, and by reason of his possession thereof, without any other reason or creation, was earl of Arundel, and held the name, style, and honour of earl of Arundel, and the place and seat of earl of Arundel in parliament and councils of the king," &c, admits him to the same seat and place as his ancestors, earls of Arundel, had held. This was long afterwards confirmed by act of parliament (3 Car. I.), reciting the dignity of earl of Arundel to be real and local, &c, and settling the title on certain persons in tail, with provisions against alienation of the castle and honour. This appears to establish a tenure by barony in Arundel, as a recent determination had done in Abergavenny. Arundel was a very peculiar instance of an earldom by tenure. For we cannot doubt that all earls were peers of parliament by virtue of that rank, though, in fact, all held extensive lands of the crown. But in 1669 a new doctrine, which probably had long been floating among lawyers and in the house of lords, was laid down by the king in council on a claim to the title of Fitzwalter. The nature of a barony by tenure having been discussed, it was found " to have been discontinued for many ages, and not in being" (a proposition not very tenable, if we look at the Abergavenny case, even setting aside that of Arundel as peculiar in its character, and as settled by statute); " and so not fit to be received, or to admit any pretence of right to succession thereto." It is fair to observe that some eminent judges were present on this occasion. The committee justly say that " this decision" (which, after all, was not in the house of lords) " may perhaps be considered as amounting to a solemn opinion that, although in early times the right to a writ of summons to parliament as a baron may have been founded on tenure, a contrary practice had prevailed for ages, and

that, therefore, it was not to be taken as then forming part of the constitutional law of the land." (p. 446.) Thus ended barony by tenure. The final decision, for such it has been considered, and recent attempts to revive the ancient doctrine have been defeated, has prevented many tedious investigations of claims to baronial descent, and of alienations in times long past. For it could not be pretended that every fraction of a barony gave a right to summons; and, on the other hand, alienations of parcels, and descents to co-parceners, must have been common, and sometimes difficult to disprove. It was held, indeed, by some, that the *caput baronice*, or principal lordship, contained, as it were, the vital principle of the peerage, and that its owner was the true baron; but this assumption seems uncertain.

It is not very easy to reconcile this peremptory denial of peerage by tenure with the proviso in the recent statute taking away tenure by knight-service, and, inasmuch as it converts all tenure into socage, that also by barony, "that this act shall not infringe or hurt any title of honour, feudal or other, by which any person hath or may have right to sit in the lords' house of parliament, as to his or their title of honour, or sitting in parliament, and the privilege belonging to them as peers." (Stat. 12 Car. II. c. 24, s. 11.)

Surely this clause was designed to preserve the incident to baronial tenure, the privilege of being summoned to parliament, while it destroyed its original root, the tenure itself. The privy council, in their decision on the Fitzwalter claim, did not allude to this statute, probably on account of the above proviso, and seem to argue that, if tenure by barony was no longer in being, the privilege attached to it must have been extinguished also. It is, however, observable that tenure by barony is not taken away by the statute, except by implication. No act indeed can be more loosely drawn than this, which was to change essentially the condition of landed property throughout the kingdom. It literally abolishes all tenure *in capite*; though this is the basis of the crown's right to escheat, and though lands in common socage, which the act with a strange confusion opposes to socage *in capite*, were as much holden of the king or other lord as those by knight-service. Whether it was

intended by the silence about tenure by barony to pass it over as obsolete, or this arose from negligence alone, it cannot be doubted that the proviso preserving the right of sitting in parliament by a feudal honour was introduced in order to save that privilege, as well for Arundel and Abergavenny as for any other that might be entitled to it.^m

NOTE X. Page 142.

The equitable jurisdiction of the Court of Chancery has been lately traced, in some respects, though not for the special purpose mentioned in the text, higher than the reign of Richard II. This great minister of the crown, as he was at least from the time of the Conquest, always till the reign of Edward III. an ecclesiastic of high dignity, and honourably distinguished as the keeper of the king's conscience, was peculiarly intrusted with the duty of redressing the grievances of the subject, both when they sprung from misconduct of the government, through its subordinate officers, and when the injury had been inflicted by powerful oppressors. He seems generally to have been the chief or president of the council, when it exerted that jurisdiction which we have been sketching in the text, and which will be the subject

^m The continuance of barony by tenure has been controverted by Sir Harris Nicolas, in some remarks on such a claim preferred by the present earl Fitzharding while yet a commoner, in virtue of the possession of Berkeley castle, published as an Appendix to his Report of the L'Isle Peerage. In the particular case there seem to have been several difficulties, independently of the great one, that, in the reign of Charles II, barony by tenure had been finally condemned. But there is surely a great general difficulty on the opposite side, in the hypothesis that, while it is acknowledged that there were, in the reigns of Edward I. and Edward II, certain known persons holding by barony and called peers of the realm, it could have been agreeable to the feudal or to the English institution that the king, by refusing to

the posterity of such barons a writ of summons to parliament, might deprive them of their nobility, and reduce them for ever to the rank of commoners.

ⁿ It has been doubted, notwithstanding the authority of Spelman, and some earlier but rather precarious testimony, whether the chancellor before the Conquest was any more than a scribe or secretary. Palgrave, in the Quarterly Review, xxxiv. 291. The Anglo-Saxon charters, as far as I have observed, never mention him as a witness; which seems a very strong circumstance. Ingulfus, indeed, has given a pompous account of chancellor Turketul; and, if the history ascribed to Ingulfus be genuine, the office must have been of high dignity. Lord Campbell assumes this in his Lives of the Chancellors.

of another note. But lie is more prominent when presiding in a separate tribunal as a single judge.

The Court of Chancery is not distinctly to be traced under Henry III. For a passage in Matthew Paris, who says of Eadulfus de Nevil—"Erat regis fidelissimus cancellarius, et inconcussa columna veritatis, singulis sua jura, prsecipue pauperibus, juste reddens et indilate," may be construed of his judicial conduct in the council. This province naturally, however, led to a separation of the two powers. And in the reign of Edward I. we find the king sending certain of the petitions addressed to him, praying extraordinary remedies, to the chancellor and master of the rolls, or to either separately, by writ under the privy seal, which was the usual mode by which the king delegated the exercise of his prerogative to his council, directing them to give such remedy as should appear to be consonant to honesty (or equity, *honestati*). "There is reason to believe," says Mr. Spence (*Equitable Jurisdiction*, p. 335), "that this was not a novelty." But I do not know upon what grounds this is believed. Writs, both those of course and others, issued from Chancery in the same reign. (Palgrave's *Essay on King's Council*, p. 15.) Lord Campbell has given a few specimens of petitions to the council, and answers endorsed upon them, in the reign of Edward I., communicated to him by Mr. Hardy from the records of the Tower. In all these the petitions are referred to the chancellor for justice. The entry, at least as given by lord Campbell, is commonly so short that we cannot always determine whether the petition was on account of wrongs by the crown or others. The following is rather more clear than the rest:—"18 Edw. I. The king's tenants of Aulton complain that Adam Gordon ejected them from their pasture, contrary to the tenor of the king's writ. Resp. Veniant partes coram cancellario, et ostendat ei Adam quare ipsos ejecit, et fiat iis justitia." Another is a petition concerning concealment of dower, for which, perhaps, there was no legal remedy.

In the reign of Edward II. the peculiar jurisdiction of the chancellor was still more distinctly marked. "From petitions and answers lately discovered, it appears that during this reign the jurisdiction of the Court of Chancery was considerably extended, as the

' *consuetudo eancellariaa* ' is often familiarly mentioned. We find petitions referred to the chancellor in his court, either separately, or in conjunction with the king's justices, or the king's Serjeants; on disputes respecting the wardship of infants, partition, dower, rent-charges, tithes, and goods of felons. The chancellor was in full possession of his jurisdiction over charities, and he superintended the conduct of coroners. Mere wrongs, such as malicious prosecutions and trespasses to personal property, are sometimes the subject of proceedings before him; but I apprehend that those were cases where, from powerful combinations and confederacies, redress could not be obtained in the courts of common law." (*Lives of Chanc.* vol. i. p. 204.)

Lord Campbell, still with materials furnished by Mr. Hardy, has given not less than thirty-eight entries during the reign of Edward I., where the petition, though sometimes directed to the council, is referred to the chancellor for determination. One only of these, so far as we can judge from their very brief expression, implies anything of an equitable jurisdiction. It is again a case of dower, and the claimant is remitted to the Chancery; "*et fiat sibi ibidem justitia, quia non potest juvari per communem legem per breve de dote.*" This case is in the *Rolls of Parliament* (i. 340), and had been previously mentioned by Mr. Bruce in a learned memoir on the Court of Star-Chamber. (*Archseologia*, xxv. 345.) It is difficult to say whether this fell within the modern rules of equity, but the general principle is evidently the same.

Another petition is from the commonalty of Suffolk to the council, complaining of false indictments and presentments in courts-leet. It is answered—" *Si quis sequi voluerit adversus falsos indicadores et procuratores de falsis indictamentis, sequatur in Cancell. et habebit remedium consequens.*" Several other entries in this list are illustrative of the jurisdiction appertaining, in fact at least, to the council and the chancellor; and being of so early a reign form a valuable accession to those which later records have furnished to Sir Matthew Hale and others.

The Court of Chancery began to decide causes as a court of equity, according to Mr. Hardy, in the reign of

Edward I I I . , probably about 22 Edw. I I I . (Introduction to Close Rolls, p. 28.) Lord Campbell would carry this jurisdiction higher, and the instances already mentioned may be sufficient just to prove that it had begun to exist. It certainly seems no unnatural supposition that the great principle of doing justice, by which the council and the chancellor professed to guide their exercise of judicature, may have led them to grant relief in some of those numerous instances where the common law was defective or its rules too technical and unbending. But, as has been observed, the actual entries, as far as quoted, do not afford many precedents of equity. Mr. Hardy, indeed, suggests (p. 25) that the *Curia Regis* in the Norman period proceeded on equitable principles; and that this led to the removal of complaints into it from the county-court. This is, perhaps, not what we should naturally presume. The subtle and technical spirit of the Norman lawyers is precisely that which leads, in legal procedure, to definite and unbending rules; while in the lower courts, where Anglo-Saxon thanes had ever judged by the broad rules of justice, according to the circumstances of the case, rather than a strict line of law which did not yet exist, we might expect to find all the uncertainty and inconsistency which belongs to a system of equity, until, as in England, it has acquired by length of time the uniformity of law, but none at least of the technicality so characteristic of our Norman common law, and by which the great object of judicial proceedings was so continually defeated. This, therefore, does not seem to me a probable cause of the removal of suits from the county-court or court-baron to those of Westminster. The true reason, as I have observed in another place, was the partiality of these local tribunals. And the expense of trying a suit before the justices in eyre might not be very much greater than in the county-court.

I conceive, therefore, that the three supreme courts at Westminster proceeded upon those rules of strict law which they had chiefly themselves established; and this from the date of their separation from the original *Curia Regis*. But whether the king's council may have given more extensive remedies than the common law afforded, as early at least as the reign of Henry I I I . , is what we are not competent, apparently, to affirm or deny. We

are at present only concerned with the Court of Chancery. And it will be interesting to quote the deliberate opinion of a late distinguished writer, who has taken a different view of the subject from any of his predecessors.

"After much deliberation," says lord Campbell, "I must express my clear conviction that the chancellor's equitable jurisdiction is as indubitable and as ancient as his common-law jurisdiction, and that it may be traced in a manner equally satisfactory. The silence of Bracton, Glanvil, Fleta, and other early juridical writers, has been strongly relied upon to disprove the equitable jurisdiction of the chancellor; but they as little notice his common-law jurisdiction, most of them writing during the subsistence of the *Aula Regia*; and they all speak of the Chancery, not as a court, but merely as an office for the making and sealing of writs. There are no very early decisions of the chancellors on points of law any more than of equity, to be found in the Year-books or old abridgments. . . . By 'equitable jurisdiction' must be understood the extraordinary interference of the chancellor, without common-law process or regard to the common-law rules of proceeding, upon the petition of a party grieved who was without adequate remedy in a court of common law; whereupon the opposite party was compelled to appear and to be examined, either personally or upon written interrogatories: and evidence being heard on both sides, without the interposition of a jury, an order was made *secundum ceguum et bonum*, which was enforced by imprisonment. Such a jurisdiction had belonged to the *Aula Begia*, and was long exercised by parliament; and, when parliament was not sitting, by the king's ordinary council. Upon the dissolution of the *Aula Eegia* many petitions, which parliament or the council could not conveniently dispose of, were referred to the chancellor, sometimes with and sometimes without assessors. To avoid the circuitry of applying to parliament or the council, the petition was very soon, in many instances, addressed originally to the chancellor himself." (Lives of Chancellors, i. 7.)

In the latter part of Edward III.'s long reign this equitable jurisdiction had become, it is likely, of such frequent exercise, that we may consider the following brief summary by lord Campbell as probable by analogy

and substantially true, if not sustained in all respects by the evidence that has yet been brought to light:—"The jurisdiction of the Court of Chancery was now established in all matters where its own officers were concerned, in petitions of right where an injury was alleged to be done to a subject by the king or his officers in relieving against judgments in courts of law (lord C. gives two instances), and generally in cases of fraud, accident, and trust." (p. 291.)

