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THE RISE AND PROGRESS

OF THE

ENGLISH CONSTITUTION

BY

SIR EDWARD CREASY

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TO THE SEVENTEENTH EDITION

THE sixteenth edition of the late Sir Edward Creasy's *Rise and Progress of the English Constitution* having run out, a new edition has been prepared. Obsolete matter has been removed, and the later chapters have been brought up to date. Creasy's work originated in a pamphlet which he wrote in 1848 (the year of the People's Charter) in order to illustrate the importance of the Magna Carta, the Petition of Right, and the Bill of Rights, and their bearing upon our constitutional development. By the year 1855 the work had become a volume, and was soon recognised as a valuable text-book for students and an excellent treatise for the general reader. It is hoped that in its new form the book will serve as a popular introduction to the history of the English Constitution. Those who wish to extend their survey will turn to the works of Stubbs, Freeman, Green, Anson, and Dicey, to the fruitful researches of Maitland, and for a modern history and criticism of our local institutions to Redlich and Hirst's *Local Government in England*.

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WHATEVER may be thought of the execution of this work, the design will not be censured. An attempt to arrange in a simple form the great principles of our Constitution—to prove their antiquity, to illustrate their development, and to point out their enduring value, will surely not be discouraged as blameworthy or slighted as superfluous.

It is, in the first place, necessary to have a clear understanding of what we mean when we talk about "the English Constitution." Few terms in our language have been more laxly employed: and so uncertain is the knowledge, so very vague are the ideas, which many have of the constitution of their country, that, when the opponent of a particular measure or a particular system of policy cries out that it is unconstitutional, the complaint generally means little more than that it is something which the speaker dislikes.

Still, the term "the English Constitution" is susceptible of full and accurate explanation: though it may not be easy to set it lucidly forth, without first investigating the archæology of our history rather more deeply than may suit hasty talkers and superficial thinkers, but with no larger expenditure of time and labour than citizens of a great and free State ought gladly to bestow, in order to comprehend and appreciate the polity and the laws *in* which, and *by* which they live, and act, and have their civic being.

Some furious Jacobins, at the close of the eighteenth century, used to clamour that there was no such thing as the English Constitution, because it could not be produced in full written form, like that of the United States, or like those with which Sieyès stocked the pigeon-holes of his bureau, to suit the varying phases of the first years of the French Revolution. The same cavil is occasionally repeated in our own times. In order to meet it, there is no occasion to resort to the strange dogma of Burke, that our ancestors, at the Revolution of 1688, bound, and had a right to bind, both themselves and their posterity to perpetual adherence to the exact order of things then established: nor need we rely solely on the eulogies which foreigners like Montesquieu and Gneist have heaped upon the unreformed British Constitution.

Those panegyrics, whether exaggerated or not at the time, were to a great extent supported by reasonings and comparisons which are now wholly inapplicable. But, without basing his political creed on them, an impartial and earnest investigator may still satisfy himself that England has a constitution, and that there is ample cause why she should cherish it. And by this is meant, that he will recognise and admire, in the history, the laws, and the

institutions of England, certain great leading principles, which have existed from the earliest periods of our nationality down to the present time; expanding and adapting themselves to the progress of society and civilisation; advancing and varying in development, but still essentially the same in substance and in spirit.

So strong and so enduring are the ancient principles of the English Constitution. And we are not obliged to learn them from imperfect evidences or precarious speculations; for they are imperishably recorded in the Great Charter, and in the Charters and Statutes connected with and confirmatory of Magna Carta. The Magna Carta itself has always been regarded as a solemn instrument deliberately agreed on by the king, the prelates, the great barons, the gentry, the burghers, and all the freemen of the realm, at an epoch which we may consider the commencement of our nationality; in it and in the statute entitled *Confirmatio Cartarum*, which is to be read as a supplement to Magna Carta, we can trace these great principles, some in the germ, some more fully revealed. And thus, at the very dawn of the history of the *present* English nation, we behold the foundations of our great political institutions imperishably laid.

Here, for example, are some of the leading principles of our Constitution:—

That the country is governed in accordance with law by an hereditary sovereign, who is bound to summon and consult a parliament of the whole realm, comprising hereditary peers and elective representatives of the Commons.

That without the sanction of parliament no tax of any kind can be imposed; and no law can be made, repealed, or altered.

That no man be arbitrarily fined or imprisoned, that no

man's property or liberties be impaired, and that no man be in any way punished, except after a lawful trial.

Trial by jury.

That justice shall not be sold or delayed.

These great constitutional principles are all contained, either expressly or by fair implication, in Magna Carta, and its above-mentioned supplement.

Their vigorous development was aided and attested in many subsequent statutes, especially in the Petition of Right and the Bill of Rights; in each of which the English nation, at a solemn crisis, solemnly declared its rights, and solemnly acknowledged its obligations:—two enactments which deserve to be cited, not as ordinary laws, but as constitutional compacts, and to be classed as such with the Great Charter, which they expound, confirm, and develop.

Lord Chatham called these three "The Bible of the English Constitution," to which appeal is to be made on every grave political question. The great statesman's judgment was sound; and it still demands the attention of subjects as well as princes; of popular leaders without the walls of parliament, as well as of ministers within them.

And, indeed, it is not only to those who are prominently engaged in political struggles, but to all who would qualify themselves for doing their duty to their country,—to all who are conscious of what Arnold has called "the highest earthly desire of the ripened mind, the desire of taking an active share in the great work of government,"—that these texts of our Constitution ought to be the objects of peculiar study; in order that, first, we may learn from them what our Constitution really is, and whether it deserves to be earnestly upheld by us as a national blessing, or considered rather as an effete encumbrance, whose euthanasia we should strive to accelerate; and, secondly, that if we have

convinced ourselves of its merit, we may be able to test projects of reform by their conformity with or their hostility to its principles.

It is a humiliating fact that few even among well-educated Englishmen possess, or have so much as ever read these three Great Statutes. Magna Carta, in particular, is on everybody's lips but in nobody's hands; and though perpetually talked of, hardly anything seems to be known of its contents, beyond a vague impression that it prohibits arbitrary taxation and arbitrary imprisonment, and that it is in favour of Trial by Jury. The original charter of King John is not even printed in the common editions of the statutes. With respect to the two other great laws which Lord Chatham ranks with Magna Carta, namely, the Petition of Right and the Bill of Rights, it may safely be asserted that hundreds who have never read a line of them would be indignant if we were to doubt their familiarity with the Attic legislation of Cleisthenes, or with the Roman reform bills of Terentillus and Licinius Stolo.

The texts of Magna Carta, the Petition of Right, and the Bill of Rights will be laid before our readers; and we have endeavoured to make the perusal of them more interesting and more useful, both by giving explanations of the legal and archæological terms which they contain, and also by adding historical introductions and comments. Unless this is done, the spirit of the Constitution cannot be perceived; and, if the letter of the Constitution deserves admiration, still more does its spirit. It is only thus that some of its essential characteristics can be discerned; and, by studying it thus, the more we convince ourselves of its reality and its antiquity, the more confident shall we become of its future durability. For the same earnest and long-continued studies which teach the historical inquirer

to believe in and to venerate the great principles of the English Constitution, also display to him the workings of its normal law of progress, its plastic power of self-amelioration and expansion, through which we may hope to see the growing exigencies of modern times supplied, not only without danger, but with aid and corroboration to the fundamental institutions of ages past.

The student of the English Constitution ought not only to be familiar with the chief portions of Magna Carta, the Petition of Right, and the Bill of Rights; but he ought also to have a clear knowledge and full appreciation of the circumstances under which each of these three primary laws came into existence; of the immediate purposes for which each was framed; and of the enduring general benefits to the nation which each was also designed to secure. He ought to trace and examine the development of the great principles which these statutes embody; and his especial attention should be directed to such other statutes as confirm, extend, or explain the leading enactments. He ought also to watch how far the constitutional rights which these laws sanction and provide have been extended to all members of the community. This is to be carefully noted, not only in respect of the protections from positive wrong which the Constitution affords, but also in respect of the other benefits which it offers. We must observe what classes and what numbers of the population have from time to time taken part in the active functions of the government of the State. And it is always to be remembered that the active functions of political government do not merely include such rights as the right of sitting in parliament, the right of voting for members of parliament, and the like, but also such rights as the right of eligibility to any magistracy or executive office,

and the right of electing others thereto; they include, also, the right of taking part in criminal or civil trials, as, for example, the right of acting as juryman. I follow here the greatest of all writers on the subject of human political institutions. Aristotle classifies the constitutional functions of a member of a State under these three heads: 1st, the Deliberative; 2ndly, the Administrative; 3rdly, the Judicial.[1]

We shall, necessarily, in thus studying the history of our nation and its institutions, be led to observe, in connection with the great primary principles that have been enumerated, many supplemental constitutional rules that have been successively introduced, and gradually established, during the long centuries of our national existence. The amount of authority to which each of these rules is entitled may perhaps vary, according to the weight of the reasons which may be found for the origin and maintenance of each, according to the extent to which each seems to carry out the true spirit of the primary principles, and also according to the length of time by which the existence of each has been hallowed. But they ought all to be carefully noted; and they all deserve the respectful attention even of those who would modify their influence, or would except particular cases from their operation. The study of their causes is indispensable for a right judgment of their effects.

I have endeavoured to compile and arrange in these pages information respecting the origin, the character, and the progress of our Constitution from these points of

[1] Ἔστι δὴ τρία μόρια τῶν πολιτειῶν πασῶν, περὶ ὧν δεῖ θεωρεῖν τὸν σπουδαῖον νομοθέτην ἑκάστῃ τὸ συμφέρον. ὧν ἐχόντων καλῶς, ἀνάγκη τὴν πολιτείαν ἔχειν καλῶς, καὶ τὰς πολιτείας ἀλλήλων διαφέρειν, ἐν τῷ διαφέρειν ἕκαστον τούτων. Ἔστι δὲ τῶν τριῶν τούτων ἓν μέν τι τὸ βουλευόμενον περὶ τῶν κοινῶν. Δεύτερον δὲ τὸ περὶ τὰς ἀρχάς· τοῦτο δὲ ἔστιν ἃς δεῖ καὶ τίνων εἶναι κυρίας· καὶ ποίαν τινὰ δεῖ γίγνεσθαι τὴν αἵρεσιν αὐτῶν. Τρίτον δέ τι τὸ δίκαζον (Aristot. *Polit.* lib. iv. c. 14).

view. I am far from venturing, on that account, to call this little volume a complete history of the English Constitution, but it may aid the student as an introduction to other more learned and elaborate treatises; and, perhaps, even the well-informed politician may sometimes find it useful as a manual for immediate reference. I believe, indeed, that with regard to Constitutional history, as well as with regard to general history, much has been done to secure a present knowledge and a permanent recollection, when the intellect has once thoroughly comprehended and the imagination has once vividly reproduced a small but well-chosen number of leading scenes in the long and complicated drama. Such scenes abide clearly in the memory when the general mass of the story becomes dim: and, when they so abide in the memory, they are valuable, not only by reason of the intrinsic importance of their own immediate topics, but because they serve us as landmarks for an improved survey of the whole subject. They are also most beneficial in enabling us to realise the utility of incidental information as to particular passages of history, which our other studies, and even our desultory reading for mere amusement's sake, continually throw in our way. He who has the knowledge of certain leading historical events firmly implanted in his mind has at his disposal a set of bases, between and round which he naturally fixes and groups all the historical facts that he reads or hears of. His memory is thus continually refreshed. Each piece of new information awakens in him intelligible and connected ideas: and he addresses himself to the acquisition of fresh facts, or to the consideration of rival theories, with far higher powers and advantages than can be possessed by the man who may, indeed, have read much more, but who has read without selection and system; and whose mind,

as to history, must (to borrow a phrase of Dryden) be only full of "a confused mass of thoughts, tumbling over one another in the dark."

Attention is, therefore, here drawn to the acquisition of the Great Charter, the passing of the Petition of Right, and that of the Bill of Rights, as leading scenes in our Constitutional history. The first of these has been treated at far greater length than the other two; both because there is not the same opportunity of referring to other writers on the subject, and because as it occurs at the very opening of our national history, a right comprehension of it forms the very foundation of our Constitutional knowledge. This is premised, lest it should be thought that the investigations of the Constitutional history of each element of our nation, which are introduced before discussing the Great Charter itself, have been foisted in here merely for the sake of inopportunely parading ethnological theories, or of swelling the size of this volume. The tenets there brought forward are essential for the fixing of the corner-stone of my position respecting the English Constitution. I maintain that the principles of our Constitution have been in existence ever since we, this English nation, have been in existence. This is to be proved not merely by quoting the Great Charter, but by making good the assertion that the epoch when the Great Charter was granted is the epoch when our nationality commenced. For this purpose it is absolutely necessary to analyse our nation, to trace the separate current of each of its primary sources, and to watch the processes of their intermingling. Perhaps I may venture to hope that one effect of studying our history in this manner will be to give it an additional interest, from its evident connection with our classical studies. The main stream of our nation is Germanic: and

he who devotes himself to the histories of Greece and Rome will find Greek history blending in Roman, and Roman blending in Germanic. The institutions of our Germanic ancestors commanded the anxious interest of the master-minds of ancient Rome. Those same institutions are the first subjects to which the inquirer into our laws and our political organisation must bend his thoughts. They have, indeed, been greatly modified by the other elements with which they have been mingled here, but they have exercised more influence than any others.

CHAPTER II

Our Constitution coeval with our Nationality—Thirteenth Century the Date when each commences—The Four Elements of our Nation—The Saxon, *i.e.* the Germanic, the chief Element—Parts of the Continent whence our Germanic Ancestors came—Their Institutions, Political, Social, and Domestic—Date of the Saxon Immigrations into this Island—What Population did they find here?—The British Element of our Nation, Romanised Celtic—Primary Character and Institutions of the British Celts—Effect of Roman Conquests—How far did the Saxons exterminate or blend with the Britons?—Evidence of Language.

It has been stated in the last chapter that Magna Carta is coeval with the commencement of our nationality; in other words, that we have had our present Constitution, as represented in Magna Carta, through the whole time of our true national history, except some brief periods of revolutionary interruption. The proof of this depends on the date at which we fix the commencement of the history of the English nation, as a complete nation. This date is the thirteenth century.[1]

[1] Macaulay, at the beginning of the first volume of his *History*, after speaking of the Great Charter as the first pledge of the reconciliation of the Norman and Saxon races, says—"Here commences the history of the English nation. The history of the preceding events is the history of wrongs inflicted and sustained by various tribes, which, indeed, dwelt on English ground, but which regarded each other with aversion, such as has scarcely ever existed between communities separated by natural barriers." In this view Creasy had anticipated Macaulay.

The accuracy as well as the importance of this date will be more readily discerned if we remember the difference that there is between the history of *the English* and the history of *England*;—between the history of our nation, and the history of the island on which we now dwell.

Our English nation is the combined product of several populations. The Saxon element is the most important, and may be treated as the chief one; but, besides this, there is the British (that is to say, the Romanised Celtic), there is the Danish, and there is the Norman element. Each of these four elements of our nation has largely modified the rest; and each has exercised an important influence in determining our national character and our national institutions. It is not until we reach the period when these elements were thoroughly fused and blended together, that the history of the English can properly be said to begin. This period is the thirteenth century after the birth of Christ. It was then, and not until then, that our nationality was complete. By nationality is meant the joint result of unity as to race, language, and institutions. In the thirteenth century these unities were created. Let us prove this separately. First, with respect to race. Though the coming over of the Normans in the eleventh century made up the last great element of our population, a long time passed away before it coalesced with the others. For at least a century and a half after the Conquest, there were two distinct peoples, the Anglo-Norman and the Anglo-Saxon, dwelling in this island. They were locally intermingled with each other, but they were not fellow-countrymen. They kept aloof from each other in social life, the one in haughty scorn, the other in sullen abhorrence. But when we study the period of the reigns of John, and

his son and grandson, we find Saxon and Norman blended together under the common name, and with the common rights, of Englishmen. From that time forth, no part of the population of England looks on another part as foreigners; all feel that they are one people, and that they jointly compose one of the States of Christendom. Secondly, with respect to language. In the thirteenth century our English language, such as it still is, became the mother tongue of every Englishman, whether of Norman or of Saxon origin.[1] So, finally, with respect to our institutions; it was during this century that the Great Charter was obtained, and the statutes connected with and confirmatory of it were passed, in which we can trace the great primary principles of our Constitution. It was in this century that Parliaments, comprising an Upper House of Temporal and Spiritual Peers, and a Lower House of Representatives of Counties and Boroughs, were first summoned. It was in this century that our legal system assumed its distinctive features, and was steadily enforced throughout the realm.

It is clear, therefore, that this is the period at which our true nationality commences; for our history, from this time forth, is the history of a national life, then complete and still in being. All before that period is a mere history of elements, and of the processes of their fusion. But it is a preliminary history that must be studied in order to comprehend aright the history that follows. In order to understand the Great Charter, we must catch the spirit of the age in which it was granted. To do this, we must

[1] The earliest extant specimen of the English language, as contradistinguished from the Saxon and semi-Saxon, is the proclamation of Henry III. to the people of Huntingdonshire, A.D. 1258. See Latham on the *English Language*, p. 77. The reader need hardly be reminded that, for the first century and a half after the Conquest, the Normans in England spoke French.

form for ourselves a vivid and a true idea of the people that obtained it; and we must, for that purpose, trace the early career, we must mark the characteristics, and watch the permanent influence of each of the four elementary races by which the English people has been formed. Of these four elements the Anglo-Saxon is unquestionably the principal one. Our language alone decisively proves this; for it is still essentially the same language which our ancestors spoke in Germany before they left the banks of the Eyder and the Elbe for the coasts of Britain.[1] We may, therefore, advantageously first see who and what the Anglo-Saxons were in their original homes; and then examine who and what the inhabitants of this island were whom the Anglo-Saxons found here. The subsequent immigration of the Danes, and the final influx of the Normans, will next be separately considered: and then (after watching also the processes and the results of the partial fusion of these races, both that which took place with respect to the first three before the arrival of the Normans, and that which afterwards took place with respect to the Norman conquerors themselves, and those whom they subdued) we may proceed to the consideration of the first part of our immediate subject, to ascertain the condition of the various classes of the community at the time when the great national movement took place, by which King John was compelled to grant Magna Carta (A.D. 1215).

The chief element of our nation is Germanic, and we have good cause to be proud of our ancestry. Freedom has been its hereditary characteristic from the earliest

[1] There are extant two Anglo-Saxon poems, "Beowulf" and the "Lay of the Traveller," which are proved by internal evidence to have been composed before our Saxon ancestors came to Britain.

times at which we can trace the existence of the German race. The Germans, alone, of all the European nations of antiquity that Rome assailed, successfully withstood her ambition and her arms. They never endured either foreign conquerors or domestic tyrants. Similarly proud are the pedigrees of two more of the elements of our nation. The Danes and the Normans who came among us were and ever had been freemen. Only the British element had endured foreign conquest and arbitrary rule; and the Celtic had been so fused with the Roman blood and enriched by the Roman civilisation that we may well regard this strain also with grateful satisfaction.

The Germans who settled in this island during the fifth and sixth centuries are usually spoken of as Saxons, Angles, and Jutes. The collective name of Anglo-Saxons has been given to them by historians for the sake of distinguishing them from the Saxons of modern Germany; and it is a name which it is convenient to employ.

There has been, and there continues to be much learned controversy as to the exact localities on the Continent whence the Germanic conquerors of Britain came, and as to their precise degrees of affinity one with the other.[1] Without entering into these perplexities, we may be safe in adopting the general statement that the Anglo-Saxons were Germans of the sea-coast between the Eyder and the Yssel, of the islands that lie off that coast, and of the water systems of the lower Eyder, the lower Elbe, and the Weser. It is important to observe that these are all parts of Germany which were less affected by contact with the Romans, and with which the Romans were less acquainted,

[1] I think that Kemble and Latham have proved that no Jutes from the country now called Jutland took part in the Anglo-Saxon conquest of this island.

than was the case with the parts of Germany that lie near the Rhine and the Danube, the two boundary rivers of the Roman continental empire in Europe. And yet it is almost exclusively from Roman writers that we gain our information about the institutions and usages of our Saxon ancestors in their primeval fatherland. Caution must be used in admitting and applying to them the details which we read in Cæsar and Tacitus respecting the manners and institutions of the Germans. But we may gain thence some general knowledge which may be safely relied on, especially when taken in connection with what we know of the Anglo-Saxons at a later period. Our German ancestors were freemen, having kings with limited authority, who were selected from certain families.[1] Besides these kings, they had chieftains whom they freely chose among themselves for each warlike enterprise or emergency. All important State affairs were discussed at general assemblies of the people; matters of minor consequence being dealt with by the chief magistrates alone.[2] Any person might be impeached and tried for his life at the chief popular assembly.[3] The head men, or magistrates, who were to preside in the local courts were also elected at popular assemblies; and the organisation of the men of each district into Hundreds, for the purposes of local self-government and for being joint securities for the good behaviour of each other, appears also to have existed among them.[4] They had no cities or walled towns, but

[1] As Tacitus says in his treatise on Germany, "the power of their kings was neither free nor unlimited."

[2] De minoribus rebus principes consultant, de majoribus omnes: ita tamen ut ea quoque quorum penes plebem arbitrium est, apud principes pertractantur (Tac. *Mor. Germ.* xi.).

[3] Licet apud concilium accusare quoque, et discrimen capitis intendere (*ibid.* xii.).

[4] Eliguntur in iisdem consiliis et principes qui jura per pagos

they had villages, where each man dwelt in his own homestead.[1]

But the love of individual liberty, the spirit of personal independence, which characterised the German were compatible with a respect for order, and a capacity for becoming the member of a permanent and civilised community. Slavery existed among the ancient Germans, but it was generally of a very mild kind. They had few domestic slaves like those of the classical nations, or the negroes in America; and the term "serf" would more accurately describe the German "Servus"[2] whom Tacitus speaks of. The serf had his own home and his land, part of the produce of which he was bound to render to his master; that was the extent of his servitude; but he was destitute of all political rights.

Military valour was the common virtue of the nations of the North. The Germans possessed this, but they had also peculiar merits. The domestic virtues flourished nowhere more than in a German home.[3] Polygamy was almost entirely unknown among them; and infanticide was looked on with the utmost horror. They paid great respect to women. These were the foundations of that probity of character, self-respect, and purity of manners which could be traced among the Germans and Goths even during Pagan times, and afterwards illuminated the age of chivalry and romance.

Much indeed of the spirit of chivalry, and even the germs of some of its peculiar institutions, may be found

vicosque reddant. Centeni singulis ex plebe comites consilium simul et auctoritas adsunt.

I do not mean that Tacitus had precisely the idea of the German "Centeni" which I have stated; but such was, most likely, the institution of which he was partly informed.

[1] Tac. *Mor. Germ.* xvi.

[2] *Ibid.* xxv.

[3] *Ibid.* xviii., xix.

in the customs of our Germanic ancestors as they are described by Tacitus. The young warrior was solemnly invested with the dignity of arms by some chief of eminence; and the most aspiring and adventurous youths were wont to attach themselves as retainers to some renowned leader, whose person they protected in war, and whose state they upheld in peace.[1] These were the "Gesithas" of the Anglo-Saxons; they fed at the chief's table, they looked to him for gifts of war-horses or weapons as rewards for deeds of distinguished valour. Their relation to him was that of Fealty; and we may see here a species of Feudalism, with the all-important exception that the relation between retainer and chief had no necessary connection with the tenure of any land.

Such were our Anglo-Saxon forefathers, who, in the fifth century of the Christian era, came across the German ocean and changed the Roman province of Britain into England, *i.e.* the land of the English; the new collective name of the whole island being taken from the Anglican portion of the conquerors, though the names of some of its new subdivisions, such as Sussex, Essex, Wessex, etc., have immediate reference to the Saxons. Whether the current story of the landing of Hengist and Horsa in Kent, of Vortigern and Rowena, etc., etc., belongs to the populous region of myths, or is to be regarded as substantially true, may be disputed; but the main facts are certain that a great Germanic immigration into Britain took place during the fifth century,[2] and that it was effected not by one great movement, but by a number of unconnected

[1] In pace decus, in bello praesidium.

[2] Already in the fourth century there was a "*Comes littoris Saxonici*" to defend the shores of Britain against Saxon raids.

expeditions of successive squadrons under independent chiefs.

What then was the character of the population which the Anglo-Saxons found in Britain?

The inhabitants were Romanised Celts,[1] speaking various dialects of Celtic, and also in the towns a provincial Latin.

The description which Cæsar gives of the inhabitants of Britain is the earliest we possess. Some valuable information is also to be obtained from Strabo and Diodorus Siculus. The south-west part of the island had been known by the civilised nations of the ancient world at a much more remote period. The Scilly Islands and Cornish coasts were frequented in very early times by the Phœnician and Carthaginian traders, who carried tin from our mines to their own countries and to the other States round the Mediterranean. From the Phœnician merchants and miners the native Britons acquired the art of working metals, and of forming the bronze weapons and other implements which are found in some of the ancient tombs in this island. But the Phœnicians here, like the Portuguese in the East Indies, seem merely to have established factories, and not to have influenced materially the condition or the usages of the native inhabitants. At a period nearer to the time of Cæsar's landing, merchant-vessels from Gaul carried on some intercourse with our south-eastern shores. Hence, as Cæsar relates, the tribes of the maritime districts were less barbarous than those of the interior, and agriculture was more practised in the

[1] The evidence of language, as shown by the names of our rivers and mountains and the other great natural objects of the island being Celtic, is conclusive of the fact of a Celtic population having been spread over Britain. Latin was the language of culture and was spoken or written by all who could read or write.

south than was the case farther north. The population of the island is said by him to have been large,[1] a statement which Diodorus confirms, but which is not to be taken according to our modern ideas of density of population. The buildings of the ancient Britons were numerous; but they had no fortified towns, and used, for the purposes of defence, spots among their woods which, naturally difficult of access, were strengthened by a ditch and stockade. They were subdivided into numerous independent tribes, with many kings and petty rulers, who, however, were less often at war than might have been expected.[2] We have no means of knowing their political institutions, beyond the fact of their having kings and other rulers. If their polity resembled (as is probable) that of their kinsmen in Gaul, they had a noblesse, and the mass of the people was destitute of all rights and franchises.[3] Their religion was Druidism; and Britain is said to have been the parent-seat of that creed. The Druids were not only priests, but they were also almost the sole civil magistrates and administrators of the law.[4] Perhaps the point in which the British Celts contrast most unfavourably with the ancient Germans is in their marriage customs. According to Julius Cæsar, they formed socialist communities of ten or twelve in number, who had their wives in common.[5]

Against these Celts, possessing, together with many of the vices of the savage state, its usual merit of irregular valour, Cæsar led the Roman legions about half a century before the Christian era. But his invasion, though

[1] "Hominum est infinita multitudo" (*Bell. Gall.* v. 12).
[2] Diod. *Sicul.* v. 21.
[3] Cæsar, *Bell. Gall.* vi. 13. "Plebes paene servorum habetur loco, quae per se nihil audet et nullo adhibetur consilio."
[4] *De Bell. Gall.* vi. 13, 14.
[5] *Ibid.* v. 14.

attended with victory, and successfully renewed in the following spring, was rather a transient inroad than an attempt at permanent conquest. After the withdrawal of his troops, Britain was left to herself for nearly a century. Then the Romans invaded in earnest, and, after a forty years' war, brought almost all that part of the island which lies south of the Firths of Forth and Clyde completely under the dominion of the emperors of Rome.

Seneca's observation, that "Wheresoever the Roman conquers, he inhabits," was made while Britain was being subdued, and it is true of this as of the other conquests which were effected by that remarkable people.

Unlike most nations of antiquity, the Romans neither sought to exterminate nor to make a slave population of those whom they invaded. By planting colonies, and by taking the towns into the pale of the Roman citizenship as "municipia," a nation of Romans was gradually formed in each conquered province. Britain (which, with the exception of Dacia, was the last acquired, and was one of the earliest lost of the Roman provinces) was not completely Romanised; but Roman civilisation flourished here for three centuries, and some of its fruits still survive. Many towns and municipalities were established, each possessing powers of self-government and taxation, the inhabitants electing their own decurions or senators, from among whom the magistrates were appointed. The Roman municipality was not quite lost in the Saxon borough.

It is to be borne in mind, that it was not exclusively an Italian stream that blended with the Celtic source of our nation, while Rome ruled the land. In fact most of the Roman legions in Britain were from Spain or Germany. From the reciprocal intercourse between the various

portions of the Roman empire, the British population must have been sensibly tinged with the blood of the various races that acknowledged the Imperators of Rome, the more so on account of the policy which the emperors adopted of pensioning off the veteran legionaries with grants of land in the countries where they had been stationed.[1]

These are important points when we are considering the British element of our nation; but it is certain that, however varied the population of the south of the island thus became under Roman rule, a community of Roman civilisation was generally diffused, and the language, the literature, and, above all, the laws of Rome, became naturalised in Britain.[2]

As the power of imperial Rome decayed, her British province began to suffer more and more from the inroads of the savage tribes from the north of the island, and from the attacks of the sea-rovers from the Saxon shores. Rome gradually withdrew her troops; and, at last, about five centuries after the first landing of Cæsar, she reluctantly abandoned her reluctant province to nominal independence, but to real anarchy and devastation. The arrival of the Saxons checked the progress of the Caledonian marauders. These were driven back to their northern fastnesses, but

[1] See Latham's *Ethnology of the British Islands*, p. 98.

[2] Macaulay, in the opening of his *History*, underrates the extent to which Britain was Romanised. There is an excellent article on the subject in the *Edinburgh Review*, No. cxci. Sir F. Palgrave's words in his *History of the English Commonwealth*, on this point, deserve citation. "The country was replete with the monuments of Roman magnificence. Malmesbury appeals to those stately ruins as testimonies of the favour which Britain had enjoyed; the towers, the temples, the theatres, and the baths, which yet remained undestroyed, excited the wonder and admiration of the chronicler and the traveller. At the present time the excavations on the Roman wall, and such museums as those of London, York, Chester, and Reading, prove that the Britons under Roman protection had made great progress in art and industry.

the German newcomers soon claimed supremacy over the British inhabitants. A long chaotic period of savage warfare ensued; and nearly two hundred years of slaughter and suffering passed away before our Saxon ancestors established their Octarchy in the island; and, even then, a considerable portion of the western districts remained in the possession of the British, or, as the Saxons termed them, the Welsh.

How far in the parts of the island which the Saxons subdued they exterminated the British, and to what extent the two populations were blended together, are still disputed questions.

The Germanic origin of our language, and the peculiarly savage nature of the warfare by which the Anglo-Saxons conquered this island, have led some writers to assert that the provincials of Britain were almost entirely exterminated, and that the land was repeopled by the rapid influx and continued increase of German colonies. This hypothesis would exclude the Celtic element from the English nation. Arnold goes so far as to say that "The Britons and Romans had lived in our country, but they are not our fathers; we are connected with them as men indeed, but, nationally speaking, the history of Cæsar's invasion has no more to do with us, than the natural history of the animals which then inhabited our forests. We, —this great English nation, whose race and language are now overrunning the earth from one end to the other,—we were born when the white horse of the Saxons had established his dominion from the Tweed to the Tamar."

On the other hand, Sir F. Palgrave and later authorities consider that a very large portion of the population of England, during the Anglo-Saxon period, was of British

descent, and indeed in many of the western counties supplied the main element. I incline so far to the opinion of Arnold, as to regard the Germanic as the main stream of our race, but I cannot wholly exclude the Celtic; nor can I dismiss Caractacus as an alien in blood, though we can proudly claim a still closer relationship with Arminius. In opposition to the Palgravian hypothesis, the reader may be usefully reminded that the Saxon invasion of Britain differed from the usual course of the barbarian conquests on the Continent over the severed fragments of Roman Empire. *There* the military superiority of the assailants was generally self-evident and uncontested. Moreover, the Germanic invaders of Gaul, of Spain, and Italy were generally warriors from tribes that had been influenced to some extent by intercourse with the Romans, both in peace and in war. Their chiefs were not wholly unfamiliar with Roman discipline and Roman art, and were ready to appreciate Roman civilisation. Many, also, of the Germanic conquerors on the Continent had been converted to Christianity before their inroads had been commenced, nearly all were converted before their settlements were concluded. But the Saxons had never been refined by peaceful approximation to the Roman frontier. No missionary had set his foot among their forests or on their coasts. They were pagan pirates. They invaded Britain by detachments, and under different independent chiefs. They never landed in such imposing force as to awe the invaded into bloodless submission, but merely in sufficient numbers to fight their way—to conquer indeed—but only to conquer inch by inch. Their savage paganism inflamed them with peculiar frenzy against all that the Christianised Britons held most sacred; each side upbraided the other with perfidy and fraud; no possible bond of fair union

existed between them; and, probably, in no conquest were the victors more ruthless to the vanquished than in the desperate and chequered struggle by which the Saxons won their slow way over this island.

Led by this historical circumstantial evidence, and by the great fact of our language being essentially Germanic, we may conclude that the Saxons almost entirely exterminated or expelled *the men* of British race whom they found in the parts of this country which they first conquered. But the same evidence (both the historical and the philological), when carefully scrutinised, suggests that it was only the male part of the British population which was thus swept away, and that, by reason of the unions of the British females with the Saxon warriors, the British element was largely preserved in our nation.

Besides those Celtic words in the English language which can be proved to be of late introduction, and those which are common to both the Celtic and Germanic tongues, there are certain words which have been retained from the original Celtic of the island. These genuine Celtic words of our language (besides proper names) are not numerous, but they tend to show that the part of the British population which the Saxons did not slay was reduced into a state of complete bondage, inasmuch as all these words have relation to some inferior employment. Now, if the reader will carefully examine the list, he will see that not only do these Celtic words all apply to inferior employments, but that by far the larger number of them apply to articles of feminine use or to domestic feminine occupations. They are as follows:—Basket, barrow, button, bran, clout, crock, crook, gusset, kiln, cock (in cock-boat), dainty, darn, tenter (in tenter-hook), fleam, flaw, funnel, gyve, griddel (gridiron), gruel, welt, wicket,

gown, wire, mesh, mattock, mop, rail, rasher, rug, solder, size (glue), tackle.[1]

This remarkable list of words is precisely what we should expect to find, on the supposition that the conquering Saxons put their male prisoners to the edge of the sword, except a few whom they kept as slaves, but that they took wives to themselves from among the captive daughters of the land. The Saxon master of each household would make his wife and his dependants learn and adopt his language; but in matters of housewifery and menial drudgery, their proud lord would scorn to interfere, and they would be permitted to employ their old own familiar terms. All the circumstances of the Saxon conquests favour this hypothesis. The Saxons came by sea, and in small squadrons at a time. They came also to fight their way, and were little likely to cumber their keels with women from their own shores. A few Rowenas may have accompanied the invading warriors, but in general they must have found the mothers of their children among the population of the country which they conquered.

This hypothesis helps to account for the difference which undoubtedly exists between ourselves and the modern Germans, both in physical appearance and in mental characteristics. Englishmen preserve the independence of mind, the probity, the steadiness, the domestic

[1] There is no subject upon which modern philologists are more at variance than upon this of the words which the Saxons derived from the Celts. Hardly any of these words are allowed to be of Celtic origin by Murray, and not many by Skeat. Most of the purely Celtic words in the English language, such as cairn and crag, came in later of course. Sweet considers that the reason why the Saxons borrowed so few Celtic words was that most of the civilised Britons spoke Latin. Street is a good instance of an English word derived through the Britons from Latin. A very great number of place-names are Roman or Celtic, and many of the principal Roman camps are still marked by "chester."

virtues, and the love of order which marked their German forefathers; while, from the Celtic element of our nation, they derive a greater degree of energy and enterprise, of versatility, and practical readiness, than are to be found in the modern populations of purely Teutonic origin.

CHAPTER III

Conversion of the Anglo-Saxons—Its civilising effects—They occupy the Roman Towns—England attacked by the Danes—The third, *i.e.* the Danish, Element of our Nation—Danish Institutions and Customs—Ferocity of their Attack on England—Extent of their chief Settlements here—Evidence of Danish Names of Places and Persons—Alfred rescues Saxon England from them—The Danish blends with the Saxon Element—Fusion of the first three Elements of our Nation.