In the reign of Richard I I . the writ of *subpoena* was invented by John de Waltham, master of the rolls ; and to this a great importance seems to have been attached at the time, as we may perceive by the frequent complaints of the commons in parliament, and by the traditional abhorrence in which the name of the inventor was held. "In reality," says lord Campbell, "he first framed it in its present form when a clerk in Chancery in the latter end of the reign of Edward I I I . ; but the invention consisted in merely adding to the old clause, *Quibusdam certis de causis*, the words '*Et hoc sub poena centum librarum nullatenus omittas*;' and I am at a loss to conceive how such importance was attached to it, or how it was supposed to have brought about so complete a revolution in equitable proceedings, for the penalty was never enforced; and if the party failed to appear, his default was treated, according to the practice prevailing in our own time, as a contempt of court, and made the foundation of compulsory process." (p. 296.)

The commons in parliament, whose sensitiveness to public grievances was by no means accompanied by an equal sagacity in devising remedies, had, probably without intention, vastly enhanced the power of the chancellor by a clause in a remedial act passed in the thirty-sixth year of Edward I I I . , that, "If any man that feeleth himself aggrieved contrary to any of the articles above written, or others contained in divers statutes, will come into the Chancery, or any for him, and thereof make his complaint, he shall presently there have remedy by force of the said articles or statutes, without elsewhere pursuing to have remedy." Yet nothing could be more obvious than that the breach of any statute was cognizable before the courts of law. And the mischief of permitting men to be sued vexatiously before the chan-

cellor becoming felt, a statute was enacted, thirty years indeed after this time (17 Ric. II. c. 6), analogous altogether to those in the late reign respecting the jurisdiction of the council, which, reciting that "people be compelled to come before the king's council, or in the Chancery, by writs grounded on untrue suggestions," provides that "the chancellor for the time being, presently after that such suggestions be duly found and proved untrue, shall have power to ordain and award damages, according to his discretion, to him which is so troubled unduly as aforesaid." "This remedy," lord Campbell justly remarks, "which was referred to the discretion of the chancellor himself, whose jurisdiction was to be controlled, proved, as might be expected, wholly ineffectual; but it was used as a parliamentary recognition of his jurisdiction, and a pretence for refusing to establish any other check on it." (p. 247.)

A few years before this statute the commons had petitioned (13 Ric. II., Rot. Parl., iii, 269) that the chancellor might make no order against the common law, and that no one should appear before the chancellor where remedy was given by the common law. "This carries with it an admission," as lord C. observes, "that a power of jurisdiction did reside in the chancellor,, so long as he did not determine against the common law, nor interfere where the common law furnished a remedy. The king's answer, 'that it should continue as the usage had been heretofore,' clearly demonstrates that such an authority, restrained within due bounds, was recognised by the constitution of the country." (p. 305.)

The act of 17 Ric. II. seems to have produced a greater regularity in the proceedings of the court, and put an end to such hasty interference, on perhaps verbal suggestions, as had given rise to this remedial provision. From the very year in which the statute was enacted we find bills in Chancery, and the answers to them, regularly filed; the grounds of demanding relief appear, and the chancellor renders himself in every instance responsible for the orders he has issued, by thus showing that they came within his jurisdiction. There are certainly many among the earlier bills in Chancery, which, according to the statute law and the great principle that they were determinable in other courts, could not have

been heard; but we are unable to pronounce bow far the allegation usually contained or implied, that justice could not be had elsewhere, was founded on the real circumstances. A calendar of these early proceedings (in abstract) is printed in the Introduction to the first volume of the Calendar of Chancery Proceedings in the Reign of Elizabeth, and may also be found in Cooper's Public Records, i. 356.

The struggle, however, in behalf of the common law was not at an end. It is more than probable, that the petitions against encroachments of Chancery, which fill the rolls under Henry IV., Henry V., and in the minority of Henry VI., emanated from that numerous and jealous body whose interests as well as prejudices were so deeply affected. Certain it is that the commons, though now acknowledging an equitable jurisdiction, or rather one more extensive than is understood by the word "equitable," in the greatest judicial officer of the crown, did not cease to remonstrate against his transgression of these boundaries. They succeeded so far, in 1436, as to obtain a statute (15 Hen. VI. c. 4) in these words:—"For that divers persons have before this time been greatly vexed and grieved by writs of *subpoena*, purchased for matters determinable by the common law of this land, to the great damage of such persons so vexed, in suspension and impediment of the common law as aforesaid; Our lord the king doth command that the statutes thereof made shall be duly observed, according to the form and effect of the same, and that no writ of *subpoena* be granted from henceforth until surety be found to satisfy the party so grieved and vexed for his damages and expenses, if so be that the matter cannot be made good which is contained in the bill." It was the intention of the commons, as appears by the preamble of this statute, and more fully by their petition in Rot. Parl. (iv. 101), that the matters contained in the bill on which the *subpoena* was issued should be not only true in themselves, but such as could not be determined at common law. But the king's answer appears rather equivocal.

The principle seems nevertheless to have been generally established, about the reign of Henry VI., that the Court of Chancery exercises merely a remedial jurisdiction, not indeed controllable by courts of law, unless

possibly in such circumstances as cannot be expected, but bound by its general responsibility to preserve the limits which ancient usage and innumerable precedents have imposed. It was at the end of this reign, and not in that of Richard I L, according to the writer so often quoted, that the great enhancement of the chancellor's authority, by bringing feoffments to uses within it, opened a new era in the history of our law. And this the judges brought on themselves by their narrow adherence to technical notions. They now began to discover this; and those of Edward IV., as Lord Campbell well says, were "very bold men," having repealed the statute *de donis* by their own authority in Taltarum's case—a stretch of judicial power beyond any that the Court of Chancery had ventured upon. They were also exceedingly jealous of that court; and in one case, reported in the Year-books (22 Edw. IV. 37), advised a party to disobey an injunction from the Court of Chancery, telling him that, if the chancellor committed him to the Fleet, they would discharge the prisoner by *habeas corpus*. (Lord Campbell, p. 394.) The case seems to have been one where, in modern times, no injunction would have been granted, the courts of law being competent to apply a remedy.

NOTE X I. Page 145.

This intricate subject has been illustrated, since the first publication of these volumes, in an Essay upon the original Authority of the King's Council, by Sir Francis Palgrave (1834), written with remarkable perspicuity and freedom from diffusiveness. But I do not yet assent to the judgment of the author as to the legality of proceedings before the council, which I have represented as unconstitutional, and which certainly it was the object of parliament to restrain.

"It seems," he says, "that in the reign of Henry III. the council was considered as a court of peers within the terms of Magna Charta; and before which, as a court of original jurisdiction, the rights of tenants holding *in capite* or by barony were to be discussed and decided, and it unquestionably exercised a direct jurisdiction over all the king's subjects" (p. 34). The first volume of Close

Bolls, published by Mr. Hardy since Sir F. Palgrave's Essay, contains no instances of jurisdiction exercised by the council in the reign of John. But they begin immediately afterwards, in the minority of Henry III.; so that we have not only the fullest evidence that the council took on itself a coercive jurisdiction in matters of law at that time, but that it had not done so before: for the Close Rolls of John are so full as to render the negative argument satisfactory. It will, of course, be understood that I take the facts on the authority of Mr. Hardy (Introduction to Close Rolls, vol. ii.), whose diligence and accuracy are indisputable. Thus this exercise of judicial power began immediately after the Great Charter. And yet, if it is to be reconciled with the twenty-ninth section, it is difficult to perceive in what manner that celebrated provision for personal liberty against the crown, which has always been accounted the most precious jewel in the whole coronet, the most valuable stipulation made at Runnymede, and the most enduring to later times, could merit the fondness with which it has been regarded. "Non super eum ibimus, nee super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre." If it is alleged that the jurisdiction of the king's council was the law of the land, the whole security falls to the ground and leaves the grievance as it stood, unredressed. Could the judgment of the council have been reckoned, as Sir F. Palgrave supposes, a "iudicium parium suorum," except perhaps in the case of tenants in chief? The word is commonly understood of that trial *per pais* which, in one form or another, is of immemorial antiquity in our social institutions.

"Though this jurisdiction," he proceeds, "was more frequently called into action when parliament was sitting, still it was no less inherent in the council at all other times; and until the middle of the reign of Edward III. no exception had ever been taken to the form of its proceedings." He subjoins indeed in a note, "Unless the statute of 5 Edw. III. c. 9, may be considered as an earlier testimony against the authority of the council This, however, is by no means clear, and there is no COP responding petition in the parliament roll from which any further information could be obtained" (p. 34).

The irresistible conclusion from this passage is, that

we have been wholly mistaken in supposing the commons under Edward III. and his successors to have resisted an illegal encroachment of power in the king's ordinary council, while it had in truth been exercising an ancient jurisdiction, never restrained by law and never complained of by the subject. This would reverse our constitutional theory to no small degree, and affect so much the spirit of my own pages, that I cannot suffer it to pass, coming on an authority so respectable, without some comment. But why is it asserted that this jurisdiction was inherent in the council? Why are we to interpret *Magna Charta* otherwise than according to the natural meaning of the words and the concurrent voice of parliament? The silence of the commons in parliament under Edward II. as to this grievance will hardly prove that it was not felt, when we consider how few petitions of a public nature, during that reign, are on the rolls. But it may be admitted that they were not so strenuous in demanding redress, because they were of comparatively recent origin as an estate of parliament, as they became in the next long reign, the most important, perhaps, in our early constitutional history.

It is doubted by Sir F. Palgrave whether the statute of 5 Edw. III. c. 9, can be considered as a testimony against the authority of the council. It is, however, very natural so to interpret it, when we look at the subsequent statutes and petitions of the commons, directed for more than a century to the same object. "No man shall be taken," says lord Coke (2 Inst. 46), "that is, restrained of liberty, by petition or suggestion to the king or to his council, unless it be by indictment or presentment of good and lawful men, where such deeds be done. This branch and divers other parts of this act have been wholly explained by divers acts of parliament, &c, quoted in the margin." He then gives the titles of six statutes, the first being this of 5 Edw. III. c. 9. But let us suppose that the petition of the commons in 25 Edw. III. demanded an innovation in law, as it certainly did in long-established usage. And let us admit what is justly pointed out by Sir F. Palgrave, that the king's first answer to their petition is not commensurate to its request, and reserves, though it is not quite easy to see what, some part of its extraordinary jurisdic-

tion.^o Still the statute itself, enacted on a similar petition in a subsequent parliament, is explicit that "none shall be taken by petition or suggestion to the king or his council, unless it be by indictment or presentment" (in a criminal charge), "or by writ original at the common law" (in a civil suit), "nor shall be put out of his franchise of freehold, unless he have been duly put to answer, and forejudged of the same by due course of law."

Lord Hale has quoted a remarkable passage from a Year-book, not long after these statutes of 25 Edw. III. and 28 Edw. III., which, if Sir F. Palgrave had not overlooked, he would have found not very favourable to his high notions of the king's prerogative in council. "In after ages," says Hale, "the constant opinion and practice was to disallow any reversals of judgment by the council, which appears by the notable case in Year-book, 39 Edw. III. 14." (Jurisdiction of Lords' House, p. 41.) It is indeed a notable case, wherein the chancellor before the council reverses a judgment of a court of law. "Mes les justices nepristoient nul regard al reverser devant le council, par ceo que ce ne fust place ou jugement purroit estre reverse." If the council could not exercise this jurisdiction on appeal, which is not perhaps expressly taken away by any statute, much less against the language of so many statutes could they lawfully entertain any original suit. Such, however, were the vacillations of a motley assembly, so steady the perseverance of government in retaining its power, so indefinite the limits of ancient usage, so loose the phrases of remedial statutes, passing sometimes by their generality the intentions of

^o The words of the petition and answer are the following:—

"Item, que nul franc homme ne soit mys a respondre de son franc tenement, ne de riens qui touche vie et membre, fyns ou redemptions, par appossailles devant le Conseil nostre seigneur le roi, ne devant ses ministres queconques, sinoun par proces de ley de ces en arere use."

"n plect a nostre seigneur le roi que les leies de son roialme soient tenuz et gardez en lour force, et que nul homme soit tenu a respondre de son fraunk tenement, sinoun par processe de ley: mes de chose que touche vie ou membre, con-

temptz on excesse, soit fail come ad este use ces en arere." Hot. Par. ii. 228.

It is not easy to perceive what was reserved by the words "chose que touche vie ou membre;" for the council never determined these. Possibly it regarded accusations of treason or felony, which they might entertain as an inquest, though they would ultimately be tried by a jury. Contempts are easily understood; and by excesses were meant riots and seditions. These political offences, which could not be always safely tried in a lower court, it was the constant intention of the government to reserve for the council.

those who enacted them, so useful, we may add, and almost indispensable, was a portion of those prerogatives which the crown exercised through the council and chancery, that we find soon, afterwards a statute (37 Edw. III. c. 18), which recognises in some measure those irregular proceedings before the council, by providing only that those who make suggestions to the chancellor and great council, by which men are put in danger against the form of the charter, shall give security for proving them. This is rendered more remedial by another act next year (38 Edw. III. c. 9), which, however, leaves the liberty of making such suggestions untouched. The truth is, that the act of 25 Edw. III. went to annihilate the legal and equitable jurisdiction of the Court of Chancery—the former of which had been long exercised, and the latter was beginning to spring up. But the 42 Edw. III. c. 3, which seems to go as far as the former in the enacting words, will be found, according to the preamble, to regard only criminal charges.

Sir Francis Palgrave maintains that the council never intermitted its authority, but on the contrary "it continually assumed more consistency and order. It is probable that the long absences of Henry V. from England invested this body with a greater degree of importance. After every minority and after every appointment of a select or extraordinary council by authority of the legislature, we find that the ordinary council acquired a fresh impulse and further powers. Hence the next reign constitutes a new era" (p. 80). He proceeds to give the same passage which I have quoted from Rot. Parl. 8 Hen. VI., vol. v. p. 343, as well as one in an earlier parliament (2 Hen. VI. p. 28). But I had neglected to state the whole case where I mention the articles settled in parliament for the regulation of the council. In the first place, this was not the king's ordinary council, but one specially appointed by the lords in parliament for the government of the realm during his minority. They consisted of certain lords spiritual and temporal, the chancellor, the treasurer, and a few commoners. These commissioners delivered a schedule of provisions "for the good and the governance of the land, which the lords **that be of the king's council** desireth" (p. 28). It does

not explicitly appear that the commons assented to these provisions; but it may be presumed, at least in a legal sense, by their being present and by the schedule being delivered into parliament, "*baillez en meme le parlement.*" But in the 8 Hen. VI., where the same provision as to the jurisdiction of this extraordinary council is repeated, the articles are said, after being approved by the lords spiritual and temporal, to have been read "*coram domino rege in eodem parlamento, in preseantia trium regni statuum*" (p. 343). It is always held that what is expressly declared to be done in presence of all the estates is an act of parliament.

We find, therefore, a recognition of the principle which had always been alleged in defence of the ordinary council in this parliamentary confirmation—the principle that breaches of the law, which the law could not, through the weakness of its ministers, or corruption, or partiality, sufficiently repress, must be reserved for the strong arm of royal authority. "Thus," says Sir Francis Palgrave, "did the council settle and define its principles und practice. A new tribunal was erected, and one which obtained a virtual supremacy over the common law. The exception reserved to their 'discretion' of interfering wherever their lordships felt too much might on one side, and too much unmight on the other, was of itself sufficient to embrace almost every dispute or trial"

But, in the first place, this latitude of construction was not by any means what the parliament meant to allow, nor could it be taken, except by wilfully usurping powers never imparted; and, secondly, it was not the ordinary council which was thus constituted during the king's minority; nor did the jurisdiction intrusted to persons so specially named in parliament extend to the regular officers of the crown. The restraining statutes were suspended for a time in favour of a new tribunal. But I have already observed that there was always a class of cases precisely of the same kind as those mentioned in the apt creating this tribunal, tacitly excluded from the operation of those statutes, wherein the coercive jurisdiction of the king's ordinary council had great convenience, namely, where the course of justice was obstructed by riots, combinations of maintenance, or overawing in-

fluence. And there is no doubt that, down to the final abolition of the Court of Star Chamber (which was no other than the *consilium ordinarium* under a different name), these offences were cognizable in it, without the regular forms of the common law.^p

" From the reign of Edward IV. we do not trace any further opposition to the authority either of the chancery or of the council. These courts had become engrafted on the constitution; and if they excited fear or jealousy, there was no one who dared to complain. Yet additional parliamentary sanction was not considered as unnecessary by Henry VII., and in the third year of his reign an act was passed for giving the Court of Star Chamber, which had now acquired its determinate name, further authority to punish divers misdemeanours." (Palgrave, p. 97.)

It is really more than we can grant that the jurisdiction of the *consilium ordinarium* had been engrafted on the constitution, when the statute-book was full of laws to restrain, if not to abrogate it. The acts already mentioned, in the reign of Henry VI., by granting a temporary and limited jurisdiction to the council, demonstrate that its general exercise was not acknowledged by parliament. We can only say that it may have continued without remonstrance in the reign of Edward IV. I have observed in the text that the Bolls of Parliament under Edward IV. contain no complaints of grievances. But it is not quite manifest that the council did exercise in that reign as much jurisdiction as it had once done. Lord Hale tells us that " this jurisdiction was gradually bought iato great disuse, though "there remain some straggling footsteps of their proceedings till near 3 Hen. VII" (Hist. of Lords' Jurisdiction, p. 38.) And the famous statute in that year, which erected a new court, sometimes improperly called the Court of Star Chamber, seems to have been prompted by a desire to restore, in a new and more legal form, a jurisdiction, which was become almost obsolete, and, being in contradiction to actq of parliament, could not well be rendered effective without one.^q

We cannot but discover, throughout the learned and

^p See Note in p. 145, for the statute 31 H. VI. c. 2.

^q See Constitutional History of England, vol i p. 48. (1842.)

luminous Essay on the Authority of the King's Council, a strong tendency to represent its exercise as both constitutional and salutary. The former epithet cannot, I think, be possibly applicable in the face of statute law; for what else determines our constitution? But it is a problem with some, whether the powers actually exerted by this anomalous court, admitting them to have been, at least latterly, in contravention of many statutes, may not have been rendered necessary by the disorderly condition of society and the comparative impotence of the common law. This cannot easily be solved with the defective knowledge that we possess. Sometimes, no doubt, the "might on one side, and unmight on the other," as the answer to a petition forcibly expresses it, afforded a justification which, practically at least, the commons themselves were content to allow. But were these exceptional instances so frequent as not to leave a much greater number wherein the legal remedy by suit before the king's justices of assise might have been perfectly effectual? For we are not concerned With the old county-courts, which were perhaps tumultuary and partial enough, but with the regular administration, civil and criminal, before the king's justices of oyer and terminer and of gaol delivery. Had not they, generally speaking, in the reign of Edward III., and his successors, such means of enforcing the execution of law as left no sufficient pretext for recurring to an arbitrary tribunal? Liberty, we should: 'remember; may require the sacrifice of some degree of security against private wrong, which a despotic government, with an unlimited power of restraint, can alone supply. If no one were permitted to travel on the high road without a licence, or, as now so usual, without a passport, if no one could keep arms without a registry, if every one might be indefinitely detained on suspicion, the evil doers of society would be materially impeded, but at the expense, to a certain degree, of every man's freedom and enjoyment. Freedom being but a means to the greatest good, times might arise when it must yield to the security of still higher blessings; but the immediate question is, whether such were the state of society in the fourteenth and fifteenth centuries. Now, that it was lawless and insecure, comparatively with our own times or the times of our fathers

is hardly to be disputed. But if it required that arbitrary government which the king's council were anxious to maintain, the representatives of the commons in parliament, knights and burgefcses, not above the law, and much interested in the conservation of property, must have comylained very unreasonably for more than a hundred years. They were apparently as well able to judge as our writers can fee ; and if they reckoned a trial by jury at *nisi prius more likely*, on the whole, to insure a just adjudication. of a civil than one before the great , officers of state and other constituent members of the ordinary council, it does not seem clear to me that we have a right to assert the contrary. This mode of trial by jury, as has been seen in another place, had acquired, by the beginning of the fifteenth century,- its present form; and considering the great authority of the judges of assise, it may not, probably, have given very frequent occasion for complaint of partiality or corrupt influence.

NOTE XII Page 156.

The, learned author of the Inquiry into the Rise and Growth of the Royal Prerogative in England has founded his historical theory on the confusion which he supposes to have, grown up between the ideal king of the constitution and the personal king on the throne. By the former he means me perspnptation of abstract principles, sovereign power, and absolute justice, which the law attributes to the *genus*, king, but which flattery or other motives have to ferred to the possessor of the crown for the time being, and have thus changed the Teutonic *cyning*, the first man of the commonwealth, the man of the highest, weregild, the man who was so much responsible that he might be sued for damages in his own courts or deposed, for misgovernment, into" the sole irresponsible person of indefeasible prerogatives, of attributes almost, divine, whom Bracton and a long series of subsequent lawyers raised up to a, height-fax beyond the theory of our early constitution.

This supported with great acuteness and learning; nor is it possible to deny that the king of England, as the law-books represent him considerably different

from what we generally conceive an ancient German chieftain to have been. Yet I doubt whether Mr. Allen has not laid too much stress on this, and given to the fictions of law a greater influence than they possessed in those times to which his inquiry relates ; and whether, also, what he calls the monarchical theory was so much derived from foreign sources as he apprehends. We have no occasion to seek, in the systems of civilians or the dogmas of churchmen what arose from a deep-seated principle of human nature. A king is a person; to persons alone we attach the attributes of power and wisdom ; on persons we bestow our affection or our ill-will. An abstraction, a politic idea of royalty, is convenient for lawyers; it suits the speculative reasoner, but it never can become so familiar to a people, especially one too rude to have listened to such reasoners, as the simple image of the king, the one man whom we are to love and to fear. The other idea is *a sort of monarchical pantheism*, of which the vanishing point is a republic. And to this the prevalent theory, that kings are to reign but not to govern, cannot but lead. It is a plausible, and in the main, perhaps, for the times we have reached; a necessary theory; but it renders monarchy ultimately scarcely possible. And it was neither the sentiment of the Anglo-Saxons, nor of the Norman baronage; the feudal relation was essentially and exclusively personal; and if we had not enough, in a more universal feeling of human nature, to account for loyalty, we could not mistake its inevitable connexion with the fealty and homage of the vassal. The influence of Roman notions was not inconsiderable upon the continent"; but they never prevailed very much here; and though, after the close alliance between the church and state established by the Reformation, the whole weight of the former was thrown into the scale of *the* crown, the mediæval clergy, as I have observed in the text, were anything rather than upholders of despotic power.

It may be very true that by considering the monarchy as a merely political Institution, the schema of prudent men to avoid confusion, and confer the *minimum of* personal authority on the reigning prince, the principle of his irresponsibility seems to be better maintained. But the question to which we are turning our eyes is not a

political one ; it relates to the positive law and positive sentiments of the English nation in the mediaeval period. And here I cannot put a few necessary fictions grown up in the courts, such as, the king never dies, the king can do no wrong, the king is everywhere, against the tenor of our constitutional language, which implies an actual and active personality. Mr. Allen acknowledges that the act against the Despensers under Edward II, and re-confirmed after its repeal, for promulgating the doctrine that allegiance had more regard to the crown than to the person of the king, " seems to establish, as the deliberate opinion of the legislature, that allegiance is due to the person of the king generally, and not merely to his crown or politic capacity, so as to be released and destroyed by his misgovernment of the kingdom" (p. 14); which, he adds, is not easily reconcilable with the deposition of Richard II. But that was accomplished by force, with whatever formalities it may have been thought expedient to surround it.

We cannot, however, infer from the declaration of the legislature, that allegiance is due to the king's person and not to his politic capacity, any such consequence as that it is not, in any possible case, to be released by his misgovernment. This was surely not in the spirit of any parliament under Edward II or Edward III. ; and it is precisely because allegiance is due to the person, that, upon either feudal or natural principles, it might be cancelled by personal misconduct. A contrary language was undoubtedly held under the Stuarts; but it was not that of the mediaeval period.

The tenet of our law, that all the soil belongs theoretically to the king, is undoubtedly an enormous fiction, and very Repugnant to the barbaric theory preserved by the Saxons, that all unappropriated land belonged to the folk, and was unalienable without its consent. It was, however, but an extension of the feudal tenure to the whole kingdom, and rested on the personality of feudal homage. William established it more by his power than by any theory of lawyers; though doubtless his successors often found lawyers as ready to shape the acts of power into a theory as if they had originally projected

^f It 'tas been mentioned in a former note, on Mr. Allen's authority, that the

locland had acquired the appellation *terra*,

re g is before the Conquest.

them. And thus grew up the high schemes of prerogative, which, for many centuries, were in conflict with those of liberty. We are not able, nevertheless, to define the constitutional authority of the Saxon kings ; it was not legislative, nor was that of William and his successors ever such; it was not exclusive of redress for private wrong, nor was this ever the theory of English law, though the method of remedy might not be sufficiently effective; yet it had certainly grown before the Conquest, with no help from Roman notions, to something very unlike that of the German kings in Tacitus.

NOTE XIII, Page 172.

The reduction of the free ceorls into villenage, especially if as general as is usually assumed, is one of the most remarkable innovations during the Anglo-Norman period; and one which, as far as our published records extend, we cannot wholly explain. Observations have been made on it by Mr. Wright, in the *Archseologia* (vol. xxx. p. 225). After adverting to the oppression of the peasants in Normandy, which produced several rebellions, he proceeds thus:—" These feelings of hatred and contempt for the peasantry were brought into our island by the Norman barons in the latter half of the eleventh century. The Saxon laws and customs continued; but the Normans acted as the Franks had done towards the Roman coloni; they enforced with harshness the laws which were in their own favour, and gradually threw aside, or broke through, those which were in favour of the miserable serf."