THE conversion of the Anglo-Saxons to Christianity (which was principally effected during the seventh century) did much to mitigate the wild fierceness of the conquerors, and also to modify their political and social institutions. The ecclesiastics from continental Christendom, who were the first missionaries to Saxon England and continued to migrate hither, knew something of the old Roman civilisation. They were familiar with the idea of imperial power, as it once had been wielded by Roman emperors in the West, and still lingered in the shadowy pretensions of the emperors of Constantinople. The church, moreover (within the pale of which St. Augustine and his coadjutors brought England), had her councils, her synods, and the full organisation of a highly complex but energetic and popular ecclesiastical polity. She recruited her ranks from men of every race, and every class of society. She taught the unity of all mankind; and practically broke down the

barriers of caste and pedigree, by offering[1] to all alike temporal advantages and spiritual blessings. She sheltered the remnants of literature and science, and brought new powers to bear against brute force and mere animal courage. All these civilising influences were felt by the converted Anglo-Saxons, and gave hope and succour to what remained of Celtic civilisation. Moreover, the very wars which the Saxons waged against the Britons and each other must have led the Germanic conquerors to appreciate the military advantages of occupying the walled towns and cities which the Romans had left in our island.[2] They who thus became dwellers in cities would naturally adopt the system of civic self-government which Rome had once introduced. Thus many germs of order appeared in Saxon England when Christianised; but, before they could be fully developed, a new stream of rough barbaric blood was poured into the population. Scandinavia sent swarms of warriors, fresh from her rugged coast, unsoftened by any recollection of Imperial or contact of Papal Rome, to struggle long and fiercely for the mastery of the island, and to make the third great element of the English nation. The historical student who has been tracing the progress of the Saxons finds the Danes commencing their ravages and partial conquests of England before the Anglo-Saxon Octarchy could be fused into a kingdom; before, indeed, any of the Saxon States had acquired a permanent predominance over the rest.

In the year 787, thirteen years before the accession of Egbert to the throne of Wessex some men of a strange race

[1] See, as to the influence of the Church of Rome as an instrument of modern European civilisation, the admirable observations of the Protestant Guizot, *Histoire de la Civilisation en Europe*, Leçons 5 et 6.

[2] Others hold that the Saxons generally suffered the Roman cities to perish, and that their own towns had a totally independent origin. Yet nearly all the Saxon towns had been Roman-British towns.

landed from three vessels at an eastern port in England. They slew on the beach the Saxon magistrate who came down to question them, plundered the neighbouring habitations, and hastily re-embarked with their spoil. Such was the first recorded appearance of the Danes in England; but they darken the pages of the Anglo-Saxon Chronicles from that time forth to the year 1066, when our last Harold destroyed the last host of Scandinavian invaders at Stamford Bridge, only a few days before his own defeat and death at Hastings.

These northern sea-rovers, from whose ravages scarcely any European coast during the ninth and tenth centuries escaped, who everywhere appear as conquerors, and up to whom so many noble and royal pedigrees are traced, had much original affinity of race, language, and institutions with the Anglo-Saxons whom they assailed so savagely in their settlements in this island.

The Scandinavian and the Germanic tongues are classed together by comparative philologists under the common title of the Gothic stock. Odin, Thor, Freia, and the other principal deities of the Scandinavian Valhalla had been also the gods of the Anglo-Saxons. Both Anglo-Saxons and Scandinavians believed that the princely families out of which they chose their kings were descended from Odin. The Scandinavians seem in their political institutions to have been more turbulently free than even their Germanic kinsmen. The three Scandinavian countries that ultimately became the monarchies of Denmark, Sweden, and Norway were originally subdivided into numerous petty kingdoms. In each of these, whenever the king died, his successor was elected out of the descendants of the sacred stock by the choice of the assembled freemen of the State. Part of the population was in a state of slavery or thraldom (trœldom), the

inevitable result of the perpetual wars and piracies in which the Scandinavians indulged. These unhappy beings were of course destitute of all political rights; but every freeman capable of bearing arms might attend at the "Ting," as the popular assemblies, both for legislative and judicial purposes, were called, and every freeman had an equal voice. Each Scandinavian State was subdivided into hærads or hundreds, which formed communities for local self-government, identical, probably, in nature with the hundreds of the primitive Germans, which have already been spoken of. They followed chiefs of their own choice in warlike expeditions: though the king was regarded as the natural leader of the national force on great occasions. But unless the assembled freemen in the Ting willed it, the king could neither make peace nor war, nor impose a tax, nor levy an army. He was little more than a military chieftain, and was sure of being speedily deposed if he did not exhibit sufficient spirit and energy in warlike enterprises to satisfy his subjects. War, especially war by sea, was the occupation in which a Danish freeman sought to live, and in which he prayed to die. Some gleams, however, of more civilised and civilising feeling may be traced amid the martial gloom of the Scandinavian character. Women were regarded always with honour, and often with chivalrous devotion. The respect, also, of these warriors for their laws, as administered by freemen towards freemen, was general and profound. They delighted in poetry and minstrelsy. They held the arts of the miner and the worker of metals in estimation. Nor were their maritime skill and enterprise displayed only for purposes of destruction. They looked on commerce with respect; laws were established and strictly observed for the protection of merchant vessels; and an extensive traffic was carried on by Scandinavian

adventurers with the Far East, through Russia and along the great rivers of Central Asia. But the fierce excitement of battle was generally the prevailing attraction for which a Danish fleet was launched. Every free Scandinavian was a seaman; and the art of shipbuilding was brought early by them to considerable perfection; though they generally used in their predatory expeditions small vessels of little draught, so as to enable them to ascend the rivers of the countries which they attacked. It was chiefly by squadrons from the Danish part of Scandinavia that England was assailed, though the Norwegians co-operated:[1] and our chroniclers speak of them generally as Danes. In France, and other countries of the Continent, they were known by their own favourite designation of Northmen.

The original affinity that had existed between the Danes and the Anglo-Saxons by no means mitigated the ferocity of the Scandinavian invaders towards the Germanic occupants of the island. A change had taken place in the Anglo-Saxons since their settlement here which had broken off every tie between them and their Scandinavian kinsmen.

The Anglo-Saxon had been converted to Christianity; while the Northman still gloried in the title of Son of Odin, and hated, as renegades, those who had left a warrior faith for the new creed of the mass and the monk. Led by their Vikings, younger sons of royal houses, whose only heritage was the sea and such lands beyond its waves as their own swords could win them, these "Slayers from the

[1] According to Worsaae, Scandinavians from Denmark chiefly attacked England; Scandinavians from Norway chiefly attacked Scotland. Of the three Scandinavian countries, Sweden sent the fewest assailants of this island. "Not that the Swedes were less piratical, but that they robbed elsewhere; in Russia, for instance, and in Finland."

North," as the old legends termed them, reappeared in England again and again, settling ere long on the shores which at first they merely ravaged, subduing Saxon bravery by their ferocious and fanatic valour, overwhelming the three minor kingdoms of Mercia, East Anglia, and Northumbria, and nearly crushing that of Wessex, which had become the chief Saxon State of the south and centre of the island.

The genius and heroic patriotism of Alfred rescued Saxon England from utter destruction. A worthy son and grandson succeeded him on the throne of Wessex. The Danish population, which had spread over the north-east of England, was brought to acknowledge their authority, partly by victories in the field, partly by the influence of superior civilisation, and still more by conversion to Christianity. Anglo-Saxon and Anglo-Dane became more and more assimilated; the Anglo-Saxon tongue, institutions, and habits generally acquiring the ascendency. But there can be no doubt of the influence of the Danish having been strong and permanent. The evidence of language, both in difference of dialect and in the names of places and persons, still points out the parts of England where the Danish occupancy was strongest. In every shire where we find the compound names of places ending in *by* (as in Derby, Grimsby, Whitby, etc.) we trace the Dane. The German (or Saxon) ending would be *ton*. The termination *son* to proper names of persons (as in Adamson, Nelson, *i.e.* Nielson, etc.) marks a Danish pedigree. Other proofs of a similar kind are collected by the modern Dane, who shows a pride, which we may well share, in these marks of affinity.[1]

The troubles which shook Saxon England after the reign of Edgar (875) caused fresh attacks from Denmark. But

[1] See Worsaae, *Danes in England*, p. 177, and pp. 186, 187.

Denmark was now consolidated into one kingdom, and had been brought within the civilising pale of Christendom. The wars which Sveyn and Canute waged here during the end of the tenth and commencement of the eleventh centuries were very different from the savage devastations with which the old Northmen had swept the land. They were steady wars of conquest: and for a time were successful.

Canute (or Knut, as the name is more properly written and pronounced) was undisputed sovereign of England from 1017 to 1035. He united also the crowns of the three Scandinavian kingdoms, and was one of the greatest princes that ever ruled in this island, whether we regard extent of power or strength of character. But his dynasty was not destined to take root, and after the death of his son Hardicanute (1052), the Anglo-Saxon element asserted its predominance over the Anglo-Danish; and the nation restored a prince of the old royal stock of Cerdic to the throne. From the accession of Edward the Confessor to the battle of Hastings, England may again be correctly termed an Anglo-Saxon kingdom.

We have thus brought together three of the four elements of our race; and watched their fusion. We have seen the general prevalence of the Anglo-Saxon over the British and the Danish; and henceforth we shall speak of the product of the combined three as Anglo-Saxon, in contradistinction to the fourth, the Norman element, that is yet to come. But before we turn our attention to Normandy, it is well to pause, and examine (so far as is practicable) the general nature of the Anglo-Saxon institutions before the Norman Conquest.

CHAPTER IV

Anglo-Saxon Institutions—Classes of the Population—Thralls, Ceorls, Thanes — Townships — Hundreds — Tythings — Frankpledge — Lords—The Were—The Socmen—The Towns—The Witenagemote — The King—The Bishops — The Clergy — The Poor— Deterioration of the Saxon Polity before the Conquest.

NOTWITHSTANDING the effects of the Norman Conquest, and the consequent introduction of the fourth element of our present nation, the foundations of so many of the most important of our institutions are Saxon, that a right understanding of the Anglo-Saxon system of government, and the condition of the various classes of the community under it, is indispensable in order to discern and appreciate the changes and modifications introduced by the Normans, and also those which "the great innovator, Time," has subsequently effected. And even at the present day we must look back to the Anglo-Saxon period, if we would properly comprehend the principles of many of the most important and the most practical parts of our laws and usages.

The word "system" can hardly be applied to Anglo-Saxon government, as it would give an idea of uniformity such as never existed. The Anglo-Saxon institutions were not arbitrarily created by any one lawgiver, or during any one age. They grew by degrees; and they grew also in

a country which was an almost perpetual scene of war and tumult, and besides was inhabited by races of different origin; so that the local development of these institutions varied, apart from their temporary fluctuations. It is unsafe to attempt to give more than a general idea of their leading features, which must be variously worked out in detail, according to the particular reign, and the particular part of England, which is being studied.

One class of the community in Anglo-Saxon times (though probably no very large portion) was in a state of absolute slavery. They were known in Saxon by the names of Theow, Esne, and Thrall. They probably originally consisted of conquered Britons; but, as criminals who could not pay the fine imposed by law were reducible to this state, many more unfortunate beings must in process of time have been enthralled. The freemen of the land were classified by a broad division into the Ceorls who formed the bulk of the population, and the Thanes who formed the nobility and the gentry. Sometimes the classification is made into Ceorls and Eorls: the title of Eorl having reference to birth, whereas the title of Thane had reference to the possession of landed property. It was this, the ownership of landed property, that mainly determined the *status* and political rights of a Saxon freeman, and therefore the classification into Ceorls and Thanes is the most convenient to follow. There is an additional reason for doing so, because the Danes used the title Eorl (Jarl, Earl) to designate authority and command; and when the Danish influence extended in Saxon England, the title of Earl was employed, not to mark a man of good birth, but the ruler of a shire or other district.

Many other names of bodies of people among the

Saxons, and among subdivisions of classes, might be cited and explained; but to do so would require a disproportionate space, and for the broad general view of Anglo-Saxon institutions, which alone is aimed at here, the classification of freemen into Ceorls and Thanes is sufficient.

Both the democratic and the aristocratic principles entered largely into the Anglo-Saxon polity; the latter finally obtaining the ascendency, chiefly by reason of the strictness of the regulations which it was found necessary to introduce in order to maintain some degree of public peace, and to give some security for property and person, amid the tumult and confusion which prevailed so often and so generally in England during the troubled ages of the Anglo-Saxon rule. To adopt the technical language of Bentham, Security being the primary object of government, it was found necessary to trench largely on both Liberty and Equality, in order to preserve it.

One great fact, however, must never be forgotten while we examine the Anglo-Saxon institutions, and mark the privileges which the thanes (*i.e.* the landed proprietors) possessed over the mass of the free commonalty, the ceorls. The superior body was not composed of an hereditary caste, or noblesse. It was an aristocracy, but it was open to receive recruits from the ranks below it. Any ceorl who could acquire a defined amount of landed property could become a thane.

It is convenient to examine the Anglo-Saxon social body by commencing with its component parts; and we may follow Palgrave in taking the Anglo-Saxon townships as the integral molecules out of which the Anglo-Saxon State was formed. He says,[1] "Ascending in the analysis of the Anglo-Saxon State, the first and primary element

[1] *Rise and Progress of the English Commonwealth*, p. 65.

appears to be the community, which in England, during the Saxon period, was denominated the Town, or Township. In times comparatively modern this term became less frequently used, and it has been often superseded by the word 'Manor.' The latter is of Norman origin, and merely denotes a residence, and is frequently applied in ancient records to any dwelling or mansion, without any reference to situation, territory, or appendant jurisdiction. An explanation of the Saxon term may be required. Denoting in its primary sense the inclosure which surrounded the mere homestead or dwelling of the lord, it seems to have been gradually extended to the whole of the land which constituted the domain." There was a lord of every township, usually one of the more opulent thanes, though some townships belonged to the sovereign as their superior. We will, however, limit our attention to the ordinary and normal case, where a resident thane was lord of the township. He dwelt there on his own demesne lands. Round him there were grouped a number of ceorls, some occupying allotments of land, some tilling the lands of others.[1] Each township had its Gerefa, or Reeve, an elective chief officer; and also in each township four good and lawful men were elected who, with the reeve, represented the township in the judicial courts of the hundred and the shire. All these appear to have been freely elected by the commonalty of each township from among their own body. The inhabitants of each township regulated their own police. They were bound to keep watch and ward; and if any crime was committed in their district, they were to raise the hue and cry, and to pursue and apprehend the offender.

[1] I am only endeavouring here to give a general sketch of a township, and therefore avoid entering into questions about Socmen, or Infangthief, or Outfangthief, etc.

Such were the townships; having, generally, each its own local court, with varying amounts of jurisdiction; and being subordinate to the hundred court, which was again subordinate to the shire moot or county court.

In most parts of the country the division into townships gradually disappeared, partly through their having been superseded by the Norman manors, and partly because the ecclesiastical division into parishes was adopted for the purposes of local self-government.

Whether our hundreds had originally any reference to *number* or not, it is certain that they ultimately became mere territorial divisions. And, both in order to facilitate the organisation of the inhabitants for military purposes and to afford better security against crime, the hundreds were subdivided into tythings. In one respect, the system of tything was more comprehensive than the system of townships, as there may have been land not included in any township, which would yet be within a hundred, and consequently would, when hundreds were subdivided, be brought within a tything.

Every hundred had its court, which was attended by the thanes whose demesnes were within its boundaries, and by the four men and the reeve of each township. The hundred court was held monthly, and was subordinate to the court of the shire. The shire or county courts were held at least twice a year. They were presided over by the bishop, and the eorlderman or earl. Each shire had also its reeve, who, in the absence of the eorlderman, was the president of its court, in conjunction with the bishop. All the thanes in the county, the four men, and the reeve of each township, and the twelve men chosen to represent each hundred, attended the county court, but it is justly doubted whether any but the thanes had a

voice in it. Though an appeal from it seems to have lain to the Witenagemote, the supreme court of the kingdom, and though the Witan in some cases sometimes exercised an original jurisdiction, the shire moots were in practice the most important tribunals in the country, and both they and the minor ones, which we have referred to, were certainly of a very free and popular character.

So far the Anglo-Saxon system seems democratic enough; but even before we proceed to the consideration of the Witenagemote, there are two features of a very different character.

Every member of the Anglo-Saxon commonalty was bound to place himself in dependence upon some man of rank and wealth, as his lord. The "lordless" man was liable to be slain as an outlaw by any one who met him. Besides this, by the system of frankpledge, every man was bound to be enrolled in some tything, the members of each tything being mutually responsible for each other's good conduct,—to this extent at least, that if any one of them committed a crime, the rest were bound either to render him to justice to take his trial, or to make good the fine to which, in his absence, he might be sentenced. The effect of these regulations was almost to limit every man to the place and neighbourhood of his nativity; for it was difficult and almost impossible to get enrolled in a tything or to find a lord in a place where a man was not known. At the same time, it is to be borne in mind that in Anglo-Saxon times, when there was little traffic or communication between one district and another, and little inducement for a poor man to try to change his home, this species of compulsory settlement inflicted far less hardship than was caused until quite recent times by our laws of settlement and removal.

The recollection of this will keep us from exaggerating the importance of one point in the position of the ceorls, which has caused some writers to speak of it as a state of servitude. Many of the Saxon ceorls were legally annexed to the lands of their lords, and could not quit the estate on which they had to render their services. But the ceorl was in other respects personally free. He was law-worthy, to use the old expressive phraseology. Among the Anglo-Saxons (as among all the other northern nations) a composition, or *were-gild*, was fixed by law for the slaying of any member of the State, according to the class to which he belonged. The were-gild for the death of a ceorl was 200 shillings, and was payable to his family, and not to the lord of the estate on which he lived. But the fine for killing a slave was paid to the slave's owner. The ceorl had the right of bearing arms. He was a legal witness. As already pointed out, he had political rights with regard to the magistracies of his township, his tything, and his hundred, both as an elector and as himself eligible to office. He could acquire and hold property in absolute ownership; and he needed no act of emancipation to pass into the class of thanes, if he acquired the requisite property qualifications of five hides of land. Many of the ceorls were small landowners. Hallam considers the Socmen, who are frequently spoken of in Doomsday Book, to have been ceorls of this description. He says, "They are the root of a noble plant, the free socage tenants, or English yeomanry, whose independence has stamped with peculiar features both our constitution and our national character."[1]

By far the larger part of the population in the Anglo-

[1] *Middle Ages*, vol. ii. p. 274.

Saxon times was agricultural, but the towns were of considerable importance. The free spirit of local self-government which marks the Anglo-Saxon polity, as displayed in its rural and village communities, was no less strongly developed in their cities and towns. The burg (as the town was usually called, meaning, literally, a fortified place) was organised like a hundred, having subdivisions analogous to those of the hundred, according to its size and population. The *Burhwara*, or men of the borough, elected from among themselves their local officers for keeping the peace, and other purposes of municipal government. They thus also freely chose their own borough-reeve, or port-reeve, as their head of the civic community was termed. This officer presided at their local courts (the burhwaremot, or hustings), and in time of war led the armed burgesses into the field. Sometimes the king, or a bishop, or a neighbouring lord, claimed and exercised seignorial rights within the borough; nor can any description of the Saxon municipal system be drawn that could be uniformly accurate. But, in general, we may say that the Saxon boroughs were thriving and were free; that they were strongholds where the germs of England's commercial prosperity, and of the capacity of the Anglo-Saxon race for local self-government, were matured, amid the turbulence of a rude age, and the attempted encroachments of royal and aristocratic power.[1]

I shall have occasion hereafter to revert to the subject of the Anglo-Saxon judicial system, particularly with reference to trial by jury; at present I will proceed to

[1] For further information as to the Anglo-Saxon boroughs, their guilds, etc., see the Appendix on Municipal Institutions, at the end of Lappenberg's *England under the Anglo-Saxon Kings*. See also the chapter in Kemble on "The Towns," vol. ii. p. 262.

a brief account of the supreme assembly, the Witenagemote, which many political writers of the last century used to describe as a genuine English parliament annually elected by universal suffrage.

This, however, is a delusion. The Witan was essentially an aristocratic body. It was summoned and presided over by the king. It was attended by the bishops, by the earls or eorldermen; the thanes generally had a right to attend; and probably those who resided in the neighbourhood of the place where a Witan was held did attend in considerable numbers. The magistrates of boroughs, and the four men and reeves of townships, and other similar officers, must have occasionally been present, for the purpose of appealing against the decisions of inferior tribunals, and of procuring justice against powerful individuals whom the minor courts could not reach. This is what Sir Francis Palgrave terms "Remedial Representation." But there certainly were no representatives of the ceorls at the Witan with any power to take part in or vote in its proceedings.

The Witan made laws and voted taxes; but taxation was a rare necessity. The king was bound to take their advice as to making war or peace, and on all important measures of government. The Witan had the power of electing the king from among the members of the blood royal. They on some occasions exercised the power of deposing him for misconduct: and they formed the supreme court of justice both in civil and criminal causes.

The nature and extent of the authority which the Anglo-Saxon kings possessed are partly shown by the description of the powers of the Witan. But, in addition to many minor rights, the royal prerogatives of appointing many of the principal officers of government, of commanding and disposing of the military force of the kingdom,

were of considerable importance; and the personal character of the sovereign influenced materially the prosperity or adversity of the country, during the troubled centuries that passed between the accession of Egbert and the fall of the last Harold.

We have seen that the bishops were members of the Witan. The influence of the clergy in the Anglo-Saxon times was very great; the humblest priest ranking with the landed gentry as a mass thane. The ecclesiastical distribution of the country into parishes (*i.e. preost scyres*, each being the district of a single priest) is Anglo-Saxon; a division since generally adopted for purposes of local self-government. It was to Saxon laws that the champions of tithes and church-rates used to refer for the original legal obligation on the English laity to provide these ecclesiastical revenues. Besides her right to these, the church was largely endowed with glebe for her parochial churches, and broad lands for her cathedrals and monasteries. The existence of one of these great ecclesiastical foundations in or near a city favoured municipal progress; and many of our towns grew up round ancient cathedrals. The high officers of the church, her bishops and archbishops, were recognised as the highest officers of the State also. As to the working of this alliance between Church and State in the Saxon times, little is known, but perhaps it may be said that the history of the Anglo-Saxons is as little deformed as any by the ambition, and power, and selfish class-interests of the clergy. Moreover, in England, as in other countries, the church did great services, partly by rescuing some branches of learning from total neglect, and partly by the counterpoise which its authority presented to the rude and forcible government of a military aristocracy.

We must refer lastly to the wretched position of those outcasts of the Saxon civil community who could find no place in one of the mutual associations, the tythings, and find no lord who would permit them to become his retainers. These friendless, helpless beings could not have been very numerous (we are not speaking of the wilful outlaws who lived by brigandage, but of the involuntary outlaws), but some there were. Such a being had no existence in the eye of the law, and the civil State abandoned him to arbitrary violence or starvation. But Christianity taught that there was something even above the State, which the State itself was bound to recognise. The church impressed the heavenly law by which the poor and needy, whom the earthly law condemned to misery, were to be relieved; and the clergy presented their organisation as an efficient machinery for the distribution of alms. There were other sources of relief for the poor. The tithes and other ecclesiastical revenues contributed their portion, and thus at every cathedral and every parish church there was a fund for the helpless pauper, and officers ready for its administration.

We leave unnoticed many points in the Anglo-Saxon system, of interest in themselves, but not indispensable for the general purpose of this treatise. But, in approaching the period of the Norman Conquest, it may be usefully observed, with Guizot, that in the last period of the Anglo-Saxon system the power of the great nobles was becoming more and more predominant, so as to menace both the independence of the crown and the freedom of the commonalty. The earls, or eorldermen, the rulers of large provinces, like Earl Siward, Earl Leofric, Earl Godwin and his sons, and others, were forming a separate order in the State, through the aggressive influence of which the

political rights and liberties of the others would probably have decayed and perished. The catastrophe of the Norman Conquest prevented this; a catastrophe terrible in itself; but, in all human probability, the averter of greater evils even to the Saxons themselves than those which it inflicted.

CHAPTER V

The Norman Element—Different from the Danish—Rolf the Ganger's Conquest of Neustria—State of Civilisation in France—Characteristics of the Normans—Their brilliant Qualities—Their Oppression of the Peasantry.

LAST, but not least in importance, of the four elements of our nation came the Norman. In one respect it was identical with the Danish: as Scandinavia was the parent country of both Norman and Dane. But there is this essential distinction. The Danes came to England direct from their Scandinavian homes. The Norman nation had dwelt in France for more than a century and a half between the time of its leaving Scandinavia and the time of its conquering England. During that interval the Normans had acquired the arts, the language, and the civilisation of the Romanised Gauls and the Romanised Franks. They had done more than acquire the characteristics of others: they had created and developed a new national character of their own, differing both from that of their rude Danish and Norse kinsmen on the shores of the Baltic and the North Sea, and from that of the Romanesque provincials whom they found on the banks of the Seine and the southern coast of the Channel.

Osker, Regner Lodbrok, Eric the Red, Biorn Ironside, Sidroc, and many more kings and jarls of the Norse or

Dansker-men, had sailed up the Seine and spread the terror of their plunderings and slaughters through France, before a young Norwegian chief, named Rolf, and surnamed "Ganger" from his length of limb, left Norway with a fleet of warriors, and in 876 A.D., after some passing forays in England and Belgium, entered the estuary of the Seine, and made the familiar voyage of his countrymen up to Rouen. To say that he was enterprising, energetic, and fearless, is only to say that he was a Norse Viking. But tall striding Rolf was much more. He was a founder of empire, the lineal ancestor of England's sovereigns. He "formed the plan of substituting permanent colonisation for periodical plunder. His men ultimately took possession of the city of Rouen, and the neighbouring country, measuring and dividing the land according to the Danish custom, by the rope." But their settlement there was not effected at once. A long series of wars with the Frankish kings followed, varied by truces which were always bought of the Northmen with French gold. At last, in the year 912, King Charles Le Chauve formally ceded to Rolf the province which the jarl already firmly held, and which, from its new lord and his warriors, has thenceforth borne the name of Normandy.

Even in the crushed and miserable state of France under her last Carlovingian kings, Rolf and his fellow-adventurers from Scandinavia could feel the influence of a civilisation superior to their own. In truth, the instinctive faculty of discerning and adopting the creations of the genius of others marked the Normans from the period of their first settlement in France. Rolf and his warriors embraced the creed, the language, the laws, and the arts which France, in those troubled times, during which the Carlovingian dynasty ended and that of the Capets

commenced, still inherited from Imperial Rome and Imperial Charlemagne. Duke Rollo (such were the title and name which Jarl Rolf assumed) was succeeded in his duchy by a race of princes resembling him in mental capacity as well as in martial bravery. The descendants also of the original Norman barons, taken as a body, were conspicuous for the merits that had marked their sires. The century and a half which passed between Duke Rollo's settlement in Normandy and Duke William the Bastard's invasion of this island form an important period in mediæval history. France, throughout this time, was little more than a federation of feudal princes; and, during this period, the power, and pride, and predominance of her nobility, as an order distinct from the mass of the nation, grew rapidly, and assumed a peculiar social organisation.

Amid the general disorder of France the noblesse fortified their castles, where they dwelt, each in his stronghold, with his family and retainers round him. The management of horses and arms began to be regarded as the sole occupation worthy of "gentle" blood. During this century and a half chivalry, with all its romantic usages and institutions, grew into existence; and the germs of modern literature, of the poetry of the *Trouveur* and the *Troubadour*, appeared. Religious zeal likewise displayed itself in distant pilgrimages, and in the building of magnificent abbeys and cathedrals. Here again the Normans were pre-eminent. Their national originality of character was at the same time shown in the free, but orderly and intelligent spirit, which made them establish and preserve in their province a regularity of government, system, and law, which contrasted strongly with the anarchy of the rest of France. This much we know, but

we have no trustworthy detailed account of the institutions and laws of the Normans before the conquest of England. We only know generally that there was a council of the Norman barons, which the Norman duke was bound to convene and consult on all important matters of state; and that William the Conqueror's counts and chevaliers had not degenerated from the independent frankness of their Scandinavian sires.

Such were the brighter qualities of the Normans, who gave "kings to our throne, ancestors to our aristocracy, clergy to our church, judges to our tribunals, rule and discipline to our monasteries, instructors to our architects, and teachers to our schools." We must add, that besides the misery their conquest caused, they also gave, for many ages, tyrants to our peasantry, and brutal oppressors to our burghers and artisans. For there is a dark side to the Norman character, which the historian of English liberty must not omit; and even the aristocrats of ancient republican Rome were surpassed by the Norman nobility in pride, in state-craft, in merciless cruelty, and in coarse contempt for the industry, the rights, and feelings of all whom they considered the lower classes of mankind.

But the warriors of Rolf, and their descendants, were not the whole population of Normandy; they formed only a small minority of the inhabitants. The peasantry, whom the Norse conquerors found there, were not extirpated or evicted, but became part of the property of the new lords of the soil. They were taken with the land, like the other animals that were found on it. The mere fact of foreign conquerors making slaves of the conquered natives would present in itself nothing remarkable. It was the established practice of ancient and mediæval times. But the domination of the Normans over their *villeins* (as the Neustrian

peasants were termed) was peculiarly oppressive; especially in the tyranny of the forest-laws. Palgrave observes, that though the Normans did not destroy the old inhabitants of Neustria, "the conquerors gave the widest construction to the law of property; air, water, and earth were all to be theirs—fowl, fish, and beasts of chase, where the arrow could fly, the dog could draw, or the net could fall—sportsmen and huntsmen, the Danish lords appropriate to themselves all woodland and water, copse and grove, river, marsh, and mere." Their usurpation of the rights previously enjoyed in common occasioned in the days of Rollo's great grandson a fearful rebellion; and the spirit of the forest-laws, a constant source of misery to old England, still infects the game laws of modern England.

It is worth while to read in the old Norman chronicler, William of Jumiege, his narrative of the insurrection in Normandy; not only for the information which it gives respecting its immediate subject, but, still more, for the insight it affords into the Norman view of the labouring classes. Count Ranulph's cruelty to the insurgent peasants might be attributed to provocation or to individual ferocity of character. But De Jumiege wrote coolly and deliberately; and his tone may be taken as accurately representing the general opinion of the Norman lords. After eulogising the virtues of the then reigning duke Richard, De Jumiege says, "While he abounded in such goodness, it happened that in his youth a certain seminary of pestiferous dissensions arose within his dukedom of Normandy. For the peasants, one and all, throughout the various counties of Normandy, holding many assemblies, resolved to live at their own free-will; so that they should enjoy their own rights as to forest and to fishery, without the barrier of the law previously ordained. And for the purpose of

establishing these schemes, two delegates were elected by each assembly of the mad rabble, who were to meet in a central convention for the purpose of confirming these resolutions. And when the duke knew it, he forthwith appointed Count Ranulph with a multitude of soldiers to repress the fierceness of the peasants, and disperse their rustic convention. And he, not delaying to do the duke's bidding, captured forthwith all the delegates, with some other peasants: and having cut off their hands and feet, he sent them back in that helpless state to their comrades; to check them from such practices, and to be warnings to them not to expose themselves to something still worse. And when the peasants received this lesson, they forthwith abandoned their assemblies and their debates, and returned to their proper places at their ploughs."[1]

[1] *William of Jumiege*, book v. chap. 2.

CHAPTER VI

The Norman Conquest—Extent of the Changes which it caused—Estimate of the Norman and Anglo-Saxon Populations—Loss of Life caused by the Conquest—Probable Number of the Normans and other newcomers from Continental Europe—Did the Population increase in the Century and a half preceding the signing of Magna Carta?—The Miseries of Stephen's Reign—Period of Tranquillity under Henry II.—Probable Amount of Population in 1215.

THE morning of the 29th day of September, 1066, saw a host of the Norman chivalry land upon the coast of the South Saxons (Sussex), and the setting sun of the following 14th day of October saw them the conquerors and lords of England.[1] The last of the Saxon kings, with his brethren, and most of the bravest thanes of the south and centre of the island, lay dead on the field of Senlac. The two great northern earls, Edwin and Morcar, were timid and irresolute. There was no vigorous native chief to renew the war. The fortification of the strong places throughout England had been neglected: and as there was no post whither the shattered remains of Harold's army could retreat, and where they could halt in safety until reinforcements arrived, and until further measures of defence could

[1] See the Battle of Hastings, chap. 8 of *The Fifteen Decisive Battles of the World.*

be organised, a single defeat placed the whole country in the power of the invader.

Duke William had, indeed, some slight pretexts of right to the English crown, besides the cogent title of the sword. His relationship to Edward the Confessor, and the alleged bequest of the sovereignty of England to him by that king, gave a colourable excuse both to his own conduct in undertaking his great enterprise and to the conduct of the Saxons who submitted to him, instead of prolonging a hopeless war after the battle of Hastings.

He was crowned King of England by the Saxon archbishop with the ancient Saxon forms, and after taking the coronation oath of the Saxon kings, on Christmas Day, 1066. At first his rule was comparatively mild. By confiscating the large estates of King Harold and Harold's family, and principal adherents, William obtained the means of staying (if he could not satisfy) the rapacity of his followers, while he left for a time the greater number of the English landowners in the enjoyment of their property. But, under any disguise, conquest is to a brave people a bitter draught. The sense of foreign domination, and the insolence of William's Norman barons and prelates, weighed heavily on the spirits of Saxon thane and Saxon ceorl. Then came fierce local risings, with delusive partial successes over the foreigners; soon crushed by the disciplined troops and the high military genius of the Conqueror. Then followed more sweeping confiscations, and darker cruelties: the results, not so much of hasty anger, as of a stern, remorseless policy. William resolved that his English subjects should fear him, if they hated him; and no feeling of mercy ever made him pause in any measure that seemed adapted to increase and consolidate his power.

Some standard works on our history and laws speak of the Norman Conquest of England in terms which would lead the reader to imagine that it amounted to little more than the substitution of one royal family for another on the throne of this country, and to the garbling and changing of some of our laws through the "cunning of the Norman lawyers." But it is certain that the social and political changes which this Conquest introduced into England excelled in importance any similar event in mediæval Christendom, and have not been equalled by the results of any subsequent conquest which one Christian nation has effected over another. In consequence of the triumph of the Normans here, new tribunals and tenures predominated over the old ones, new divisions of race and class were introduced, whole districts were devastated to gratify the vengeance or the caprice of the new tyrants, the greater part of the lands of the English were confiscated and divided among aliens, "the very name of Englishman was turned into a reproach, the English language rejected as servile and barbarous, and all the high places in Church and State for upwards of a century filled exclusively by men of foreign race." Thierry[1] tells us that "if he would form a just idea of England conquered by William of Normandy, he must figure to himself, not a mere change of political rule, nor the triumph of one candidate over another candidate, of the man of one party over the man of another party, but the intrusion of one people into the bosom of another people, the violent placing of one society over another society, which it came to destroy, and the scattered fragments of which it retained only as personal

[1] Thierry's *Norman Conquest.* See, too, Hallam's *Middle Ages*, vol. ii. p. 304. Freeman, however, modifies this picture, and shows that in *Ivanhoe* the line between English and Norman is too sharply drawn.

property, or (to use the words of an old Act) as 'the clothing of the soil.' He must not picture to himself—on the one hand, William, a king and a despot—on the other, subjects of William's, high and low, rich and poor, all inhabiting England, and consequently all English: he must imagine two nations, of one of which William is a member and the chief—two nations which (if the term must be used) were both *subject* to William; but as applied to which the word has quite different senses, meaning in the one case *subordinate*, in the other *subjugated*. He must consider that there are two countries—two soils—included in the same geographical circumference; that of the Normans rich and free—that of the Saxons poor and serving, vexed by *rent* and *taillage*;—the former full of spacious mansions, and walled and moated castles—the latter scattered over with huts of straw and ruined hovels;—that peopled with the happy and the idle—with men of the army and of the court—with knights and nobles,—this, with men of pain and labour—with farmers and artisans;—on the one, luxury and insolence,—on the other, misery and envy—not the mere envy of the poor at the sight of opulence which they cannot reach, but the envy of the despoiled when in presence of the despoiler."

We have now traced the four great elements of our nation from their respective origins until they were all brought together in this country. The period which elapsed between the introduction of the last of these in point of date (that is to say, the Norman) and the national rising against King John, in the early part of the thirteenth century, is a period of fusion; very interesting as to many of its events, and as to the personal characters of many who figured during it. In particular, the Conqueror himself, the brave Saxon chieftain Hereward, the Archbishops

Lanfranc and Anselm, King Henry the Second, Archbishop A'Beckett, and William Longbeard, the Saxon burgess who strove in vain to defend the oppressed commonalty of the capital against their Norman tyrants, all deserve study. But to avoid prolixity, we pass over the details of this period in order to examine the number and condition of the various classes of the population of England in the reign of John, the epoch of the true dawn of our complete nationality. In making that examination, we shall be led to consider several of the important events that had happened in the interval since the Conquest.

One primary point, before we notice the subdivisions of the population, is to ascertain, as well as we are able, the numerical amount of the whole. And this is closely connected with a topic which ought not to be omitted when we speculate on the comparative importance of the four elements; I mean the proportion which the Normans and other newcomers from Continental Europe bore to the Anglo-Saxons and Anglo-Danes among whom they settled as conquerors.

The population of England at the time of the Norman Conquest is variously estimated at from a million and a half to two millions. It is necessary to bear this in mind when we read of the losses sustained by defeats in the field and other calamities of this period; because we are apt to forget the vast growth of population. Unless we correct this anachronism in our ideas, we cannot realise what the destruction of two or three hundred thousand human beings meant to England in that age.