In the Laws of Henry I. we find the weregild of the twyhinder, or villein, set at 200 shillings in Wessex, "*quae caput regni est et legum*" (c. 70). But this expression argues an Anglo-Saxon source; and, in feet, so much in that treatise seems to be copied, without regard to the change of time!, from old authorities, mixed up with provisions of a feudal or Norman character, that we hardly know how to distinguish what belongs to each period. It is far from improbable that villenage, in the sense the word afterwards bore, that is, an absolutely servile tenure of lands, not only without legal

rights over them, but with an incapacity of acquiring either immovable or movable property against the lord, may have made considerable strides before the reign of Henry 11. But unless light should be thrown on its history by the publication of more records, it seems almost impossible to determine the introduction of predial villenage more precisely than to say it does not appear in the laws of England at the Conquest, and it does so in the time of Glanvil. Mr. Wright's Memoir in the *Archeeologia*, above quoted, contains some interesting matter; but he has too much confounded the *theow*, or Anglo-Saxon slave, with the *ceorl*; not even mentioning the latter, though it is indisputable that *villanus* is the equivalent of *ceorl*, and *serous* of *theow*.

But I suspect that we go a great deal too far in setting down the descendants of these *ceorls*, that is, the whole Anglo-Saxon population except thanes and burgesses, as almost universally to be counted such villeins as we read of in our law-books, or in concluding that the cultivators of the land, even in the thirteenth Century, were wholly, or at least generally, servile. It is not only evident that small freeholders were always numerous, but we are, perhaps, greatly deceived in fancying that the occupiers of villein tenements were usually villeins. *Terre-tenants en villenage* and tenants *par copie*, who were undoubtedly free, appear in the early Year-books, and we know not why they may not always have existed/ This, however, is a subject which I am not sufficiently conversant with records to explore; it deserves the attention of those well-informed and diligent antiquaries whom we possess. Meantime it is to be observed that the lands occupied by *villani* or *bordarii*, according to the Domesday survey, were much more extensive than the copyholds of the present day; and

• A presumptive proof of this may be drawn from a chapter in the Laws of Henry I. c. 81, where the penalty payable by a villen for certain petty offences is set at thirty pence; that of a *cotset* at fifteen; and of a *theow* at six. The passage is extremely obscure; and this proportion of the three classes of men is almost the only part that appears evident. The *cotset*, who is often mentioned in Domesday, may thus have been an infe-

rior villen, nearly similar to what Glanvil and later law-books call such.

† The following passage in the Chronicle of Brakelond does not mention any manumission of the *ceorl* on whom abbot Samson conferred a manor: — *Unum solum manerium carta sua confirmavit cuidais Anglico natione, glebae adscripto, de cujus fidelitate plenitts confidebat quia bonus agricola erat, et quia nesciebat loqui Gallice.* p. 24.

making every allowance for enfranchisements, we can hardly believe that all these lands, being, in fact, by far the greater part of the soil, were the *villemgia* of Glanvil's and Bracton's age. It would be interesting to ascertain at what time the latter were distinguished from *libera tenementa*; at what time, that is, the distinction of territorial servitude, independent as it was of the personal state of the occupant, was established in England.

NOTE XIV. Page 173.

This identity of condition between the villein regardant and in gross appears to have been, even lately, called in question, and some adhere to the theory which supposes an inferiority in the latter. The following considerations will prove that I have not been mistaken in rejecting it:—

I. It will not be contended that the words "regardant" and "in gross" indicate of themselves any specific difference between the two, or can mean anything but the title by which the villein was held; prescriptive and territorial in one case, absolute in the other. For the proof, therefore, of any such difference we require some ancient authority, which has not been given. II. The villein regardant might be severed from the manor, with or without land, and would then become a villein in gross. If he was sold as a domestic serf, he might, perhaps, be practically in a lower condition than before, but his legal state was the same. If he was aliened with lands, parcel of the manor, as in the case of its "descent to coparceners who made partition, he would no longer be regardant, because that implied a prescriptive dependence on the lord, but would occupy the same tenements and be in exactly the same position as before. "Villein in gross," says Littleton, "is where a man is seised of a manor whereunto a villein is regardant, and granteth the same villein by deed to another; then he is a villein in gross, and not regardant." (Sect. 181.) III. The servitude of all villeins was so complete that we cannot conceive degrees in it. No one could purchase lands or possess goods of his own; we do not find that any one, being strictly a

villein, held by certain services; "he must have regard," says Coke, "to that which is commanded unto him; or, in the words of Bracton, 'a quo praestandum servitium incertum et indeterminatum, ubi scire non poterit vespere quod servitium fieri debet mane.'" (Co. Pat. 120, b.) How could a villein in gross be lower than this? It is true that the villein had one inestimable advantage over the American negro, that he was a freeman, except relatively to his lord; possibly he might be better protected against personal injury; but in his incapacity of acquiring secure property, or of refusing labour, he was just on the same footing. It may be conjectured that some villeins in gross were descended from the *servi*, of whom we find 25,000 enumerated in Domesday. Littleton says, "If a man and his ancestors, whose heir he is, have been seised of a villein and of his ancestors, as of villeins in gross, time out of memory of man, these are villeins in gross." (Sect. 182.)

It has been often asserted that villeins in gross seem not to have been a numerous class, and it might not be easy to adduce distinct instances of them in the fourteenth and fifteenth centuries, though we should scarcely infer, from the pains Littleton takes to describe them, that none were left in his time. But some may be found in an earlier age. In the ninth of John, William sued Ralph the priest for granting away lands which he held to Canford priory. Ralph pleaded that they were his freehold. William replied that he held them in villenage, and that he (the plaintiff) had sold one of Ralph's sisters for four shillings. (Bloniefeld's Norfolk, vol. iii. p. 8G0, 4to. edition.) And Mr. Wright has found in Madox's *Formulare Anglicanum* not less than five instances of villeins sold with their family and chattels, but without land. (*Archaeologia*, xxx. 228.) Even where they were sold along with land, unless it were a manor, they would, as has been observed before, have been villeins in gross. I have, however, been informed that in valuations under escheats in the old records a separate value is never put upon villeins; their alienation without the land was apparently not contemplated. Few cases concerning villeins in gross, it has been said, occur in the Year-books; but villenage of any kind

does not furnish a great many; and in several I do not perceive, in consulting the report, that the party can be shown to have been regardant. One reason why villeins in gross should have become less and less numerous was that they could, for the most part, only be claimed by showing a written grant, or by prescription through descent; so that, if the title-deed were lost, or the descent improved, the villein became free.

Manumissions were often, no doubt, gratuitous; in some cases the villein seems to have purchased his freedom. For though in strictness, as Glanvil tells us, he could not "*libertatem suam suis denariis quaerere*," inasmuch as all he possessed already belonged to the lord, it would have been thought a meanness to insist on so extreme a right. In order, however, to make the deed more secure, it was usual to insert the name of a third person as paying the consideration-money for the enfranchisement. (*Archaeologia*, xxx. 228.)

It appears not by any means improbable that regular money payments, or other fixed liabilities, were often substituted instead of uncertain services for the benefit of the lord as well as the tenant. And when these had lasted a considerable time in any manor, the villenage of the latter, without any manumission, would have expired by desuetude. But, perhaps, an entry of his tenure on the court-roll, with a copy given to himself, would operate of itself, in construction of law, as a manumission. This I do not pretend to determine.

NOTE XV, Page 179.

The public history of Europe in the middle ages inadequately represents the popular sentiment, or only when it is expressed too loudly to escape the regard of writers intent sometimes on less important subjects. But when we descend below the surface, a sullen murmur of discontent meets the ear, and we perceive that mankind was not more insensible to wrongs and sufferings than at present. Besides the various outbreaking® of the people in several countiess, and their complaints in parliament, after the commons obtained a representation, we gain a conclusive insight into the spirit of the times

by their popular poetry. Two very interesting collections of this kind have been lately published by the Camden Society, through the diligence of Mr. Thomas Wright; one, the Poems attributed to Walter Mapes; the other, the Political Songs of England, from John to Edward II.

Mapes lived under Henry II., and has long been known as the reputed author of humoiros Latin verses ; but it seems much more probable, that the far greater part of the collection lately printed is not from his hand. They may pass, not for the production of a single person, but rather of a class, during many years, or, in general words, a century, ending with the death of Henry III. in 1272. Many of them are professedly written by an imaginary Golias.

" They are not the expressions of hostility of one man against an order of monks, but of the indignant patriotism of a considerable portion of the English nation against the encroachments of civil and ecclesiastical tyranny." (Introduction to Poems ascribed to Walter Mapes, p. 21.) The poems in this collection reflect almost entirely on the pope and the higher clergy. They are all in rhyming Latin, and chiefly, though with exceptions, in the loose trochaic metre called Leonine. The authors, therefore, must have been clerks, actuated by the spirit which, in a church of great inequality in its endowments, and with a very numerous body of poor clergy, is apt to gain strength, but certainly, as ecclesiastical history bears witness, not one of mere envious malignity towards the prelates and the court of Rome. These deserved nothing better, in the thirteenth century, than biting satire and indignant reproof, and the poets were willing enough to bestow both.

But this popular poetry of the middle ages did not confine itself to the church. In the collection entitled ' Political Songs ' we have some reflecting on Henry III., some on the general administration. The famous song on the battle of Lewes in 1264 is the earliest in English; but in the reign of Edward I. several occur in that language. Others are in French or in Latin; one complaining of the taxes is in an odd mixture of these two languages; which, indeed, is not without other examples

in mediaeval poetry. These Latin songs could not, of course, have been generally understood. But what the priests sung in Latin, they said in English; the lower clergy fanned the flame, and gave utterance to what others felt. It may, perhaps, be remarked, as a proof of general sympathy with the democratic spirit which was then fermenting, that we have a song of exultation on the great defeat which Philip IV. had just sustained at Courtrai, in 1302, by the burgesses of the Flemish cities, on whose liberties he had attempted to trample (p. 187). It is true that Edward I. was on ill terms with France, but the political interests of the king would not, perhaps, have dictated the popular ballad.

It was an idle exaggeration in him who said that, if he could make the ballads of a people, any one might make their laws. Ballads, like the press, and especially that portion of the press which bears most analogy to them, generally speaking, give vent to a spirit which has been at work before. But they had, no doubt, an influence in rendering more determinate, as well as more active, that resentment of wrong, that indignation at triumphant oppression, that belief in the vices of the great, which, too often for social peace and their own happiness, are cherished by the poor. In comparison, indeed, with the efficacy of the modern press, the power of ballads is trifling. Their lively sprightliness, the humorous tone of their satire, even their metrical form, sheathe the sting; and it is only in times when political bitterness is at its height that any considerable influence can be attached to them, and then it becomes undistinguishable from more energetic motives. Those which we read in the collection above mentioned appear to me rather the signs of popular discontent than greatly calculated to enhance it. In that sense they are very interesting, and we cannot but desire to see the promised continuation to the end of Richard II.'s reign.^u They are said to have become afterwards less frequent, though the wars of the Roses were likely to bring them forward.

Some of the political songs **are** written in France,

^u Mr. Wright has given a few specimens in *Essays on the Literature and Popular Superstitions of England in the Middle Ages*, vol. i. p. 257. In fact, we may reckon *Hers Plowman* an instance of popular satire, though far superior to the rest

though relating to our kings John and Henry III. Deducting these, we have two in Latin for the former reign; seven in Latin, three in French (or what the editor calls Anglo-Norman, which is really the same thing), one in a mixture of the two, and one in English, for the reign of Henry III. In the reigns of Edward I. and Edward II. we have eight in Latin, three in French, nine in English, and four in mixed languages; a style employed probably for amusement. It must be observed that a large proportion of these songs contain panegyric and exultation on victory rather than satire; and that of the satire much is general, and much falls on the church; so that the animadversions on the king and the nobility are not very frequent, though with considerable boldness; but this is more shown in the Latin than the English poems.

CHAPTER IX.^a

ON THE STATE OF SOCIETY IN EUROPE DURING THE MIDDLE AGES.

PART I.

Introduction — Decline of Literature in the latter Period of the Roman Empire — Its Causes — Corruption of the Latin Language — Means by which it was effected — Formation of new Languages — General Ignorance of the Dark Ages — Scarcity of Books — Causes that prevented the total Extinction of Learning — Prevalence of Superstition and Fanaticism — General Corruption of Religion — Monasteries — their Effects — Pilgrimages — Love of Field Sports — State of Agriculture — of Internal and Foreign Trade down to the End of the Eleventh Century — Improvement of Europe dated from that Age.

IT has been the object of every preceding chapter of this work, either to trace the civil revolutions of states during the period of the middle ages, or to investigate, with rather more minute attention, their political institutions. There remains a large tract to be explored, if we would complete the circle of historical information, and give to our knowledge that copiousness and clear perception which arise from comprehending a subject under numerous relations. The philosophy of history embraces far more than the wars and treaties, the factions and cabals of common political narration; it extends to whatever illustrates the character of the human species in a particular period, to their reasonings and sentiments, their arts and industry. Nor is this comprehensive survey merely interesting to the speculative philosopher; without it the statesman would form very erroneous estimates of events, and find himself constantly misled in any analogical application of them to present circumstances. Nor is it an uncommon source

^a The subject of the present chapter, so far as it relates to the condition of literature in the middle ages, has been again treated by me in the first and second chapters of a work, published in 1836, the Introduction to the History of Literature in the Fifteenth, Sixteenth, and Seventeenth Centuries. Some things will be found in it more exactly stated, others newly supplied from recent sources.

of error to neglect the general signs of the times, and to deduce a prognostic from some partial coincidence with past events, where a more enlarged comparison of all the facts that ought to enter into the combination would destroy the whole parallel. The philosophical student, however, will not follow the antiquary into his minute details; and though it is hard to say what may not supply matter for a reflecting mind, there is always some danger of losing sight of grand objects in historical disquisition, by too laborious a research into trifles, I may possibly be thought to furnish, in some instances, an example of the error I condemn. But in the choice and disposition of topics to which the present chapter relates, some have been omitted on account of their comparative insignificance, and others on account of their want of connexion with the leading subject. Even of those treated I can only undertake to give a transient view; and must bespeak the reader's candour to remember that passages which, separately taken, may often appear superficial, are but parts of the context of a single chapter, as the chapter itself is of an entire work.

The Middle Ages, according to the division I have adopted, comprise about one thousand years, from the invasion of France by Clovis to that of Naples by Charles VIII. This period, considered as to the state of society, has been esteemed dark through ignorance, and barbarous through poverty and want of refinement. And although this character is much less applicable to the last two centuries of the period than to those which preceded its commencement, yet we cannot expect to feel, in respect of ages at best imperfectly civilized and slowly progressive, that interest which attends a more perfect development of human capacities, and more brilliant advances in improvement. The first moiety indeed of these ten ages is almost absolutely barren, and presents little but a catalogue of evils. The subversion of the Roman empire, and devastation of its provinces, by barbarous nations, either immediately preceded, or were coincident with the commencement of the middle period. We begin in darkness and calamity; and though the shadows grow fainter as we advance, yet we are to break off our pursuit as the morning breathes upon us, and the twilight reddens into the lustre of day.

No circumstance is so prominent on the first survey of society during the earlier centuries of this period as the depth of ignorance in which it was immersed; and as from this, more than any single cause, the moral and social evils which those ages experienced appear to have been derived and perpetuated, it deserves to occupy the first place in the arrangement of our present subject. We must not altogether ascribe the ruin of literature to the barbarian destroyers of the Roman empire. So gradual, and, apparently, so irretrievable a decay had long before spread over all liberal studies, that it is impossible to pronounce whether they would not have been almost equally extinguished if the august throne of the Caesars had been left, to moulder by its intrinsic weakness. Under the paternal sovereignty of Marcus Aurelius the approaching declension of learning might be scarcely perceptible to an incurious observer. There was much indeed to distinguish his times from these of Augustus; much lost in originality of genius, in correctness of taste, in the masterly conception and consummate finish of art, in purity of the Latin, and even of the Greek language. But there were men who made the age famous, grave lawyers, judicious historians, wise philosophers; the name of learning was honourable, its professors were encouraged; and along the vast surface of the Roman empire there was perhaps a greater number whose minds were cultivated by intellectual discipline than under the more brilliant reign of the first emperor.

It is not, I think, very easy to give a perfectly satisfactory solution of the rapid downfall of literature between the ages of Antonine and of Diocletian. Perhaps the prosperous condition of the empire from Trajan to Marcus Aurelius, and the patronage which those good princes bestowed on letters, gave an artificial health to them for a moment, and suspended the operation of a disease which had already begun to undermine their vigour. Perhaps the intellectual energies of mankind can never remain stationary; and a nation that ceases to produce original and inventive minds, born to advance the landmarks of knowledge or skill, will recede from step to step, till it loses even the

**Decline of
learning in
Roman
empire.**

Its causes.

secondary merits of imitation and industry. During the third century, not only there were no great writers, but even few names of indifferent writers have been recovered by the diligence of modern inquiry.^b Law neglected, philosophy perverted till it became contemptible, history nearly silent, the Latin tongue growing rapidly barbarous, poetry rarely and feebly attempted, art more and more vitiated; such were the symptoms by which the age previous to Constantino announced the decline of human intellect. If we cannot fully account for this unhappy change, as I have observed, we must, however, assign much weight to the degradation of Rome and Italy in the system of Severus and his successors, to the admission of barbarians into the military and even civil dignities of the empire, to the discouraging influence of provincial and illiterate sovereigns, and to the calamities which followed for half a century the first invasion of the Goths and the defeat of Decius. To this sickly condition of literature the fourth century supplied no permanent remedy. If under the house of Constantine the Roman world suffered rather less from civil warfare or barbarous invasions than in the preceding age, yet every other cause of decline just enumerated prevailed with aggravated force; and the fourth century set in storms, sufficiently destructive in themselves, and ominous of those calamities which humbled the majesty of Rome at the commencement of the ensuing period, and overwhelmed the Western Empire in absolute and final ruin before its termination.

The diffusion of literature is perfectly distinguishable from its advancement; and whatever obscurity we may find in explaining the variations of the one, there are a few simple causes which seem to account for the other. Knowledge will be spread over the surface of a nation in proportion to the facilities of education; to the free circulation of books; to the emoluments and distinctions which literary attainments are found to produce; and still more to the reward which they meet in the general respect and applause of society. This cheering incite-

^b The authors of *Histoire Littcraire de la France*, t i., can only find three writers of Gaul, no inconsiderable part of the Roman Empire, mentioned upon any

authority; two of whom are now lost In the preceding century the number was considerably greater.

ment, the genial sunshine of approbation, has at all times promoted the cultivation of literature in small republics rather than large empires, and in cities compared with the country. If these are the sources which nourish literature, we should naturally expect that they must have become scanty or dry when learning languishes or expires. Accordingly, in the later ages of the Roman empire a general indifference towards the cultivation of letters became the characteristic of its inhabitants. Laws were indeed enacted by Constantine, Julian, Theodosius, and other emperors, for the encouragement of learned men and the promotion of liberal education. But these laws, which would not perhaps have been thought necessary in better times, were unavailing to counteract the lethargy of ignorance in which even the native citizens of the empire were contented to repose. This alienation of men from their national literature may doubtless be imputed in some measure to its own demerits. A jargon of mystical philosophy, half fanaticism and half imposture, a barren and inflated eloquence, a frivolous philology, were not among those charms of wisdom by which man is to be diverted from pleasure or aroused from indolence.

In this temper of the public mind there was little probability that new compositions of excellence would be produced, and much doubt whether the old would be preserved. Since the invention of printing, the absolute extinction of any considerable work seems a danger too improbable for apprehension. The press pours forth *in* a few days a thousand volumes, which, scattered like seeds in the air over the republic of Europe, could hardly be destroyed without the extirpation of its inhabitants. But in the times of antiquity manuscripts were copied with cost, labour, and delay; and if the diffusion of knowledge be measured by the multiplication of books, no unfair standard, the most golden ages of ancient learning could never bear the least comparison with the three last centuries. The destruction of a few libraries by accidental fire, the desolation of a few provinces by unsparing and illiterate barbarians, might annihilate every vestige of an author, or leave a few scattered copies, which, from the public indifference, there was no inducement to multiply, exposed to similar casualties in succeeding times.

We are warranted by good authorities to assign as a collateral cause of this irretrievable revolution the neglect of heathen literature by the Christian church. I am not versed enough in ecclesiastical writers to estimate the degree of this neglect; nor am I disposed to deny that the mischief was beyond recovery before the accession of Constantine. From the primitive ages, however, it seems that a dislike of pagan learning was pretty general among Christians. Many of the fathers undoubtedly were accomplished in liberal studies, and we are indebted to them for valuable fragments of authors whom we have lost. But the literary character of the church is not to be measured by that of its more illustrious leaders. Proscribed and persecuted, the early Christians had not perhaps access to the public schools, nor inclination to studies which seemed, very excusably, uncongenial to the character of their profession. Their prejudices, however, survived the establishment of Christianity. The fourth council of Carthage in 398 prohibited the reading of secular books by bishops. Jerome plainly condemns the study of them except for pious ends. All physical science especially was held in avowed contempt, as inconsistent with revealed truths. Nor do there appear to have been any canons made in favour of learning, or any restriction on the ordination of persons absolutely illiterate.^c There was indeed abundance of what is called theological learning displayed in the controversies of the fourth and fifth centuries; and those who admire such disputations may consider the principal champions in them as contributing to the glory, or at least retarding the decline, of literature. But I believe rather that polemical disputes will be found not only to corrupt the genuine spirit of religion, but to degrade and contract the faculties. What keenness and subtlety these may sometimes acquire by such exercise is more like that worldly shrewdness we see in men whose trade it is to outwit their neighbours than the clear and calm discrimination of philosophy. However this may be, it cannot be doubted that the controversies agitated in the church

^c Moaheim, Cent 4. Tiraboschi endeavours to elevate higher the learning of the early Christians, t il. p. 328. Jortin, however, asserts that many of the bishops in the general councils of Ephe- sus and Chalcedon could not write their names. Remarks on Ecclesiast Hist, vol. ii. p. 411.

during these two centuries must have diverted studious minds from profane literature, and narrowed more and more the circle of that knowledge which they were desirous to attain.

The torrent of irrational superstitions which carried all before it in the fifth century, and the progress of ascetic enthusiasm, had an influence still more decidedly inimical to learning. I cannot indeed conceive any state of society more adverse to the intellectual improvement of mankind than one which admitted of no middle line between gross dissoluteness and fanatical mortification. An equable tone of public morals, social and humane, verging neither to voluptuousness nor austerity, seems the most adapted to genius, or at least to letters as it is to individual comfort and national prosperity. After the introduction of monkery and its unsocial theory of duties, the serious and reflecting part of mankind, on whom science most relies, were turned to habits which, in the most favourable view, could not quicken the intellectual energies; and it might be a difficult question whether the cultivators and admirers of useful literature were less likely to be found among the profligate citizens of Rome and their barbarian conquerors or the melancholy recluses of the wilderness.

Such therefore was the state of learning before the subversion of the Western Empire. And we may form some notion how little probability there was of its producing any excellent fruits, even if that revolution had never occurred, by considering what took place in Greece during the subsequent ages; where, although there was some attention shown to preserve the best monuments of antiquity, and diligence in compiling from them, yet no one original writer of any superior merit arose, and learning, though plunged but for a short period into mere darkness, may be said to have languished in a middle region of twilight for the greater part of a thousand years.

But not to delay ourselves in this speculation, the final settlement of barbarous nations in Gaul, Spain, and Italy consummated the ruin of literature. Their first irruptions were uniformly attended with devastation; and if some of the Gothic kings, after their establishment, proved humane and civilized sovereigns,¹ yet the nation

gloried in its original rudeness, and viewed with no unreasonable disdain arts which had neither preserved their cultivators from corruption nor raised them from servitude. Theodoric, the most famous of the Ostrogoth kings in Italy, could not write his name, and is said to have restrained his countrymen from attending those schools of learning by which he, or rather perhaps his minister Cassiodorus, endeavoured to revive the studies of his Italian subjects. Scarcely one of the barbarians, so long as they continued unconfused with the native inhabitants, acquired the slightest tincture of letters; and the praise of equal ignorance was soon aspired to and attained by the entire mass of the Roman laity. They, however, could hardly have divested themselves so completely of all acquaintance with even the elements of learning, if the language in which books were written had not ceased to be their natural dialect. This remarkable change in the speech of France, Spain, and Italy is most intimately connected with the extinction of learning; and there is enough of obscurity as well as of interest in the subject to deserve some discussion.

It is obvious, on the most cursory view of the French and Spanish languages, that they, as well as the Italian, are derived from one common source, the Latin. That must therefore have been at some period, and certainly not since the establishment of the barbarous nations in Spain and Gaul, substituted in ordinary use for the original dialects of those countries which are generally supposed to have been Celtic, not essentially differing from those which are spoken in Wales and Ireland. Rome, says Augustin, imposed not only her yoke, but her language, upon conquered nations. The success of such an attempt is indeed very remarkable. Though it is the natural effect of conquest, or even of commercial intercourse, to ingraft fresh words and foreign idioms on the stock of the original language, yet the entire disuse of the latter, and adoption of one radically different, scarcely takes place in the lapse of a far longer period than that of the Roman dominion in Gaul. Thus, in part of Britany the people speak a language which has perhaps sustained no essential alteration from the revolution of two thousand years; and we know how steadily another Celtic dialect has kept its ground in

Corruption
of the Latin
language.