Let us then determine as far as possible, 1st, the extent to which the Saxon population was diminished by its afflictions under the Normans; and, 2ndly, the probable number of the Normans and other Continental Europeans

who settled here. These calculations will supply us with our primary data for estimating the number of the population at the epoch of the Great Charter.

The Saxon army which perished with Harold at Hastings is said not to have been a very large one. But the slaughters of the Saxons which followed, in consequence of their subsequent insurrections against the Conqueror, were numerous and severe: nor can we estimate the total number that perished by the edge of the sword, during William's invasion and reign, at less than a hundred thousand. The number of exiles also was considerable; as very many of the Saxons sought refuge in Scotland; and many fled beyond seas from the tyranny of their Norman lords. But the massacres perpetrated in cold blood by William's command destroyed more than fell fighting, or fled into exile: and the famines and pestilences caused by his merciless devastations of wide tracts of populous and fertile territory were more destructive still. One of his most atrocious acts of this kind was his laying waste the country between the Humber and the Tyne, partly from anger at a rising of some of the inhabitants against him, and partly as a measure of precaution, because he expected an invasion from Denmark, and thought that the Danes would probably land in the North of England, where the population was most nearly akin to them. The Norman monkish chronicler, Ordericus Vitalis, who is generally William's unscrupulous panegyrist, thus speaks of his devastation of Northumbria: "He extended his posts over a space of one hundred miles. He smote most of the inhabitants with the edge of the avenging sword: he destroyed the hiding-places of others: he laid waste their lands: he burned their houses, with all that was therein." Nowhere else did William act with such cruelty: and in

this instance he cut off the guilty and innocent with equal severity. "He bade the crops, and the herds, and the household stuff, and every description of food, to be gathered in heaps, and burnt so that all sustenance for man or beast should be at once wasted throughout all the region beyond the Humber. Whence there raged grievous want far and wide throughout England; such a misery of famine involved the helpless people that there perished of Christian human beings, of either sex and every age, upwards of a hundred thousand."[1]

A large part of Hampshire was made a wilderness by his orders, so as to supply him with a "New Forest," wherein he might pursue his favourite sport of the chase. Many other acts of his might be mentioned, all tending to waste the people from off the face of the land: and an infinitely larger number of cruel and destructive deeds were perpetrated by him and his Norman followers, no special record of which has survived, but to which the lamentations of the old Saxon chroniclers bear emphatic though confused testimony. For instance: one of these old writers[2] tells us that he forbears narrating, in detail, the conduct of the Normans to the mass of the population, "because it was hard to express in words, and because it would appear incredible by reason of its excessive barbarity." Many similar phrases of the Saxon monks who saw and mourned over the miseries of their countrymen might be cited. And there is also the explicit proof which the figures in Domesday Book[3] supply of the decay of the populations of the great cities and towns during the first twenty years of the Norman rule in this country. Altogether, I believe that the old popu-

[1] Ordericus Vitalis, lib. iv.

[2] *Hist. Elicns.*

[3] See Hallam's *Middle Ages*, chap. 8, p. 2.

lation of the island was diminished by at least a third during the invasion and the reign of William the Conqueror.

It remains to be considered how far this gap was filled up by the Normans and their companions.

William's army at Hastings is said to have numbered 60,000 fighting men. Of these, a fourth fell in the fight; but we must add largely for the non-combatants who accompanied the troops. We have an account also of another even larger host, which he brought over from the Continent, in the nineteenth year of his reign, when he expected an invasion from Scandinavia; and a constant stream of new population from Normandy was poured into England during the reigns of her first Anglo-Norman monarchs.

Few of these adventurers returned to their homes. So that it is probable that, during the reigns of the Conqueror and his sons, from two hundred thousand to three hundred thousand Normans and other immigrants from the Continent became inhabitants of this country.

The accession of population to England from the Continent continued during the reigns of Stephen and Henry II., especially the latter, when the Plantagenet heritage in the south of France contributed to the influx. The introduction also of a large colony of Flemings, who were principally settled in the south of Wales, is not to be omitted. I do not, however, think that the aggregate population of England was larger at the death of Richard I. than at the epoch of the Conquest. The misery which the country suffered during the reign of Stephen must have fearfully reduced their numbers. The old chroniclers tell us that "The nobles and bishops built castles, and filled them with devilish and evil men, and oppressed the people, cruelly torturing them for their money. They made many

thousands die of hunger. They imposed taxes upon towns, and when they had exhausted them of everything, set them on fire. You might travel a day, and not find one man living in a town, or in the country one cultivated field. The poor died of hunger; and they who were once men of substance now begged their bread from door to door. Never did the country suffer greater evils. The very Pagans did not more evil than those men did. If two or three men were seen riding up to a town, all its inhabitants left it, taking them for plunderers. To till the ground was as vain as to till the sand on the sea-shore. And this lasted, growing worse and worse, throughout Stephen's reign. Men said openly that Christ and his saints were asleep."

During the long and prosperous reign of Henry II., the country recovered from "that shipwreck of the Commonwealth," as one of Henry's Acts of State emphatically calls the condition of the land in the time of Stephen. But looking generally to the character of the other reigns, in spite of this recuperation, there is no reason to suppose that the total population of the realm, in the time of John, exceeded the largest census which is assigned to Anglo-Saxon England, namely, about two millions.

CHAPTER VII

General View of the Feudal System—Meaning of the terms "Feudal" and "Allodial"—General Sketch of the Progress of a Germanic Settlement in a Roman Province—Causes of Feudalism—Progress of "Sub-infeudation"—Aristocratic Character of Feudalism—Its Oppressiveness to the Commonalty—Its brighter Features.

IN order to understand the classes into which the two millions of people who dwelt here at the time of the grant of the Great Charter were divided, and the system of government which then existed, a right comprehension of the principles of the Feudal System is indispensable. Even the state of the enslaved peasantry of England at the commencement of the thirteenth century cannot be understood unless we view the peasants in relation to their feudal lords. And, when we proceed to the great events of the century, it would be utterly impossible to give any intelligible account of the greatest of all, the acquisition of Magna Carta, without continually pausing to explain feudal terms and usages, had we not first taken a preliminary survey of that strange body of social and political institutions, so long and so generally prevalent over Europe, to which historians and jurists have given the title of Feudal.

The inquiry is, indeed, far from being one of mere antiquarian interest. The forms of our Constitution can-

not be understood without it; and the student of our law, especially of the law of real property, must still resort to the feudal system if he would understand all the mysteries of his art.

I am not, however, going to discuss here, either the etymology, or the date of the birth, or the exact pedigree of Feuds. Suffice it, for the present occasion, to say generally, that the feudal system was gradually matured during the six or seven centuries of confusion which followed the irruption of the Germanic nations into the Western Roman empire: and that, at the epoch which we treat as the dawn of complete English history (about A.D. 1215), the feudal system was established, though with different modifications, in all the Roman provinces of Europe that had been overrun by German conquerors. The feudal system was also established in Germany itself.

There are many things which are the more easily understood by first obtaining an understanding of their opposites. This is the case with the word "Feudal." The term used in contradistinction to it, by European jurists, is "Allodial." Allodial land was land in which a man had the full and entire property; which he held (as the saying is) out and out. But feudal land (and the land itself so held was called a Feud, or Fief) was land which a man held of some other man, from whom or whose ancestors the holder (or his ancestor) had received permission to possess and enjoy the fruits of the land; but the property and ultimate dominion of it remained in the giver, or, as he was technically called, the lord. The idea of the sovereign owner of land allowing individuals to have the possession of portions of it, and even to transmit such possessory interest to their heirs, on condition of render-

ing certain services, usually military, may be found in the institutions of almost every ancient European nation, and in those of many Asiatic States at the present time. But it was only in mediæval Europe that this simple idea and natural custom were elaborated into a complete system of government and of social organisation, to which everything else was made subordinate, and by reference to which every public office and every private right were determined.

In order to picture to ourselves the chief causes of the establishment of Feudalism, we may sketch in our minds the progress of some one of those numerous bands of Teutonic conquerors that had won their way into a Roman province at the fall of the ancient Western empire. Our sketch will be applicable to Romanised Europe generally, not specially to England, the object being to give the leading ideas of feudalism. When we come to apply them to the state of things in this island, some important modifications must be introduced: but still the general theory must first be learned. Here, again, in order to illustrate and explain feudalism, we look first at its negation, allodialism.

When, by degrees, the bands of Germanic warriors who had broken in upon Gaul and the other Roman provinces began to lose their spirit of fierce restlessness, and to wish for some permanent settlement in the territories they had conquered from the provincials, and had long fought for with one another, the ownership of land acquired not merely a higher value in their eyes, but of wholly different nature from that which it possessed for their ancestors, who dwelt amid primitive forests and wildernesses, or even for themselves so long as they were a mere troop of adventurers, roving in quest of plunder or

excitement. Let us imagine an army of Germanic conquerors in this mood for becoming inhabitants of the land they had conquered, and let us mark what would be the natural results. Some part of the territory might probably be left in the hands of the conquered population; but the conquerors would share the rest. We must inquire, first, how they would share it; and secondly, what other system of parcelling out domains would soon ensue. It is to be remembered that each barbaric king was not the sovereign of an army of subjects in the sense in which we employ the term "sovereign" and "subject"; but of free and independent warriors, each of whom would claim his share of the spoil as a right, as something to hold at his own free will, not as a boon revocable at a despot's caprice. The portion of land which the German soldier thus took, he took as his property; and his estate in it was termed, by the Franks, Allodial. As the conquerors dwelt among a numerically superior population, their safety must have required them to keep up their military organisation; and the subordination, which is the essence of all military discipline, must have greatly facilitated the change of tenure which, as we shall next see, generally occurred.[1]

I have described the distribution of land that took place among the free warriors who composed a Germanic army, and the terms on which that land was usually assigned; but all the confiscated territories was not thus portioned out. Large demesnes were reserved for the king, called fiscal lands. Out of these royal demesnes the sovereigns granted lands to their most favoured or distinguished personal followers, under the title of fiefs or benefices. Whether any definite services were at first affixed to a beneficiary grant is uncertain; but, in the nature of

[1] See Note 8 to Robertson's *View of the State of Europe.*

things, some return would be expected from the favoured follower; an expectation which would soon ripen into a demand: and military service against foreign or domestic foes would, in such a state of society, be the return most desirable to the grantor, and most easily and willingly accorded by the receiver. But the ownership of the fief did not pass out of the grantor. The favoured individual (the Feudatory, in the technical phrase) received, not a right of property, but a mere licence of possession and enjoyment, a usufructuary right, which some authors suppose to have been at first precarious and arbitrarily revocable; though the feudatory's interest soon became more certain and permanent, enduring for his life, unless forfeited by some act of misconduct towards the giver, or, as we will term him, assuming the feudal phraseology, the lord. And gradually fiefs became hereditary; though, throughout the development of the system, the ultimate property was and is held to be in the lord, as evidenced both by legal forms and symbols, and by the liabilities of the fief to revert to the hand that gave it—liabilities which long afforded sharp and practical symptoms of its original character.

As the privileges of the feudatory thus became certain, so were his duties systematised, and the consequences of his breach of them defined. Military service, fidelity in counsel, respect for the person and honour of his lord, attendance at his lord's tribunal, pecuniary contribution in certain cases, formed the essence of these duties, varying, however, in detail, at different times and in different countries.

Corresponding duties of protection from the lord to the feudatory existed; and the general character of the relation between the lord and vassal may be defined in Mr. Hallam's words as a mutual contract of support and fidelity.

I have been describing a case of feudalism in its simplest form, where the feudatory, to whom the sovereign lord of the land granted it, continued to hold the land himself. But the process of "Sub-infeudation" was common, and then a far more complex state of things arose. The feudatory who received large grants of land from his sovereign frequently had dependants of his own, to whom he carved out portions of his fief, to be held of himself on terms similar to those by which he held it of his lord. His sub-grantees thus became vassals under him, and he was a feudal lord to them. They again might subdivide their sub-fiefs and grant them to others. And the process might be indefinitely renewed as often as each subdivided piece of feudal land was capable of still further subdivision. So that many links in the feudal chain might intervene between the original grantor, or Lord Paramount, and the actual occupant of the soil, who was termed the Tenant Paravail. Thus there arose a seignorial hierarchy, so specious in appearance that it earned the praise of Blackstone, but in reality productive of very great confusion. For, as it was in respect of the land that the feudal relation arose, and not in respect of any personal *status* of the individual, the same two men might be and often were lords and vassals of each other in respect of different lands, and an endless conflict of obligations and rights was created.

Still, some protection was gained from the system; and, as times grew more and more troubled after the dissolution of the empire of Charlemagne, the oppressed and isolated allodialist was glad to obtain shelter by becoming a liegeman of some powerful baron in his neighbourhood. Frequently, also, the feudal barons took forcible possession of the little properties of their feebler neighbours. "During the tenth and eleventh centuries," says Hallam, "it appears

that allodial lands in France had chiefly become feudal; that is, they had been surrendered by their proprietors, and received back again upon the feudal conditions; or, more frequently, perhaps, the owner had been compelled to acknowledge himself the man or vassal of a suzerain, and thus to confess an original grant which had never existed. Changes of the same nature, though not, perhaps, so extensive or so distinctly to be traced, took place in Italy and Germany. Yet it would be inaccurate to assert that the prevalence of the feudal system has been unlimited; in a great part of France allodial tenures always subsisted, and many estates in the empire were of the same description."

The influence of the feudal system was not limited to the lay part of the population, or to the rural districts of the state. The prelates and abbots were "feudal nobles"; they swore fealty for their lands to the king or other superior; received the homage of their vassals, enjoyed the same immunities, exercised the same jurisdiction, and maintained the same authority as the lay lords. Very frequently the bishops and abbots gave fiefs to knights on condition of defending the cathedral or the abbey, and of supplying and leading the contingent of troops which the lord paramount demanded. The towns and cities also had their feudal lords. Sometimes the rights of war and conquest gave to the sovereign or some powerful noble the feudal seigniory over a civic community: sometimes the burghers voluntarily placed their city under the feudal seigniory of some celebrated chieftain, or neighbouring baron, for the sake of military protection. The extent of the jurisdiction of the feudal lord over a borough varied according to the terms of the original compact, where it had been voluntarily created; and according to the terms which the burgesses were able to purchase, where the

lord's right over them was that of conquest. The modes by which the boroughs obtained their charters of liberties, their municipal organisations, and their own leagues with one another for self-protection, form a distinct and very interesting chapter of mediæval history.

The spirit of the feudal system was essentially aristocratic. It required, indeed, the existence of a single lord paramount, whether termed Emperor or King, who was theoretically the supreme fountain of honour and justice, and the motive centre of authority both in peace and war. But, in practice, the feudal aristocracy was an aggressive power, that ever sought to aggrandise itself at the expense of monarchy. The process of sub-infeudation was the great cause of this. Each baron who girt himself with martial vassals sworn to serve him, and made the revenues of provinces and cities his own, became the founder of an "*imperium in imperio.*" He did not, indeed, often throw off the semblance of allegiance to his sovereign, but he claimed and exercised the right of resisting his sovereign by open force, if the sovereign carried his feudal prerogatives too far, and of making formal war on him as on a stranger, if his sovereign did him wrong on any matter unconnected with their feudal relationship. He claimed and freely exercised the right of similarly making war on any of his fellow-subjects, on the neighbouring barons or others who offended him. This "right" of private warfare was the severest affliction of feudal Europe, and its abolition in all civilised states, followed by the gradual disappearance of duelling, is one of the greatest steps ever taken in the slow march of human progress. Another point on which the feudal lords strove to assert their independence of the crown was the right of administering justice in their own territories. Each feudal lord had his baronial court, at which his military tenants

attended, and where the judicial combat was a favourite mode of determining controversies between the litigants, whether of a civil or a criminal nature.

While the feudal aristocracy was thus weakening the monarchy, it was also encroaching upon the commonalty of the land. The feudal barons and their retainers gradually formed an aristocracy of birth as well as of tenure. It is to be observed that every holder of a fief by military tenure, however small his strip of land, was a noble, as distinguished from the tiller of the soil, the burgess, and the artisan, and even from him who held land by a less martial title. The superiority of the feudal warrior who was trained to war, and who fought on horseback, protected by his coat-of-mail armour, over the common people who fought on foot and without armour of defence, was enormous, and tended more and more to encourage the pride of superiority of class. Men who belonged to this equestrian rank retained their pride, even though they had parted with their land. Their children did the same. The institutions of chivalry, and the adoption of distinctive armorial bearings by members of particular families, aided powerfully in creating this mixed feudal aristocracy, based partly on tenure of land and partly on birth. The nobility, and the knights and members of knightly families, made up a warrior caste, who termed themselves gentle by birth; and who looked down on the great mass of the lay community as inferior beings. According to the favourite theory of the admirers of the feudal system, men were divided under it into three classes—warriors, teachers, and producers. The feudal nobles and knights with their military followers were the first class; the clergy were the teacher class; and the rest of the people were the third, the productive class. Un-

happily, the general tendency of feudalism was to depress the producers. The peasantry and the little allodialists were ground down with servitude, and forced to till the soil as abject dependants of the barons; while the stores of the merchant and the earnings of the artisan were too often treated as the natural objects of knightly rapacity and violence. These social aspects of feudalism amply account for the inextinguishable hatred with which it has ever been regarded by the common people. But this ought not to make us blind to its brighter features. There was much in feudalism, especially as developed in the institutions of chivalry, that was pure and graceful and generous. It gave woman a high position and zealously protected her honour. It favoured the growth of domestic attachments, and the influence of family associations. It fostered literature and science. It kept up among the nobles a feeling of independence and a spirit of adventurous energy. Above all, it paid homage to the virtues of Courage and Truth in man, and of Affection and Constancy in woman.

CHAPTER VIII

Distinction between Feudalism as developed in England and Feudalism as generally developed on the Continent—How far did it exist among the Saxons before the Conquest; how far among the Normans?—Character of William the Conqueror—Feudalism which he introduced—His Checks on the Baronial Power—Great Authority of the First Anglo-Norman Kings.

In applying to English History our description of feudalism which was given in the last chapter, we must remember several important points of distinction between our system and that of the Continent. The Roman province of Britain underwent two, if not three, successive conquests by nations of Germanic race. First there was the Saxon conquest, which differed, as we have seen, from the Germanic conquests of Roman provinces on the Continent. There was afterwards the great conquest of Saxon England by the Normans, who came from semi-Germanised and semi-civilised France, and who brought with them a system of feudalism already moulded in its essential parts. Perhaps the extensive immigration of victorious Danes, which occurred in the interval between the Saxon and Norman conquests, ought to be reckoned as a conquest itself. No continental province of the old Roman empire underwent such experiences. But the distinction between feudalism in England and feudalism in France, Germany, Italy, or

Spain, is due even more to the sagacious mind and resolute will of one great man, William the Conqueror.

First, let us ask how far feudalism existed among the Saxons in England before the Conquest; and secondly, how far did it exist among the Normans in Normandy before the Conquest?

On the first of these questions many volumes have been written, and many more will probably appear. I am not going to discuss the conflicting theories that have been put forward; and will only observe that, so far as the *forms* of feudalism are concerned, there are few, if any, of which traces cannot be found among the Anglo-Saxons; but no general and elaborate system of feudal forms and ceremonies existed in Saxon England. Of the *spirit* of feudalism there was certainly little here before the Conquest. The Saxon ceorl stood to his thane in a position far different from that in which the Anglo-Norman villein stood to his lord. On the whole, I would affirm that there were many institutions among the Anglo-Saxons of a partially feudal nature which much facilitated the subsequent introduction of feudalism; but that the feudal system, as a system, cannot be said to have existed here before the overthrow of Saxon independence at Hastings.

With regard to the other topic—how far feudalism prevailed among the Normans themselves in Normandy before they conquered this country, Sir Francis Palgrave, in his *History of Normandy*, disputes the commonly-received opinion of Sismondi and others, that Duke Rollo and his Northmen, when they became permanent denizens of Normandy, introduced a complete system of feudality.[1] Palgrave's contradiction of Sismondi appears to be verbally right, and substantially wrong. There seems to be no

P. 673.

evidence, direct or inferential, of either Duke Rollo, or any other Norman Duke, having suddenly composed and introduced among his subjects an elaborate system of feudalism, with all the laws and incidents of tenure designed and provided for. But a perusal of Dudon de St. Quentin and William of Jumiege abundantly proves that feudalism, in all its essential principles, either had been established, or had grown up in Normandy, before William the Bastard became duke; and one great point, namely, that the Norman peasantry were tyrannised over as villeins in the fullest intensity of feudalism, is shown by the narrative of the insurrection of those unhappy men against Duke Richard the Second, referred to in a preceding chapter. William's dealings with landholders in England are also cogent proof that he was familiar with the feudal tenures in his own duchy. On the whole, then, it is substantially correct to say, that William introduced the feudal system into this country, though some portions of it were not fully developed till after his time, and though Henry the Second and his Justiciars, when they re-organised the kingdom, after the "shipwreck" which it underwent in Stephen's time, probably made several innovations.

Hallam correctly describes William the Conqueror as a cold and far-sighted statesman, of great talents, with little passion or insolence, but utterly indifferent to human suffering. These qualities were all eminently displayed in the way in which he organised feudalism in this country, adopting it so far as it tended to confirm his conquest and consolidate his power, but modifying its Continental form, so as to guard his throne from being overshadowed by a haughty and turbulent nobility, as he himself and the other great lords of France overawed the French Crown. Nor ought we, in justice to William, to doubt but that the

instinctive appreciation of Order, which is a characteristic of great men, must have strongly influenced him in the precautions which he took against the development here of the baronial insubordination that distracted the Continent. Guizot says truly that "there are men whom the spectacle of anarchy or of social stagnation strikes and distresses, who are intellectually shocked thereat as with a fact which should not be, and who become possessed with an uncontrollable desire to change it and to plant some rule, some uniformity, regularity, and permanency, in the world before them." Such a man, notwithstanding his selfishness, pride, and hardness of heart, was William, Duke of Normandy, and, by conquest, King of England.

He established as a universal rule throughout the country, that he himself was the supreme lord of all the land. And this is still in a sense the theory of our law. "All the lands and tenements in England in the hands of subjects," says Coke, "are holden mediately or immediately of the king; for in the law of England we have not properly allodium."[1]

This feudal supremacy of the Crown was solemnly acknowledged at the great assembly which William convened at Salisbury, in 1086. Every man of the least note who held land in England attended there:[2] and they all took the oath of fealty to William as their liege lord; and each of the vast multitude performed the ceremony of homage to him.

Each landowner, whatever his rank or wealth, knelt humbly before William as he sat on his throne. Each placed his clasped hands within the king's hands, and pronounced the formal words, "I become your man, from this day forth, of life, of limb, and of earthly worship, and

[1] Coke *Littleton*, cap. i. sect. 1. [2] *Saxon Chron.* 290.

unto you will be true and faithful, and bear you faith for the land I hold of you, so help me God."

But while William thus made feudalism universal in England, he at the same time made an important alteration in its system, by which he strengthened the authority of the Crown, and provided against his great vassals acquiring the insubordinate powers which the feudal nobility on the Continent enjoyed. He did not, indeed, prohibit sub-infeudation. That was not done till two centuries later. But William at the Salisbury convention made all the sub-tenants of his *Tenants in capite* (*i.e.* of those who held land immediately from himself), take the oath of fealty to him, the king, as the lord paramount of all. On the Continent, the vassal who held lands took an oath of fealty to his own immediate lord;—to the sovereign, if he held directly from him, but to the mesne lord, if (as in the great majority of cases) some peer or baron intervened between the Crown and the occupant of the soil.

Besides thus "breaking in upon the feudal compact in its most essential attributes, the exclusive dependence of a vassal upon his immediate lord,"[1] William took other effective measures to keep down the influence of the aristocracy, and exalt that of the Crown. While lavishly generous in his grants of land to those who had served him, he took care to reward each leading Norman noble with estates scattered over different parts of the kingdom, and not with compact little principalities, which might serve as bases of rebellion, and form independent States. He maintained also in effective force the supreme authority of his own royal tribunal; and curtailed as far as possible the territorial jurisdiction which each lord of a manor exercised in his court baron. He had the wisdom

[1] Hallam, vol. ii. p. 312.

also to retain the Saxon popular tribunals of the county court and the court of the hundred, although he diminished the dignity of the county court by withdrawing ecclesiastical matters from its cognizance. But its temporal jurisdiction was preserved; indeed, it may be said to have acquired vigour, and to have become more democratic in character under the Anglo-Norman kings, than it had been before the Conquest. Under the Anglo-Saxon system only the thanes, that is, the gentry, could act and vote as members of the county court. Under the Anglo-Norman rule all persons who held any land by a free tenure had a right to attend the county court and to take part both as suitors and voters in its proceedings. While these democratic courts of the shire and the hundred flourished, and while the power of the king's courts was gradually extended by the Conqueror's wisest successors, it was impossible for any feudal lord in England to raise his baronial court into the judicial importance arrogated by each count and seignior on the Continent.

Such licensed anarchy as is implied by a recognised right of private warfare was little likely to be permitted under the iron rule of William. Every man, small or great, was bound to keep the king's peace, and was amenable to the criminal law for the breach of it. Instances of violence and strife between rival nobles, that seem to amount to private warfare, may certainly be found in the Anglo-Norman times, but these, even when unpunished, were looked on as breaches of the law, and not as things done in the exercise of legal privileges.[1]

Thus, Norman feudalism in England secured more order and regularity, and embodied a stronger central government, than could be maintained in the feudal States of

[1] See Hallam, vol. ii. p. 345.

Continental Christendom. There were other causes for the predominant power and authority of Anglo-Norman royalty. One of these was the immense wealth of the Crown, independently of any contributions from its subjects. William kept nearly 1500 manors, and almost all the cities and towns of any note, as his own share of the spoils of the Conquest. Another cause was the readiness with which the oppressed Saxon part of the population ever served the king against any Norman baron who rebelled. A third, and not the least important cause, was the remarkable intellectual capacity and energy not only of the Conqueror himself, but of his successors on our throne, until John became king of England.

We may now pass to the condition of the population of the land at the time when this degenerate inheritor of the Conqueror's sceptre roused all classes of freemen into a joint struggle against the abused predominance of royal power.

CHAPTER IX

State of the Mass of the English Nation at the Commencement of the Thirteenth Century—The Peasantry—Villeinage: its Incidents: its probable Origin and Extent; and the Modes of becoming emancipated from it—State of the Lower Classes in Towns—State of the Middle and Upper Classes—The various Tenures of Land—State of the Boroughs after the Conquest—Their partial Recovery of their Liberties.

OF the two millions of human beings who inhabited England in the reign of John, a very large number, probably nearly half, were in a state of slavery. Those who are disposed to listen to tales about "Merrie England," and "the good old times," should remember this fact. At the commencement of true English history, we start with the labourers in abject wretchedness. The narrative of the changes in their social and political positions thenceforward to modern times is certainly a history of progressive amelioration, though lamentably slow and imperfect.

The technical name for the kind of slavery which prevailed in Anglo-Norman England is Villeinage. Some slaves were annexed to certain lands, and passed into the dominion of the heirs or purchasers of those lands whenever the ground, which was considered the more important property, changed owners. These were called "Villeins regardant." Others were bought and sold, and passed

from master to master, without respect to any land. These were termed "Villeins in gross": the ancient law applying to them the same uncouth but expressive phraseology which it used of rights of common and other inanimate legal entities.

It is probable that the number of villeins in gross was never very considerable: but there are good grounds for believing that, at the commencement of the thirteenth century, the greater part of the labouring agricultural population of England (including not only actual farm-labourers, but the followers of handicrafts connected with husbandry, and practised on the land) were villeins regardant, and were looked on in much the same way as the live-stock of the land to which they belonged.

A good description of the ancient state of villeinage is contained in Hargreaves' celebrated argument in the case of the Negro Somerset, in 1772; when he successfully maintained that a slave who touched British ground became free. He proved this by showing that the law of England had never [that is to say, never since the formation of the Common Law] recognised any species of slavery, except the ancient one of villeinage, then long extinct; and that our law had effectually guarded against the introduction of any new sort of slavery into England. In the course of his argument he was led into a very full and accurate investigation of the nature of villeinage.

"Slavery," said he, "always imports an obligation of perpetual service; an obligation which only the consent of the master can dissolve. It generally gives to the master an arbitrary power of administering every sort of correction, however inhuman, not immediately affecting the life or limb of a slave; and sometimes even these are left exposed to the arbitrary will of the master, or they are

protected by fines and other slight punishments, too inconsiderable to restrain the master's inhumanity. It creates an incapacity of acquiring, except for the master's benefit. It allows the master to alienate the person of the slave, in the same manner as other property. Lastly, it descends from parent to child, with all its severe appendages."

The condition of a villein involved most of these miserable incidents. The villein's service was uncertain and indeterminate, being entirely dependent in nature and amount on the caprice of his lord. In the emphatic terms of some of our old law-writers, "*The villein knew not in the evening what he was to do in the morning, but he was bound to do whatever he was commanded.*" He was liable to beating, imprisonment, and every other chastisement that his lord thought fit to inflict; except that the lord was criminally punishable if he actually killed or maimed his villeins, or if he violated the person of his *neif*, as a female villein was termed. The villein was incapable of acquiring property for himself; the rule being, that all which the villein got became the lord's. He usually passed to each successive owner of the land as if he had been a chattel attached to it. But the lord, if he pleased, could sever him from the land, and separate him from his family and children, by selling him as a villein in gross by a separate deed. This wretched condition of slavery descended to the children of villein parents; and even if the father only was a villein, the children inherited the same sad lot from him. Indeed, at one time, the severity of the law was such, that if a villein who belonged to one lord married a neif who belonged to another lord, the children of such a marriage were equally divided between the two slave-owners.[1]

Such was the wretched state in which we find the bulk

[1] See Hargreaves' *Jurisconsult Exercitations*, vol. i. p. 19.

of the English peasantry at the time when the full history of our nation commences. We cannot track the precise steps by which the law of villeinage had become so established; but we have every reason to suppose that this took place in the interval between the Conquest and the reign of Henry II., when we find villeinage completely settled, as appears by the book of Chief Justice Glanville.[1] The Norman lords had then brought the peasantry of England almost as low as that to which their ancestors had formerly reduced the peasantry of Normandy. "By a degradation of the Saxon Ceorls, and an improvement in the state of the Saxon Thralls, the classes were brought gradually near together, till at last the military oppression of the Normans, thrusting down all degrees of tenants and servants into a common slavery, or at least into strict dependence, one name was adapted for both of them as a generic term—that of *villeins regardant.*" This last remark is taken from Ellis's *Introduction to Domesday Book*; and it is from the valuable statistics which he has compiled of the number of "Villani" and "Servi" therein recorded, relatively to the numbers of other classes which are there mentioned, and by bearing in mind the probable character of the parts of the population not registered in Domesday Book, that the best data are to be obtained for calculating the number of villeins in the reign of John: having regard, also, to the probable deterioration in the lot of the lower orders which had been going on in the interim, or at least until the time of Henry II.

It remains to mention the facilities which the law, as established in the thirteenth century, gave for the emancipation of villeins, and the difficulties it placed in the way of any accession to their number.

[1] Glanville, lib. v.

The lord might, at any time, enfranchise his villein; and there were also many acts of the lord from which the law inferred an enfranchisement, though none could be proved to have actually taken place. If the lord treated the villein as a freeman, by vesting the ownership of lands in him, or by accepting from him the feudal solemnity of homage, or by entering into an obligation under seal with him, or by pleading with him in an ordinary action, the law held that the lord should never afterwards be permitted to contradict his own act by treating him as a villein. There were many other modes of constructive enfranchisement. One of the most important was, that if a villein remained unclaimed by his lord for a year and a day, in any privileged town (that is to say, in any town possessed of franchises by prescription or charter), he was thereby freed from his villeinage. Moreover, in all disputes on the subject of villeinage the presumption of law was in favour of liberty. The burden of proof always lay upon the lord. And there were only two ways in which villeinage could be proved. One was, by showing that the alleged villein and his ancestors before him had been the property of the claimant and of those through whom he deduced title for time whereof the memory of man ran not to the contrary; the other was, by showing that the alleged villein had solemnly confessed his villeinage in a court of justice. The first of these modes of proof was always liable to be defeated by showing that the alleged villein, or some one of his ancestors, through whom villeinage was said to be traced, had been born out of wedlock. For, as the law held that an illegitimate child was *nullius filius*, it also held that an illegitimate child could not possibly inherit the condition of villeinage.

Thus while, at the period when we first can assert the

common law of the complete English nation to commence, we find this species of slavery so widely established in the country, we also find the law providing means for its gradual, and ultimately certain, extinction. We know little of the Justiciars of Henry II., in whose time this branch of our law can first be traced distinctly. But if, as is probable, Chief Justice Glanville and Abbot Samson of St. Edmunds,[1] and others, their fellows on the judicial bench, while they found the power of the lords over their villeins too firmly established to be called in question without shaking the rights of property, devised and encouraged these numerous methods by which villeinage could gradually be extinguished, they may be reckoned among the truest benefactors of our country.

Our knowledge of the condition of the artisans and lower orders in our cities and towns at this period is but scanty.

No large portion of them, if any, can have been in a state of slavery. It has been seen that in Henry II.'s time the villein from the country who resided, unclaimed by his lord, for a year and a day in a town with franchises, became thereby free; and it is difficult to suppose that any one born within the town would be in a worse condition. The absolute slaves, the theows and thralls of the Saxon times, cease to be mentioned soon after the Norman Conquest. The villeins in gross (who alone could be in an analogous position to that of those Saxon thralls who lived in the towns) were not numerous in Anglo-Norman England; nor am I aware that any positive mention of them in the towns can be traced.[2] Generally speaking, we

[1] See the account of Abbot Samson in the *Chronicle of Jocelin de Brakelonde*, partly translated in Carlyle's *Past and Present*. Henry II. employed Abbot Samson as a judge.

[2] In the Inquisition made in the Borough of Ipswich in the second

may consider that villeinage in John's time existed only among the rural population; but it is to be remembered that the relative proportion of the number of the dwellers in the country to the number of the dwellers in the towns was enormously greater then than now.

The free labouring population, therefore, in John's time included the lower classes in the towns, and those of the peasantry who had either escaped being reduced to villeinage, or had been emancipated from it. This class was gradually increasing in number; but the whole amount of free labourers in England in the early part of the thirteenth century cannot have been considerable; for there is no complaint in the legislation or in the law chronicles of that time about vagrant beggars and paupers —evils repeatedly noticed in the statutes and histories of the next and subsequent centuries. The villeins on each estate were maintained by the lord of it, like his other cattle; and such freemen as became destitute found relief from the church, the ample endowments of which continued, after the Conquest, as before it, to provide means for the maintenance of the afflicted and distressed, aided by the alms of the laity, which the clergy received and

year of John's reign, mention is made of various privileges enjoyed by the Bishop and Prior of Norwich *and their villeins*, by the Bishop and Prior of Ely *and all their villeins*, by the Lord Roger de Bigod *and his villeins*, and by other noblemen and knights and their *villeins*. But these seem to have been cases of non-residents in the borough. There is a remarkable stipulation respecting the villeins of some of the privileged persons whom this Inquisition mentions. It is declared that *if the villeins are merchants*, they are to pay their custom towards the king for their merchandise. This seems to prove that in John's time some villeins were permitted by their lords to traffic on their own account; as was often the case with slaves in Ancient Rome. The gains of the merchant-villein would be strictly "*Peculium.*" See the Ipswich Inquisition in Merewether and Stephens' *History of Boroughs*, vol. i. p. 396. See also the 38th chapter in Britton, *De Purchas de Villeyns.*

administered: the clergy being in those days the overseers and guardians of the poor.

As has been already stated, County Courts and the Hundred Courts were preserved by the Anglo-Norman kings: and the subdivision of the freemen of each hundred into decennas, with the old Saxon regulations respecting frankpledge, were also in full vigour in the reign of John. The poorest free peasant was so far vested with political functions as to have the capacity and to be under the obligation of being enrolled in a decenna; and he co-operated with his brother decennaries in preserving the peace. He also attended as a member of the court of the Hundred (the court-leet as it was now termed), and so participated in some rudimentary functions of local self-government. The presidents of the Hundred Courts had now, with very few exceptions, ceased to be elective. Frequently the right of presiding in the Hundred Court had become annexed to the lordship of one of the principal manors of the district. In other cases, the lordship of the Hundred (or the lordship of the leet, as it is more often called) had been granted by the Crown to some favourite baron, the office being lucrative by reason of the fines and forfeitures that accrued to its holder. But every freeman was eligible to serve the minor offices of local self-government, so far as the tything and the hundred were concerned; and, as a "free and lawful man," he also acted on the inquests or juries, on which (as we shall see hereafter) the king's judges frequently summoned the hundredors.

On turning to the state of the upper and middle classes at this period (exclusively of the inhabitants of the towns), we find the various incidents of the several Anglo-Norman feudal tenures of land so difficult to

follow, that it is best to direct our attention to them in the first instance. The king, it is to be remembered, was and long remained in theory supreme feudal lord of all English land.

There were three principal tenures by which Englishmen held their land, either immediately of the king, or immediately of some other subject, and so mediately of the king. These were, 1st, tenure in chivalry, sometimes called military tenure, or tenure by knight's service; 2nd, tenure in free socage, the original of our modern freehold tenure; 3rd, tenure in villeinage, the original of our modern copyhold tenure.[1]

1. Tenure in chivalry was the most honourable; it was that by which the barons and other chief landowners held their lands of the Crown, and by which they frequently made sub-grants of land to their own military followers. But the burdens of this tenure were numerous and severe. They require particular attention, in order that we may comprehend the oppressions at the hand of the sovereign to which the barons who gained the Great Charter were exposed, and which caused them to become the chiefs of a great national movement on behalf of the liberty of England. Not that we would deny or disparage the renown justly due to them for the magnanimous and far-sighted spirit which won protection for the rights of others besides their own; but obviously it was community in suffering that led to their community in action with the other freemen of the realm, when those primary constitutional guarantees against arbitrary oppression were obtained, which are frequently designated in English history by the title of the Baronial reforms.

[1] Tenure by chivalry included tenure by grand and petit serjeanty. For more full information on these points see Reeve's *History of the English Law*, vol. i. p. 38.

The king, as feudal lord of his barons, and other military tenants, had a right to exact from them military service, or a pecuniary payment in lieu thereof: and it seems to have become optional with the king to claim the money, whether the vassal wished to serve in person or not, and even to exact both money and personal service. This war-tax was called "escuage," or "scutage"; and the constant wars and troubles of the times always furnished a ready pretext for demanding it. Other exactions of money-payments, under the title of *aids*, were continually practised. Besides these, the heir, on succeeding to his estate, was required to pay a sum of money to the lord, under the title of a "*relief*." If the heir was a minor, the lord took possession of the land as guardian, and used or abused it as he pleased, till the heir attained his majority. And even then the heir was obliged to pay a fine on suing out his livery, that is, on obtaining the delivery of the land from his guardian to him. The lord also had the right of nominating and tendering a wife to his male ward, or a husband to his female ward. And if the ward declined to marry the person so selected, the ward forfeited to the lord such a sum of money as the alliance was considered worth. The lord was entitled to a fine upon alienation; that is, if the tenant disposed of the land or any portion of it to any third party. If the tenant died without heirs, the land reverted to the lord. This was termed Escheat; and, as the right of devising real property did not exist in England after the Conquest till Henry VIII.'s time, escheats must have been numerous. The lord also claimed to take back the land whenever the tenant committed any of a numerous list of crimes or acts of feudal misconduct. Such criminality or misconduct on the tenant's part was

held to work a *forfeiture*; a doctrine which was made peculiarly severe in England where, by attainder of treason or felony, the tenant not only forfeited his land, but his blood was held to be corrupted or stained; so that every inheritable quality was entirely blotted out and abolished, and no land could thereafter be transmitted from him or through him in a course of descent. The king's military tenants *in capite* were also subject to the peculiar burden of *primer seisin*, which did not apply to those who held of inferior or mesne lords. *Primer seisin* was a kind of extra *relief*; and under it the king, on the death of any of his military tenants in chief, took of the heir (if of full age) a whole year's profits of the lands.

2. The landholders of inferior rank, who held their lands, not by military, but by socage tenure, the yeomen of a later age, were not liable to so many exactions from their feudal lord as were the military tenants. The tenant in free socage was subject to the payment of aids for knighting the lord's son, and providing a portion for the marrying his eldest daughter. *Relief* was due on this tenure; but its amount was fixed and limited to one year's rent of the land. Escheat and forfeiture were incident to socage tenure, and fines were due upon alienation. The lord had no right of wardship or marriage over his socage tenants.

3. The holders of land by villein tenure were originally villeins on the domains of feudal lords of manors, whom the indulgence of the lords permitted to remain in the occupation of their little strips of ground so long as they duly rendered the customary services. When villeins were emancipated, they often continued to reside on the lord's estate and on the same holdings, but the services

they still rendered to the lord were no longer variable at his will. Sometimes, also, freemen took lands which had been previously held by villeins, and became bound to continue the services which the lord had usually received from the servile occupants of such lands. By degrees the customary expectation of such holders of manorial lands, that they and their heirs would not be removed so long as they paid the customary rent and performed their customary duties, ripened into the legal title of our modern copyholders; but it is not probable that any considerable number of freemen occupied land by villein tenure so early as the reign of John.[1]

William the Conquerer had kept as part of his own share of the spoil nearly all the considerable cities and towns in England. Some few had been granted by him to favourite Norman lords. By no class was the effect of the Conquest felt more severely than by that of the citizens and burgesses. Their Norman lord required of them an annual rent, and various dues and customs. He commonly farmed these out to the highest bidder; who, under the title of Bailiff, became the chief local ruler of the oppressed citizens, instead of their own old elected port-reeve or borough-reeve. By degrees they bought back some of their old liberties. Their Norman lords found that they could not extort so much by force as the burgesses would voluntarily pay for the sake of getting rid of the obnoxious petty tyranny of the bailiff and recovering their own local self-government. This led the king and other lords of towns to farm them to the burgesses themselves, who paid a fixed rent, and were thenceforth said to hold their town in fee-farm, or by burgage tenure.

[1] For further explanation of tenure in villeinage, see Blackstone's *Commentaries*, book ii. chapters 4, 5, 6, and Reeve's *History of the English Law*, vol. i. p. 269.

They also obtained charters entitling them to elect their own chief officer, who generally took the Norman title of Mayor. Other privileges were similarly purchased; for a fine of money was almost invariably the consideration on which a charter was granted; and the cupidity of the lords made them seek pretexts for declaring that a borough had forfeited its charter, in which case another fine for a re-grant was exacted.

Besides these liabilities to the king, or other lord of the city or land, the burgesses were liable to be *tallaged*; that is, to have special contributions of money levied on them for the lord's behalf, in the same way that *aids* were exacted by him of his tenants of land.

The political rights (in judicial and other matters) of the middle and upper classes, the powers of the sovereign, and the general legal system of the age, will be most conveniently considered when we discuss the terms of the Great Charter and its supplements. We must next proceed to a view of the circumstances under which Magna Carta was gained from John; how it was renewed under Henry III.; and how its powers were extended and confirmed by the final charter of Edward I.

CHAPTER X

Character of King John — His Tyranny and Crimes — Fortunate Loss of Normandy—John's Quarrels with his Clergy and with the Pope — The Interdict — The Excommunication — John's abject Submission to the Pope — Return of Archbishop Langton to England — His patriotic Character — He checks the King — King's Oath to redress Wrongs — His repeated Acts of Tyranny—Council of the Barons—Archbishop Langton produces the Charter of Henry I.—Nature of this Charter, and its Value—Demands of the Barons on the King—Vain Intervention of the Pope — Firmness of Archbishop Langton — Strength of the National Party — Runnymede — Articuli Cartæ — The Grant of the Great Charter.

THE Father of History sums up the evil qualities of a Despot in these words: "He subverts the laws and usages of the country, he violates women, and he puts people to death without trial."[1]

The character and conduct of King John exemplify every word of this emphatic definition. The feudal law of England (as it has been described in the preceding chapters) gave him oppressively strong powers over his barons and other subjects; but the savage tyranny of John

[1] Νόμαιά τε κίνει πάτρια, καὶ βιᾶται γυναῖκας, κτείνει τε ἀκρίτους (Herodotus, *Thalia*, lxxx.).

The old chronicler, the Waverley annalist, says of John, that the old laws and free customs of the realm "Maxime suo tempore corruptae nimis et aggravatae fuerant; nam quosdam absque judicio parium suorum exhaeredebat, nonnullos morte durissima condemnabat. Uxores filiasque eorum violabat; et ita pro lege ei erat tyrannica voluntas" (p. 181).

was exercised over every class, high and low, often without the semblance, and in open defiance of the law. Several of his predecessors had solemnly promulgated charters, which tended to restrain the abuses of feudal rule. These charters usually contained also general promises to respect ancient rights, to cease to follow evil practices, and to maintain the old liberties of the people. The kings who gave them, often violated them; but they were recognitions (though vague and imperfect ones) of rights limiting the royal will: and none even of the most arbitrary of the six first Anglo-Norman kings professed to govern without regard to legal rules and restrictions.

The seventh set at nought every restraint of law, either human or divine; and what was afterwards said of Henry VIII. might, with more truth, have been affirmed of John, that he spared neither woman in his lust, nor man in his revenge. But John was utterly destitute of such high abilities and resolute will as signalised the haughty Tudor. John mingled all the qualities that inspire contempt with those that provoke hatred.

A few only of the specific instances of John's tyrannical and barbarous cruelties need be cited here; we need not dwell on the murder of his nephew Arthur, which he was believed by his contemporaries to have perpetrated with his own hand. William de Braosse, one of his nobles, had offended him and escaped to Ireland. John, in 1211, got into his power De Braosse's wife, Matilda, their son William, and their son's wife. The king then gratified his fiendish malignity by sending these three prisoners to Windsor Castle, where he had them shut up in a dungeon and starved to death.[1] In the next year, one of his clergy, Geoffry of Norwich, whom the old chronicler terms a loyal,

[1] Matthew Paris. 230. Roger de Wendover, *Chron.* vol. iii. p. 235.

learned, and accomplished man, came under the capricious displeasure of the king. John had him seized and carried off to Nottingham Castle, where he was tortured to death.[1]

Under his tyranny there was no more safeguard for property than for person. His exactions were often made with open and undisguised violence,[2] though they were also often practised in the form of judicial fines, which John levied upon men and women on the most trivial and insulting pretexts.[3] The grossness and the frequency of his outrages on the honour of private families almost surpass belief; and Eustace de Vesci was but one of many who, when they rose against John as the public enemy of the country, were animated also by the fiercest indignation for the wrongs that had been offered them as husbands or as fathers by the brutal licentiousness of the king.[4]

I have dwelt on the subject of the character of John, because that character had a most important effect on our constitutional history. Had he been less vicious and cruel, it is probable that the barons would not have leagued with the inferior freemen of England against their Norman king. Had he been less imbecile, it is probable that the national league would have been crushed by him. Even the foreign events of John's reign (I mean

[1] Matthew Paris, 232. "Fecit poena excogitata usque ad mortem torqueri": according to another chronicler, John had him wrapped in a cope of lead and left to die of starvation.

[2] For instance, in 1203, he forced from his subjects, clerical as well as lay, a seventh part of their moveables. See Roger de Wendover, vol. iii. p. 173, who names the "hujus rapinae executores." In 1205 he extorted from them a sum which the chronicler terms "infinite" (*ibid.* 182).

[3] The Bishop of Winchester paid a tun of good wine for not reminding the king (John) to give a girdle to the Countess of Albemarle; and Robert de Vaux five best palfreys that the same king might hold his peace about Henry Pinel's wife. Another paid four marks for leave to eat ("pro licentia comedendi") (Hallam's *Middle Ages*, vol. ii. p. 317, citing from Madox's *History of the Exchequer*).

[4] See Walter de Hemingburg, 249.

those which more immediately affected the continental provinces of the Plantagenet princes) were of infinite moment in determining the future destinies of England. The very shame of the sovereign proved the source of the nation's freedom.

Foremost amongst these causes was the fortunate loss of Normandy. Philip Augustus, the able sovereign of France, took advantage of John's murder of his nephew Arthur to cite him, as Duke of Normandy and a feudal vassal of the crown of France, to take his trial before the high peers of France on the charge of having murdered an *arrière* vassal and homager of the French king. John scoffed at the summons, but the French Court passed sentence on him of forfeiture of all the lands which he held in France by homage, and Philip Augustus carried that sentence into speedy execution. All the provinces north of the Loire which John's ancestors had bequeathed to him were wrested from him, but he succeeded in retaining Guienne, Poitou, and a small portion of Touraine.

Both what he lost and what he retained were important to the constitutional history of England. After the annexation of the duchy of Normandy to the actual dominions of the French king, our barons' only homes were in England. Henceforth they began to value the name of Englishman, though they long remembered the pride of Norman race. The Saxon now no more appeared in civil war against the Norman, the Norman no longer scorned the language of the Saxon, or refused to share with him in the common love for a common country. The whole community began to feel as one people, and learned to unite their efforts for the common purpose of protecting the rights and promoting the welfare of all.

And, while the loss of Normandy thus happily tended

to promote the union of all the inhabitants of this land, John's partial success in preserving Guienne and Poitou from the conquering arms of Philip Augustus aided materially in completing the same result. From these provinces he drew large bands of mercenary soldiers, whose support emboldened him to defy the remonstrances and discontent of his English barons; and trusting to them, he took no pains to form or preserve any party for himself among the nobility of his kingdom. The rapacity and the violence which these hireling cut-throats and brigands from beyond the seas were licensed by their sovereign to practise throughout England, came home to the middle and lower orders of the English, and made them eagerly co-operate with the barons against the Crown. In the rural districts also the oppressive cruelties of the forest-laws, which John carried further than the most arbitrary of his predecessors, tended still more to exasperate the people against the Government; and filled the forests with bands of adventurers, who were ready to join in any enterprise against the tyranny which had driven them beyond the pale of the law.

John had made himself the enemy of the powerful body of the English clergy, as fully as he had drawn on himself the hostility of his lay subjects. He levied pecuniary contributions on his ecclesiastics with arbitrary rapacity. A dispute which broke out in 1205 respecting the election to the See of Canterbury involved John in dissension with Innocent III., who refused to consecrate the nominee of John. The Pope caused Cardinal Langton to be elected by some of the Canterbury monks, who had been deputed to Rome, and, after a vain attempt to obtain the English king's consent, he consecrated Langton at Viterbo in Italy, as Primate of England.

Stephen de Langton, to whom we are more deeply indebted than to any other individual for the obtaining of the Great Charter, was an Englishman by birth, but had been chiefly educated in the University of Paris, where he acquired the highest reputation for learning and piety. Pope Innocent III. had invited him to Rome, and conferred on him the dignity of cardinal; and he now sought to place him at the head of the Church of England. John fiercely refused to permit Langton to set foot in England; and wreaked his vengeance on the Canterbury monks, by seizing their lands and possessions, and driving them all out of England. The Pope in return placed England under an interdict, on which John confiscated all the ecclesiastical property in the kingdom. When the interdict had lasted a year, the Pope pronounced sentence of excommunication against John: and finally, in 1213, Pope Innocent assumed and exercised the right of deposing John, and solemnly exhorted all Christian princes and barons to unite in dethroning him as an impious and unworthy king.[1]

These spiritual thunders of papal Rome were of little effect, when those against whom they were levelled maintained vigorous union at home, and were threatened by the arms of no formidable foe from abroad: but they were truly terrible when there was disunion in the State which was the mark of their operation; and when a powerful and ambitious prince like Philip Augustus was ready to undertake the execution of the sentence for the purposes of his own aggrandisement. King John found himself menaced with invasion from France; and though he assembled an army of 60,000 men ("sufficient," says

[1] For these temporal pretensions of the popes, see Hallam's chapter on "The Ecclesiastical Power during the Middle Ages."

the old historian, "to have defied all the powers of Europe had they been animated with love for their sovereign"), John knew that all his subjects hated him with a hate which he had richly earned, and there was in the vast host around him scarcely a man on whose fidelity he could depend. The ruffian in his disposition now suddenly was changed into the craven. He had an interview at Dover with the Pope's confidential Nuncio, Pandulph, and signed a deed (May 13, 1213) whereby he consented to admit Langton as Archbishop of Canterbury, to restore the refugees both of his clergy and laity to their possessions and offices, to liberate those whom he had imprisoned, and to make full restitution for the injuries which he had wantonly inflicted. On condition of the king's doing this, the sentences of interdict and excommunication were to be revoked.

Had John's submission ended here, there would have been nothing in the terms to censure, whatever we might think of the motives which caused him to make it. But, rushing from arrogant defiance of the Roman pontiff into abject servility, on Ascension Eve, Wednesday, May 15, 1213, the king, by a formal deed, gave up his kingdom to the Pope, to take it back as the Pope's vassal, and under the obligation of paying a yearly tribute of 1000 marks. By this humiliating surrender John won the partisanship of the Pope, but increased the alienation and disgust of his subjects, ecclesiastics as well as laymen. Hallam[1] has truly observed that we are deeply indebted to the English clergy for their zeal in behalf of liberty during the reign of John's successor; and the same remark applies to their exertions in the nation's cause in the time of John himself. Cardinal Langton is the most illustrious

[1] *Middle Ages*, vol. ii. p. 327.

example of patriotism and wisdom that the history of the Charter supplies. On this prelate's return to England, and installation in his archbishopric, in 1214, he showed immediately that, though he was one of the Pope's cardinals, he was no mere emissary of an Italian priest, but a true-hearted Englishman, to whom his country's honour and his country's freedom were most dear, and one whom no threats of either temporal or ecclesiastical superiors could deter from the path of duty. Before he would grant absolution to the king at their first meeting, he compelled him to swear that he would abolish all illegal customs; that he would restore the good laws of his predecessors, especially King Edward's; that he would give just and true judgments to all men, and that he would restore to all their rights.[1] A council was also convened at St. Albans, at which Fitz-Peter, the chief justiciary, presided on behalf of the king. Proclamations were then issued in the king's name ordering the observance of the laws granted by Henry I., and denouncing the punishment of death against all sheriffs, officers of the royal forests, and other ministers of the crown, who should exceed the strict limits of their authority. The mention here of the laws of Henry I., instead of those of Edward the Confessor, is somewhat remarkable. Possibly it was made out of deference to the prejudices of some of the Anglo-Norman barons, who

[1] "It became the favourite cry to demand the laws of Edward the Confessor; and the Normans themselves, as they grew dissatisfied with the royal administration, fell into these English sentiments. But what these laws were, or more properly, perhaps, these customs subsisting in the Confessor's age, was not very distinctly understood. So far, however, was clear, that the rigorous feudal servitude, the weighty tribute upon the poorer freemen had never prevailed before the Conquest. In claiming the laws of Edward the Confessor, our ancestors meant but the redress of grievances which tradition told them had not always existed."—Hallam's *Middle Ages*, vol. ii. p. 321.

may have preferred the name of a Norman lawgiver to that of a Saxon one, and who may not yet have learnt the necessity of merging all differences of race between themselves and their fellow inhabitants of this island. The laws referred to may have been those which we now read in the collection entitled the laws of Henry I., which, though not compiled or issued by that monarch, is an unquestionably ancient collection, and is believed to have been formed by some judge or lawyer during the reign of the sovereign whose name it bears. It consists principally of extracts from the laws of various Saxon kings. One of its provisions is that "every man is to be tried by his peers."

While this council was being held, John had sailed on an expedition against France. Incensed at the refusal of his barons to follow him, he returned to England, and began to avenge himself upon them according to his custom by leading the armed force of foreign mercenaries, which he had brought back with him, through the parts of his own kingdom where his barons' estates lay, as if it had been an enemy's country, and pillaging and burning without mercy. He had marched up from the south coast as far as Northampton, when the archbishop met him and rebuked him to his face. "This barbarous violence," said the prelate, "is a direct breach of your oath. Your barons must be judged and tried by their peers, and not subjected to military execution." John fiercely answered, "Rule you the Church, and leave me to govern the State." He proceeded as far as Nottingham, where Langton again braved his wrath and commanded him to desist, threatening to excommunicate every follower of John who should dare to draw his sword again in such impious warfare. John now gave way, and for the sake of appearance

summoned those whom he accused to appear before him, or his justices, in his Court.

Langton and the barons knew John's character too well to believe that this submission to legal restraint on the king's part would be permanent; and on the 25th of August, 1213, at a great council of the prelates and the barons, which was held at St. Paul's, in London, the archbishop took measures for forming an effective confederacy for curbing the power of the oppressor.

The ostensible purpose of the council was to settle the amount of compensation which the king was to pay to those who had been exiled during the late troubles, and despoiled of their possessions; but Langton addressed them on the subject which they all had most at heart—the obtaining of some security against the tyranny of John for the future. The archbishop told them that he had discovered a charter of King Henry I. which they might force the king to re-establish, and thereby regain their liberties. They answered with joyous acclamations, and the archbishop administered an oath to them, by which each bound himself to strive for their liberties, if need were, even to the death.

This charter of Henry I. had been granted by that sovereign when he first seized the crown to the exclusion of his elder brother Robert, and when he was desirous to win the favour of the Saxon as well as of the Norman inhabitants of England. It contains specific provisions against the abuse of the right of wardship, against the abuse of the right of claiming aids, and against other of the chief feudal oppressions to which the military tenants of the crown were liable at the hands of the king. It gives also a general promise to observe the good laws of Edward the Confessor. Copies of this charter had been

deposited in the principal monasteries; and it has been doubted whether it could have become so generally unknown in John's time that its discovery by the archbishop should have been such a matter of triumph and novelty as the old chroniclers relate. If, however, we call to mind the devastations that took place throughout England during Stephen's reign, and the negligence often shown by ecclesiastical bodies with regard to the preservation of even their own muniments, we may readily understand that copies of the charter of Henry I. may have become scarce, and almost inaccessible, in the lapse of a century. If we recollect also how few laymen had even enough education to read, we shall not be surprised if general ignorance prevailed in 1213 as to the contents of the ancient charter which Archbishop Langton spoke of.

By admitting the truth of the old narrative respecting this charter of Henry I., we by no means detract from the original value of the Great Charter of John. The older instrument bears no comparison with the latter, with regard either to explicitness, to fulness, or to comprehensiveness, in providing for the rights of all classes of freemen. But still the charter of Henry I. applied specifically to many of the feudal grievances under which John's barons smarted; it furnished them with a legal authority against the king; and it gave to the archbishop, and the other chiefs of the great movement in behalf of the national liberties a basis for their operations. There is in the minds of most civilised men a natural, a laudable reluctance to advance their interests, or even to defend themselves, by the introduction of mere political novelties: but the same men will act cheerfully and zealously when they have the sanction of ancient ordinance on their side. The Restorer has a lighter task than the Innovator; though,

in order to restore with effect, it frequently becomes necessary to add, to alter, and to reorganise. Langton, and other leading spirits of the baronial party, may have early foreseen the necessity of doing much more than revive the decayed legal safeguards of a former century; but, for the mass of their party, the demand for the restoration of the laws and liberties of Henry I. was an effective rallying cry, till it was changed at Runnymede for a fuller and a nobler strain.

During the greater part of the next year John was engaged in unsuccessful warfare on the Continent; but in the autumn he returned with the "alien knights, cross-bow-men, and hired followers, who came" (in the language of the Great Charter) "with arms and horses to molest England." So John recommenced his old course of spoliation and outrage. His chief justiciary, Fitz-Peter, one of the very few ministers who exercised any control over John, had died during the last year. John, who had stood in some awe of this man, exclaimed with joy when he heard of his death, "It is well. Fitz-Peter will now shake hands again with our late Archbishop Hubert in hell, for assuredly he will find him there. By God's teeth, I am now for the first time true lord and king of England."

On the 20th of November, St. Edmund's Day, 1214, the earls and barons of England met again at St. Edmund's Bury. Archbishop Langton was the guiding spirit of the assembly. The Primate of England stood at the high altar; and thither advanced each peer according to seniority, and, laying his hand on the altar, swore solemnly that if the king would not consent to acknowledge the rights which they claimed, they would withdraw their fealty and make war upon him till, by a charter

under his own seal, he should confirm their just demands. "And at length," says the old chronicler,[1] "it was agreed that, after the nativity of our Lord, they should come to the king in a body, to desire a confirmation of the liberties before mentioned; and that in the meantime they were to provide themselves with horses and arms in the like manner, that if the king should perchance break through that which he had specially sworn (which they well believed), and recoil by reason of his duplicity, they would instantly, by capturing his castles, compel him to give them satisfaction."

Accordingly, in the beginning of the following year, the barons appeared before the king, fully prepared both to state and to enforce the national will. Matthew Paris thus describes:—

"The Demand for the Liberties
"of England made by the Barons."

"In the year of grace one thousand two hundred and fifteen, which is the seventeenth year of King John, the same king held his court, for the space of one day, at Worcester, where he had been at the feast of the Birth of our Lord. Thence he came with all haste to London, and was received at New Temple Inn. Here, then, came to the king the aforesaid great barons, in a very resolute guise, with their military garb and weapons, insisting on the liberties and laws of King Edward, with others for themselves, the kingdom, and the Church of England, to be granted and confirmed according to the Charter of King Henry the First. They asserted, moreover, that at the time of the king's absolution at Winchester, those ancient laws and liberties were promised, and that he was bound to observe them by especial oath. But the king, finding

[1] *Matthew Paris*, p. 176.

the barons so resolute in their demands, was much concerned at their impetuosity. When he saw that they were furnished for battle, he replied, that it was a great and difficult thing which they asked, from which he required a respite until after Easter, that he might have space for consideration; and if it were in the power of himself or the dignity of his crown, they should receive satisfaction. But at length, after many proposals, the king unwillingly consented that the Archbishop of Canterbury, the Bishop of Ely, and William Marshal should be made sureties, and that by reason of their intercession on the day fixed he would satisfy all."[1]

During the interval which he had thus gained, John sought to strengthen himself by detaching the clergy from the barons. He granted (Jan. 15, 1215) a charter to the Church of England, by which he secured to her the free election of the bishops, and ordained that when a bishop had been thus elected and presented to the king, the king's consent should not be refused unless lawful reasons could be assigned for the refusal. He took another measure, which shows how much the influence of the yeomanry and the other freemen of England below the rank of the barons had increased, and how conscious John was that they also were ready to act against him. He ordered the sheriffs to summon the freemen of each shire and tender to them a new oath of allegiance. He confessed at the same time how little he had a right to rely on the loyalty of his subjects, by seeking the special protection which the church gave in those ages to the person and the property of Crusaders. John took the cross on the 2nd February, 1215, and vowed to lead an army into Palestine for the recovery of the Holy Sepulchre from the Infidels.

[1] *Matthew Paris*, p. 176.

None of these manœuvres was successful. The national union against him was firm. His pretence of preparing for the Crusades was of no avail. Nor did he gain any advantage in this time of need from his ignominious subjection to the Pope. John applied to Innocent for help against his barons, and the pontiff openly sided with his vassal king. A peremptory and vehement letter came from Rome to Archbishop Langton, wherein the Pope directed his Cardinal to support John in upholding the rights of the crown, and to reconcile the barons to their sovereign. In another letter the Pope censured the violence of the barons, and ordered them to act towards their sovereign with humility. But neither the English primate nor the English barons succumbed to this intervention of Rome. Langton continued to advise the barons; they continued their preparations; and when Easter approached, the confederates fixed their muster-place at Stamford, in Lincolnshire. The time within which the king was to answer their demands was now on the point of expiring; and in Easter week the barons assembled at Stamford with a force of 2000 armed knights to receive or to enforce the king's ratification of the liberties which they claimed. John was at Oxford. He did not summon the barons thither, nor did he venture to go to them, but he sent William Marshal, Earl of Pembroke, the Earl Warenne, and Archbishop Langton to Brackley, in Northamptonshire (whither the barons had marched), to demand a more specific account of those laws and liberties which were so earnestly desired. The confederates delivered a schedule containing the articles of their claims. The deputies returned with this to Oxford, and, when Langton was explaining to the king what was demanded of him, John broke out into one of his fits of impotent

frenzy—"And why do they not demand my crown also?" he exclaimed. "By God's teeth, I will not grant them liberties that will make me a slave." He sent back his deputies to the barons' camp with orders to offer an appeal to the Pope, as feudal lord of England. The barons refused it. Pandulph, the papal legate, was in England at the king's court, and he now called on Archbishop Langton to excommunicate the barons as mutineers against the Holy See. Langton calmly replied that he was better acquainted than Pandulph was with the pontiff's real purposes, and added, that unless John instantly dismissed his foreign mercenaries, he, the archbishop, would excommunicate them. John now threw himself into the Tower of London, and endeavoured to secure the possession of the capital. The barons acted as if open war had commenced. They proclaimed themselves the army of God and Holy Church, and elected Robert Fitzwalter, Earl of Dunmore, as their general. Their numbers increased rapidly; the yeomanry in the country and the burghers in the towns now actively aided them, and rendered their success certain. It was no longer a rising of one order of the community, but a movement of all the freemen of the land. John now endeavoured to detach the barons from the national cause, by offering special terms in favour of themselves and their immediate retainers.[1] But the baronial chiefs felt their true position as champions of a nation's rights, and disregarded the insidious offers of the king. The army of God and the Holy Church moved first against Northampton Castle, which was garrisoned by some of John's foreign mercenaries. The garrison refused to capitulate; and the national army, unprovided with engines for a regular siege, moved upon

[1] See his letters patent, dated the 10th of May, which are extant in the rolls in the Tower, and are cited in the note at p. xxxi. of the introduction to Blackstone's tract on the Charter.

Bedford, where they were gladly received. Thence they marched to the capital, where they arrived on the 24th of May. The gates were open to them, the citizens eagerly welcomed them as national deliverers, and the Mayor of London took his position in the army as one of the principal leaders. John had fled from the Tower, and was now at Odiham, in Hampshire, whither only seven knights had followed him. He now in despair sent the Earl of Pembroke to London to inform the confederates that he was ready to comply with their petitions, and to desire that a place and time might be named for a conference. The barons answered, "Let the day be the 9th of June,—the place, Runnymede."

This spot sacred to English liberty is about halfway from Odiham to London, a grassy plain, of about 160 acres, on the south bank of the Thames, between Staines and Windsor. Various derivations are given for the name: that of the antiquary Leland affirms it to have been so called from the Saxon word *Rune*, or council, and to mean the council meadow, having been used in the old Saxon times as a place of assembly. Here then the first triumph of the English Constitution was achieved; and the noble lines of Akenside should be present to the mind of all who tread the plain of Runnymede.

INSCRIPTION FOR A COLUMN AT RUNNYMEDE

"Thou, who the verdant plain dost traverse here,
While Thames among his willows from thy view
Retires; O stranger, stay thee, and the scene
Around contemplate well. This is the place
Where England's ancient barons, clad in arms
And stern with conquest, from their tyrant king
(Then render'd tame) did challenge and secure

The Charter of thy freedom. Pass not on
Till thou hast bless'd their memory, and paid
Those thanks which God appointed the reward
Of public virtue. And if chance thy house
Salute thee with a father's honoured name,
Go, call thy sons; instruct them what a debt
They owe their ancestors; and make them swear
To pay it, by transmitting down entire
Those sacred rights to which themselves were born."

On the 8th of June, the day before that named for the conference at Runnymede, the king came to Merton, in Surrey. But the conference was adjourned to the 15th, the Monday following, and the king in the meantime proceeded to Windsor; thence, on the last appointed day, being Trinity Monday, A.D. 1215, the king, with his scanty train of personal followers, came to Runnymede, where the barons and their host were now encamped.

On the part of John stood only eight bishops, fifteen noblemen and knights, and Pandulph, the papal legate: even of these many were only seemingly his adherents, or, as an old chronicler expressively phrases it, they stood "*Quasi ex parte Regis.*"[1] The opposite side of the plain, that nearest to where the town of Egham now stands, was white with the tents of a countless army.[2] "It is needless," says Matthew Paris, "to enumerate the barons who composed the army of God and the Holy Church; they were the whole nobility of England." Negotiations were formally opened and continued for several days, during which the chief managers of the conference on either side may have retired to the little island a short distance higher up the river, which bears the name of Magna Carta Island.

[1] W. de Hemingburg.
[2] "Exercitum inaestimabilem confecere," *Matthew Paris*, p. 253.

The conference was not concluded till Friday, the 19th of June. Articles or heads of agreement were first drawn up, which were afterwards regularly embodied in the form of a Charter. These "Articuli Magnae Cartae" are still preserved, and deserve attentive comparison with the Charter for which they served as the rough draft, but which does not always strictly accord with them. When the Charter itself was prepared, the royal seal was solemnly affixed to it before the Congress at Runnymede, and it bears date as of the first day of that conference, the 15th June, in the year of our Lord 1215, being 149 years after the Norman Conquest, and seven centuries and a half after the reputed era of the landing of the first of our Saxon ancestors in this island.

CHAPTER XI

Magna Carta—General Distribution of its Clauses—Text of the Great Charter, and Comments.

IT may be useful to preface the text of the Great Charter with some general summary of its contents. A very little attention will show how unjust it is to speak of it as a mere piece of class-legislation, obtained by the barons for their own special interests. Guizot well asks, "How is it possible that at least a third of the provisions of the Charter should have related to promises and guarantees made on behalf of the people, if the aristocracy had only aimed at obtaining that which would benefit themselves? We have only to read the Great Charter in order to be convinced that the rights of all three orders of the nation are equally respected and promoted."[1]

By the three orders, which Guizot here speaks of, are meant the clergy, the nobility, and the general commonalty of the freemen of the realm. It will be seen also that the serfs are not wholly neglected in it. And inasmuch as the serfs were always capable of being raised into freemen, and the process of their emancipation was continually, though gradually, going forward, the Great Charter, by providing for the rights of all freemen, provided directly or indirectly for the rights of all the inhabitants of the land.

[1] *History of Representative Government*, pt. ii. lect. 7.

Part of the Great Charter consists of clauses relating to the clergy. These are not numerous, as the charter granted by John in the preceding February had provided for ecclesiastical interests. The Great Charter confirms these provisions.

With respect to the rights of the laity, the Great Charter determines with careful precision the amount of feudal obligation to which the barons and other immediate tenants of the crown should be thenceforth subject. Involved in those provisions is the all-important article about convening the great council of the realm. It will be seen also that the Charter binds the barons to allow their subvassals the same mitigations of the feudal burdens which the barons acquired for themselves from the king. In behalf of the rest of the members of the free community, special clauses will be found by which the ancient customs and liberties of cities and boroughs are secured, and by which protection for the purposes of commerce is given to foreign merchants. Thus far the Charter legislates specially for the interests of separate classes, though several of the clauses of this kind, besides redressing an immediate and partial wrong, contain also the germ of a permanent and national right. But the Great Charter is also rich in clauses, which have for their object the interests of the nation as a whole. It provides for the pure, the speedy, the fixed, and uniform administration of justice. It prohibits arbitrary imprisonment and arbitrary punishment of any kind. It places the person and the property of every freeman under the solemn and sacred protection of free and equal law.

Lastly, it contains clauses of a temporary character for the redress of the immediate evils of the time, as by directing the removal of the king's foreign mercenaries from England, and it provides guarantees for King John adhering

to its obligations, by appointing a baronial council, who were to be the guardians of the Charter, and who were to be armed with ample powers for redressing any infraction of it which the king or his ministers might attempt.

The translation of Magna Carta, which will now be laid before the reader, is accompanied by explanatory notes; but full comment on its most important passages is reserved until we shall have seen the form which the Charter assumed, as adopted and ratified by Henry III. and subsequent monarchs, and until we shall have also examined the confirmation which it received from Edward the First.