Wales, notwithstanding English laws and government, and the long line of contiguous frontier which brings the natives of that principality into contact with Englishmen. Nor did the Romans ever establish their language (I know not whether they wished to do so) in this island, as we perceive by that stubborn British tongue which has survived two conquests.⁴

In Gaul and in Spain, however, they did succeed, as the present state of the French and peninsular languages renders undeniable, though by gradual changes, and not, as the Benedictine authors of the *Histoire Litteraire de la France* seem to imagine, by a sudden and arbitrary innovation. This is neither possible in itself, nor agreeable to the testimony of Ireneus, bishop of Lyons at the end of the second century, who laments the necessity of learning Celtic/ But although the inhabitants of these provinces came at length to make use of Latin so completely as their mother tongue that few vestiges of their original Celtic could perhaps be discovered in their common speech, it does not follow that they spoke with the pure pronunciation of Italians, far less with that conformity to the written sounds which we assume to be essential to the expression of Latin words.

. It appears to be taken for granted that the Romans pronounced their language as we do at present, so far at least as the enunciation of all the consonants, however we may admit our deviations from the classical standard in propriety of sounds and in measure of time. Yet the example of our own language, and of French, might show us that orthography may become a very inadequate representative of pronunciation.

Ancient
Latin pro-
nunciation.

^d Gibbon roundly asserts that "the language of Virgil and Cicero, though with some inevitable mixture of corruption, was so universally adopted in Africa, Spain, Gaul, Great Britain, and Pannonia, that the faint traces of the Punic or Celtic idioms were preserved only in the mountains or among the peasants." *Decline and Fall*, vol i. p. 60 (8vo. edit.). For Britain he quotes Tacitus's *Life of Agricola* as his voucher. But the only passage in *ibis* work that gives the least colour to Gibbon's assertion is one in which Agricola is said to have encouraged the children of British chieftains

to acquire a taste for liberal studies, and to have succeeded so much by judicious commendation of their abilities, *ut qui modo linguam Romanam abnuebant, eloquentiam concupiscerent* (c. 21.) This, it is sufficiently obvious, is very different from the national adoption of Latin as a mother tongue.

e t vii. preface.

^f It appears, by a passage quoted from the digest by M. Bonamy, *Mem. de l'Acad. des Inscriptions*, t xxiv. p. 589, that Celtic was spoken in Gaul, or at least parts of it, as well as Punic in Africa.

It is indeed capable of proof that in the purest ages of Latinity some variation existed between these two. Those numerous changes in spelling which distinguish the same words in the poetry of Ennius and of Virgil are best explained by the supposition of their being accommodated to the current pronunciation. Harsh combinations of letters, softened down through delicacy of ear or rapidity of utterance, gradually lost their place in the written language. Thus *exfregit* and *adrogavit* assumed a form representing their more liquid sound; and a *tidor* was latterly spelled *autor*, which has been followed in French and Italian. *Autor* was probably so pronounced at all times; and the orthography was afterwards corrected or corrupted, whichever we please to say, according to the sound. We have the best authority to assert that the final *m* was very faintly pronounced, rather it seems as a rest and short interval between two syllables than an articulate letter; nor indeed can we conceive upon what other ground it was subject to elision before a vowel in verse, since we cannot suppose that the nice ears of Rome would have submitted to a capricious rule of poetry for which Greece presented no analogy.⁸

A decisive proof, in my opinion, of the deviation which took place, through the rapidity of ordinary elocution, from the strict laws of enunciation, may be found in the metre of Terence. His verses, which are absolutely refractory to the common laws of prosody, may be readily scanned by the application of this principle. Thus, in the first act of the *Heautontimorumenos*, a part selected at random, I have found, I. Vowels contracted or dropped so as to shorten the word by a syllable; in in, *via*, *diutius*, *ei*, *solius*, *eam*, *unius*, *suam*, *divitias*, *senex*, *voluptatem*, *illius*, *semel*; II. The proceleusmatic foot, or four short syllables, instead of the dactyl; seen. i. v. 59, 73, 76, 88, 109; seen. ii. v. 36; III. The elision of *s* in words ending with *us* or *is* short, and sometimes even of the whole syllable, before the next word beginning with a vowel; in seen. i. v. 30, 81, 98, 101, 116, 119; seen. ii. v. 28.

⁸ Atque eedem ilia liters, quoties ultima est, et vocalem verb! sequentis ita contingit, ut in eam transire possit, etiam il scribitur, taraen paruin exprimitur, ut *Multum ille*, et *Quantum erat*: adeo ut

pene enjusdam novae literae sonum reddat. Neque enim eximitur, sed obscuratur, et tantum aliqua inter duos vocales velut notaest, ne p̄ae coeant Quintilian, Institut. l. ix. c. 4, p. 585, edit Capperonier

IV. The first syllable of *ille* is repeatedly shortened, and indeed nothing is more usual in Terence than this licence; whence we may collect how ready this word was for abbreviation into the French and Italian articles. V. The last letter of *apudis* cut off, seen. i. v. 120; and seen. ii. v. 8. VI. *Hodie* is used as a pyrrhichius, in scon. ii. v. 11. VII. Lastly, there is a clear instance of a short syllable, the antej)enultimate of *impulerim*, lengthened on account of the accent at the 113th verse of the first scene.

These licences are in all probability chiefly colloquial, and would not have been adopted in public harangues, to which the precepts of rhetorical writers commonly relate. But if the more elegant language of the Komans, since such we must suppose to have been copied by Terence for his higher characters, differed so much in ordinary discourse from their orthography, it is probable that the vulgar went into much greater deviations. The popular pronunciation errs generally, we might say perhaps invariably, by abbreviation of words, and by liquefying consonants, as is natural to the rapidity of colloquial speech.^h It is by their knowledge of orthography and etymology that the more educated part of the community is preserved from these corrupt modes of pronunciation. There is always therefore a standard by which common speech may be rectified; and in proportion to the diffusion of knowledge and politeness the deviations from it will be more slight and gradual. But in distant provinces, and especially where the language itself is but of recent introduction, many more changes may be expected to occur. Even in France and England there are provincial dialects, which, if written with all their anomalies of pronunciation as well as idiom, would seem strangely out of unison with the regular language; and in Italy, as

^h The following passage of Quintilian is an evidence both of the omission of harsh or superfluous letters by the best speakers, and of the corrupt abbreviations usual with the worst. Dilucida vero erit pronunciatio primum, si verba tota exegerit, quorum pars devorari, pars destitui solet pierisque extremas syllabas non proferentibus, dom priorum sono indulgent Ut est autem necesaria verborum expla-

natio, ita omnes computare et velut admirare litem, molestum et odiosum.— Nam et vocales frequentissimoe coeunt, et consonantium quodam insequente vocall dissimulantur; utriusque exemplum posuimus; Multum ille et terris. Vitatur etiam durforum inter se congressus, unde pellaeit et collegit, et que alio loco dicta sunt. 1. ii. c 3, p. 696.

is well known, the varieties of dialect are still more striking. Now, in an advancing state of society, and especially with such a vigorous political circulation as we experience in England, language will constantly approximate to uniformity, as provincial expressions are more and more rejected for incorrectness or inelegance. But, where literature is on the decline, and public misfortunes contract the circle of those who are solicitous about refinement, as in the last ages of the Roman empire, there will be no longer any definite standard of living speech, nor any general desire to conform to it if one could be found ; and thus the vicious corruptions of the vulgar will entirely predominate. The niceties of ancient idiom will be totally lost, while new idioms will be formed out of violations of grammar sanctioned by usage, which, among a civilized people, would have been proscribed at their appearance.

Such appears to have been the progress of corruption in the Latin language. The adoption of words from the Teutonic dialects of the barbarians, which took place very freely, would not of itself have destroyed the character of that language, though it sullied its purity. The worst law Latin of the middle ages is still Latin, if its barbarous terms have been bent to the regular inflections. It is possible, on the other hand, to write whole pages of Italian, wherein every word shall be of unequivocal Latin derivation, though the character and personality, if I may so say, of the language be entirely dissimilar. But, as I conceive, the loss of literature took away the only check upon arbitrary pronunciation and upon erroneous grammar. Each people innovated through caprice, imitation of their neighbours, or some of those indescribable causes which dispose the organs of different nations to different sounds. The French melted down the middle consonants; the Italians omitted the final. Corruptions arising out of ignorance were mingled with those of pronunciation. It would have been marvellous if illiterate and semi-barbarous provincials had preserved that delicate precision in using the inflections of tenses which our best scholars do not clearly attain. The common speech of any people whose language is highly complicated will be full of solecisms. The French inflections are not comparable in number or delicacy to

the Latin, and yet the vulgar confuse their most ordinary forms.

But, in all probability, the variation of these derivative languages from popular Latin has been considerably less than it appears. In the purest ages of Latinity the citizens of Koine itself made use of many terms which we deem barbarous, and of many idioms which we should reject as modern. That highly complicated grammar, which the best writers employed, was too elliptical and obscure, too deficient in the connecting parts of speech, for general use. We cannot indeed ascertain in what degree the vulgar Latin differed from that of Cicero or Seneca. It would be highly absurd to imagine, as some are said to have done, that modern Italian was spoken at Koine under Augustus.¹ But I believe it may be asserted not only that much the greater part of those words in the present language of Italy which strike us as incapable of a Latin etymology are in fact derived from those current in the Augustan age, but that very many phrases which offended nicer ears prevailed in the same vernacular speech, and have passed from thence into the modern French and Italian. Such, for example, was the frequent use of prepositions to indicate a relation between two parts of a sentence which a classical writer would have made to depend on mere inflection.^k

From the difficulty of retaining a right discrimination of tense seems to have proceeded the active auxiliary verb. It is possible that this was borrowed from the Teutonic languages of the barbarians, and accommodated both by them and by the natives to words of Latin origin. The passive auxiliary is obtained by a very ready resolution of any tense in that mood, and has not been altogether dispensed with even in Greek, while in Latin it is used much more frequently. It is not quite so easy to perceive the propriety of the active *habeo* or *teneo*, one

ⁱ Tiraboschi (*Storia dell Lett Ital.* lii. preface, p. v.) imputes this paradox to Berabo and Quadrio; but I can hardly believe that either of them could maintain it in a literal sense.

^k M. Bonamy, in an essay printed in *Mem. de l'Academie des Inscriptions*, t. xxiv., has produced several proofs of this from the classical writers on agriculture and other arts, though some of his instances are not in point, as any school-

boy would have told him. This essay, which by some accident had escaped my notice till I had nearly finished the observations in my text, contains, I think, the best view that I have seen of the process of transition by which Latin was changed into French and Italian. Add however, the preface to Tiraboschi's third volume and the thirty-second dissertation of Muratori

or both of which all modern languages have adopted as their auxiliaries in conjugating the verb. But in some instances this analysis is not improper; and it may be supposed that nations, careless of etymology or correctness, applied the same verb by a rude analogy to cases where it ought not strictly to have been employed."¹

Next to the changes founded on pronunciation and to the substitution of auxiliary verbs for inflections, the usage of the definite and indefinite articles in nouns appears the most considerable step in the transmutation of Latin into its derivative languages. None but Latin, I believe, has ever wanted this part of speech; and the defect to which custom reconciled the Romans would be an insuperable stumbling-block to nations who were to translate their original idiom into that language. A coarse expedient of applying *unus, ipse*, or *ille* to the purposes of an article might perhaps be no unfrequent vulgarism of the provincials; and after the Teutonic tribes brought in their own grammar, it was natural that a corruption should become universal, which in fact supplied a real and essential deficiency.

That the quantity of Latin syllables is neglected, or rather lost, in modern pronunciation, seems to be generally admitted. Whether, indeed, the ancient Romans, in their ordinary speaking, distinguished the measure of syllables with such uniform musical accuracy as we imagine, giving a certain time to those termed long, and exactly half that duration to the short, might very reasonably be questioned; though this was probably done, or attempted to be done, by every reader of poetry. Certainly, however, the laws of quantity were forgotten, and an accentual pronunciation came to predominate, before Latin had ceased to be a living language. A Christian writer named Commodianus, who lived before the end of the third century according to some, or, as others think, in the reign of Constantine, has left us a philological curiosity, in a series of attacks on the pagan superstitions, composed in what are meant to be verses, regulated by accent instead of quantity, exactly as we read Virgil at present.¹¹

Pronunciation no longer regulated by quantity.

¹¹ See Lanzi, *Saggio della Lingua Etrusca*, t. i. c. 431; *Mem. de l'Acad. des Inscrip.* t. xxiv. p. 632. ¹² No description can give so adequate a notion of this extraordinary performance as a short specimen. Take the in

It is not improbable that Commodianus may have written in Africa, the province in which more than any the purity of Latin was debased. At the end of the fourth century St. Augustin assailed his old enemies, the Donatists, with nearly the same arms that Commodianus had wielded against heathenism. But as the refined and various music of hexameters was unlikely to be relished by the vulgar, he prudently adopted a different measure.⁰ AJI the nations of Europe seem to love the trochaic verse; it was frequent on the Greek and Roman stage; it is more common than any other in the popular poetry of modern languages. This proceeds from its simplicity, its liveliness, and its ready accommodation to dancing and music. In St. Austin's poem he united to a trochaic measure the novel attraction of rhyme.