Magna Carta

JOHN, by the grace of God King of England, Lord of Ireland, Duke of Normandy, Aquitaine, and Count of Anjou, to his Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Governors, Officers, and to all Bailiffs, and his lieges, greeting. Know ye, that we, in the presence of God, and for the salvation of our soul, and the souls of all our ancestors and heirs, and unto the honour of God and the advancement of Holy Church, and amendment of our Realm, by advice of our venerable Fathers, STEPHEN, Archbishop of Canterbury, Primate of all England and Cardinal of the Holy Roman Church, HENRY, Archbishop of Dublin, WILLIAM of London, PETER of Winchester, JOCELIN of Bath and Glastonbury, HUGH of Lincoln, WALTER of Worcester, WILLIAM of Coventry, BENEDICT of Rochester, Bishops; of Master PANDULPH, Sub-Deacon and Familiar of our Lord the Pope, Brother AYMERIC, Master of the Knights-Templars in England; and of the Noble Persons,

WILLIAM MARESCALL, Earl of Pembroke, WILLIAM, Earl of Salisbury, WILLIAM, Earl of Warren, WILLIAM, Earl of Arundel, ALAN DE GALLOWAY Constable of Scotland, WARIN FITZ GERALD, PETER FITZ HERBERT, and HUBERT DE BURGH Seneschal of Poitou, HUGH DE NEVILLE, MATTHEW FITZ HERBERT, THOMAS BASSET, ALAN BASSET, PHILIP OF ALBINEY, ROBERT DE ROPPELL, JOHN MARESCHALL, JOHN FITZ HUGH, and others our liegemen, have, in the first place, granted to God, and by this our present Charter confirmed, for us and our heirs for ever:

1. That the Church of England shall be free, and have her whole rights, and her liberties inviolable; and we will have them so observed, that it may appear thence that the freedom of elections, which is reckoned chief and indispensable to the English Church, and which we granted and confirmed by our Charter, and obtained the confirmation of the same from our Lord the Pope Innocent III., before the discord between us and our barons, was granted of mere free will; which Charter we shall observe, and we do will it to be faithfully observed by our heirs for ever. 2. We also have granted to all the free-men of our kingdom, for us and for our heirs for ever, all the underwritten liberties, to be had and holden by them and their heirs, of us and our heirs for ever: If any of our earls, or barons, or others, who hold of us in chief by military service, shall die, and at the time of his death his heir shall be of full age, and owes a relief,[1] he shall have his inheritance by the ancient relief; that is to say, the heir or heirs of an earl, for a whole earldom, by a hundred pounds; the heir or heirs of a baron, for a whole

[1] Explanations of the feudal terms in this and the six next clauses will be found in Chapter IX., *supra*.

barony, by a hundred pounds; the heir or heirs of a knight, for a whole knight's fee, by a hundred shillings at most; and whoever oweth less shall give less, according to the ancient custom of fees. 3. But if the heir of any such shall be under age, and shall be in ward when he comes of age, he shall have his inheritance without relief and without fine. 4. The keeper of the land of such an heir being under age, shall take of the land of the heir none but reasonable issues, reasonable customs, and reasonable services, and that without destruction and waste of his men and his goods; and if we commit the custody of any such lands to the sheriff, or any other who is answerable to us for the issues of the land, and he shall make destruction and waste of the lands which he hath in custody, we will take of him amends, and the land shall be committed to two lawful and discreet men of that fee, who shall answer for the issues to us, or to him to whom we shall assign them: and if we sell or give to any one the custody of any such lands, and he therein make destruction or waste, he shall lose the same custody, which shall be committed to two lawful and discreet men of that fee, who shall in like manner answer to us as aforesaid. 5. But the keeper, so long as he shall have the custody of the land, shall keep up the houses, parks, warrens, ponds, mills, and other things pertaining to the land, out of the issues of the same land; and shall deliver to the heir, when he comes of full age, his whole land, stocked with ploughs and carriages, according as the time of wainage shall require, and the issues of the land can reasonably bear. 6. Heirs shall be married without disparagement, and so that before matrimony shall be contracted, those who are near in blood to the heir shall have notice. 7. A widow, after the death of her husband, shall forthwith and without difficulty have her

marriage and inheritance; nor shall she give anything for her dower, or her marriage, or her inheritance, which her husband and she held at the day of his death; and she may remain in the mansion-house of her husband forty days after his death, within which term her dower shall be assigned. 8. No widow shall be distrained to marry herself, so long as she has a mind to live without a husband; but yet she shall give security that she will not marry without our assent, if she hold of us; or without the consent of the lord of whom she holds, if she hold of another.[1] 9. Neither we nor our bailiffs shall seize any land or rent for any debt so long as the chattels of the debtor are sufficient to pay the debt; nor shall the sureties of the debtor be distrained so long as the principal debtor is sufficient for the payment of the debt; and if the principal debtor shall fail in the payment of the debt, not having wherewithal to pay it, then the sureties shall answer the debt; and if they will they shall have the lands and rents of the debtor, until they shall be satisfied for the debt which they paid for him, unless the principal debtor can show himself acquitted thereof against the said sureties. 10. If any one have borrowed anything of the Jews,[2] more or less, and die before the debt be satisfied, there shall be no interest paid for that debt, so long as the heir is under age, of whomsoever he may hold; and if the debt falls into our hands, we will only take the chattel mentioned in the

[1] By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord, neither could she marry again without his licence, lest she should contract herself, and so convey part of the feud to the lord's enemy. This licence the lords took care to be well paid for, and, as it seems, would sometimes force the dowager to a second marriage in order to gain the fine.—2 *Bl. Com.* 135.

[2] Some curious information respecting the position of the Jews in England at this and other early periods will be found in Tovey's *Anglia Judaica*, Oxford, 1738.

deed. 11. And if any one shall die indebted to the Jews, his wife shall have her dower and pay nothing of that debt; and if the deceased left children under age, they shall have necessaries provided for them, according to the tenement of the deceased; and out of the residue the debt shall be paid, saving however the service due to the lords; and in like manner shall it be done touching debts due to others than the Jews. 12. *No scutage or aid shall be imposed in our kingdom, unless by the general council of our kingdom; except for ransoming our person, making our eldest son a knight, and once for marrying our eldest daughter; and for these there shall be paid a reasonable aid. In like manner it shall be concerning the aids of the City of London.* 13. *And the City of London shall have all its ancient liberties and free customs, as well by land as by water: furthermore we will and grant, that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs.* 14. *And for holding the general council of the kingdom concerning the assessment of aids, except in the three cases aforesaid, and for the assessing of scutages, we shall cause to be summoned the archbishops, bishops, abbots, earls, and greater barons of the realm, singly by our letters. And furthermore we shall cause to be summoned generally by our sheriffs and bailiffs, all others who hold of us in chief, for a certain day, that is to say, forty days before their meeting at least, and to a certain place; and in all letters of such summons we will declare the cause of such summons. And summons being thus made, the business of the day shall proceed on the day appointed, according to the advice of such as shall be present, although all that were summoned come not.* 15. We will not for the future grant to any one that he may take aid of his own free tenants, unless to ransom his body, and to make his eldest son a knight, and once to marry his eldest daughter; and for this there shall be only paid a

reasonable aid. 16. No man shall be distrained to perform more service for a knight's fee, or other free tenement, than is due from thence. 17. Common pleas shall not follow our court, but shall be holden in some place certain.[1] 18. Assizes of novel disseisin, and of mort d'ancestor, and of darrein presentment, shall not be taken but in their proper counties, and after this manner: We, or, if we should be

[1] By the ancient Saxon constitution there was only one superior court of justice in the kingdom, and that court had cognisance both of civil and spiritual causes, viz. the *witenagemote* or general council, which assembled annually, or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel, and the Conqueror established a constant court in his own hall, thence called by Bracton and other ancient authors *aula regia* or *aula regis*. This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person; such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms, determining according to the law military and the law of nations. Besides these, there were the lord high steward and lord great chamberlain, the steward of the household, the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants, and letters as were to pass under that authority, and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty; all these in their several departments transacted all secular business both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ*, who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence; and this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and from the plenitude of his power grew at length both obnoxious to the people and dangerous to the government which employed him.

This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject; wherefore King John, who dreaded also the power of the justiciar, very readily consented to this article of Magna Carta.—3 *Bl. Com.* 38. See also Lord Campbell's *Lives of the Chief Justices of England*, vol. i. c. i.

out of the realm, our chief justiciary, shall send two justiciaries through every county four times a year, who, with four knights, chosen out of every shire by the people, shall hold the said assizes, in the county, on the day, and at the place appointed. 19. And if any matters cannot be determined on the day appointed for holding the assizes in each county, so many of the knights and freeholders as have been at the assizes aforesaid shall stay to decide them, as is necessary, according as there is more or less business.[1] 20. A freeman shall not be amerced for a small

[1] The legal term, "assize," means strictly the jury of twelve knights, whom Henry II. appointed as "assessors" to the judges on certain trials of questions of fact respecting real property. Thence the word came to mean the trial itself; and the term "assizes" has long been popularly used for the trials, both civil and criminal, which are held before the judges on their circuits. The three actions (or assizes) which are spoken of in the text, had long been obsolete before they were formally abolished early in the nineteenth century. The two first related to the trial of title and possessory rights to real property, the last related to disputes as to the rights to advowson. Actions of this nature were obliged to be commenced in the king's court. "But because few, comparatively speaking, could have recourse to so distant a tribunal as that of the king's court, and perhaps also on account of the attachment which the English felt to their ancient trial by the neighbouring freeholders, Henry II. established itinerant justices to decide civil and criminal pleas in each county. Justices in Eyre (or, as we now call them, of assize) were sometimes commissioned in the reign of Henry I., but do not appear to have gone their circuits regularly before 22 Hen. II. (1176). We have owed to this excellent institution the uniformity of our common law, which would otherwise have been split, like that in France, into a multitude of local customs. The justices of assize seem originally to have gone their circuits annually; and as part of their duty was to set tallages upon all royal towns, and superintend the collection of the revenue, we may be certain that there could be no long interval. This annual visitation was expressly confirmed by the twelfth section of Magna Charta, which provides also, that no assize of novel disseisin, or mort d'ancestor, should be taken except in the shire where the lands in controversy lay. Hence this clause stood opposed on the one hand to the encroachments of the king's court, which might otherwise, by drawing pleas of land to itself, have defeated the suitor's right to a jury from the vicinage; and, on the other, to those of the feudal aristocracy, who hated any interference of the Crown to chastise their violation of law, or control their own jurisdiction."—Hallam's *Middle Ages*, vol. ii. p. 334.

fault, but after the manner of the fault; and for a great crime according to the heinousness of it, saving to him his contenement; and after the same manner a merchant, saving to him his merchandise. And a villein[1] shall be amerced after the same manner, saving to him his wainage, if he falls under our mercy; and none of the aforesaid amerciaments shall be assessed but by the oath of honest men in the neighbourhood. 21. Earls and barons shall not be amerced, but by their peers, and after the degree of the offence. 22. No ecclesiastical person shall be amerced for his lay tenement, but according to the proportion of the others aforesaid, and not according to the value of his ecclesiastical benefice.[2] 23. Neither a town nor any tenant shall be distrained to make bridges or banks, unless that anciently and of right they are bound to do it. 24. No sheriff, constable, coroner, or other our bailiffs, shall hold pleas of the Crown.[3] 25. All counties, hundreds, wapen-

[1] See for explanation of villeinage, Chapter IX. *supra.*

[2] Blackstone describes the meaning of these clauses to be, that no man should have a larger amercement imposed upon him than his circumstances or personal estate would bear.

[3] The object of this enactment was, that all criminal charges, which exposed the party accused to the peril of heavy punishment, should be tried before judges of learning and experience in the laws of the realm, and not before inferior, and probably incompetent officers. (See Coke, 2 Inst. 30.)

"*Pleas of the Crown*" mean those judicial processes which are carried on in the sovereign's name against criminal offenders, because (as Blackstone observes) "in him centres the majesty of the whole community, and he is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence." At the time of the grant of the Great Charter, the crimes of theft, forgery, coining false money, and other acts coming within the definition of the *crimen falsi*, were held to be pleas of the Crown, as well as treason, murder, manslaughter, robbery, and other graver atrocities.

The present clause of the Great Charter mentions specifically sheriffs, constables, coroners, and bailiffs; but it has been held to prohibit all persons from trying and determining criminal cases, unless they have a special commission from the Crown for that purpose, such

takes, and tythings, shall stand at the old rents, without any increase, except in our demesne manors.[1] 26. If any

as the commissions of oyer and terminer and of gaol delivery, which are given to the judges on each circuit, or such as is included in the commission given to the justices of the peace in their respective counties. Some explanation may be useful of the four degrees of the royal officers here specified, and forbidden henceforth to try pleas of the Crown. Sheriffs were the chief officers under the king in every county, deriving their title from the two Saxon words "shire" and "reeve," the bailiff or steward of the division. They are called in the Latin text of the Great Charter, *vicecomes*, which literally signifies "in place of the earl of the county," who anciently governed it under the king. The next officer mentioned is *constabularius*, or *constable*, from the Latin *comes stabuli*, a superintendent of the imperial stables, or master of the horse. In the present instance, the word is put for the constable, or keeper of a castle, frequently called a Castellan. They were possessed of such considerable power within their own precincts, that previously to the present Act they held trials of crimes, properly the cognisance of the Crown, as the sheriffs did within their respective bailiwicks; and sealed with their own effigies on horseback. The English fortresses to which these officers belonged in the time of King Henry II. amounted in number to 1115. As prisons were an important part of all ancient castles, these officers, as keepers of prisons, were sometimes called constables of fees. In this duty they appear often to have been guilty of great cruelty; since in the fifth year of Henry IV., 1403, chap. 10, it is enacted, the justices of peace shall imprison in the common gaol, "because," says the passage, "that divers constables of castles within the realm of England be assigned to be justices of peace by commission from our Lord the King, and by colour of the said commissions they take people to whom they bear ill-will, and imprison them within the said castles, till they have made fine and ransom with the said constables for their deliverance." The title of *Coroner* implies that he was an officer to the Crown, to whom, in certain cases, pleas of the Crown in which the king is more immediately concerned, properly belong. Before the Magna Carta, a coroner might not only receive accusations against offenders, but might try them; but his authority was afterwards in general reduced to the inquiry into violent and untimely death, on sight of the body. The last rank of great officers mentioned in this chapter, is that of *bailiffs*, whose name is derived from the old French word Bayliff, the keeper of a province; but in the present instance, in this term, says Coke, "are comprehended all judges or justices of any court of justice;" whence it is evident, according to a rule cited by the same author, that "the pleas of our Lord the King shall be especially reserved, that by none now in the kingdom can pleas be had or held, after the confirmation of the aforesaid charter is made, without a special commission."—Cf. *Thomson's Magna Charta*, p. 204.

[1] This clause of John's Charter is not repeated in the Charter as confirmed by Henry III.

one holding of us a lay-fee die, and the sheriff, or our bailiffs, show our letters patent of summons for debt which the dead man did owe to us, it shall be lawful for the sheriff or our bailiff to attach and inroll the chattels of the dead, found upon his lay-fee, to the value of the debt, by the view of lawful men, so as nothing be removed until our whole clear debt be paid; and the rest shall be left to the executors to fulfil the testament of the dead, and if there be nothing due from him to us, all the chattels shall go to the use of the dead, saving to his wife and children their reasonable shares. 27. If any freeman shall die intestate, his chattels shall be distributed by the hands of his nearest relations and friends, by view of the church; saving to every one his debts which the deceased owed to him. 28. No constable or bailiff of ours shall take corn or other chattels of any man, unless he presently give him money for it, or hath respite of payment by the good-will of the seller.[1] 29. No constable shall distrain any knight

[1] "The profitable prerogative of purveyance and pre-emption was a right enjoyed by the Crown of buying up provisions and other necessaries, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owner; and also of forcibly impressing the carriages and horses of the subject to do the king's business on the public roads in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. In those early times the king's household (as well as those of inferior lords) were supported by specific renders of corn and other victuals from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use; and this answered all purposes in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done), it was found necessary to send purveyors beforehand to get together a sufficient quantity of provisions and other necessaries for the household; and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors, who, in process of time, very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the Crown; ready money in open

to give money for castle guard, if he himself will do it in his person, or by another able man in case he cannot do it through any reasonable cause. And if we lead him, or send him in an army, he shall be free from such guard for the time he shall be in the army by our command.[1] 30. No sheriff or bailiff of ours, or any other, shall take horses or carts of any freeman for carriage, but by the good-will of the said freeman. 31. Neither shall we nor our bailiffs take any man's timber for our castles or other uses, unless by the consent of the owner of the timber. 32. We will retain the lands of those convicted of felony only one year and a day, and then they shall be delivered to the lord of the fee.[2] 33. All wears for the time to come shall be put

market (when the royal residence was more permanent and specie began to be plenty) being found upon experience to be the best proveditor of any; wherefore by degrees the power of purveyance having fallen into disuse during the suspension of monarchy, King Charles at his restoration consented to resign entirely these branches of his revenue and powers."—1 *Bl. Com.* 287.

[1] According to Lord Coke, the common law was, that he who held by castle-guard, that is, by the service of keeping a tower, or a gate, or the like, of a castle in time of war, might do it either by himself, or by any sufficient deputy; and that if such tenant were by the king led or sent to his hosts in time of war, he was excused and quit of his service for keeping of the castle either by himself or by another during the time he so served the king.—2 *Coke's Inst.* 34.

[2] The word *convict* here means attainted (2 *Coke's Inst.* 37), although it generally has a very different signification. The difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession; and when he hath his judgment upon the verdict or confession, then he is said to be attainted (1 *Inst.* 390 *b*), that is to say, his blood is become (*attinctus*) *tainted*, stained, or corrupted; insomuch that, by the common law, in cases of treason or capital felony, his children or other kindred could not inherit his estate, nor his wife claim her dower; the same could not be restored or saved but by Act of Parliament. And by the common law, all lands of inheritance whereof the offender was seised in his own right, and also all rights of entry to lands in the hands of a wrong-doer, were forfeited to the king by an attainder of high treason; and to the lord of whom they were immediately holden by an attainder of petit treason or felony.

down in the rivers of Thames and Medway, and throughout all England, except upon the sea-coast.[1] 34. The writ which is called *praecipe*, for the future, shall not be made out to any one, of any tenement, whereby a freeman may lose his court.[2] 35. There shall be one measure of wine and one of ale through our whole realm; and one measure of corn, that is to say, the London quarter; and one breadth of dyed cloth, and russets, and haberjeets, that is to say, two ells within the lists; and it shall be of weights as it is of measures. 36. Nothing from henceforth shall be given or taken for a writ of inquisition of life or limb, but it shall be granted freely, and not denied.[3] 37. If any

[1] This was to prevent any person from appropriating to himself a fishery of any part of a public river. Every public river or stream, says Lord Coke, is the king's highway, which cannot be privately occupied. It was accordingly held to be illegal to erect any obstruction, such as a weir, across a public river.

[2] This clause was designed to protect, to some extent, the local jurisdiction of the courts baron. When the tenant of lands, who was not a tenant *in capite* of the Crown, was dispossessed, he was required first to sue for their recovery in the court baron of the inferior lord, of whom he held them. It was only when the inferior lord resigned his privilege of jurisdiction, that the tenant was entitled to sue out in the king's court the writ of right for the recovery of the lands, which was called a *praecipe in capite*.

[3] The object of this clause was, to prevent the long imprisonment of a person charged with a crime without inquiring into his guilt or innocence. For the proper purpose of imprisoning such is, as Lord Coke says, only for securing that they may be duly tried. The writ of inquisition mentioned in the text was called a writ *de odio et atiâ* and was one of the great securities of personal liberty in those days. It was a rule that a person committed to custody on a charge of homicide should not be bailed by any other authority than that of the king's writ; but to relieve such a person from the hardship of lying in prison till the coming of the justices in eyre, this writ used to be directed to the sheriff, commanding him to make *inquisition*, by the oaths of lawful men, whether the party in prison was charged through malice, *utrum rettatus sit odio et atiâ*; and if it was found that he was accused *odio et atiâ*, and that he was not guilty, or that he did the fact *se defendendo* or *per infortunium*, yet the sheriff had no authority by this writ to bail him, but the party was then to sue a writ of *tradas in ballium*, directed to the sheriff, and commanding him that if the prisoner found twelve good and lawful men of the county who would

do hold of us by fee-farm, or by socage, or by burgage, and he hold also lands of any other by knight's service, we will not have the custody of the heir or land, which is holden of another man's fee by reason of that fee-farm, socage or burgage; neither will we have the custody of such fee-farm, socage, or burgage, except knight's service was due to us out of the same fee-farm. We will not have the custody of an heir, nor of any land which he holds of another by knight's service, by reason of any petty serjeanty that holds of us, by the service of paying a knife, an arrow, or the like.[1]

38. No bailiff from henceforth shall put any man to his law upon his own bare saying, without credible witnesses to prove it.[2]

39. *No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.* 40. *We will sell to no man, we will not deny to any man, either justice or right.*[3]

be mainprize for him, then he should deliver him in bail to those twelve.

[1] For explanation of socage tenure, knight's service, fee-farm, and burgage tenure, see Chapter IX., *supra*. "Petit serjeanty," as defined by Littleton, "consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, or an arrow, or the like."—For laws of Wager see Selden and Lee.

[2] This disputed clause is generally understood as referring to the modes of trial in which a party charged was allowed to prove that a criminal charge or a civil claim made against him was unfounded, by pledging his own oath, and bringing others to swear with him to that effect. This mode of defence was called in criminal cases a trial by compurgators; in civil cases it was called Wager of law, and was not entirely abolished until the reign of William IV.

[3] 39. Nullus liber homo capiatur, vel imprisonetur, aut utlagetur, aut exuletur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. 40. Nulli vendemus, nulli negabimus, aut differemus rectum aut justitiam.

These clauses are the crowning glories of the Great Charter.

41. All merchants shall have safe and secure conduct, to go out of, and to come into England, and to stay there and to pass as well by land as by water, for buying and

Hallam (*Midd. Ag.* ii. 324) calls them its "essential clauses," being those which "protect the personal liberty and property of all freemen, by giving security from arbitrary imprisonment and arbitrary spoliation." The same authority observes that these words of the Great Charter, "interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's Charter, it must have been a clear principle of our constitution that no man can be detained in prison without trial." Whether courts of justice framed the writ of habeas corpus in conformity to the spirit of this clause, or found it already in their register, it was henceforth the right of every subject to demand it. That writ, strengthened by the statute of Charles II., but founded upon the broad basis of Magna Carta, is the principal bulwark of English liberty.

These clauses of the Great Charter of John were formed into one chapter in the Charter as issued by Henry III., and confirmed by subsequent kings, and some words were added to one of the provisions, for the purpose apparently of making the meaning more explicit. The chapter of Henry III.'s Charter is as follows:—"Nullus liber homo capiatur, vel imprisonetur, aut disseisietur *de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis*, aut utlagetur, aut exulet, aut aliquo *alio* modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam." This chapter is translated in our common edition of the Statutes as follows:—"No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right."

Lord Coke commented on this famous article as follows:—"As the gold-finer will not out of the dust, or shreds of gold, let passe the least crum, in respect of the excellency of the metal; so ought not the learned reader to passe any syllable of this law, in respect of the excellency of the matter."

Lord Chatham's eulogium on the public spirit shown in this respect by the barons who signed the Great Charter is also worthy of quotation. "My lords," said that great statesman to the House of Peers, in his speech on the 9th of January, 1770, "it is to *your* ancestors, my lords,—it is to the English barons, that we are indebted for the laws and constitution we possess. I think that history has not done justice to their conduct, when they obtained from their sovereign that great acknowledgment of national rights contained in Magna Carta; they did not confine it to themselves alone, but delivered it as a

selling by the ancient and allowed customs, without any evil tolls; except in time of war, or when they are of any nation at war with us. And if there be found any such

common blessing to the whole people. They did not say, These are the rights of the great barons, or these are the rights of the great prelates. No, my lords; they said, in the simple Latin of the times, *nullus liber homo*, and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to the criticism of scholars, but the hearts of free men. These three words, *nullus liber homo*, have a meaning which interests us all; they deserve to be remembered—they deserve to be inculcated in our minds—they are worth all the classics."

When the chapter declares that none "*shall be dissesed of his free tenement, his liberties, or his free customs,*" it means that neither the king nor others shall seize upon any of his possessions, and that a man shall not be put from his livelihood without answer. The word "*liberties*" has several significations, as the laws of the realm, privileges bestowed by the king, and the natural freedom possessed by the subjects of England; so that monopolies in general are against the enactments of the Great Charter.

The present chapter ordains, thirdly, that none shall be *outlawed, exiled, or in any way destroyed.* By *outlawry* is signified the ejecting of a person, by three public proclamations, from the benefit of the law, which, from the time of Alfred until long after the reign of William I., could be done for felony only, for which the penalty was death; and therefore an outlaw, being considered as a wolf, might be slain by any man. In the beginning of the days of King Edward III., however, it was enacted that none but the sheriff should put an outlaw to death; or else that they should be considered guilty of felony, unless he was slain in an attempt to take him.

The words "*Nec super eum ibimus, nec super eum mittemus,*" are translated in the ordinary edition of the Statutes: "*Nor will we pass upon him, nor condemn him,*" a version neither accurate nor sufficiently expressive. Lord Coke says, that the words signify that none shall be condemned [that is, except after lawful trial, as next mentioned] at the king's suit, either before the king in his bench, where the pleas are supposed to be held in his presence or before any judge or commissioner whatever.

The Great Charter next specifies the lawful trial which each freeman is to be entitled to before he can suffer aught at the hands of the executioner. He is to suffer none of the above-mentioned things, "*nisi per legale judicium parium suorum, vel per legem terræ,*" *unless by the lawful judgment of his peers or by the law of the land.* The full meaning of these important words will be found discussed later when we investigate how far Magna Carta recognises trial by jury as a principle of our constitution. For the present, it may be observed that this part of the Great Charter establishes the general right of the subject to have his guilt or innocence of any criminal charge that may be

in our land, in the beginning of the war, they shall be attached, without damage to their bodies or goods, until it be known unto us, or our chief justiciary, how our merchants be treated in the nation at war with us; and if ours be safe there, the others shall be safe in our dominions.[1] 42. It shall be lawful, for the time to come, for any one to go out of our kingdom, and return safely and securely, by land or by water, saving his allegiance to us; unless in time of war, by some short space, for the common benefit of the realm, except prisoners and outlaws, according to the law of the land, and people in war with us, and merchants who shall be in such condition as is above mentioned.[2] 43. If any man hold of any escheat, as of the honour of Wallingford, Nottingham, Boulogne, Lancaster, or of other escheats which be in our hands, and are baronies, and die, his heir shall give no other relief, and perform no other service to us, than he would to the baron, if it were in the baron's hand; we will hold it after the same manner as

preferred against him, determined by the free voice of his equals, and not by the sovereign or any nominee of the sovereign. And the same general principle is established as to all civil suits by which he may be affected, so far as their determination may depend upon the decision of issues of fact.

"*We will sell to no man, we will not deny or delay to any man, justice or right.*" One immediate object of this was to put an end to the fines which John and his predecessors had been accustomed to extort from suitors in their courts. Lord Coke observes, that these words are spoken in the person of the king, who is supposed to be present in all his courts of law; wherefore all his subjects, for all kinds of injuries, are entitled to immediate and perfect justice.

[1] Montesquieu eulogised our English ancestors for having thus "made the protection of foreign merchants an article of their national liberty."

[2] This clause is only to be found in the Charter of John. The sovereign has the prerogative of restraining, by the writ "Ne exeat regno," any subject from quitting the kingdom. The reason given for this power is that every man ought, if required, to defend the king and the realm. It was not, however, limited to time of war.

the baron held it.[1] 44. Those men who dwell without the forest, from henceforth shall not come before our justiciaries of the forest, upon common summons, but such as are impleaded, or are pledges for any that are attached for something concerning the forest.[2] 45. We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it.[3] 46. All barons who have founded abbeys, and have the kings of England's charters of advowson, or the ancient tenure thereof, shall have the keeping of them, when vacant, as they ought to have. 47. All forests that have been made forests in our time, shall forthwith be disforested; and the same shall be done with the banks that have been fenced in by us in our time. 48. All evil customs concerning forests, warrens, foresters, and warreners, sheriffs and their officers, rivers and their keepers, shall forthwith be inquired into in each county,

[1] The general purpose of this clause was that the tenant of an inferior lord (or baron) should not have his feudal burdens increased if the lord's estate (or barony) lapsed to the Crown, and the tenant thereby became the king's tenant.

[2] This and the 47th, 48th, and part of the 53rd clauses in John's Charter are all that relate to the oppressions caused by the forest laws. These evils were afterwards more satisfactorily redressed by the Carta de Forestâ of Henry III. See Blackstone's Introduction to the Charters, pp. xxii. xli.

[3] This clause only appears in John's Charter. It is said to have been specially required at the time, in consequence of the misconduct and incompetency of some of the judicial officers whom John had lately appointed.

The principle on which it is founded ought to be remembered both by those who confer and those who accept judicial appointments; especially the important station of justice of the peace, an office which, though created after the time of John, comes fully within the spirit of this clause of the Great Charter. Wilful or corrupt perversion of the law by county or borough magistrates is almost unknown in modern times; but the gross ignorance of the laws of the realm among many of the justices is discreditable and mischievous to the community. Lord Coke truly said that "*ignorantia judicis fit sæpenumero calamitas innocentis.*" There should be a qualification of knowledge whether there be a property qualification or not.

by twelve sworn knights of the same shire, chosen by creditable persons of the same county; and within forty days after the said inquest, be utterly abolished, so as never to be restored: so as we are first acquainted therewith, or our justiciary, if we should not be in England. 49.[1] We will immediately give up all hostages and writings delivered unto us by our English subjects, as securities for their keeping the peace, and yielding us faithful service. 50. We will entirely remove from our bailiwicks the relations of Gerard de Atheyes, so that for the future they shall have no bailiwick in England; we will also remove Engelard de Cygony, Andrew, Peter, and Gyon, from the Chancery; Gyon de Cygony, Geoffrey de Martyn and his brothers; Philip Mark, and his brothers, and his nephew, Geoffrey, and their whole retinue. 51. As soon as peace is restored, we will send out of the kingdom all foreign soldiers, cross-bowmen, and stipendiaries, who are come with horses and arms to the prejudice of our people. 52. If any one has been dispossessed or deprived

[1] The remainder of the Great Charter of John (except the 54th chapter) is not repeated in the subsequent Charters. It consists of provisions of a temporary nature rendered necessary by the recent events. The 61st and 62nd chapters deserve more particular attention. Guizot remarks on them—"It is not enough that rights should be recognised and promises made, it is further necessary that these rights should be respected, and that these promises should be fulfilled. The 61st and last article of the Great Charter is intended to provide this guarantee." It is there said that the barons shall elect twenty-five barons by their own free choice, charged to exercise all vigilance that the provisions of the Charter may be carried into effect; the powers of these twenty-five barons are unlimited. If the king or his agents violate the enactments of the Charter in the smallest particular, the barons will denounce this abuse before the king, and demand that it be instantly checked. If the king do not accede to their demand, the barons have the right, forty days after the summons has been issued by them, to prosecute the king, to deprive him of his lands and castles until the abuse has been reformed to the satisfaction of the barons. Guizot points out also the effect of this in centralising the council of barons.

by us, without the legal judgment of his peers, of his lands, castles, liberties, or right, we will forthwith restore them to him; and if any dispute arise upon this head, let the matter be decided by the five-and-twenty barons hereafter mentioned, for the preservation of the peace. As for all those things of which any person has, without the legal judgment of his peers, been dispossessed or deprived, either by King Henry our father, or our brother King Richard, and which we have in our hands, or are possessed by others, and we are bound to warrant and make good, we shall have a respite till the term usually allowed the crusaders; excepting those things about which there is a plea depending, or whereof an inquest hath been made, by our order, before we undertook the crusade, but when we return from our pilgrimage, or if perchance we tarry at home and do not make our pilgrimage, we will immediately cause full justice to be administered therein. 53. The same respite we shall have (and in the same manner about administering justice, disafforesting the forests, or letting them continue) for disafforesting the forests, which Henry our father, and our brother Richard have afforested; and for the keeping of the lands which are in another's fee, in the same manner as we have hitherto enjoyed those wardships, by reason of a fee held of us by knight's service; and for the abbeys founded in any other fee than our own, in which the lord of the fee says he has a right; and when we return from our pilgrimage, or if we tarry at home, and do not make our pilgrimage, we will immediately do full justice to all the complainants in this behalf. 54. No man shall be taken or imprisoned upon the appeal[1] of a woman, for

[1] An *appeal*, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior

the death of any other than her husband. 55. All unjust and illegal fines made by us, and all amerciaments imposed unjustly and contrary to the law of the land, shall be entirely given up, or else be left to the decision of the five-and-twenty barons hereafter mentioned for the preservation of the peace, or of the major part of them, together with the aforesaid Stephen, Archbishop of Canterbury, if he can be present, and others whom he shall think fit to take along with him; and if he cannot be present, the business shall notwithstanding go on without him; but so that if one or more of the aforesaid five-and-twenty barons be plaintiffs in the same cause, they shall be set aside as to what concerns this particular affair, and others be chosen in their room, out of the said five-and-twenty, and sworn by the rest to decide the matter. 56. If we have disseised or dispossessed the Welsh of any lands, liberties, or other things, without the legal judgment of their peers, either in England or in Wales, they shall be immediately restored to them; and if any dispute arise upon this head, the matter shall be determined in the marche by the judgment of their peers; for tenements in England according to the law of England,

one, which is the general use of the word; but it here means an *original* suit at the time of its first commencement. An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another for some heinous crime, demanding punishment on account of the particular injury suffered, rather than for the offence against the public.

This private process for the punishment of public crimes had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relative, to expiate enormous offences. As, therefore, during the continuance of this custom a process was certainly given for recovering the weregild by the party to whom it was due, it seems that when these offences by degrees grew no longer redeemable, the private process was still continued, in order to ensure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offence.—4 *Bl. Com.* 312.

for tenements in Wales according to the law of Wales, for tenements of the marche according to the law of the marche; the same shall the Welsh do to us and our subjects. 57. As for all those things of which a Welshman hath, without the legal judgment of his peers, been disseised or deprived of by King Henry our father, or our brother King Richard, and which we either have in our hands, or others are possessed of, and we are obliged to warrant it, we shall have a respite till the time generally allowed the crusaders; excepting those things about which a suit is depending, or whereof an inquest has been made by our order, before we undertook the crusade: but when we return, or if we stay at home without performing our pilgrimage, we will immediately do them full justice, according to the laws of the Welsh and of the parts before mentioned. 58. We will without delay dismiss the son of Llewellin, and all the Welsh hostages, and release them from the engagements they have entered into with us for the preservation of the peace. 59. We will treat with Alexander, King of Scots, concerning the restoring his sisters and hostages, and his right and liberties, in the same form and manner as we shall do to the rest of our barons of England; unless by the charters which we have from his father, William, late King of Scots, it ought to be otherwise; and this shall be left to the determination of his peers in our court. 60. All the aforesaid customs and liberties, which we have granted to be holden in our kingdom, as much as it belongs to us, towards our people of our kingdom, as well clergy as laity, shall observe, as far as they are concerned, towards their dependents. 61. And whereas, for the honour of God and the amendment of our kingdom, and for the better quieting the discord that has arisen between us and

our barons, we have granted all these things aforesaid; willing to render them firm and lasting, we do give and grant our subjects the under-written security, namely, that the barons may choose five-and-twenty barons[1] of the kingdom, whom they think convenient; who shall take care, with all their might, to hold and observe, and cause to be observed, the peace and liberties we have granted them, and by this our present charter confirmed; so that if we, our justiciary, our bailiffs, or any of our officers, shall in any circumstance fail in the performance of them, towards any person, or shall break through any of these articles of peace and security, and the offence be notified to four barons chosen out of the five-and-twenty before mentioned, the said four barons shall repair to us, or our justiciary, if we are out of the realm, and, laying open the grievance, shall petition to have it redressed without delay: and if it be not redressed by us, or if we should chance to be out of the realm, if it should not be redressed by our justiciary, within forty days, reckoning from the time it has been notified to us, or to our justiciary (if we should be out of the realm), the four barons aforesaid shall lay the cause before the rest of the five-and-twenty barons; and the said five-and-twenty barons, together with the community of the whole kingdom, shall distrain and distress us in all possible ways, by seizing our castles, lands, possessions, and in any other manner they can, till the grievance is redressed according to their pleasure; saving harmless our own person, and the persons of our queen and children; and when it is redressed, they shall obey us as before. And any person whatsoever in the kingdom may swear that he will obey the orders of the five-and-twenty barons

[1] See note at p. 130 *supra*.

aforesaid, in the execution of the premises, and will distress us, jointly with them, to the utmost of his power; and we give public and free liberty to any one that shall please to swear to this, and never will hinder any person from taking the same oath. 62. As for all those of our subjects who will not, of their own accord, swear to join the five-and-twenty barons in distraining and distressing us, we will issue orders to make them take the same oath as aforesaid. And if any one of the five-and-twenty barons dies, or goes out of the kingdom, or is hindered any other way from carrying the things aforesaid into execution, the rest of the said five-and-twenty barons may choose another in his room, at their discretion, who shall be sworn in like manner as the rest. In all things that are committed to the execution of these five-and-twenty barons, if, when they are all assembled together, they should happen to disagree about any matter, and some of them, when summoned, will not, or cannot, come, whatever is agreed upon, or enjoined by the major part of those that are present, shall be reputed as firm and valid as if all the five-and-twenty had given their consent; and the aforesaid five-and-twenty shall swear, that all the premises they shall faithfully observe, and cause with all their power to be observed. And we will not, by ourselves, or by any other, procure anything whereby any of these concessions and liberties may be revoked or lessened; and if any such thing be obtained, let it be null and void; neither shall we ever make use of it, either by ourselves or any other. And all the ill-will, indignations, and rancours that have arisen between us and our subjects, of the clergy and laity, from the first breaking out of the dissensions between us, we do fully remit and forgive: moreover all trespasses occasioned by

the said dissensions, from Easter in the fifteenth year of our reign, till the restoration of peace and tranquillity, we hereby entirely remit to all, both clergy and laity, and as far as in us lies do fully forgive. We have, moreover, caused to be made for them the letters patent testimonial of Stephen, Lord Archbishop of Canterbury, Henry, Lord Archbishop of Dublin, and the bishops as aforesaid, as also of master Pandulph, for the security and concessions aforesaid. 63. Wherefore we will and firmly enjoin, that the Church of England be free, and that all the men in our kingdom have and hold all the aforesaid liberties, rights, and concessions, truly and peaceably, freely and quietly, fully and wholly to themselves and their heirs, of us and our heirs, in all things and places, for ever, as is aforesaid. It is also sworn, as well on our part as on the part of the barons, that all the things aforesaid shall be observed *bonâ fide* and without evil subtilty. Given under our hand, in the presence of the witnesses above named, and many others, in the meadow called Runing-mede, between Windsor and Staines, the 15th day of June, in the 17th year of our reign.

Such is the complete text translated from the original Latin of the Magna Carta. From this time may be said to date the constitutional history of England, the history of the maintenance and development of the Great Charter.

CHAPTER XII

Renewals of the Great Charter in Henry the Third's Reign — The Charter as confirmed by Edward I. and subsequent Kings—The Statute Confirmatio Cartarum—All Taxation without Consent of Parliament made illegal.

JOHN died soon after the grant of the Great Charter, leaving England distracted by civil war and foreign invasion. The first act of the Earl of Pembroke, as Protector of the Kingdom on the accession of Henry III., was to renew the Charter, but with several changes, the most important of which was the omission of the provisions concerning the levy of scutages. It assigned as a reason for these and other omissions, that the prelates and barons had agreed to respite their consideration to a time when they and such other things as *pertained to the welfare of all* should be most fully reviewed and set right. The temporary stipulations in John's Charter, which referred to the troops and allies of that king and his barons respectively, were of course not copied into Henry's Charters. And the provisions for empowering the twenty-five chosen barons to redress violations of the Charter were not renewed. A duplicate of the Charter was forthwith transmitted to Ireland, for the benefit of the king's subjects there; and writs were sent to the sheriffs of the several English counties, command-

ing them to cause the Charter of Liberties to be publicly read in full County Court, and to see that its ordinances were fully observed within their several jurisdictions. In the next year, after the French Dauphin had been driven out of the kingdom, and the malcontent English who had fought under him had returned to their allegiance, the Charter of Liberties was granted again, and on this occasion some highly valuable words were added to the clause in which the king binds himself to respect the property and personal rights of his subjects. The Charter was again renewed by Henry in the ninth year of his reign, and at the same time the Charter of the Forest was granted, whereby many of the most atrocious iniquities of the primitive game-laws were redressed. The two Charters were five times renewed between this period and Henry's death. At some of these renewals temporary variations were introduced; but it is in the form in which it was promulgated in the ninth year of Henry's reign that the Great Charter was solemnly confirmed by his successor, and in that form it appears at the head of our statute book, where (as before mentioned) it is printed from the *inspeximus* and confirmation of it by Edward I.

Magna Carta

THE GREAT CHARTER

(TRANSLATED AS IN THE STATUTES AT LARGE)

MADE IN THE NINTH YEAR OF KING HENRY THE THIRD, AND CONFIRMED BY KING EDWARD THE FIRST, IN THE FIVE-AND-TWENTIETH YEAR OF HIS REIGN.

EDWARD, by the grace of God King of England, Lord of Ireland, and Duke of Guyan: to all archbishops, etc. We

have seen the Great Charter of the Lord Henry, sometimes King of England, our Father, of the Liberties of England, in these words:

"HENRY, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Guyan, and Earl of Anjou: To all archbishops, bishops, abbots, priors, earls, barons, sheriffs, provosts, and officers, and to all bailiffs and other our faithful subjects, which shall see this present Charter, greeting: Know ye that We, unto the honour of Almighty God, and for the salvation of the souls of our progenitors and successors, kings of England, to the advancement of Holy Church and amendment of our realm, of our mere and free will have given and granted to all archbishops, bishops, abbots, priors, earls, barons, and to all freemen of this our realm, these liberties following, to be kept in our kingdom of England for ever."

CHAPTER I

A Confirmation of Liberties.

"FIRST, we have granted to God, and by this our present Charter have confirmed for us and our heirs for ever, that the Church of England shall be free, and shall have all her whole rights and liberties inviolable. We have granted also, and given to all the freemen of our realm, for us and our heirs for ever, these liberties under-written, to have and to hold to them and their heirs, of us and our heirs for ever."

CHAPTER II

The Relief of the King's Tenant of full Age.

[Same as 2nd Chapter of John's Charter.]

CHAPTER III

The Wardship of the Heir within Age. The Heir a Knight.

[Similar to 3rd Chapter of John's Charter.]

CHAPTER IV

No waste shall be made by a Guardian in waste lands.

[Same as 4th Chapter of John's Charter.]

CHAPTER V

Guardians shall maintain the Inheritance of Wards. Of Bishoprics, etc.

[Similar to 5th Chapter of John's Charter, with addition of like provisions against the waste of ecclesiastical possessions while in the king's hand during a vacancy in the See, etc.]

CHAPTER VI

Heirs shall be Married without Disparagement.

[Similar to 6th Chapter of John's Charter.]

CHAPTER VII

A Widow shall have her Marriage, Inheritance and Quarantine. The King's Widow, etc.

[Similar (with additions) to the 7th and 8th Chapters of John's Charter.]

CHAPTER VIII

How Sureties shall be charged to the King.

[Same as 9th Chapter of John's Charter.]

CHAPTER IX

The Liberties of London and other Cities and Towns confirmed.

[Same as 13th Chapter of John's Charter.]

CHAPTER X

None shall distrain for more Service than is due.

[Same as 16th Chapter of John's Charter.]

CHAPTER XI

Common Pleas shall not follow the King's Court.

[Same as 17th Chapter of John's Charter.]

CHAPTERS XII AND XIII

When and before whom Assizes shall be taken. Adjournment for Difficulty. Assizes of Darrein Presentment.

[Analogous to 18th and 19th Chapters of John's Charter.]

CHAPTER XIV

How Men of all sorts shall be amerced, and by whom.

[Same as 20th and 21st Chapters of John's Charter.]

CHAPTERS XV AND XVI

Making and defending of Bridges and Banks.

[Similar to 23rd Chapter of John's Charter.]

CHAPTER XVII

Holding Pleas of the Crown.

[Same as 24th Chapter of John's Charter.]

CHAPTER XVIII

The King's Debtor dying, the King shall be first paid.

[Same as 26th Chapter of John's Charter.]

CHAPTERS XIX, XX, AND XXI

Purveyors for a Castle. Doing of Castle-ward. Taking of Horses, Carts, and Woods.

[Same as 28th, 29th, 30th, and 31st Chapters of John's Charter.]

CHAPTER XXII

How long Felons' Land shall be holden by the King.

[Same as 32nd Chapter of John's Charter.]

CHAPTER XXIII

In what places Wears shall be put down.

[Same as 33rd Chapter of John's Charter.]

CHAPTER XXIV

In what case a Praecipe in Capite is grantable.

[Same as 14th Chapter of John's Charter.]

CHAPTER XXV

There shall be but one Measure through the Realm.

[Same as 35th Chapter of John's Charter.]

CHAPTER XXVI

Inquisition of Life and Member.

[Same as 38th Chapter of John's Charter.]

CHAPTER XXVII

Tenure of the King in Socage, and of another by Knight's Service. Petit Serjeanty.

[Same as 37th Chapter of John's Charter.]

CHAPTER XXVIII

Wager of Law shall not be without witness.

[Same as 38th Chapter of John's Charter.]

CHAPTER XXIX

None shall be condemned or injured in property, person, or liberty, without Trial. Justice shall not be sold or deferred.[1]

NULLUS LIBER HOMO CAPIATUR, VEL IMPRISONETUR, AUT DISSEISIETUR DE ALIQUO LIBERO TENEMENTO SUO VEL LIBERTATIBUS VEL LIBERIS CONSUETUDINIBUS SUIS, AUT UTLAGETUR, AUT EXULET, AUT ALIQUO ALIO MODO DESTRUATUR, NEC SUPER EUM IBIMUS, NEC SUPER EUM MITTEMUS, NISI PER LEGALE JUDICIUM PARIUM SUORUM VEL PER LEGEM TERRAE. NULLI VENDEMUS, NULLI NEGABIMUS, AUT DIFFEREMUS RECTUM VEL JUSTITIAM.

NO FREEMAN SHALL BE TAKEN OR IMPRISONED, OR BE DISSEISED OF HIS FREEHOLD, OR LIBERTIES, OR FREE CUSTOMS, OR BE OUTLAWED OR EXILED, OR ANY OTHERWISE DESTROYED; NOR WILL WE PASS UPON HIM, NOR CONDEMN HIM, BUT BY LAWFUL JUDGMENT OF HIS PEERS, OR BY THE LAW OF THE LAND. WE WILL SELL TO NO MAN, WE WILL NOT DENY OR DEFER TO ANY MAN, EITHER JUSTICE OR RIGHT.

[1] See 39th and 40th chapters of John's Charter, and notes at pp. 125-128 *supra*.

CHAPTER XXX

Merchant Strangers coming into this Realm shall be well used

[Same as 41st Chapter of John's Charter.]

CHAPTER XXXI.

Tenure of a Barony coming into the King's hands by Escheat.

[Same as 43rd Chapter of John's Charter.]

CHAPTER XXXII

Lands shall not be Aliened to the Prejudice of the Lord's Service [i.e. Lord of the Fee].

CHAPTER XXXIII

Patrons of Abbeys shall have the custody of them in time of Vacation.

[Same as 46th Chapter of John's Charter.]

CHAPTER XXXIV

In what cases only a Woman shall have an Appeal of Death.

[Same as 51st Chapter of John's Charter.]

CHAPTER XXXV

At what time shall be kept a County Court, a Sheriff's Tourn, and a Leet.

"No county court shall from henceforth be holden but from month to month: and where a greater term has been used, it shall be greater. Neither shall any sheriff or his bailiff keep his tourn in the hundred but twice in the year; and nowhere but in due and accustomed place, that is to say, once after Easter, and again after the Feast of Saint Michael. And the view of frank-pledge shall be likewise at Saint Michael's term, without occasion; so that every man may have his liberties, which he had and was accustomed to have in the time of King Henry our grandfather, or which he hath purchased since. The view of frank-pledge shall be done so, that our peace may be kept, and that the tything be wholly kept as it hath been accustomed; and that the sheriff seek no occasions, and that he be content with so much as

the sheriff was wont to have for his view-making, in the time of King Henry our grandfather." [1]

CHAPTER XXXVI

No Land shall be given in Mortmain.[2]

"It shall not be lawful from henceforth to any to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it: if any from henceforth

[1] The sheriff's tourn was the county court for criminal matters, and for the preservation of the peace; and that officer used to hold it in the respective hundreds of the county by rotation. The courts leet are minor local courts of the same character as that of the tourn, having the same jurisdiction, but being limited to smaller districts. According to Lord Coke (2 Inst. 70), the courts leet were carved out of the courts of the tourn, "for the ease of the people, that they should have justice done them at their own doors." It is more probable that they are the original hundred courts of the Saxon times, though the area of a manor often became the area of their jurisdiction, instead of the old area of a hundred. The right of holding a court leet was often granted to the lord of a manor, partly for the benefit of his tenants, resident in the manor, and partly for the benefit of the lord himself; who, besides the judicial authority and dignity which he gained, derived pecuniary advantages from the fines and fees of court; generally also when the leet continued to be held for a particular hundred, some neighbouring lord received from the Crown the right of presiding in it personally, or by his steward. The criminal jurisdiction both of the tourn and the leet was reduced within very narrow limits by the 24th clause of the Great Charter respecting the holding pleas of the Crown. But these courts long continued to be of practical importance in many matters of local self-government. Thus the assembled inquest or jury of the leet inquired and made presentments respecting persons of notorious evil fame; respecting cheats, especially with regard to the venders of unwholesome provisions; respecting escapes from prisons, breaches of the peace, public nuisances, and many other subjects. The court leet (or tourn) could impose a fine or amerciament on any person who was presented as an offender in any of these respects, and such fine or amerciament could be levied by distress. Headboroughs or constables for the hundred were also chosen at the court leet, and many other local officers. The tourn had become obsolete before Lord Coke's time. For further information as to these courts, see Coke's second *Institute*, p. 69, and Comyns's *Digest*, title Leet.

[2] Alienation in *mortmain*, *in mortua manu*, is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal. But these purchases having been chiefly made by

give his lands to any religious house, and thereupon be convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee."

CHAPTER XXXVII

A Subsidy in Respect of this Charter and the Charter of the Forest granted to the King.

"Escuage from henceforth shall be taken like as it was wont to be in the time of King Henry our grandfather; reserving to all archbishops, bishops, abbots, priors, templars, hospitalers, earls, barons, and all persons as well spiritual as temporal, all their free liberties and free customs, which they have had in time passed. And all these customs and liberties aforesaid, which we have granted to be holden within this our realm, as much as appertaineth to us and our heirs, we shall observe. And all men of this our realm, as well spiritual as temporal (as much as in them is), shall observe the same against all persons in like wise. And for this our gift and grant of these liberties, and of other contained in our Charter of liberties of our forest, the archbishops, bishops, abbots, priors, earls, barons, knights, freeholders, and other our subjects have given unto us the fifteenth part of all their moveables. And we have granted unto them, for us and our heirs, that neither we nor our heirs shall procure or do anything whereby the liberties in this Charter contained shall be infringed or broken. And if anything be procured by any person contrary to the premises, it shall be had of no force nor effect. These being witnesses, Lord B. Archbishop of Canterbury, E. Bishop of London, I. Bishop of Bath, P. of Winchester, H. of Lincoln, R. of Salisbury, W. of Rochester, W. of Worcester, J. of Ely, H. of Hereford, R. of Chichester, W. of Exeter, Bishops: the Abbot of St. Edmonds, the Abbot of St. Albans, the Abbot of Bello, the Abbot of St. Augustines in Canterbury, the Abbot of Evesham, the Abbot of Westminster, the Abbot of Bourgh St. Peter, the Abbot of Reding, the Abbot of Abindon, the Abbot of Malmsbury,

religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain.—See 2 *Bl. Com.* 268.

the Abbot of Winchcomb, the Abbot of Hyde, the Abbot of Certesy, the Abbot of Sherburn, the Abbot of Cerne, the Abbot of Abbotebir, the Abbot of Middleton, the Abbot of Seleby, the Abbot of Cirencester: H. de Burgh, Justice, H. Earl of Chester and Lincoln, W. Earl of Salisbury, W. Earl of Warren, G. de Clare Earl of Gloucester and Hereford, W. de Ferrars Earl of Derby, W. de Mandeville Earl of Essex, H. de Bygod Earl of Norfolk, W. Earl of Albemarle, H. Earl of Hereford, J. Constable of Chester, R. de Ros, R. Fitzwalter, R. de Vyponte, W. de Bruer, R de Muntefichet, P. Fitzherbert, W. de Aubenie, J. Gresly, F. de Breus, J. de Monemue, J. Fitzallen, H. de Mortimer, W. de Beauchamp, W. de St. John, P. de Mauly, Brian de Lisle, Thomas de Multon, R. de Argenteyn, G. de Nevil, W. Mauduit, J. de Balun, and others."

"We, ratifying and approving these gifts and grants aforesaid, confirm and make strong all the same for us and our heirs perpetually; and by the tenor of these presents do renew the same, willing and granting for us and our heirs, that this Charter, and all and singular its articles for ever shall be stedfastly, firmly, and inviolably observed. Although some articles in the same Charter contained yet hitherto peradventure have not been kept, we will, and, by authority royal, command, from henceforth firmly they be observed. In witness whereof we have caused these our letters patent to be made. Witness Edward, our Son, at Westminster, the twelfth day of October, in the twenty-fifth year of our reign."

Magna Carta, in this form, has been solemnly confirmed by our kings and parliaments upwards of thirty times; but in the twenty-fifth year of Edward I. much more than a simple confirmation of it was obtained for England. As has been already mentioned, the original Charter of John forbade the levying of *escuage* save by consent of the Great Council of the land; and although those important provisions were not repeated in Henry's Charter, it is certain that they were respected. Henry's barons frequently refused him the subsidies which his

prodigality was always demanding. Neither he nor any of his ministers seems ever to have claimed for the Crown the prerogative of taxing the landholders at discretion: but the sovereign's right of levying money from his towns and cities under the name of tallages was constantly exercised during Henry III.'s reign and during the earlier portion of his son's. But, by the statute of Edward I., intituled *Confirmatio Cartarum*, all private property was secured from royal spoliation and placed under the safeguard of the Great Council of *all* the realm.

King Edward had committed several violent and arbitrary measures in order to raise the moneys which his wars required. The details of these transactions will be found in Guizot's *History of Representative Government*, and in Blackstone's "Introduction to the Charter," as well as in the regular Histories of England. Providentially for this nation, wise and fearless patriots were still to be found among our barons,[1] who led the national opposition to these royal aggressions. Edward made a virtue of necessity and yielded to the popular feeling.[2] While he was in Flanders, in 1297, his son (who presided as regent in the English Parliament) passed, in the king's name, the statute usually called "Confirmatio Cartarum," in the then usual form of a charter. It was sent over to King Edward, and signed by him at Ghent;[3] and was afterwards (after some attempts at evasion) solemnly confirmed in a parliament held by himself in person in the year 1300.

[1] See Hallam's remarks on the Earls of Hereford and Essex, *Hist. Mid. Ages*, vol. iii. p. 2, note.

[2] "To know when to yield in government is at least as necessary as to know when to lose in trade; and he who cannot do the first, is so little likely to govern a kingdom well, that it is more than probable he would govern a shop ill" (Bolingbroke).

[3] See Blackstone's Introduction, p. xcv.

The material portions of this Statute, or Charter, are as follows:—

"CONFIRMATIO CARTARUM

ANNO VICESIMO QUINTO EDV. I.

CAP. V

"And for so much as divers people of our realm are in fear that the aids and tasks which they have given to us beforetime, towards our wars and other business, of their own grant and goodwill (howsoever they were made), might turn to a bondage to them and their heirs because they might be at another time found in the rolls, and likewise for the prises taken throughout the realm, in our name, by our ministers; we have granted for us and our heirs that we shall not draw such aids, tasks, nor prises into a custom for anything that hath been done heretofore, be it by roll or any other precedent that may be founden.

CAP. VI

"Moreover, we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy church, as also to earls, barons, and to all the commonalty of the land, that *for no business from thenceforth we shall take such manner of aids, tasks, nor prises, but by the common consent of all*[1] *the realm, and for the common* profit thereof, saving the ancient aids and prises due and accustomed."[2]

Thus we see the Charter of John reinforced by the Charter of Edward the First and the principle of the supremacy of law supplemented by the principle of popular control over taxation. The way was now paved for the development of parliamentary government.

[1] "Par commun assent de *tut* le roiaume." The version in our statute book omits the important word "All."

[2] Coke says the ancient aids *pour file marier*, etc., are here meant: and the ancient takings or seizures are here intended, such as waifes, strays, the goods of felons and outlaws, deodands, and the like (*Second Institut.* p. 529).

CHAPTER XIII

The Principles of the Constitution traced in the Charter—Kingship in England — Its Powers and Limitations — Parliament — Origin of the House of Peers — Of the two Branches of the House of Commons—Trial by Jury—Writ of Habeas Corpus—Origin and Value of these Constitutional Rights.

HAVING now examined the text of Magna Carta and its Supplement, we may pause and consider how far they recognise or establish those leading features of our constitution which were defined in the first chapter of this work, and may conveniently be repeated here.

1. The country is governed by an hereditary sovereign, ruling with limited powers, who is bound to summon and consult a parliament of the whole realm, comprising hereditary peers and elective representatives of the commons.

2. Without the sanction of parliament no tax of any kind can be imposed, and no law can be made, repealed, or altered.

3. No man may be arbitrarily fined or imprisoned, nor may his property or liberties be impaired, and no man may be in any way punished, except after a lawful trial.

4. Trial by jury.

5. Justice shall not be sold or delayed.

In the first place, with regard to the government of the

country, the Great Charter and its supplements clearly recognise the authority of an hereditary sovereign. The repeated expressions in them of the king *granting for himself and his heirs* the various popular privileges, which they secure, are themselves sufficient to prove this. It would not be difficult to point out in them recognitions of the king being the fountain of honour,[1] and of justice,[1] and of other rules respecting English royalty, which have been developed in modern times to fit in with our Cabinet system of parliamentary government. But without resorting to literal criticism, no one can read the Charter without feeling perfectly certain that royalty was a fundamental portion, and at that time the primary governing power of our political system. Indeed, not only in England, but throughout Europe, during the Middle Ages, the existence of a "permanent suzerain, vested with large rights of a mixed personal and proprietary character over his vassals, though subject also to certain obligations towards them," was always presumed as indispensably necessary for the existence of political society.[2] "The rights of the chief were always conceived as constituting a *Status* apart, and neither conferred originally by the grant, nor revocable at the pleasure of those over whom they were exercised. This view of the essential nature of political authority was a point in which all the three great elements of modern European society—the Teutonic, the Roman,[3] and the Christian—concurred, though each in a different way and

[1] See sections 14, 39, 36, 45, and 61 of John's Charter.

[2] See Grote's *History of Greece*, vol. iii. p. 13 *et seq.*; the reflections on the discontinuance of kingship in Hellas, compared with its preservation in mediæval Europe, deserve an attentive perusal.

[3] *I.e.* the *Imperial* Roman. The influence of Republican Rome, when her history and literature were first made familiar to Europe by the revival of classical studies, was certainly not monarchical.

with different modifications." Thus in England we find the nation constantly striving to regulate and temper, by solemn compact and laws, the power of its royal chief, but never attempting, in early times, to dispense with the existence of kingly chiefdom. Even when the oppressiveness and proved perfidy of individual monarchs induced the nation to take away practical power from them, and to choose an executive board who should rule in their name, such provisions, however necessary, were always considered and designed to be of a temporary nature. Nor even when kings were solemnly deposed, as in the cases of the second Edward and the second Richard, was kingship itself assailed. A new sovereign was instantly placed in the room of the deposed one, in order that the nation might not be deprived for a moment of the monarchical head, that was reckoned politically indispensable.

The peaceable and undisputed accession of Edward I., though he was far distant from England at the time of the death of Henry III., established not only that the crown was hereditary in the royal family, but also that it was hereditary according to the principles of descent which regulate a private inheritance.[1]

It appears also clearly in the Charter that the royal power, which still forms part of our constitution, is a limited power. The king's Council sanctions the royal will. The very charters purport in their preambles to be granted by the advice of the great spiritual and

[1] The form of popular consent expressed at the coronation was long considered necessary to complete the royal title. The heir to the throne had an inchoate right immediately on his predecessor's death, but his reign dated from his coronation. Such was the case till Edward I.'s reign, which dated from the day (four days after Henry III.'s death) when the barons swore fealty to him in his absence, and his peace was proclaimed (see Hallam's *Middle Ages*, vol. ii. p. 342).

lay councillors of the Crown. We shall have occasion to consider the importance of this more fully when we examine the origin of our parliaments. But the great principle which emphatically distinguishes a constitutional from an absolute monarchy—the principle that the Crown is subject to the law—requires our present attention, and it is fully established by the Great Charter. A king who avows that he is bound to inflict no punishment, save according to the law of the land,[1] and that he cannot, save by the authority of the law, touch a freeman's property or person, or control his freedom of action; a king who by a public instrument surrenders all fines and amerciaments which he has imposed contrary to the law of the land[2]—completely admits the supremacy of law over royal power. And in fact, although the government of our Anglo-Norman kings was often extremely arbitrary, they never were supposed, either by others or by themselves, to be absolute irresponsible lords of the lives and properties of their subjects, like the despots of the Eastern World. But though by common understanding the king was bound to consult his Great Council before he made new laws or exacted fresh taxes, and though the very essence of feudalism involved a reciprocity of duties between lord and vassal, the checks on royal caprice and royal oppression were always vague, and generally ineffectual before the epoch of the Great Charter. From that time forward the limitations of the royal prerogative were unmistakable and undeniable, and "Sub lege Rex" became a sure constitutional maxim, though forensic sycophants in after ages were sometimes found who whispered its converse.[3]

[1] Magna Carta, sec. 39, *supra*. [2] Sec. 55, *supra*.

[3] Cf. Hallam's *Middle Ages*, vol. ii. p. 431, for the proofs found in Bracton, a judge at the end of Henry III.'s reign, of the limitations of

Next let us trace the great principle that the sovereign of England is bound to summon and consult a parliament of the whole realm, comprising hereditary peers and elective representatives of the commons. This important topic requires consideration under several aspects. We must first ascertain the existence of such a body as a Great Council of the realm, or Parliament; and next examine of whom and how it was composed. This will lead us to consider the origin of each of the two Houses of Parliament; and with regard to the House of Commons, we shall have to trace separately the growth of its two branches, its knights of the shire, and its representatives of cities and boroughs. Together with the general principle of the authority of parliament, and its composition, we may conveniently consider the maxims relating to legislation and taxation —and the important fact that one parliament was established for all England, and not separate parliaments for separate provinces.

Among all the nations of the Gothic stock, whether of

prerogative by law. "The king can do nothing but what he can do by law," etc. The volume of *Ancient English Political Songs*, published by the Camden Society, shows also how the clergy and educated part of the laity in the thirteenth century reasoned on this topic. The fine poem on the barons' war, in Henry III.'s reign (which must have been written after the battle of Lewes, 1264, before the battle of Evesham, 1265) contains many spirited passages as to the necessary restrictions of royal power. The patriotic poet says: "It is a vulgar error to assert that the course of law depends on the king's will. The truth is the reverse; for the king may fail, but the law stands firm. The law rules even the royal dignity":—

> Dicitur vulgariter ut rex vult, lex vadit,
> Veritas vult aliter; nam lex stat, rex cadit.
>
> . . . . .
>
> Legem quoque dicimus regis dignitatem
> Regere, etc.

This may be contrasted with the older writer Glanvill, who actually applied to Henry II. the maxim of Imperial Rome that the mere will of the king has the force of law.

its Scandinavian or of its Teutonic branch, and in all the kingdoms founded by them out of conquered Roman provinces, councils or assemblies of some form existed, whose consent the ruling chief was bound to obtain, in order to legalise important measures of State. We have already drawn attention to the assemblies of the *principes*, and the general assemblies of freemen among the primitive Germans, and to the Tings of the primitive Danes. The student may also here usefully refer to what has been said respecting the witenagemotes of the Anglo-Saxons.[1] At least he must bear in mind that it was only with the sanction of this witan that an Anglo-Saxon king could make new laws or impose new taxes; that the prelates and the great nobles and thanes attended these assemblies; and that the inferior class, the ceorls, though not directly represented there, yet were not without protectors and advocates; inasmuch as certain of the magistrates, whom the men of every borough and township regularly elected from among themselves for the purpose of local self-government, might be present at the witan for the purpose of obtaining redress for any wrong which might have been committed, and for the redress of which the ordinary tribunals were inadequate. When once present at the witan, though ostensibly only for the purpose of remedial justice, the ceorl magistrates must also have had some influence in other matters: inasmuch as the cheerful co-operation of the bulk of the community in carrying any particular measure into effect never can be thought immaterial, even by those who have the power of enforcing sullen obedience. The Anglo-Saxon polity was overthrown by the conquering Normans; but the recollection of this virtual though indirect system of

[1] Chapter iv.

representation must have survived among the bulk of the population; and may have facilitated the adoption and ensured the good working of the subsequent parliamentary representation of the Commons.

It has also been pointed out that, though we have no authority for minute details of the polity of the Normans in Normandy, prior to the conquest of this country by Duke William, thus much is certain, that there was a council of the Norman barons which the dukes were obliged on all important occasions to summon and consult. It was not likely that they, by whose help William won the crown of this country, and to whom he parcelled out its lands as rewards, would consent to forgo in their new abodes the political rights which they had enjoyed in their old homes across the Channel. The Anglo-Norman king summoned and consulted his Great Council, as he had done while merely a Norman duke. All who held land by military tenure immediately of the Crown had a right to attend, and were expected to attend the king's court on the solemn days of council, and all these were originally styled the king's barons. Besides these, the prelates, and the heads of the chief abbeys and priories formed here, as in every country of Christendom, an essential part of the Great Council. No other persons of any class whatever had the right to appear there, either in person, or by any sort of representative, to take part in the proceedings; though petitioners for justice still flocked thither, as to the highest court of the realm.

Many among the large number of tenants-in-chief, by reason of their comparative poverty, the distance of their estates from the cities where the Council was usually convened, and other causes, soon ceased to attend or to be expected to attend as regularly as the more powerful

and wealthy nobles. These last were soon termed the greater barons, and ultimately the titles of "peer" and "baron," which had first been common to all the king's immediate tenants, were, in speaking of the kingdom generally, exclusively applied to the heads of a few great houses, who, largely endowed with lands, and constant members of the Great Council, were clearly distinguishable in rank and in circumstances from the mass of the inferior tenants-in-chief. Traces of the distinction appear earlier than John's reign, but in that king's Great Charter the line is drawn decisively and broadly between these two bodies, which we may safely call, in modern phraseology, the nobility and the gentry of the realm. By the 14th chapter of John's Charter the king binds himself in order to constitute the General Council for the grant of pecuniary aids, that it shall be summoned thus—"We shall cause the archbishops, bishops, abbots, earls,[1] and greater barons to be separately summoned by our letters. And we shall cause our sheriffs and bailiffs to summon generally all others who hold of us in chief."

With respect to the spiritual lords no particular comment here is necessary. We principally direct our attention to the origin of the temporal peers. Altogether we see in the words of the Charter, which have just been quoted, the clear original of our modern House of Lords, consisting of lords spiritual and temporal. And, as the temporal peerage was thus a body originally composed of the most powerful landowners in the kingdom, it naturally

[1] The title "Earl," under the first Anglo-Norman kings, meant that its holder was governor of a county or province. By degrees it became a mere titular distinction. The title of duke was first granted to a peer in Edward III.'s reign; that of marquess in Richard II.; that of viscount in Henry VI.

became an hereditary peerage without any express enactment to that effect. This will appear clear if we call to mind that the power of devising real estates did not exist for many ages after the grant of the Great Charter; and, although alienation with the consent of the lord, and upon paying him a fine, was permitted by law, the entire transfer of large estates by such means could seldom or never have occurred, for the simple and obvious reason, that there were no wealthy capitalists to come forward and buy the whole lands of a mighty but impoverished baron at a single bargain. As, therefore, the estates of the great barons descended generally from heir to heir, and as each heir on coming into possession had the same right as his predecessor to be treated as a great baron of the realm, the idea of hereditary descent became gradually associated with the *status* of a peer. And this theory of the descent of peerage at last prevailed so far as to be extended to a new species of peers: to men who held no baronial possessions, but whom our kings summoned by writ to meet and consult among the prelates, the magnates, and the chief men of the realm. This mode of creating peers by writ is said to have been first practised in Edward I.'s reign; and it appears to have been established as early as Richard II.'s reign, that such a writ of summons to parliament, and the fact of having sat there by virtue of such a writ, gave an hereditary right to the descendants of the person so summoned. The modern form of the sovereign creating a peer by letters patent dates from the reign of Richard II. By an almost invariable usage, the letters patent creating a peerage direct its hereditary descent. Whether it is in the power of the Crown to grant a peerage that shall not be hereditary, is a question in dispute. In the Wensleydale Peerage Case

(1856) the Committee for Privileges held that a patent conferring a life peerage did not entitle the grantee to sit and vote in the House of Lords. Parliament, however, is omnipotent, and has done what the Crown wished to do. By Acts passed 1876 and 1887, every judge who is appointed to try cases in the House of Lords—the Supreme Court of Appeal—is entitled, though only appointed for life, to sit and vote in the House of Lords.

We next come to the rise and progress of our Commons House of Parliament; and it will be convenient to deal separately with its two branches—the knights of the shire, and the borough members.

The 14th clause of the Great Charter of John, after providing that the prelates and great barons shall be summoned individually, ordains that the king shall, by his sheriffs and bailiffs, summon generally all others who hold of the king in chief. There is nothing said here about any two or any other number in each county being elected to sit as representatives of the rest. But if we can satisfy ourselves that the idea and the practice of representation were at this period becoming familiar to the English, we can readily understand that the practice of representation in this instance also might be tacitly annexed to this provision of the Great Charter; and, then, if we consider that, by virtue of the 14th clause, the mass of inferior tenants-in-chief in each county would, at the summons of their sheriff, elect certain individuals of their body to represent them in the Great Council of the realm, we see a recognition of that part of the supreme assembly, which now consists of the county members of the House of Commons; and we see the principle of representation also.

We may indeed trace signs of the Representative System as early as the very first establishment of the Normans in

this country. The causes why this system of government was so seldom and so unsuccessfully attempted by the classic States of Greece and Rome, and why it grew and throve in mediæval Europe, deserve an investigation which cannot be attempted here.[1] Feudalism favoured, and to some extent involved, Representation. The lord who attended his sovereign's council was supposed to vote, and make grants of money on his own behalf and on behalf of his vassals also. The Abbots (who as spiritual lords formed a considerable part of the councillors of every sovereign in Christendom) were more completely the elected representatives of the whole body of the members of their respective monasteries or abbeys. And the Church did much to diffuse the idea of representative action by her councils, synods, and other assemblies, "all of which were formed on the principle of a virtual or express representation, and had a tendency to render its application to national assemblies more familiar."

Specific instances of election of individuals from each county for purposes connected with the administration of government, even before the date of John's Charter, can be proved; and it is reasonable to believe that very many more must have taken place, which no chronicler has thought it necessary to mention, and of which no documentary proof has survived. Thus, four years after the Conquest, we find William directing twelve persons to be chosen for each county, to inform him rightly of the laws and customs of England.[2] Writs are extant by

[1] See Newman's *Contrasts between Ancient and Modern History*, and Freeman's *History of Federal Government*. The most remarkable instances of representative government in classical times are the Achaean League, and the system adopted by the Italian Allies in the Social war. It is curious to speculate what Italica would have been if it had conquered Rome.

[2] Hoveden, 343.

which King John, in 1214, the year before the grant of the Great Charter, ordered the sheriffs of each county to send to a general assembly at Oxford "four chosen knights, in order to discuss with us the affairs of our kingdom."[1] It is also deserving of attention that another clause of John's Charter (the 48th) very explicitly requires an election of knights of the shire in each county for a very important purpose. It directs that "all evil customs concerning forests, etc., shall be forthwith inquired into in each county by twelve sworn knights of the same shire, chosen by creditable persons of the same county." Moreover, the practice of knights being chosen from each district, who, in behalf of the whole body of the county, made presentments of crimes before the king's judges on their circuits, must have materially aided in habituating the freeholders of each county, especially the knights, to representative action. This practice was certainly as old as the reign of Henry the Second, and was probably based on a still more ancient Anglo-Saxon custom.[2] An ordinance of Richard the First had regulated the procedure for about twenty years before the date of Magna Carta. Four knights were chosen for each county, who then proceeded to choose others for each hundred or wapentake.

We must also, in examining the 14th clause of John's Charter, respecting the summoning of the mass of tenants-in-chief to the Great Council, bear in mind who the officer was by whom the summons was to be given. The officer specially mentioned in the Great Charter for this purpose is the sheriff. The sheriff would naturally

[1] "Quatuor discretos milites ad loquendum nobiscum de negotiis regni nostri."

[2] See Forsyth's *History of Trial by Jury*, p. 187.

execute this duty at the county court, of which he was the presiding officer, and at which the mass of the tenants-in-chief, like other freeholders, were bound to attend. It may be taken for certain that it was at the county court that the twelve knights, under section 48 of the Charter, were to be elected; that it was there that the four knights were chosen for the presentment of offences, under Richard the First's ordinance; and that it was there that the selections of knights for any purpose (such as that which had occurred in 1214) were made. It would naturally follow that the assembled tenants-in-chief, who heard at the county court a general summons from the sheriff to the Great Council of the realm, would follow their usual course, and appoint some of their number to act for them. They may not have intended to waive the abstract right which each possessed of attending in person; but it is improbable that on the receipt of a mere general summons they should have recommenced a practice which they had laid aside as burdensome. But it would be requisite to pay some kind of obedience to the royal summons, and the mode of doing so would naturally be by electing some of their number to attend and act for the whole body.

The clauses of John's Charter respecting the manner of granting aids and escuages, and the summonses to the Great Council, were not repeated in the Charter as issued under Henry the Third. But it is clear that the prohibition against levying these imposts without consent was considered to be still binding;[1] nor did Henry, though he tallaged the royal towns without mercy, venture to

[1] It appears from the conclusion of the Great Charter as issued by Henry in the twenty-fifth year of his reign that he there acknowledges a grant from his subjects.

take escuages or aids by the mere exercise of royal power.

During the long reign of Henry III. we find the proofs of county representation in parliament becoming more numerous and more clear. Thus, during the earlier years, we find repeated instances of elections of knights of the shire for the purpose of presenting grievances, and for assessing on each individual his fair proportion of a voted subsidy. In 1245 we find Henry, in the very terms of the Great Charter of John, summoning the great barons singly, and the other tenants-in-chief generally, by writs to the sheriffs of each county. To a Great Council summoned in 1246, the title of Parliament is for the first time given by the old chronicler, which had previously been applied to any kind of conference, but thenceforth in England became restricted to the Great Council of the nation. In 1254 Henry directs a parliament to be convened at London, to which the sheriff of each county is to cause to be elected in the county court two good and discreet knights of the shire, whom the men of the shire 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.