As Africa must have lost all regard to the rules of measure in the fourth century, so it appears that Gaul was not more correct in the next two ages. A poem addressed by Auspicius bishop of Toul to count Arbogastes, of earlier date probably than the invasion of Clovis, is written with no regard to quantity.^P The

troductory lines; which really, prejudices of education apart, are by no means inharmonious:—

Praefatio nostra viam erranti demonstrat,
Respectumque bonum, cum venerit
sseni meta,
Æternum fieri, quod discredunt insci
corda.
Ego similiter erravi tempore multo,
Fana prosequendo, parentibus insciis
ipsis.
Abstuli me tandem inde, legendo de
lege.
Testificor Doraimim, doleo, proh! ci-
vica turba
Inscia quod perdit, pergens deos quaere
vanos.
Ob ea perdoctus ignoros instruoverum.

Commodianus however did not keep tip this excellence in every part. Some of his lines are not reducible to any pronunciation, without the summary rules of Procrustes; as for instance—

Paratus ad epulas, et refugiscere praecepta; or, Capillos inficitis, oculos fuligine relinitis.

It must be owned that this text is exceedingly corrupt, and I should not despair of seeing a truly critical editor, unscrupulous as his fraternity are apt to be, improve his lines into unblemished

hexameters. Till this time arrives, however, we must consider him either as utterly ignorant of metrical distinctions, or at least as aware that the populace whom he addressed did not observe them in speaking. Commodianus is published by Dawes at the end of his edition of Minucius Felix. Some specimens are quoted in Harris's *Philological Inquiries*.

⁰ *Archaeologia*, vol. xiv. p. 188. The following are the first lines:—

Abundantia peccatorum solet fratres
conturbare;
Propter hoc Dominus noster voluit nos
præmonere,
Comparans regnum cælorum reticulo
misso in mare,
Congregant! multos pisces, omne genus
nunc et inde,
Quos cum traxissent ad Littus, tunc
cooperunt separe,
Bonos in vasa miserunt, reliquos malos
in mare.

This trash is much below the level of Augustin; but it could not have been later than his age.

^P Becueil des Historiens, t. i. p. 814; it begins in the following manner:—

Praecelso expectabill bis Arbogasto
comiti
Auspicius, qui diligo, salutem dico
plurimam. Magnas

bishop by whom this was composed is mentioned by his contemporaries as a man of learning. Probably he did not choose to perplex the barbarian to whom he was writing (for Arbogastes is plainly a barbarous name) by legitimate Koman metre. In the next century Gregory of Tours informs us that Chilperic attempted to write Latin verses; but the lines could not be reconciled to any division of feet; his ignorance having confounded long and short syllables together.^q Now Chilperic must have learned to speak Latin like other kings of the Franks, and was a smatterer in several kinds of literature. If Chilperic therefore was not master of these distinctions, we may conclude that the bishops and other Romans with whom he conversed did not observe them; and that his blunders in Terbification arose from ignorance of rules, which, however fit to be preserved in poetry, were entirely obsolete in the living Latin of his age. Indeed the frequency of false quantities in the poets even of the fifth, but much more of the sixth century, is palpable. Fortunatus is quite full of them. This seems a decisive proof that the ancient pronunciation was lost. Avitus tells us that few preserved the proper measure of syllables in singing. Yet he was bishop of Vienne, where a purer pronunciation might be expected than in the remoter parts of Gaul.^r

Defective, however, as it had become in respect of pronunciation, Latin was still spoken in France during the sixth and seventh centuries. We have compositions of that time, intended for the people, in grammatical language. A song is still extant in rhyme and loose accentual measure, written upon a victory of Clotaire II. over the Saxons in 622, and obviously intended for circulation among the people.' For-

Change of
Latin into
Romance.

Magnas coelesti Domino rependo corde
gratias

Quod te Tullensi proxime magnum in
urbe vidimus.

Multis me tuis artibus letificabas
an tea,

Sed nunc fecisti maxirao me exultare
gaudio.

^q Chilpericus rex confecit
duos libros, quorum verelculi debiles nul-
lis pedibus subsistere possunt: in quibus,
dum non intelligebat, pro longis sylabas
breves posuit, et pro brevibus tongas sta-
tuebat 1. vi. c. 46.

^r Mem. de l'Academie des Inscryp-
tions, t xvii. Hist Litteraire de la
France, t. ii. p. 28. It seems rather pro-
bable that the poetry of Avitus belongs
to the fifth century, though not very far
from its termination. He was the cor-
respondent of Sidonius Apollinaris, who
died in 489, and we may presume his
poetry to have been written rather early
in life.

• One stanza of this song will suffice
to show that the Latin language was yet
unchanged:— De

tunatus says, in his Life of St. Aubin of Angers, that he should take care not to use any expression unintelligible to the people.' Baudemind, in the middle of the seventh century, declares, in his Life of St. Arnaud, that he writes in a rustic and vulgar style, that the reader may be excited to imitation." Not that these legends were actually perused by the populace, for the very art of reading was confined to a few. But they were read publicly in the churches, and probably with a pronunciation accommodated to the corruptions of ordinary language. Still the Latin syntax must have been tolerably understood; and we may therefore say that Latin had not ceased to be a living language, in Gaul at least, before the latter part of the seventh century. Faults indeed against the rules of grammar, as well as unusual idioms, perpetually occur in the best writers of the Merovingian period, such as Gregory of Tours : while charters drawn up by less expert scholars deviate much further from purity.^x

The corrupt provincial idiom became gradually more and more dissimilar to grammatical Latin ; and the *lingua Romana rustica*, as the vulgar *patois* (to borrow a word that I cannot well translate) had been called, acquired a distinct character as a new language in the eighth century/ Latin orthography, which had been hitherto pretty well maintained in books, though not always in charters, gave way to a new spelling, conformably to the current pronunciation. Thus we find *lui*, for *illius*, in the Formularies of Marculfus; and *Tu lo juva* in a liturgy of Charlemagne's age, for *Tu ilium juva*. When this barrier was once broken down, such a deluge of innovation poured in that all the characteristics of Latin were

De Clotario est canere rege Francomm,
Qui ivi pugnare cum gente Saxonum,
Quam graviter provenisset miss in Sax-
onum,
Si non fuisset inclitus Faro de gente
Burgundionum.

ⁱ *Præcavendum est, ne ad aurea populi minus aliquid intelligibile profatur.* Mem. de l'Acad. t xvii. p. 712.

ⁱⁱ *Rustico et plebeio germone propter eseroplum et imitationem.* Id. *ibid.*

^x Hist Litte'raire de la France, t. iii. p. 5. Mem. de l'Académie, t xxiv. p. 617. Nouveau Traite de Diplomatique, t iv. p. 485.

7 Hist Litte'raire de la France, t vii. p. 12. The editors say that it is mentioned by name even in the seventh century, which is very natural, as the corruption of Latin had then become striking. It is familiarly known that illiterate persons *understand* a more correct language than they use themselves; so that the corruption of Latin might have gone to a considerable length among the people, while sermons were preached, and tolerably comprehended, in a purer grammar. -

effaced in writing as well as speaking, and the existence of a new language became undeniable. In a council held at Tours in 813 the bishops are ordered to have certain homilies of the fathers translated into the rustic Roman, as well as the German tongue.² After this it is unnecessary to multiply proofs of the change which Latin had undergone.

In Italy the progressive corruptions of the Latin language were analogous to those which occurred in France, though we do not find in ^{its corrup-} ~~tion in Italy.~~ writings any unequivocal specimens of a new formation at so early a period. But the old inscriptions, even of the fourth and fifth centuries, are full of solecisms and corrupt orthography. In legal instruments under the Lombard kings the Latin inflections are indeed used, but with so little regard to propriety that it is obvious the writers had not the slightest tincture of grammatical knowledge. This observation extends to a very large proportion of such documents down to the twelfth century, and is as applicable to France and Spain as it is to Italy. In these charters the peculiar characteristics of Italian orthography and grammar frequently appear. Thus we find, in the eighth century, *diveatis* for *debeatis*, *da* for *de* in the ablative, *avendi* for *habendi*, *dava* for *dabat*, *cedo a deo*, and *ad ecclesia*, among many similar corruptions.^a Latin was so changed, it is said by a writer of Charlemagne's age, that scarcely any part of it was popularly known. Italy indeed had suffered more than France itself by invasion, and was reduced to a lower state of barbarism, though probably, from the greater distinctness of pronunciation habitual to the Italians, they lost less of their original language than the French. I do not find, however, in the writers who have treated this subject, any express evidence of a vulgar language distinct from Latin earlier than the close of the tenth century, when it is said in the epitaph of Pope Gregory V., who died in 999, that he instructed the people in three dialects — the Frankish or German, the vulgar, and the Latin.^b

^a *Mem. de l'Acad. des Insc t xvli.*
See two memoirs in this volume by du
Clos and le Bauf, especially the latter,
as well as that already mentioned in
t xxiv. p. 682, by M. Bonamy.

a Muratori, Dissert i. and xliii.

^b *Usus Francica, vulgari, et voce*
Latina.
Instituit populos eloquio triplici.
Fontanini dell' Eloquenza Italiana,
p. 15. Muratori, Dissert xxxii

Ignorance
consequent
on the disuse
of Latin.

When Latin had thus ceased to be a living language, the whole treasury of knowledge was looked up from the eyes of the people. The few who might have imbibed a taste for literature, if books had been accessible to them, were reduced to abandon pursuits that could only be cultivated through a kind of education not easily within their reach. Schools, confined to cathedrals and monasteries, and exclusively designed for the purposes of religion, afforded no encouragement or opportunities to the laity.^c The worst effect was, that, as the newly-formed languages were hardly made use of in writing, Latin being still preserved in all legal instruments and public correspondence, the very use of letters, as well as of books, was forgotten. For many centuries, to sum up the account of ignorance in a word, it was rare for a layman, of whatever rank, to know how to sign his name.^d Their charters, till the use of seals became general, were subscribed with the mark of the cross. Still more extraordinary it was to find one who had any tincture of learning. Even admitting every indistinct commendation of a monkish biographer (with whom a knowledge of church-music would pass for literature'), we could make out a very short list of scholars. None certainly were more distinguished as such than Charlemagne and Alfred. But the former, unless we reject a very plain testimony, was incapable of writing;^e and Alfred found

^c *Histoire Littéraire de la France*, t vi. p. 20. Muratori, *Dissert* xliii.

^d *Nouveau Traité de Diplomatie*, t ii. p. 419. This became, the editors say, much less unusual about the end of the thirteenth century; a pretty late period! A few signatures to deeds, appear in the fourteenth century; in the next they are more frequent. *Ibid.* The emperor Frederic Barbarossa could not read (Struvius, *Corpus Hist German.* l i p. 377), nor John king of Bohemia in the middle of the fourteenth century (Stemondt, t v. p. 205), nor Philip the Hardy, king of France, although the son of St Louis. (Velly, t vi. p. 426.)

^e Louis IV., king of France, laughing at Folk count of Anjou, who sang anthems among the choristers of Tours, received the following pithy epistle from

his learned vassal: *Noveritis, domine quod rex illiteratus est asinus coronatus. Grata Comitum Andegavensium.* In the same book, Geoffrey, father of our Henry II., is said to be *optimè literatus*; which perhaps imports little more learning than his ancestor Fulk possessed.

^f The passage in Eginhard, which has occasioned so much dispute, speaks for itself: *Tentabat et scribere, tabulasque et codicil Jos ad hoc in Jectula sub cervicalibus circumferre solebat, ut, cum vacuum tempus esset, manum effigiandis Uteris assuefaceret; sed parum prospere successit labor proposterus ac sero inchoatus.*

Many are still unwilling to believe that Charlemagne could not write. M. Ampere observes that the emperor asserts himself to have been the author of the

difficulty in making a translation from the pastoral instruction of St. Gregory, on account of his imperfect knowledge of Latin.^g

Whatever mention, therefore, we find of learning and the learned during these dark ages, must be understood to relate only to such as were within the pale of clergy, which indeed was pretty extensive, and comprehended many who did not exercise the offices of religious ministry. But even the clergy were, for a long period, not very materially superior, as a body, to the uninstructed laity. A cloud of ignorance overspread the whole face of the church, hardly broken by a few glimmering lights, who owe much of their distinction to the surrounding darkness. In the sixth century the best writers in Latin were scarcely read;^h and perhaps from the middle of this age to the eleventh there was, in a general view of literature, little difference to be discerned. If we look more accurately, there will appear certain gradual shades of twilight on each side of the greatest obscurity. France reached her lowest point about the beginning of the eighth century; but England was at that time more respectable, and did not fall into complete degradation till the middle of the ninth. There could be nothing more deplorable than the state of letters in Italy and in England during the succeeding century; but France cannot be denied to have been uniformly, though very slowly, progressive from the time of Charlemagne.'

Libri Carolini, and is said by some to have composed verses. Hist Litt de la France, iii. 37. But did not Henry VIII. claim a book against Luther, which was not written by himself? *Qui facit per alium, facit per se*, is in all cases a royal prerogative. Even if the book were Charlemagne's own, might he not have dictated it? I have been informed that there is a manuscript at Vienna with autograph notes of Charlemagne in the margin. But is there sufficient evidence of their "genuineness? The great difficulty is to get over the words which I have quoted from Eginhard. M. Ampere ingeniously conjectures that the passage does not relate to simple common writing, but to calligraphy; the art of delineating in a beautiful manner, prac-

tised by the copyists, and of which a contemporaneous specimen may be seen in the well-known Bible of the British Museum. Yet it must be remembered that Charlemagne's early life passed in the depths of ignorance; and Eginhard gives a fair reason why he failed in acquiring the art of writing, that he began too late. Fingers of fifty are not made for a new skill. It is not, of course, implied by the words that he could not write his own name; but that he did not acquire such a facility as he desired, [1848.]