Finally, in 1265, in the celebrated parliament summoned by De Montfort in Henry's name, at which the representation of the boroughs was created, the representation of the counties was undoubtedly placed or confirmed on its permanent basis, as the writs are still extant by which each sheriff is directed to return two lawful, good, and discreet knights for his shire.

The date cannot be exactly given of the important change in county representation, when all the freeholders of the county began to vote in the election of knights of

the shire, and not merely those who held their land directly of the Crown by military tenure. It is obvious that this extension of the franchise arose from the circumstance of the knights being elected at the county courts, at which all the freeholders of the shire did suit and service. And although opinions vary as to the precise time and mode in which it was effected, it is clear that at a very early period, certainly during Henry III.'s reign, the county members of England were elected by all the freeholders, without regard to their holding by military or by socage tenure, and without reference to their being or not being immediate tenants of the Crown. Subsequently, a statute of Henry VI. limited the county franchise to such freeholders only as possessed free tenements of the clear annual value of forty shillings.

For the commencement of the other branch of our House of Commons, the representatives of cities and boroughs, we must take a date subsequent to the Great Charter of John. Those who obtained that Charter had designed to give the citizens and burghers of England the same protection from royal rapacity which they exacted for the landholders. This is evident from the "Articuli Magnæ Cartæ,"[1] the rough draft of the barons' stipulations laid before King John at Runnymede, to which he assented under seal. In the 32nd of these articles, after the provision against the levy of scutages or aids, save by consent of the General Council of the realm, were added the important words, "And in a like manner be it done respecting the talliages and aids of and from the city of London and other cities." Through some unexplained neglect or manœuvre, these important words were omitted when the Charter was formally drawn up; and

[1] See them at length in Blackstone on the Charter, p. 1 *et seq.*

the cities and towns were left exposed to the exactions of their feudal oppressors, without any protection in the national Council. Simon de Montfort was the first statesman who perceived and fully appreciated the growing importance of the commercial middle classes in England. The instances sometimes asserted of borough representation before his time are both scanty and spurious; but to the parliament summoned by him in Henry's name, after the battle of Lewes, 1264, two burgesses were returned for every borough in each county; and the writs for their returns are still preserved. De Montfort soon perished in the vicissitude of civil war; but his reform measure survived him. The victorious royalists felt the policy of enfranchising the trading community of the land. Parliaments continued to be summoned on De Montfort's plan; and when at length the Confirmatio Cartarum, in the twenty-fifth year of Edward I., by the enactments which have above been quoted, made the consent of parliament necessary to the levy of talliages, of subsidies, and, in effect, of all taxes, the presence of the burgesses in the parliaments of England became essential and indispensable.

Had our kings been less wasteful and warlike, it is probable that parliaments including the burgesses would seldom have been convened; and it is certain that the House of Commons never would have grown into a great governing organ of the constitution. There was an essential difference in the origin of its two branches. The presence of the knights of the shire in parliament sprang from the old Anglo-Norman right of each immediate military tenant of the king to be present at the king's Great Council. Councils, therefore, might have long continued to be called at which the prelates, the great barons, and the knights would attend and take part in legislation and the delibera-

tions of State affairs, but in which the burgesses would have no place. Councils of this nature were in fact frequently convened at intervals in Edward the First's reign, after the introduction of what we should term full parliaments of peers, knights of the shire, and burgesses.[1] But the ample domains with which the Conqueror had fortified the Crown were diminished rapidly by the lavish generosity and costly campaigns of his successors. Our kings were in constant need of money, and the money granted by the burgesses was an important consideration. The frequent convention of parliaments, therefore, at which the burgesses attended, became indispensable; and the gradual strengthening of the assemblies on which the Crown was thus dependent for supplies was equally inevitable. Thus the power of the purse drew after it other power. The representatives of cities and boroughs acquired and exercised equal rights with the knights of the shire; and so two bodies, by uniting together, gained the needful authority for their country's good which neither could have singly maintained.[2]

[1] Two kinds of parliament appeared under Edward I. The one kind was composed only of the higher barons, and seemed to form the Grand Council of the king; in the other, deputies from counties and boroughs had a seat. No legal distinction existed between these assemblies; their attributes were almost identical, and they often exercised the same powers. However, the meetings of those parliaments which were composed only of the higher barons were very frequent; they took place regularly four times a year. The other parliaments, on the contrary, were only convened on extraordinary occasions, and when it was necessary to obtain from the freeholders, either of the counties or of the towns and boroughs, some general impost.

[2] It is very instructive to compare the growth and durability of English liberty with the fate of that of Castile. The Castilian cities sent deputies to the Cortes long before the English towns were represented in parliament. These popular members of the early Cortes were fully equal in spirit to the early members of our Commons House, and had much more power. But the inferior nobility and the country landowners of Castile were unrepresented. Hence the

The constitutional principle that the Crown should not tax the subject without the consent of parliament was undoubtedly the practical mainspring of parliamentary power. Sir William Temple once said that for a prince to govern all *by* all is the great secret of happiness and safety both for prince and people.[1] Gleams of the spirit of this precept appear in the political poem of Henry the Third's time, which has been already referred to. For example, the poet (probably a friend and adviser of De Montfort) bids that the Commons of the realm be consulted, and that the opinion of the whole body of the people be made known:—

> Igitur communitas regni consulatur,
> Et quid universitas sentiat sciatur.

Thus, too, we find an archbishop of Canterbury, in Edward the First's reign, in a letter to the Pope, asserting that it is the custom of the kingdom of England that, "in matters which regard the state of that kingdom, the advice of all those interested in the matter should be consulted." Guizot observes on this, that "there is no need that we should take this principle in its most rigorous application; it is not the fact that all those who were interested in these matters were consulted about them; but the sentiment is still a witness of the progress which had already been made by the ideas of a free and public Government."[2]

Cortes of Castile, when the great struggle between them and the Crown, in the reign of Charles V. (Charles I. of Castile) came on in the sixteenth century, were overthrown, and the cause of constitutional freedom in Spain fell with them. On the other hand, it is well to watch the fatal weakness of freedom in Poland, where a martial nobility and gentry had the fullest rights, but where the towns were allowed no political power. Kosciusko and his compatriots endeavoured to reform this, but it was too late.

[1] Napoleon's maxim was the exact converse. "Everything *for* the people, nothing *by* them."

[2] *Hist. Represent. Gov.* part ii. lect. 13.

We have examined the respective origins of the elements of our parliament; next comes the very important subject of its division into two Houses, one consisting of the lords spiritual and the lords temporal, the other of the knights of the shire and burgesses. In the first place, the mere fact of the division of our parliament into *two* Houses is of great importance in our constitutional history. According to some writers, it enabled England to escape the miseries which the instability, the violence, and the impassioned temerity of a single legislative assembly produced, when that form of government was tried, as it often was in the Italian Republics of the Middle Ages, as it was for a short period in Pennsylvania and Georgia, and again by revolutionary France, Spain, Naples, and Portugal, in later times. Among the political writers of the United States, Kent, Story, and Lieber[1] have applauded "The Principle of Two Houses," or the "Bicameral System," as it was phrased by Jeremy Bentham.[2] On the other hand, the example of modern Germany shows that a single chamber is not necessarily unstable, violent, or rash.

An increase of the number of Houses beyond two

[1] Yet it can hardly be maintained now that the two Chambers in the United States, Congress and Senate, provide a favourable example of the bicameral system.

[2] Thus Lieber in his work on *Civil Liberty and Self-Government*, after allowing that practice alone can show the whole advantage that may be derived from the system of two Houses, points out that "not only has the system of two Houses historically developed itself in England, but it has been adopted by the United States in all the thirty-one States, as well as the six now existing territories, and by all the British Colonies where local Legislatures exist. The bicameral system," he adds, "accompanies the English race like the common law. Moreover, no one attempt at introducing the unicameral system in larger countries has succeeded. France, Spain, Naples, Portugal—in all these countries it has been tried, and everywhere it has failed. The idea of one House flows from that of the unity of power, so popular in France. The bicameral system is called,

gives no advantage which the bicameral plan does not afford, and introduces irreparable mischief, by the complicated dissensions, the vacillations, and the delays which are inevitable when there are three or more legislative councils. The facilities for corruption and intimidation by the sovereign or his ministers are also augmented; but it becomes an easy matter for an adroit and ambitious politician to gain an ascendency in one weak House out of many, and thereby to destroy the general free action of the political body. It is useful to compare, in this respect, the primary institutions of our own country with the different forms assumed by the national assemblies of other European nations in early times. For example, we find in mediæval Sweden four estates in four Houses; in mediæval Spain and France three estates in three Houses. We Englishmen may fairly boast that of all the early free institutions of Europe, our own alone have enjoyed continuity.[1]

The division of our parliament into two Houses is foreshadowed in the distinction drawn by John's Charter between the great barons and the inferior tenants-in-chief; and the nature of the division which took place when our parliament was fully constituted by the addition of borough members was most momentous for the liberty of England. If the representatives of the inferior military tenants-in-chief had been admitted to the chamber

by the advocates of democratic unity of power, an aristocratic institution. This is an utter mistake. In reality it is a truly popular principle to insist on the protection of a Legislature, divided into two Houses." Since Lieber wrote, Germany has adopted the single chamber for her Reichstag.

[1] See Sir J. Mackintosh's *Memoirs*, vol. ii. p. 188. Perhaps the Hungarian Parliament with its two Houses is the exception. The Hungarian constitution goes back to the Golden Bull, as ours does to Magna Carta.

of the great barons, or if they had sat apart from the burgesses, the same sharp distinctions of class and caste might have grown up in England that caused such mischief in the continental kingdoms. But, providentially for England, the knights of the shire coalesced in parliament with the borough representatives; and though some time elapsed before any certain system was set up, they became the joint representatives of the Commons of England, leaving the great barons to form together with the prelates a separate senate and a separate order. Thus England has had a nobility, without being cursed by a noblesse. One of the proud deficiencies of our language is, that the term "roturier" is untranslatable into English. As Hallam truly remarks, "from the reign of Henry III. at least, the legal equality of all ranks [of freemen] below the peerage was to every essential purpose as complete as at present."

It is to be observed, that the peerage itself confers no privilege, except on its actual possessor. The sons of peers, as we well know, are commoners, and totally destitute of any legal right beyond a barren pre-eminence. "There is no part of our constitution so admirable as this equality of civil rights, this *isonomia*, which the philosophers of ancient Greece only hoped to find in democratical government. From the beginning our law has been no respecter of persons. It screens not the gentleman of ancient lineage from the judgment of an ordinary jury, nor from ignominious punishment. It confers not, it never did confer, those unjust immunities from public burdens which the superior orders arrogated to themselves upon the Continent." [1] Hence no doubt it is that the privileges of British peers as hereditary legislators

[1] Hallam's *Middle Ages*, vol. ii. p. 343.

have proved less invidious and therefore more enduring than those of other nobilities in democratic countries.

Another important characteristic of the parliament was its unity. There was *one* parliament for all England, and not separate legislative and taxing assemblies for separate counties or separate provinces. We thus enjoyed the blessings of a national representative Government—of a representative system, comprehending the whole State.[1] Without this centralisation of parliamentary power, our sovereigns never could have been brought under parliamentary control.

In all probability, the great diversity in the ultimate result of the English struggles for a free, that is, a rational and stable mixed constitution, and those of the French barons and towns during the fourteenth and fifteenth centuries for the same purpose, was due to England having one central Government and one parliament acting for the whole, whereas in France, each of the great provinces of the kingdom (such as Normandy) had its own states in parliament, the assembling of the States General being only occasional. By merely provincial autonomy, civil liberty has never been firmly established; on the contrary, it has been lost in the course of time, unless the estates have become united in some central representative system. Even in our own time we find that those Governments which can no longer resist the popular demand for liberty, yet are bent on yielding as little as possible, have always tried to grant provincial estates only.

The last great principles of our Constitution guarantee the security of person and property from arbitrary violence, and the due administration of justice. They are these three:—

[1] Lieber, *Civil Liberty and Self-Government*, p. 137.

That no man be arbitrarily fined or imprisoned, that no man's property or liberties be impaired, and that no man be in any way punished, except after a lawful trial.

Trial by jury.

That justice shall not be sold or delayed.

This last maxim needs no comment. We have, and our ancestors for more than six centuries have had, in the words of the Great Charter, the solemn declaration and covenant of the sovereign—"We will sell to no man, we will not deny or delay to any man, either justice or right." Would that we could boast that it had been carried out in practice as fully as it has been acknowledged in theory. "*The law's delay*" still, as in Shakspeare's time, forms one of the curses of human life, to an extent never contemplated at Runnymede. The security from arbitrary imprisonment, and the other great constitutional principle, of trial by jury, are of cardinal importance in the development of English liberty.

The great words of the Great Charter—worth all the classics, to Lord Chatham's mind—which have protected for six centuries, and still protect the personal liberty and property of all, are these: "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him, nor send upon him, but by the lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or delay to any man, justice or right."

The value of these words of the Charter, as constitutional checks on royal power, has been already dwelt upon. We are now viewing them as strictly applying to the administration of justice. They contain two great principles. First, that no man shall be imprisoned on mere

general grounds of suspicion, or for an indefinite period, at the discretion or caprice of the executive power; but that imprisonment shall be only inflicted as the result of a legal trial and sentence, or for the purpose of keeping in safe custody, when necessary, an accused person on a definite charge, until he can be tried on that charge. Secondly, they provide that, as a general rule, every person accused of a criminal offence shall have the question of his guilt or innocence determined by a free jury of his fellow-countrymen, and not by any nominee of the Government.

The first of these principles is familiar to us by the term of an Englishman's right to a Habeas Corpus, if his personal liberty be interfered with. Some writers on our constitution have erroneously supposed that this safeguard of freedom dates only from the reign of Charles II., when the celebrated Habeas Corpus Act was passed. But its true foundation is the Great Charter; and from the earliest times of our law "no freeman could be detained in prison except upon a criminal charge, on conviction, or for a civil debt. In the former case it was always in his power to demand of the Court of King's Bench a suit of *habeas corpus ad subjiciendum* directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. This writ issued of right, and could not be refused by the court."[1]

[1] Hallam's *Constitutional History*, vol. i. p. 16.

An imprisonment must either be by process from a court of judicature, or by the warrant from some legal officer having authority to commit to prison: which warrant must be under the hand and seal

It is impossible to overvalue this great barrier against tyrannical power. Blackstone's eulogy on it, and his historical sketch of the Habeas Corpus Act,[1] deserve

of the magistrate, and express the cause of the commitment, in order to be examined into, if necessary, upon a *Habeas Corpus*. The gaoler is not bound to detain the prisoner, if there be no cause of committal expressed in the warrant. Coke observes that the law judges in this respect like Festus the Roman governor—that it is unreasonable to send a prisoner, and not to signify the crimes alleged against him. Cp. *Coke's 2nd Inst.*, 52, 53.

[1] "The language of the Great Charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the Petition of Right, 3 Car. I., it is enacted that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law. By 16 Car. I. c. x., if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty in person, or by warrant of the council-board, or of any of the privy council, he shall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the Court of King's Bench or Common Pleas; who shall determine whether the cause of commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. ii., commonly called the *Habeas Corpus* Act, the methods of obtaining this writ are so plainly pointed out and enforced, that so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law justifies and requires such detainer. And lest this Act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared, by 1 Wm. & M. stat. 2, c. ii., that excessive bail ought not to be required. Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper, as in France it is daily practised by the Crown, there would soon be an end of all other rights and immunities. Some have thought, that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom: but confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the State is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is

the attention of every student of our constitution. And if we would satisfy ourselves by a practical proof of the fearful sufferings which a nation may undergo, when its rulers have power to arrest and imprison without trial, upon mere suspicion, we may refer to Mr. Gladstone's narrative of the scenes which he witnessed in the Neapolitan prisons in 1849.

We come now to the second great judicial principle contained in the clause of Magna Carta, which provides that a freeman is to have a free trial; that he is to suffer nought unless by the lawful judgment of his peers, or by the law of the land: in other words, the principle of an Englishman's right to trial by jury.

The words of the Great Charter, *Legale judicium parium suorum*, "the lawful judgment of a man's peers," have for centuries been familiar to the nation as household words, and have been understood by Blackstone and most other commentators on our laws and institutions as referring to trial by jury. Some few writers, however, whose station and learning entitle them to attention, have treated this supposition as a mere vulgar error; and deny that the *judicium parium* has any reference whatever to trial by jury. The subject well

not left to the executive power to determine when the danger of the State is so great as to render this measure expedient: for it is the parliament only, or legislative power, that, whenever it sees proper, can authorise the Crown, by suspending the *Habeas Corpus* Act for a short and limited time, to imprison suspected persons without giving any reason for so doing; as the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, '*dent operam consules, ne quid respublica detrimenti capiat*,' was called the *senatus-consultum ultimae necessitatis*. In like manner this expedient ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it for ever" (*Commentaries*, vol. i. p. 145).

deserves investigation; as it certainly involves not a mere point of legal archæology, but a high constitutional question.

Did trial by jury exist in England in John's time? and, if so, did the framers of the Great Charter mean trial by jury when they spoke of the lawful judgment of a man's peers?

Before investigating the existence of trial by jury in the thirteenth century, we should be precise as to what we understand by the term. Some persons, when they speak of trial by jury, whatever be the period of our history that is referred to, are always thinking of a trial by jury in all particulars resembling that which is now in actual practice in our courts. In a modern trial by jury we see a trial by twelve men, fairly taken from the general body of private citizens, with hardly any possibility of its being known beforehand who they will be, who are sworn to give a true verdict on a distinct question of fact before them; who act under the presidency of a professional judge, from whom they take directions in matters of law, and who must act according to their findings on matters of fact. All these are ancient characteristics of the institution; but there is also this other ingredient of modern jury trial, with which we are all practically familiar — that the juries give their verdict, not according to their own knowledge of the transaction, but according to the evidence which others lay before them. They act not as witnesses, but as critics of witnesses; as weighers, not as givers of proofs. Now, if we are to consider this last quality of a modern trial by jury to be necessarily involved in the term, we undoubtedly shall not find the trial by jury such as we seek, in John's time, nor shall we discover it for two

centuries after his reign. If, on the other hand, when we speak of trial by jury as a safeguard of English liberty, we mean no more than the general principle that the question of a man's guilt or innocence of a criminal charge is to be determined by a free and independent body of his fellow-citizens, and not by officers of the executive authority, we shall find that principle flourishing in the very earliest periods of our national existence; and we shall find it still earlier in the tribunals of the Germans, the Danes, and the Normans, that is to say, among three of the four elements of our race.

Something, however, more extensive than this is fairly to be understood when trial by jury is spoken of, though, on the other hand, the first-mentioned conception of trial by jury would suggest too much. Perhaps we may best express the fair signification of the phrase by saying that, when we speak of trial by jury, we mean a system whereby the judges, who are commissioned by the sovereign to administer the law, to put accused persons upon trial, to discharge them if innocent, and to pass sentence upon them if guilty, are not allowed to determine for themselves the fact whether an accused person be innocent or guilty, but are required to be guided on this point by the opinion of a body of private individuals (usually twelve in number), fairly taken from among those who, in the eye of the law, are equals with the accused person, summoned to give, upon oath (*Jurati*), a True Saying (*Veredictum*) to the court, as to whether the party accused be guilty or not guilty; by means of which true saying the court may be enabled to pronounce a right judgment. We can readily understand that in early times the simplest and shortest plan was followed, of summoning, as jurors, twelve men from the immediate neighbourhood where the imputed crime was said to have

been committed, who were to give the court a True Saying about it from their own knowledge. The well-working of this plan must have been greatly aided by the law of frankpledge, which was, in those times, carried out in full practice, and which must have compelled the men of each neighbourhood to keep watch upon the conduct of each other. When the system of frankpledge became obsolete, when population increased, and the facilities of moving from place to place became greater, the personal knowledge which the twelve men from the neighbourhood would have respecting an imputed crime must have become less full and less accurate. The custom, then, would naturally grow up of their hearing the evidence of others who happened to have actually seen the transaction in question, or who could testify, of their own knowledge, to any material fact, whence inferences of guilt or innocence might be drawn. The production before the jurors of documentary proof (where any existed) would be a still more natural step. The jurors would weigh the value of all this in giving their verdict, and thus, from being witnesses themselves, they would gradually become what they now are, the hearers of witnesses, and the deciders upon proof supplied by others. We see, however, that this last characteristic of modern trial by jury would be slowly and gradually established; and it need not be sought for as an essential part of trial by jury in its original existence.

Keeping in mind the third and last definition of trial by jury which we have been considering, both with respect to what the term necessarily implies and what it does not, we may proceed to investigate its origin.[1]

[1] For a modern investigation see Pollock and Maitland's *History of English Law*, Book I. chap. v.

For the sake of brevity and clearness, I deal here almost solely with trial by jury in criminal cases. I also limit the inquiry to the subject of the actual trial of guilt or innocence before the jury of twelve (which we now call the petty jury); that is to say, before the jury who give the verdict. The subject of the preliminary inquiry by the grand jury, who, in the name of the sovereign, make presentment to the court of the charge, is of minor importance.

Some writers have assigned to trial by jury a very specific and a very illustrious parentage. They have represented it as an institution established by the great Alfred, and as the peculiar gem of Anglo-Saxon freedom, which Norman tyranny could not destroy or dim. Others assign to it a still more remote and very general antiquity. They trace it in the ancient tribunals so generally prevalent among the Teutonic nations of the Continent, and also among the Scandinavian; in which "a select number of persons, often twelve, were taken from the community and appointed to try causes, but who did so in the capacity of judges," as well as in the capacity which we understand as the peculiar province of jurors, and "who, when satisfied as to the evidence, awarded, and pronounced the doom."[1] Such were the Norwegian Laugrettomen, the Swedish Nämbd, the Danish Nœvn, the Jutish Sandemœnd, the Germanic Scabini, and others. But, as Mr. Forsyth in his excellent *History of Trial by Jury* has pointed out, the difference between all these tribunals and the English juries is vital and essential. It is in England, and in England alone (unless Normandy should be added), that we find juries quite distinct from the judges who compose the court;—juries

[1] Forsyth's *History of Trial by Jury*. See Chapters ii. and iii.

who are summoned for the sole purpose of giving a True Saying on a question of fact, and who have nothing to do with the sentence of the court which follows the delivery of their verdict. To this peculiar characteristic of the English jury it is that we owe the preservation of jury trial in this country, while the ancient popular tribunals of Germany, France, and Scandinavia have perished.

"A court of justice," to quote a striking passage from Forsyth, "where the whole judicial authority is vested in persons taken from time to time from amongst the people at large, with no other qualification required than that of good character, can only be tolerated in a state of society of the most simple kind. As the affairs of civil life become more complicated, and laws more intricate and multiplied, it is plainly impossible that such persons, by whatever name they are called, whether judges or jurors, can be competent to deal with legal questions. The law becomes a science which requires laborious study to comprehend it; and without a body of men trained to the task, and capable of applying it, the rights of all would be set afloat—tossed on a wide sea of arbitrary, fluctuating, and contradictory decisions. Hence in all such popular courts as we are describing, it has been found necessary to appoint jurisconsults to assist with their advice, in matters of law, the uninstructed judges. These at first acted only as assessors, but gradually attracted to themselves and monopolised the whole judicial functions of the court. There being no machinery for keeping separate questions of law from questions of fact, the lay members felt themselves more and more inadequate to adjudge the causes that came before them. They were obliged perpetually to refer to the legal functionary who presided, and the more his authority was enhanced,

the more the power of the other members of the court was weakened, and their importance lessened, until it was seen that their attendance might, without sensible inconvenience, be dispensed with altogether. And of course this change was favoured by the Crown, as it thereby gained the important object of being able, by means of creatures of its own, to dispose of the lives and liberties of its subjects under the guise of legal forms. Hence arose in Europe, upon the ruins of the old popular tribunals, the system of single judges appointed by the king and deciding all matters of fact and law, and it brought with it its odious train of secret process and inquisitorial examinations."

But the English jury never usurped the functions of judge. They were originally called in to aid the court with information upon questions of fact, that the law might be properly applied; and this has continued to be their province to the present day. "The utility of such an office is felt in the most refined as well as in the simplest state of jurisprudence. Twelve men of average understanding are at least as competent now as they were in the days of Henry II. to determine whether there is sufficient evidence to satisfy them that a murder has been committed, and that the party charged with the crime is guilty. The increased technicality of the law does not affect their fitness to decide on the *effect* of proofs. Hence it is that the English jury flourishes still in all its pristine vigour, while what are improperly called the old juries of the Continent have either sunk into decay or been totally abolished."[1]

Few now credit the myth of trial by jury having been invented by Alfred. But some attention to the Anglo-

[1] Forsyth, p. 9.

Saxon criminal system is necessary in order to understand the rise and growth of trial by jury in England. The Anglo-Saxon system of criminal judicature had certainly the great principle of trying men publicly before a popular tribunal, and not permitting their fate to be dependent on the subserviency or caprice of any officer of the Crown. This principle is also an essential attribute of trial by jury, and the introduction of that system was without doubt facilitated by its being thus congenial to the old feelings and customs of the mass of the population. But according to the definition which has been above considered and adopted, much more is involved in the idea of trial by jury, which we shall vainly look for in Anglo-Saxon times. An Anglo-Saxon criminal trial did not take place before judges who summoned, as their informants on matters of fact, twelve sworn men, or any other definite number; but it took place in presence of all the assembled members of the hundred or the county court, the latter being the tribunal before which most criminal charges were determined. All the landowners of the county, under the presidency of the sheriff and bishop, formed this court. They were its "Sectatores," or suitors. They all took part, or had a right to take part, in a criminal trial, and they all *looked on* to see whether the stipulated proof of guilt or innocence was given. I say they *looked on*, for that term implies more accurately the functions of the county-court suitors in a Saxon criminal trial, than any word which involves the idea of giving and comparing testimony, or of arguing from apparent fact to inferential fact. This arose from the system of the Saxon jurisprudence making a trial, as Palgrave truly remarks,[1] "rather of the nature of an

[1] See Palgrave's *History of the English Commonwealth.*

arithmetical calculation, or a chemical experiment, than what we now understand by the trial of a cause. A certain form was gone through, and according to its result, which was always palpable and decisive one way or the other, the accused person was found guilty or acquitted." This is in no degree an exaggerated account of the Anglo-Saxon system of trying offenders, either by the production of compurgators, or by the ordeal. In the first of these modes, the accused party was required to produce neighbours to swear to their belief in his innocence; and the effect of such neighbours' oaths was estimated not by the means of knowledge possessed by the deponents, or by their characters, or even by their number, but by their "worth" in the Anglo-Saxon scale of persons; according to which an eorl's oath was equal to the oaths of six ceorls, and so on. If the accused party produced the requisite amount of oath (which was in every case rigorously defined by a curiously minute penal tariff), he was set free. If the aggregate value of the oaths of his compurgators fell below the prescribed sum, he was pronounced guilty. If the accused person put himself upon the trial by ordeal, the weight of the hot iron which he was to bear, or the depth to which he was to plunge his arm into the hot water, was scrupulously pre-appointed by the law. The assembly looked on. In trial by compurgation they added up the amount of the oaths; in trial by ordeal they watched the effect of the hot iron or hot water upon the culprit's skin, and that was all which they had to do.

How, then, did trial by jury arise in this country? According to one set of writers we are chiefly indebted for trial by jury to our Norman ancestors, who are supposed to have brought it hither from Normandy, where it

had existed before the Conquest. Others say that trial by jury first grew up in Anglo-Norman England, and that it was introduced into Normandy itself from England, while our kings were still dukes of that country. Those who hold this theory, consider Henry II. and his justiciars as the founders of trial by jury, or rather as the first developers of jury trial out of the different processes and judicial customs which various races and rulers had imported into this island, or had created here. The choice between these two theories depends mainly on the opinion which we form respecting an old treatise called the "Grand Constumier," in which the laws and judicial usages of Normandy are minutely described. It is generally agreed that the "Grand Constumier" was written before the separation of the Duchy from the English Crown, which we know to have been effected in John's time; but it is suggested that it may have been written after Henry II.'s time, and may only describe usages which had originated in England, and had been introduced from our courts into the Norman courts. But this is a mere hypothesis, without any evidence to uphold it; and it seems more reasonable to regard the law and customs described in the "Grand Constumier" as genuine primitive Norman than as English importations. In Normandy (besides trial by battle, in which the accused and the accuser, or in some few cases their champions, settled their differences in mortal combat) criminal charges were tried as follows:—An inquest of twenty-four "good and lawful men" was summoned from the neighbourhood where the murder or the theft had been committed. These were the "Jurati" or "Juratores," so called from the oath they took to speak the truth. The officer is directed by the Norman law to

select "those who are believed to be best informed of the truth of the matter, and how it happened." None were to be adduced who were known friends or declared enemies of either party. Before the culprit was put upon his trial, a preliminary inquest was taken by four knights, who were questioned concerning their belief of his guilt; and in their presence the officer afterwards interrogated the twenty-four jurors, not in one body, but separately from each other. They were then assembled and confronted with the culprit, who could challenge any one for lawful cause, and if the challenge was allowed, the testimony of that juror was rejected. The presiding officer or judge then "recorded" the verdict of the jurors, in which twenty at least were required to concur.

The introduction into England of this jury trial, as well as of the trial by battle, was naturally favoured by the Norman judges who presided over the royal courts after the Conquest: and the king's itinerant courts soon assumed the functions of trying many of the cases which had previously been tried at the county courts. In all these courts, in the old Aula Regia, in the King's Bench which sprang from it, and in the courts of the Justices in Eyre, the judges formed the court. They delivered judgment; they caused justice to be executed. But they did not themselves determine on the question of fact as to guilt or innocence. For the answer to that question the court looked to the event of the ordeal, or appeal of battle, or to the true saying of twelve sworn men summoned from the immediate neighbourhood. This was the original trial by jury, which by degrees superseded the other modes of trial. The Normans generally abolished trial by compurgators in criminal cases; and though the trial by ordeal long continued in force, men at length

began to regard it in its true light, as an impious absurdity, and a not unfrequent engine of fraud. Henry II., by the laws in which he instituted the trial by twelve sworn knights, in certain civil causes, where real property was the subject of dispute, familiarised men's minds more and more with the theory and practice of jury trial; and the more it was known, the more it was valued. Repeated instances can be traced, in the reigns of his sons, of accused persons being tried by juries on criminal charges, for which mode of trial they paid a sum of money to the king, evidently regarding it as a valuable privilege. At length, in the year 1215, the year of the grant of Magna Carta, the Council of Lateran prohibited throughout Christendom the further continuance of trial by ordeal, and the adoption of trial by jury became unavoidably general in England, in order to dispose of the numerous class of cases where the charge was preferred, not by an injured individual against the culprit in the form of an appeal, but by the great inquest of the county (our modern grand jury) in the form of a presentment. For it was only where there was an accusing appellant that the trial by battle was possible. Still, there was for a long time no mode of compelling a prisoner to put himself on the country, *i.e.* to commit the question of his guilt or innocence to twelve sworn men, summoned from the neighbourhood. Edward I.'s law, inflicting the "*Peine forte et dure*" on prisoners who refused to plead, was passed to obviate this difficulty; which was not, however, completely got rid of till the reign of George III.

Trial by jury was originally, both in Normandy and here, an appeal to the knowledge of the country. The jury were selected so as to ensure the attendance of those

who knew most of the transaction. They gave a verdict from their own knowledge of the case, and not from hearing the testimony of others. Gradually, however, a change took place in this respect. At first documentary evidence, such as deeds, charters, etc., throwing light on the matter in dispute, were permitted to be laid before the jurors. The next improvement was to introduce the *vivâ voce* testimony of persons, other than the jurors, who could give any information as to the true circumstances of the case. This was certainly effected by the time of Henry VI., as appears by the treatise of Henry's Chancellor, Fortescue, "De Laudibus Legum Angliæ," in which trial by jury is boasted of as the peculiar glory of the English law, and the whole procedure is minutely described. The production of witnesses who give evidence on oath before the jury is there specially mentioned. But the jurors were still, in Fortescue's time, summoned from the neighbourhood, and were not only allowed, but required, to act upon such knowledge of the facts as they themselves possessed. The complete change in respect of the modern system, whereby jurors are summoned, not from the immediate neighbourhood, but generally from the whole county, and are bound to decide only according to the evidence laid before them, was not effected for some centuries later.[1]

We now return to the words of Magna Carta, which forbid a freeman to suffer "except by the lawful judgment of his peers, or the law of the land." I believe that the trial by peers here spoken of means trial by jury. The words will bear this meaning; and it is certainly impossible to give them any other satisfactory meaning.

[1] By a recent statute passed in 1898, persons accused of a crime may give evidence.

Some writers who deny the applicability of the thirty-ninth clause of John's Charter, and the twenty-ninth of Henry III.'s, to trial by jury, have supposed that the expression in it respecting a freeman's trial by his peers referred to the old county court and hundred criminal judicature, according to which a freeman was certainly tried *before*, if not *by*, his brother freemen. We cannot suppose (nor have I ever seen it suggested) that this clause of the Charter related to civil actions only, and merely meant those proceedings in county courts and courts baron in which the attendant suitors, as each other's peers, adjudicated upon claims to property. The whole spirit of the clause, as well as the arrangement of its words, shows clearly that it was mainly designed as a safeguard against wrongful penal procedure, and as providing a just mode of trial in proceedings by the Government against the subject; though it was made sufficiently extensive to protect rights of property as well as rights of persons. It seems to me that the hypothesis of the trial by peers in Magna Carta meaning the criminal judicature of the county and hundred courts, is decisively contradicted by the fact, that the twenty-fourth chapter of John's Charter and the seventeenth of Henry's forbade the sheriff and other inferior officers to hold pleas of the Crown, and thus put an end, almost entirely, to the criminal authority of those tribunals. It has been explained already to how scant a relic the power of the tourn and the courts leet was thereby reduced; and it is impossible to believe that the thirty-ninth clause of John's Charter or the twenty-ninth of Henry's solemnly ordained a mode of trial which preceding sections of those instruments had (with trifling exceptions) solemnly forbidden.

The other hypothesis brought forward by those who deny that the "Judicium Parium" in Magna Carta means trial by jury is, that the Great Charter, in speaking of trial by peers, had in view solely the great barons, who, as members and peers of the great Court of the king, had a right to be tried there by their peers. Undoubtedly this clause gives a peer of the land an indisputable right to a trial in the House of Lords; but I am led to reject the interpretation which would restrict the operation of the clause to the peerage only, by a consideration of the circumstances and documents connected with the passing of the Great Charter, which are collected by Blackstone in the work so often referred to.[1]

King John, about a month before the congress at Runnymede, had made a fruitless attempt to detach the great barons from the formidable national rising against him, by offering to them and their immediate followers the privileges which the thirty-ninth chapter of his Great Charter afterwards assured to every freeman of the realm. John's letters of proffered compromise are still in existence, and in them he writes, "Be it known that we have granted to our barons who are against us, that we will neither take nor disseise them or their men, nor will we pass upon them by force or by arms, except by the law of our realm, *or by the Judgment of their Peers in our Court*," *etc.*

The words "in our Court" here clearly limit the privilege of "trial by peers" to the barons, who alone were members of the king's Court, or could have their peers there to try them. Had these words been repeated in the analogous clause in the Great Charter, the interpretation which we are now considering would have appeared

[1] Blackstone's *History of the Charters.*

correct; but the phraseology of Magna Carta is widely different. Magna Carta says "NULLUS LIBER HOMO dissaisietur, etc., nisi per legale judicium parium suorum." It is evident that the barons, when they rejected the insidious offer of John, and refused to make their reform a mere class intrigue instead of a great national movement, took care so to alter the terms of this important stipulation as to make it embrace all the free community. I cannot but believe that the framers of Magna Carta *did* intend to give a solemn sanction to the trial by jury, which had been becoming more prevalent. The expression "trial by peers," as applied to trial by jury, though it may not have enough technical accuracy to satisfy a mere legal antiquary, is, and was at the time, sufficiently appropriate to justify its being so understood; and so it certainly has been generally understood for centuries, by England's jurists, judges, statesmen, and historians.

An advantage peculiar to jury trial is, that it is not known beforehand who will be the jurors in any particular case, so that no time is given for the work of corruption. It is hardly known, even at the trial, who the individual jurors are; and, when the trial is over, the members of the jury are dispersed and lost sight of amid the mass of the community. Hence they are, while acting, exempt from all bias of fear and from all selfish motive to favour. And not only are they peculiarly free from all evil influences upon their integrity, but they are free from the suspicion of being so influenced. The people have full confidence in their honesty. The same amount of confidence (whether deserved or not) would not be accorded to permanent paid officials: and there is truth in the seeming paradox of Bentham, that it is even more

important that the administration of justice should be believed to be pure, than that it should actually be so. Nor are the errors of judgment which juries fall into by any means so numerous as the impugners of the system assert. The jury generally know what they are about much better than their critics do. "Twelve men conversant with life, and practised in those feelings which mark the common and necessary intercourse between man and man," are far more likely to discriminate correctly between lying and truth-telling tongues, between bad and good memories, and to come to a sound, common-sense conclusion about disputed facts, than any single intellect is, especially if that single intellect has been "narrowed, though sharpened," by the practice of the law.