^g Spelman, Vit Alfred. Append.

^h Hist Litteraire de la France, i lit p. 5.

I These four dark centuries, the eighth, ninth, tenth, and eleventh, occupy five

Of this prevailing ignorance it is easy to produce abundant testimony. Contracts were made verbally, for want of notaries capable of drawing up charters; and these, when written, were frequently barbarous and ungrammatical to an incredible degree. For some considerable intervals scarcely any monument of literature has been preserved, except a few jejune chronicles, the vilest legends of sainte, or verses equally destitute of i spirit and metre. In alriaost every council the ignorance of the clergy forms a subject for reproach. It is asserted by one held in 992 that scarcely a single person was to be found in Borne itself who knew the first elements of letters.^k Not one priest of a thousand in Spain, about the age of Charlemagne, could address a common letter of salutation to. another."^l In England, Alfred declares that he could not recollect a single priest south of the Thames (the most civilized part of England), at the time of his accession, who understood the ordinary prayers, or could translate Latin into his mother tongue." Nor was this better in the time of Dunstan, when, it is said, none of the clergy knew how to write or translate a Latin letter.^o The homilies which they preached were

large quarto volumes of the Literary History of France, by the fathers of St Maur. But the most useful part will be found in the general view at the commencement of each volume; the remainder is taken up with biographics, into which a reader may dive at random, and sometimes bring up a curious fact I may refer also to the 14 th volume of Leber, Collections Relatives a l'Histoire de France, where some learned dissertations by the Abbe's Lebeuf and Goujet, a little before the middle of the last century, are reprinted. [NOTE L]

Tiraboschi, Storia della Letteratura, t. iii, and Muratori's forty-third Dissertation, are good authorities for the condition of letters in Italy; but I cannot easily give references to all the books which I have consulted.

^k Tiraboschi, t iii p. 198.

^m Mabillon, De Re Diplomatica, p. 55. the reason alleged, indeed, is that they Irene wholly occupied with studying Arabic, in order to carry on a controversy frith the Saracens. But, as this is not my credible, we may rest with the main

fact that they could write no Latin.

ⁿ Spelman, Vit Alfred. Append. The whole drift of Alfreds preface to this translation is to defend the expediency of rendering books into English, on account of the general ignorance of Latin. The zeal which this excellent prince shows for literature is delightful, Yet us endeavour, he says, that all the English youth, especially the children of those who are fred-born, and can educate them, may learn to read English before they take to any employment. Afterwards such as please may be instructed *in Latin. Before the Danish invasion indeed, he tells us, churches were well furnished with books; but the priests got little good from them, being written in a foreign language which they could not understand.

^o Mabillon, De Re Diplomatica, p. 55. Ordericus Vitalis, a more candid judge of our unfortunate ancestors than other contemporary annalists, says that tha English were, at the Conquest, rude and almost illiterate, which he ascribes to the Danish invasion. Du Chasm, Hist

compiled for their use by some bishops, from former works of the same kind, or the writings of the fathers.

This universal ignorance was rendered unavoidable, among other causes, by the scarcity of books, which could only be procured at an immense price. From the conquest of Alexandria by the Saracens at the beginning of the seventh century, when the Egyptian papyrus almost ceased to be imported into Europe, to the close of the eleventh, about which time the art of making paper from cotton rags seems to have been introduced, there were no materials for writing except parchment, a substance too expensive to be readily spared for mere purposes of literature.^p Hence an unfortunate practice gained ground, of erasing a manuscript in order to substitute another on the same skin. This occasioned the loss of many ancient authors, who have made way for the legends of saints, or other ecclesiastical rubbish.

If we would listen to some literary historians, we should believe that the darkest ages contained many individuals, not only distinguished among their contemporaries, but positively eminent for abilities and knowledge. A proneness to extol every monk of whose production a few letters or a

Want of
eminent
men in
literature.

Norm. Script, p. 518. However, Ingulfus tells us that the library of Croyland contained above three hundred volumes, till the unfortunate fire that destroyed that abbey in 1091. Gale, XV Scriptores, t. i. 93. Such a library was very extraordinary in the eleventh century, and could not have been equalled for some ages afterwards. Ingulfus mentions at the same time a nadir, as he calls it, or planetarium, executed in various metals. This had been presented to abbot Turketil in the tenth century by a king of France, and was, I make no doubt, of Arabian or Greek manufacture.

Parchment was so scarce that none could be procured about 1120 for an illuminated copy of the Bible. Warton's Hist of English Poetry, Dissert II. I suppose the deficiency was of skins beautiful enough for this purpose; it cannot be meant that there was no parchment for legal instruments.

Manuscripts written on papyrus, as
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may be supposed from the fragility of the material, as well as the difficulty of procuring it, are of extreme rarity. That in the British Museum, being a charter to a church at Kavenuv in 572, is in every respect the most curious: and indeed both Mabillon and Muratori seem never to have seen anything written on papyrus, though they trace its occasional use down to the eleventh or twelfth centuries. Mabillon, De Re Diplomatica, l. i; Muratori, Antichita Italiane, Dissert xliii. p. 602. But the authors of the Nouveau Traité* de Diplomatique speak of several manuscripts on this material as extant in France and Italy, t. i. p. 493.

As to the general scarcity and high price of books in the middle ages, Robertson (Introduction to Hist Charles V. note x.), and Warton in the above-cited dissertation, not to quote authors less accessible, have collected some of the leading facts; to whom I refer the reader.

devotional treatise survives, every bishop of whom it is related that he composed homilies, runs through the laborious work of the Benedictines of St. Maur, the Literary History of France, and, in a less degree, is observable even in Tiraboschi, and in most books of this class. Bede, Alcuin, Hincmar, Raban, and a number of inferior names, become real giants of learning in their uncritical panegyrics. But one might justly say that ignorance is the smallest defect of the writers of these dark ages. Several of them were tolerably acquainted with books; but that wherein they are uniformly deficient is original argument or expression. Almost every one is a compiler of scraps from the fathers, or from such semi-classical authors as Boethius, Cassiodorus, or Martianus Capella.^q Indeed I am not aware that there appeared more than two really considerable men in the republic of letters from the sixth to the middle of the eleventh century—John, surnamed Scotus or Erigena, a native of Ireland; and Gerbert, who became pope by the name of Sylvester I I. : the first endowed with a bold and acute metaphysical genius; the second excellent, for the time when he lived, in mathematical science and mechanical inventions/

^q Lest I should seem to have spoken too peremptorily, I wish it to be understood that I pretend to hardly any direct acquaintance with these writers, and found my censure on the authority of others, chiefly indeed on the admissions of those who are too disposed to fall into a strain of panegyric. See *Histoire Littéraire de la France*, t. iv. p. 281 et alibi.

^r John Scotus, who, it is almost needless to say, must not be confounded with the still more famous metaphysician Duns Scotus, lived under Charles the Bald, in the middle of the ninth century. It admits of no doubt that John Scotus was, in a literary and philosophical sense, the most remarkable man of the dark ages; no one else had his boldness, his subtlety in threading the labyrinths of metaphysical speculations which, in the west of Europe, had been utterly disregarded. But it is another question whether he can be reckoned an original writer; those who have attended most to his treatise *De Divisione Nature*, the

most abstruse of his works, consider it as the development of an oriental philosophy, acquired during his residence in Greece, and nearly coinciding with some of the later Platonism of the Alexandrian school, but with a more unequivocal tendency to pantheism. This manifest! itself in some extracts which have latterly been made from the treatise *De Divisione Naturae*; but though Scotus had not the reputation of unblemished orthodoxy, the drift of his philosophy was not understood in that barbarous period. He might, indeed, have excited censure by his intrepid preference of reason to authority. "Authority," he says, "springs from reason, not reason from authority—true reason needs not be continued by any authority." *La véritable importance historique*, says Ampère, *de Scot Erigène n'est donc pas dans ses opinions; celles-ci n'ont d'autre intérêt que leur date et le lieu où elles apparaissent* Sam doute, il est piquant et bizarre de voir ces opinions orientales et alexandrines surgir au IX^e siècle, à Paris, à la cour de

If it be demanded by what cause it happened that a few sparks of ancient learning survived throughout this long winter, we can only ascribe their preservation to the establishment of Christianity. Religion alone made a bridge, as it were, across the chaos, and has linked the two periods of ancient and modern civilization. Without this connecting principle, Europe might indeed have awakened to intellectual pursuits, and the genius of recent times needed not to be invigorated by the imitation of antiquity. But the memory of Greece and Rome would have been feebly preserved by tradition, and the monuments of those nations might have excited, on the return of civilization, that vague sentiment of speculation and wonder with which men now contemplate Persepolis or the Pyramids. It is not, however, from religion simply that we have derived this advantage, but from religion as it was modified in the dark ages. Such is the complex reciprocation of good and evil in the dispensations of Providence, that we may assert, with only an apparent paradox, that, had religion been more pure, it would have been less permanent, and that Christianity has been preserved by means of its corruptions. The sole hope for literature depended on the Latin language; and I do not see why that should not have been lost, if three circumstances in the prevailing religious system, all of which we are justly accustomed to disapprove, had not conspired to maintain it—the papal supremacy, the monastic institutions, and the use of a Latin liturgy. 1. A continual intercourse was kept up, in consequence of the first, between Borne and the several nations of Europe; her laws were received by the bishops, her legates presided in councils; so that a common language was as necessary in the church as it is at present in the diplomatic relations of kingdoms. 2. Throughout the whole course of

Causes of the
preservation
of learning
—religion.

Charles le Chauve; mais ce qui n'est pas seulement piquant et bigarre, ce qui interesse le developpement de l'esprit humain, c'est que la question ait ete posee, des lors, si nettement entre 'Tauritorite' et la raison, et si dnergiquement resolie en faveur de la seconde. En un mot, par ses idees, Scot Ertgene est encore un philosophe de l'antiquity Grecque; et par l'independance haute-

ment accusee de son point de vue philrisophique, il est deja un devancier de la philosophic moderne. Hist Litt ill. 146.

Silvester II. died in 1003. Whether he first brought the Arabic numeration into Europe, as has been commonly said, seems uncertain; it wag at least not much practised for some centuries after his death.

the middle ages there was no learning, and very little regularity of manners, among the parochial clergy. Almost every distinguished man was either the member of a chapter or of a convent. The monasteries were subjected to strict rules of discipline, and held out, at the worst, more opportunities for study than the secular clergy possessed, and fewer for worldly dissipations. But their most important service was as secure repositories for books. All our manuscripts have been preserved in this* manner, and could hardly have descended to us by any other channel; at least there were intervals when I do not conceive that any royal or private libraries existed. 3. Monasteries, however, would probably have contributed very little towards the preservation of learning, if the Scriptures and the liturgy had been translated out of Latin when that language ceased to be intelligible. Every rational principle of religious worship called for such a change; but it would have been made at the expense of posterity. One might presume, if such refined conjectures were consistent with historical caution, that the more learned and sagacious ecclesiastics of those times, deploring the gradual corruption of the Latin tongue, and the danger of its absolute extinction, were induced to maintain it as a sacred language, and the depository, as it were, of that truth and that science which would be lost in the barbarous

Charlemagne had a library at Aix-la-Chapelle, which he directed to be sold at his death for the benefit of the poor. His son Louis is said to have collected some books. But this rather confirms, on the whole, my supposition that, in some periods, no royal or private libraries existed, since there were not always princes or nobles with the spirit of Charlemagne, or even Louis the Debonair.

"We possess a catalogue," says M. Ampere (quoting d'Achery's *Spicilegium*, ii. 310), "of the library in the abbey of St Riquier, written in 831; it consists of 266 volumes, some containing several works. Christian writers are in great majority; but we find also the *Eclogues* of Virgil, the *Rhetoric* of Cicero, the *History* of Homer, that is, the works ascribed to Dictys and Dares." Ampere, iii. 236. Can anything be lower than this, if nothing is omitted more valuable

than what is mentioned? The *Rhetoric* of Cicero was probably the spurious books *Ad Herennium*. But other libraries must have been somewhat better furnished than this; else the Latin authors would have been still less known in the ninth century than they actually were.

In the gradual progress of learning, a very small number of princes thought it honourable to collect books. Perhaps no earlier instance can be mentioned than that of a most respectable man, William I., duke of Guienne, in the first part of the eleventh century. *Pult dux iste, says a contemporary writer, a pueritia doctus Uteris, et satis notitiam Scripturarum habuit; librarium copiari in palatio suo servavit; et si forte a Irrequientia causarum et tumultu vacaret, lectioni per seipsum operam dabat longioribus noctibus, elucubrans in libris, donec somno vinceretur.* Rec. des Hist. x. 156.