Trial by jury has another merit when compared with the system of trial of law and fact by a single person. Our method of trial gives peculiar guarantees that all who take part in deciding a cause, both the judge and the jury, will exercise their best powers of attending and of reasoning, and will not give way to hasty impressions. According to our system, the judge, at the close of a case, sums up the evidence to the jury; and, if he expresses opinions of his own on matters of fact for their consideration, he tells them not only what he thinks, but also why he thinks it. He is, therefore, obliged to take careful notes throughout the trial, and to reason out in his own mind the whole of the case. But, if he had to try the cause, and pronounce in favour of one of the parties, without the intervention of a jury, he would be under no such necessity. He might give way to laziness, and summarily make up his mind in accordance with the bias for or against one party which is so apt to arise in our minds early in a trial, but which is also so often, as the trial

proceeds, proved to be erroneous. Our system gives safeguards of a similar nature against hasty conclusions and imperfect observation on the part of the jury. Each juror knows that it is not by him alone, but by him and his eleven fellow-jurors conjointly, that the verdict is to be given. Each juror, therefore, knows that, if any of the eleven differ from him in opinion at the end of the case, they must argue the matter out among them. Each juror, therefore, watches the entire progress of the trial with his reasoning faculties intent on every part of each litigant's case, and thus prepares himself for a full and fair discussion and judgment of the whole.

It is unquestionably in criminal charges that the value of trial by jury is most apparent, but the prevalence of that mode of trial in civil causes also, so far as they involve disputes of fact, is of incalculable advantage to the community.

In his great work, *De la Démocratie en Amérique*, Tocqueville avows his conviction that the jury system, if limited solely to criminal trials, is always in peril. The people see it in operation only at intervals, and in particular cases; they are accustomed to dispense with it in the ordinary affairs of life, and look upon it merely as one means, and not the sole means, of obtaining justice. But when it embraces civil actions, it is constantly before their eyes, and affects all their interests; it penetrates into the usages of life, and so habituates the minds of men to its forms, that they, so to speak, confound it with the very idea of justice. The jury, he continues, and especially the civil jury, serves to imbue the minds of the citizens of a country with a part of the qualities and character of a judge; and this is the best mode of preparing them for freedom. It spreads amongst all classes a respect for the decisions of the law:

it teaches them the practice of equitable dealing. Each man in judging his neighbour reflects that he also may be judged in his turn. This is in an especial manner true of the civil jury; for although hardly any one fears lest he may become the object of a criminal prosecution, everybody may be engaged in a lawsuit. It teaches every man not to shrink from the responsibility attaching to his own acts: and this gives a manly character, without which there is no political virtue. It clothes every citizen with a kind of magisterial office; it makes all feel that they have duties to fulfil towards society, and that they take a part in its government; it forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness which is, as it were, the rust of the community.

But, moreover, it is a great instrument for the education of the people. "C'est là, à mon avis," says M. de Tocqueville, "son plus grand avantage." He calls it a school into which admission is free and always open, which each juror enters to be instructed in his legal rights, where he engages in daily communication with the most accomplished and enlightened of the upper classes, where the laws are taught him in a practical manner, and are brought down to the level of his apprehension by the efforts of the advocates, the instruction of the judge, and the very passions of the parties in the cause. Hence, says M. de Tocqueville, "Je le regarde comme l'un des moyens les plus efficaces dont puisse se servir la société pour l'éducation du peuple."

The great constitutional enactments of Magna Carta have, from the very earliest times, been regarded as the fundamental institutions of our government and laws. Their confirmation was repeatedly exacted from the reign-

ing sovereign by our parliaments; not because the Great Charter was supposed to become invalid without such ratification, but in order to impress on impatient princes and profligate statesmen their duty of respecting the great constitutional ordinances of the realm. Religion was called in aid by the English clergy (to whom, as Hallam remarks, we are much indebted for their zeal in behalf of liberty during the thirteenth century) to bind the slippery consciences of John's son and grandson, and to awe them by the terrors of excommunication from breaking the great compact between the Crown and the people. It was sought to make the Great Charter familiarly known throughout the land by all, as the common birthright of all, and the most stringent measures of law were devised to ensure the prompt punishment of any who should dare to violate it. Thus by the *Confirmatio Cartarum*, 25 Ed. I. (part of which has already been cited), it was ordained that the charters of liberties and of the forest should be kept in every parish; and that they should be sent under the king's seal as well to the justices of the forest as to others, to all sheriffs and other officers, and to all the cities in the realm, accompanied by a writ commanding them to publish the said charters, and declare to the people that the king had confirmed them in all points. All justices, sheriffs, mayors, and other ministers were directed to allow them when pleaded before them; and any judgment contrary thereto was to be null and void. The charters were to be sent under the king's seal to all cathedral churches throughout the realm, there to remain, and to be read to the people twice a year. It was ordained that all archbishops and bishops should pronounce sentence of excommunication against those who, by word, deed, or counsel, did contrary to the aforesaid charters.

By the "*Articuli super Cartas*," a statute passed in the 28th Ed. I., the charters are ordered to be read by the sheriffs four times a year, before the people of the shire in open county court. And the statute further ordains, that for the punishing of offenders against the charters—

"There shall be chosen, in every shire court, by the commonalty of the same shire, three substantial men, knights, or other lawful, wise, and well-disposed persons, which should be justices sworn and assigned by the king's letters patent under the great seal, to hear and determine without any other writ, but only their commission, such plaints as shall be made upon all those that commit or offend against any point contained in the aforesaid charters, in the shires where they be assigned, as well within franchises as without, and as well for the king's officers out of their places as for others; and to hear the plaints from day to day without any delay, and to determine them, without allowing the delays which be allowed by the common law. And the same knights shall have power to punish all such as shall be attainted of any trespass done contrary to any point of the aforesaid charters where no remedy was before by the common law, as before is said, by imprisonment, or by ransom, or by amerciament, according to the trespass."

So much for the Magna Carta, a document which, in the words of Mackintosh, was appealed to for almost five centuries as the decisive authority on behalf of the people: "Whoever may admire the felicity of the expedient which converted the power of taxation into the shield of liberty, by which discretionary and secret imprisonment was rendered impracticable, and portions of the people were trained to exercise a larger share of judicial power than ever was allotted to them in any other civilised State, in

such a manner as to secure, instead of endangering, public tranquillity; whoever exults at the spectacle of enlightened and independent assemblies which, under the eye of a well-informed nation, discuss and determine the laws and policy likely to make communities great and happy; whoever is capable of comprehending all the effects of such institutions with all their possible improvements upon the mind and genius of a people—is sacredly bound to speak with reverential gratitude of the authors of the Great Charter. To have produced it, to have preserved it, to have matured it, constitute the immortal claim of England upon the esteem of mankind. Her Bacons and Shakspeares, her Miltons and Newtons, with all the truth which they have revealed, and all the generous virtue which they have inspired, are of inferior value when compared with the subjection of men and their rulers to the principles of justice, if, indeed, it be not more true that these mighty spirits could not have been formed except under equal laws, nor roused to full activity without the influence of that spirit which the Great Charter breathed over their forefathers." [1]

[1] Mackintosh, *Hist. Eng.* vol. i. p. 221.

CHAPTER XIV

Progress of the Constitution during the Reigns of the ten last Plantagenet Kings — Growing Importance of the House of Commons — Qualifications of Members and Electors — Prerogatives of the Crown — State of the Population — Jurors — Boroughs — Number of Electors.

IT has been shown in the preceding pages that the thirteenth century saw the commencement of our nationality, and that during it the great foundations of our constitution were laid. Not that the organisation of our institutions was complete at the time of the death of Edward I., A.D. 1307. What was said of the Roman Constitution by two of its greatest statesmen, and written by another, may with equal truth be averred of the English—that no one man and no one age sufficed for its full production.[1] But its kindly growth went rapidly on during the reigns of the later Plantagenets; and the historian of the last centuries of the Middle Ages[2] traces with pride and pleasure the increase and systematisation of the power of the House of Commons in asserting and

[1] "Tum Laelius, nunc fit illud Catonis certius, nec temporis unius, nec hominis esse constitutionem reipublicae" (Cicero, *De Republica*, lib. ii. 21).

[2] Cp. the third part of the 8th chapter of Hallam's *Middle Ages*, and the first part of Redlich and Hirst's *Local Government in England*, and Redlich's later work, *Recht und Technik des Englischen Parliamentarismus*.

maintaining the exclusive right of taxation; in making the grant of supplies dependent on the redress of grievances; in directing and checking the public expenditure; in establishing the necessity of the concurrence of both Houses of Parliament in all legislation; in securing the people against illegal ordinances and interpolations of the statutes; in inquiring into abuses; in controlling the royal administration; in impeaching and bringing to punishment bad ministers and other great offenders against the laws and liberties of the land; and in defining and upholding their own immunities and privileges.

The limits of this work will only permit the citation here of a few proofs of the progress of our constitution during this time. More elaborate treatises must be referred to for full information.

In the second year of Edward II.'s reign we find the Commons, when applied to for a grant of money to the Crown, making it "upon condition that the king should take advice and grant redress upon certain articles wherein they are aggrieved. They complain that they are not governed as they ought to be, especially as to the articles of the Great Charter."

In 1322 a statute was passed, declaring that "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." Hallam well observes that "this statute not only establishes, by a legislative declaration, the present constitution of parliament, but recognises it as already standing upon a custom of some length of time." During Edward III.'s long and active

reign, the wars in which that sovereign was almost continually engaged kept him dependent on his parliament for supplies of money; and the power of the Commons was thereby materially augmented, notwithstanding the high abilities of Edward, and his fondness for his royal prerogatives. The king was continually attempting to raise money by arbitrary and illegal imposts; but the Commons never ceased to remonstrate against such acts, and to insist on the fundamental right of there being no taxation without consent. The complete and permanent division of parliament into two Houses, as at present, is admitted by all writers to have been established in this reign, if not earlier.

The Commons had now formed themselves into a body or estate of the realm, distinct from the estate of the prelates and abbots, or spiritual peers, distinct from the estate of the temporal peers, distinct from the Crown, but comprehending all the rest of the free inhabitants of the land. A distinct House of Parliament represents this estate of the Commons, and is now generally (and with substantial, though not literal accuracy) spoken of as being itself that which it represents, the Commons of the realm.

The leading feature of our constitutional history is no longer a conflict between the king and the barons, wherein the Commons, as auxiliaries of the barons, play a mere secondary part. That conflict has, to a great extent, ceased. The reign of Edward III. shows us the baronial aristocracy grouped round the throne, while the Commons are the party of progress. Not that the nobles of England have quite given up their championship of the liberties of England. On great emergencies, especially in the reign of Richard II., we shall see them acting with the Commons in the national cause. But, as a general rule, it is the

Lower House of Parliament that henceforth supports the struggle for constitutional rights and for the advancement of popular power. The Commons do not, indeed, yet aspire to snatch the supreme power from the hands of the king and the barons; they would not have strength enough for that; but they resist every encroachment upon rights which they are beginning to know and to appreciate; they have acquired a consciousness of their own importance, and know that all public affairs properly fall under their cognisance. Finally, either by their petitions, or by their debates in reference to taxation, they are obtaining a larger share in the government, exercise control over affairs which, fifty years before, they never heard mentioned, and are already, under Edward the Third, an integral and almost indispensable part of the political machine.

It is also observable that the Commons, during this reign, in their opposition to the royal power, do not attack the king himself, but they lay all blame upon his ministers, and begin to assert and popularise the principles of parliamentary responsibility. They frequently addressed Edward, complaining of his counsellors and officers; and in 1376 we find them exercising, for the first time, the formidable constitutional weapon of impeachment. In that year the Commons accused, before the House of Lords, the Lords Latimer and Nevil, and four commoners, Lyons, Ellis, Peachey, and Bury, who had been employed by the king in revenue matters, for various acts of ministerial misconduct.[1] The Lords tried and convicted them, except Bury, who did not appear to take his trial. The records of these proceedings well deserve attention, and especially the trials of Latimer and Nevil.

The right of impeachment strikingly illustrates the

[1] See 3 Rot. Parl. 323.

great principle that the ministers and servants of the Crown are responsible for acts of misconduct in which they take part, notwithstanding that they may have acted under the order of the sovereign. This principle is one of the most far-reaching and fruitful of all our constitutional customs.

The supremacy of law over regal power has been made a rule of universal and constant practical application in England, by our courts early recognising the right of every subject, who has been injured by any illegal stretch of power, to sue the officer who has been the minister of injury to him, and to recover, by the verdict of a jury, compensation in damages for the trespass that has been committed against him. Closely connected with this is the recognised right of every individual to resist the execution of an illegal act against his person or property, although it is an officer of the regular executive power of the State who seeks to commit the act, and who seeks to do it in his official character. It is no excuse for the officer that he acts by the order of regular superior authority.[1] It has been well observed that this principle of ministerial responsibility is so natural to the English and their colonists, that few of us are struck with its vital importance to civil liberty, and with the extent to which it distinguishes a thorough government of law from a government of functionaries. In many countries an officer cannot be sued for his official acts, without the

[1] A rational exception to this rule was made in George II.'s reign by a statute (24 Geo. II. c. 44) indemnifying constables who act, *bonâ fide*, under a justice's warrant. The same statute required that notice of action be given to a justice before he is sued for anything done in execution of his office, and enabled him to make a legal tender of amends. Though other similar statutes have been passed for the protection of public authorities, nothing in the nature of a "droit administratif" has been allowed to grow up.

injured party first obtaining from the superior powers permission to bring his action: and obedience to the acts of regularly constituted officials is in all cases required.[1]

Edward frequently asked the advice of his parliament on questions of war and peace. Some have thought that this was done by the king as an artifice, with a view to throw the responsibility of warfare on the Commons, and prevent their murmuring when asked for subsidies, but that the Commons avoided the responsibility. But Guizot argues that the Commons of the fourteenth century frequently sought and exercised the power of thus interfering in the administration of the public affairs of the kingdom. Thus in 1328, during the minority of Edward, and while Mortimer reigned in his name, the treaty of peace with Scotland, which fully liberated that kingdom from all feudal subordination to England, was concluded with the consent of the parliament. The Commons are expressly mentioned; and we may suppose that Mortimer was anxious thereby to cover his own responsibility for

[1] Lieber on *Civil Liberty and Self-Government*, p. 91, thus states the English principle:—

"It is simply this, that, on the one hand, every officer, however high or low, remains personally answerable to the affected person for the legality of the act he executes, no matter whether his lawful superior has ordered it or not, and, even, whether the executive officer had it in his power to judge of the legality of the act he is ordered to do or not; and that, on the other hand, every individual is authorised to resist an unlawful act, whether executed by an otherwise lawfully appointed officer or not. The resistance is made at the resister's peril. In all other countries, obedience to the officer is demanded in all cases, and redress can only take place after previous obedience. Occasionally this principle acts harshly upon the officer; but we prefer this inconvenience to the inroad which its abandonment would make in the government of law." In his *Law of the Constitution*, Professor Dicey develops with much nicety the essential distinctions between the English and continental systems. The latter have special courts for actions in which public officials are concerned, and the judges in these courts are little better than officials of the government. It is strange that such a tyranny should subsist in Republican France as well as in Imperial Germany.

a disgraceful treaty. In 1331, Edward consulted the parliament upon the question of peace or war with France, on account of his continental possessions, and also upon his projected journey to Ireland. The parliament gave its opinion in favour of peace, and of the king's departure for Ireland. In 1336, it urged the king to declare war against Scotland, saying: "That the king could no longer, with honour, put up with the wrongs and injuries daily done to him and his subjects by the Scots."[1] In 1341, after Edward's first victories in France, the parliament pressed him to continue the war, and furnished him with large subsidies; and all classes of society bestirred themselves to support the king in a conflict which had become national. In 1343, the parliament was convoked to examine and advise what had best be done in the existing state of affairs, especially in regard to the treaty recently concluded by the king with his enemy the king of France. Sir Bartholomew Burghersh told the parliament that "as the war was begun by the common advice of the prelates, great men, and Commons, the king could not treat of, or make peace, without the like assent."[2] The two Houses deliberated separately, and gave their opinion that the king ought to make peace if he could obtain a truce that would be honourable and advantageous to himself and his friends; but if not, the Commons declared that they would aid and maintain his quarrel with all their power. In 1344, when the truce with the king of France had been broken off by him, parliament, on being consulted, manifested a desire for peace, but thought it could only be obtained by carrying on the war with energy, and voted large subsidies for the purpose. In 1348, the war had

[1] *Parliamentary History*, vol. i. p. 93
[2] *Ibid.* p. 106.

become increasingly burdensome; all the subsidies proved insufficient; and the king again consulted the parliament "concerning the war undertaken with its consent." The Commons, thinking they had gone rather too far in their language, now showed greater reserve, and answered "that they were not able to advise anything concerning the war, and therefore desired to be excused as to that point; and that the king will be advised by his nobles and Council, and what shall be by them determined, they would consent unto, confirm, and establish."[1] In 1354, the Lord Chamberlain, by the king's command, informed the parliament: "That there was great hopes of bringing about a peace between England and France, yet the king would not conclude anything without the consent of his Lords and Commons. Wherefore he demanded of them, in the king's name, whether they would assent and agree to a peace, if it might be had by treaty." To this the Commons replied at first, "that what should be agreeable to the king and his Council in making of this treaty, would be so to them"; but on being asked again, "If they consented to a perpetual peace, if it might be had," they all unanimously cried out, "Yea! Yea!"[2] Finally, on the 25th of January 1361, peace having been concluded by the treaty of Bretigny, the parliament was convoked, the treaty was submitted to its inspection and received its approval, and on the 31st a solemn ceremony took place in the cathedral church at Westminster, when all the members of parliament, both Lords and Commons, individually swore upon the altar to observe the peace.

Again, in 1368, the negotiations with Scotland were

[1] *Parliamentary History*, vol. i. p. 115
[2] *Ibid.* p. 122.

submitted to the consideration of the parliament; the king of Scotland, David Bruce, offered peace on condition of being relieved from all homage of his crown to the king of England. The Lords and Commons replied "That they could not assent to any such peace, upon any account, without a disherison of the king, his heirs and crown, which they themselves were sworn to preserve, and therefore must advise him not to hearken to any such propositions;"[1] and they voted large subsidies to continue the war.

In 1369, the king consulted the parliament as to whether he should recommence the war with France, because the conditions of the last treaty had not been observed; the parliament advised him to do so, and voted subsidies.

These facts prove a direct and constant responsibility of the Commons in matters of peace and war. When fortune turned decidedly against Edward III., at the close of his reign, the Commons, as we have seen, took advantage of the right of intervention which they had acquired to possess themselves also of the right of impeaching the ministers, to whom they attributed the misfortunes of the time. All this follows in the natural course of things, and clearly demonstrates the continually increasing influence of the Commons in political matters.

The acknowledged right of the Commons to participate in legislation is proved by the very phraseology of the statute book. "When we open a collection of the statutes of this reign, we find at the head of each statute one of the two following formulas: '*A la requeste de la commune de son roïalme par lor pétitions mises devant lui et son conseil, par assent des prélats, comtes, barons, et autres grantz, au dit*

[1] *Parliamentary History*, vol. i. p. 131.

parlement assemblés,' etc.[1] Or: '*Par assent des prélats, comtes, et barons, et de tote la commune du roïalme, au dit parlement assemblés,*' etc. Sometimes the statute begins with these words: '*Ce sont les choses que notre seigneur le roi, les prélats, seignours, et la commune ont ordiné en ce présent parlement.*'"

Another important feature of the reign of Edward III. was the regularity with which parliament was convoked. A measure was adopted for this purpose in 1312, during the reign of Edward II., by the Lords Ordainers, and two statutes followed, one of which was passed in 1331, and the other in 1362. Finally, in 1377, the last year of the reign of Edward III., the Commons themselves demanded by petition that the sessions of parliament should take place regularly every year. During the reign of Edward III. we may enumerate forty-eight sessions of parliament, which make nearly one session in each year.

Edward the Third's parliament also took measures to ensure the security of its deliberations. In 1332, a royal proclamation forbade all persons to wear coats of mail, or to carry any other offensive or defensive arms, in those towns in which the parliament was sitting: it also prohibited all games and diversions which might disturb the deliberations of the assembly. The frequent recurrence of such proclamations marks the formation of a regular assembly.

During the twenty-two years of the reign of Richard II. the power of the Commons made rapid progress, and at the accession of Henry IV., of the three capital points in contest while Edward III. reigned, that money could

[1] "At the request of the Commons of his realm, by their petitions laid before him and his council, and by the assent of the prelates, earls, barons, and other nobles, in the said parliament assembled."

not be levied, or laws enacted, without the Commons' consent; and third, 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."[1] The Commons also claimed and maintained a right to appropriate to special purposes the supplies they granted to the king; and by the impeachment of the Earl of Suffolk, Richard's favourite minister, in 1386, they confirmed their right of wielding that formidable but necessary weapon against the ministers of the royal will. The attempt made by the king in 1398 to obtain a packed House of Commons deserves notice, as a royal confession that it was necessary to rule the nation through a parliament. The temporary triumph which the king obtained by this device was soon followed by his overthrow and deposition; and thenceforth a free parliament became the popular cry when the common liberties were supposed to be in danger.

The princes of the House of Lancaster, conscious that they reigned rather by the people's choice than by any lineal title to the Crown, did not venture on any open resistance to the powers which the Lower House of parliament had obtained, and they regularly held a parliament in almost every year. Some arbitrary acts on the part of the Crown may be found during their reigns, but they are far less numerous than had formerly been the case, and are clearly exceptional to the regular course of government. Even Henry V., in the zenith of his glory and popularity, never ventured to slight the authority of parliament in granting supplies, in general legislation, and in participating in the administration of affairs.

[1] Hallam's *Middle Ages*, vol. iii. p. 124.

An important change in the financial system introduced in this reign illustrates the ascendency of the parliament, for it was entirely of parliamentary creation—the practice of pledging, as a security for loans made to the Crown, duties already granted.

Our parliaments under the House of Lancaster, besides maintaining the rights which had been acquired by their predecessors, established others of great importance. At least it is in the records of that period that we first obtain definite proof of them. Hallam cites at length[1] a remarkable passage from the Rolls of Parliament of 9th Henry IV., which shows the recognition of two important constitutional principles; namely, 1st, that all money bills must originate in the House of Commons; and 2ndly, the right of the Houses that the king should take no cognisance of the subject of their deliberations until they had come to a decision upon it, and brought that decision regularly before him.

Public as well as Private Bill legislation originally arose out of petitions for the redress of grievances.

The Commons used to petition the Crown, and the king, on their petition, and by the advice of the Lords, used to enact. By ancient custom the king used to reply to all the petitions of the Commons at the end of the session; and statutes founded on petitions that were sanctioned by the Lords and granted by the Crown were afterwards drawn up by the king's officers. Frequent frauds were committed by these functionaries, who did not faithfully reproduce in the statutes the petitions out of which they had originated. The Commons continually complained of this trickery; but at last, in Henry VI.'s

[1] *Middle Ages*, vol. iii. p. 102; see also Guizot's *History of Representative Government*, part ii. lect. 25.

time, they began to guard effectually against it, by preparing bills in their own House in the form of complete statutes, which they sent up to the House of Lords, that they might be discussed in that assembly, and, if adopted there, be presented to the king, who then had nothing more to do than to give or refuse his sanction. No precise date can be named when the House of Lords began to originate bills in their own House, which were sent thence to the Commons. But the custom soon grew up; and it became the rule of parliament that bills may commence in either House, except money bills, which, as we have seen, must come from the Commons.

The essential right of freedom of debate is to some extent involved in the second principle of parliamentary law, which has been mentioned as solemnly recognised in the ninth year of Henry IV. There is, however, no point of parliamentary privilege which the Crown conceded to the Commons more unwillingly than full liberty of speech; but the Commons felt its full importance, and struggled manfully and perseveringly to secure it. An attack made by Richard II., in the last year of his reign, upon Thomas Haxey, a member of the House of Commons, for words spoken in debate, was no slight cause of the popular indignation by which that misguided prince was driven from the throne. One of the first acts of Henry IV.'s first parliament was to annul the proceedings against Haxey. During this reign we find the Speaker of the House of Commons demanding liberty of speech of the king at the opening of every session. Without doubt under Henry IV. the Commons used greater liberty of speech than they had previously enjoyed. It was, indeed, made a subject of special praise to Sir John Tibetot, Speaker in the parliament of 1406.

The king soon manifested great distrust of the extension given to this right. In 1410, he told the Commons that he hoped that they would no longer use unbecoming language, but act with moderation. In 1411, the Speaker, Sir Thomas Chaucer, having made the usual demand at the opening of the session, the king replied that he would allow the Commons to speak as others before had done, but that "he would have no novelties introduced, and would enjoy his prerogative." The Speaker requested three days to give a written answer to this observation, and then replied "that he desired no other protestation than what other Speakers had made; and that if he should speak anything to the king's displeasure, it might be imputed to his own ignorance only, and not to the body of the Commons," which the king granted.

We hear of no infringement upon the liberty of speech enjoyed by the Commons until the parliament of 1455, at which time a deputy from Bristol, Thomas Young, complained that he had been arrested and imprisoned in the Tower, six years before, on account of a motion which he had brought forward in the House. The object of this motion had been, to declare, that as the king then had no children, the Duke of York was the legitimate heir to the throne. The Commons transmitted this petition to the Lords, and the king commanded his Council to do whatever might be judged fitting on behalf of the petitioner.

Other points of parliamentary privilege, such as the freedom of members from arrest, first attract attention in the records of the Lancastrian reigns; but with regard to one very important matter, the right to investigate and determine contested elections, the Commons were as yet unarmed. The judgment of election disputes was exercised

by the king and his Council. And it was at this epoch that it was solemnly declared that the Commons had no share in the general judicial functions of parliament. This declaration was made in 1399, at the suggestion of the Commons themselves, and by the mouth of the Archbishop of Canterbury, who said: "That the Commons were only petitioners, and that all judgment belonged to the king and Lords; unless it was in statutes, grants of subsidies, and such like." Since this period the Commons, when they desired to interfere in judgments otherwise than by impeachment, were obliged to employ the means of bills of attainder. They adopted this plan in the case of the Duke of Suffolk in 1450, and very frequently afterwards.[1]

The Lancastrian period of our parliamentary history is peculiarly remarkable for the statutes which were then passed respecting elections. Besides the immediate subjects which they deal with, they bear strong evidence of the increasing importance of the House of Commons, and

[1] The following observations of May, on bills of attainder, deserve attention: "The proceedings of parliament in passing bills of attainder, and of pains and penalties, do not vary from those adopted in regard to other bills. They may be introduced into either House; they pass through the same stages; and, when agreed to by both Houses, they receive the royal assent in the usual form; but the parties who are subjected to these proceedings are admitted to defend themselves by counsel and witnesses before both Houses; and the solemnity of the proceedings would cause measures to be taken to enforce the attendance of members upon their service in parliament. In evil times, this summary power of parliament to punish criminals by statute has been perverted and abused; and in the best of times it should be regarded with jealousy; and, whenever a fitting occasion arises for its exercise, it is undoubtedly the highest form of parliamentary judicature. In impeachments, the Commons are but accusers and advocates; while the Lords alone are judges of the crime. On the other hand, in passing bills of attainder the Commons commit themselves by no accusations, nor are their powers directed against the offender; but they are judges of equal jurisdiction and with the same responsibility as the Lords; and the accused can only be condemned by the unanimous judgment of the Crown, the Lords, and the Commons."

of the anxiety of the Crown to influence the popular assembly, which it could not with safety neglect or openly control. An ancient statute of Edward I. ordains that elections ought to be free, and forbids the disturbance of their freedom.[1] And in the fifth year of Richard II.'s reign an Act was passed to punish sheriffs who were negligent in making returns of parliamentary writs, or who left out of the returns any cities or boroughs which were bound, and formerly were wont, to send members to parliament. With these exceptions, and some few other unimportant ones, it is in the reigns of the Fourth, Fifth, and Sixth Henrys that we first find the subject of the election and return of members becoming an object of earnest legislative attention.

It is to be remembered that the great instruments of the Crown, in packing a House of Commons, were the sheriffs, who were nominated by the king. When a parliament was convened, it was to these officers that the royal precept was addressed for the election of knights, citizens, and burgesses. The king's writ required that two knights should be elected for the county, and that the sheriff should cause to be elected two citizens for each city, and two burgesses for each borough in his bailiwick. As no particular cities and boroughs were specified, the sheriffs assumed a discretionary power as to what places they would consider fit cities and boroughs to return members to parliament; and this power was often grossly abused by those functionaries, who omitted or included boroughs most fraudulently and irregularly. This wholesale garbling of parliamentary representation was checked by the statute of Richard II., which has been referred to; but the sheriffs

[1] Statute of Westminster the First, c. v.; see Reeve, *Hist. Law*, c. iv.

still had the power of influencing the elections and falsifying the returns of individual members, especially of knights of the shire, as these were elected in the county court, at which the sheriff himself presided.[1] This power was frequently used by them at the instigation of the Crown, or of great noblemen, or for private ends of their own. Richard II. had largely availed himself of this dishonest engine in packing the House of Commons which he brought together two years before his deposition. The parliaments of his successor strove vigilantly to prevent such malpractices for the future. The statute of the 7th Henry IV. was passed "on the grievous complaints of the Commons against undue elections for shires." It contained regulations for the time and manner of the election of knights; and, among other things, ordained that all those who should be present at the county court, as well suitors duly summoned for that cause as others, should enter upon the election of knights; and then in full court they were to proceed freely and indifferently, notwithstanding any request or command to the contrary. The bearing of this clause, upon the question how far the elective franchise extended, will be hereafter considered. The statute also contained several clauses to secure a true return by the sheriff of the result of the election; and by an Act passed four years afterwards, severe penalties were imposed for any breach of its provisions.

Notwithstanding these enactments, the king's ministers, especially during the early part of Henry VI.'s reign, continued their attempts to influence elections; and used for this purpose not only the agency of the sheriffs, but

[1] A practice was attempted at one time to have the burgesses elected at the county court by delegates from the boroughs. See Hallam, p. 116, and note to p. 117.

that also of the mayors and other officers of the cities and boroughs. It was during this period that a change in the character of our municipal institutions was commenced, which will presently be described; a change that made them more open than before to the influence of corruption and intimidation. The parliament sought to check these practices in the twenty-third year of Henry VI., when it was enacted that, under peril of severe penalties, every sheriff should deliver a proper precept to the mayor or bailiff of each city or borough in the shire to elect citizens or burgesses for parliament; that the mayors and bailiffs should make true return of those which be chosen by the citizens and burgesses of the cities or boroughs where such elections be made.

The constitutional history of the reign of the Lancastrian kings is marked by attempts on the part of the Legislature to determine the qualifications both of electors and of persons to be elected. It has been seen that the statute 7 Hen. IV. c. 15, while guarding against the malpractices of sheriffs in county elections, recognised or established the right of all persons who were present at the county court to vote for knights of the shire. But in the eighth year of Henry VI. was passed an Act that was framed in a very different spirit. This remarkable statute, the first disfranchising one upon record, reciting the grievous uproar and disorder at elections, chiefly occasioned by the "outrageous and excessive number of people of small substance or no value," enacted, "that for the future knights of the shire shall be chosen by people dwelling and resident in the counties, whereof every one of them shall have free land or tenement to the value of forty shillings by the year at least, above all charges." This was, indeed, a most stringent enactment, operating as a sweeping dis-

franchisement; for forty shillings then were equal to at least twenty pounds of the present day. This statute, coupled with one passed two years afterwards (which required the voter's freehold to be situate in the county for which he votes), remained the basis of the county franchise till 1884, though modified from time to time by various statutes prescribing the requisite length of possession, or receipt of rents and profits. The right was "*freehold, free land, or tenement*," requiring both the tenure and the interest to be freehold, consequently excluding copyholders and leaseholders for lives.

It will be observed that this statute, besides fixing a property qualification for voters in county elections, also aimed at limiting the right of voting to those who were residents in the county. Moreover, it required "that they which shall be so chosen, shall be dwelling and resident within the same counties." So that residence was made a necessary qualification for both electors and elected, in counties and in boroughs, as indeed it had been under the first statute of Henry V. Bearing in mind the origin of the House of Commons, we may agree with Hallam, that the old custom was for each county, city, or borough to elect deputies out of its own body, who being resident themselves, would be acquainted with local necessities and grievances. Hallam thinks it likely that the practice of electing non-residents had begun in the reign of Edward III.[1]

[1] The restrictions of the statute seem to have been generally evaded as early as Edward IV.'s reign. An unsuccessful attempt was made in the thirteenth year of Elizabeth's reign formally to repeal the Act, as regarded boroughs. But though this failed, non-residents seem to have been continually returned both for counties and boroughs; and at last, in the case of Onslow *v.* Ripley, 1781, the Court of King's Bench resolved that "little regard was to be had to that ancient statute, 1 Hen. V., *because the common practice of the kingdom had been ever since to the contrary.*" Thus the neglect of a statute was treated as equivalent to its repeal.

It may be added that the provisions in the statutes of Henry V. and Henry VI., which required electors to be residents in the county or borough for which they voted, were almost equally inoperative in practice; and the statute of 14 George III. c. 58, which at last formally repealed the restriction of residence as to members, also repealed the provisions as to the residence of voters. The modern statute significantly recited, that certain provisions in the old Acts had been found by long usage to be unnecessary and had become obsolete; and it repealed them so far as they relate to the residence both of candidates and voters. It is, however, probable that in early times the number of non-resident voters, which implied the "plural" vote, was small. With respect to the county voters, the requirement of the 10 Hen. VI. c. 2, that the land which gave the vote should be situate within the county, was always obeyed; and it is not likely that any great number of persons, in the time of the Plantagenets, were owners of freehold property in counties in which they did not reside. With respect to boroughs,[1] there is little doubt that originally a man must have been a resident, and a member of the court leet of the borough, in order to be recognised as a burgess. Afterwards the practice grew up in many boroughs of admitting non-residents as burgesses. This does not date earlier than Henry VI.'s reign, when boroughs were first incorporated. In after times (down to the passing of the Reform Bill of 1832), the question whether non-residents could vote in borough elections was decided by the words of the incorporating charter, or by proof of custom. Plural voting seems now to be on the point of abolition.

Another point of interest is suggested by a perusal of an old Act of Hen. VI. with respect to elections. This is,

[1] See Merewether and Stephens on Boroughs.

whether any qualification of birth or estate was necessary for a member of parliament in those early times. For boroughs there seems to have been none before the celebrated statute of the ninth year of Queen Anne's reign. Only it may be assumed that a villein would not have been eligible; indeed, the 1 Hen. V. c. 11, requires that the chosen burgesses shall be free. With respect to representatives of counties the case is different. They were (as we have seen) originally the representatives of the mass of the immediate military tenants of the Crown; they were always (and still are) described in the parliamentary writs as knights; and there can be no question that originally knights only were chosen. By degrees the practice of the voters and the sheriffs in this respect became less strict; and, at least as early as Edward III.'s reign, many persons who were not knights sat in the House of Commons as knights of shires.

The statute of Henry VI.'s reign, to which we are referring (23. c. 14. 3.), though it sanctioned the return of representatives of counties who were not actually knights, sought to impose a twofold qualification of birth and estate. It required that knights of the shires for parliament shall be notable knights of the same counties for which they shall be chosen, or otherwise such notable esquires, *gentlemen born*, of the same counties, as shall be able to be knights, and no man to be such knight as standeth in the degree of a yeoman or under.[1] A knight's fee, that is to say, the amount of land which made its owner eligible for

[1] Issint, que lez chivalers dez counteez pour le parlement soien notablez chivalers dez mezmez lez counteez ou autrement tielx notablez Esquiers *gentils homez del Nativite* dez mezmez lez counteez come soient ablez destre Chivalers: et null home destre tiel chivaler que estoise en la degree de vadlet et desouth (*Statutes of the Realm*, vol. ii. p. 342).

knighthood, was worth, in Edward II.'s reign, £20 a year, which is equivalent to at least £300 a year of the present time. The property qualification, therefore, which it was thus sought to establish was considerable; but the attempt to found a qualification of gentle birth was more important still; for, if successful, it would have gone far to make a distinction of caste among the commonalty of England, and to impair their equality in the eye of the law. One instance is recorded in which this very aristocratic provision of the statute was appealed to. Six years after it was passed some of the electors of Huntingdonshire, in the twenty-ninth year of Henry VI., petitioned the king against the election of one Henry Gimber, because (among other reasons) he was not of gentle birth.[1] But this part of the statute appears to have been so generally disregarded, that it was not even thought worthy of repeal.

The natural influence of ancient lineage and landed property must generally have caused the representatives of each county to be chosen from among its principal gentry, but no impassable barrier of pedigree excluded others; nor, until the reign of Ann, was a property qualification indispensable.

There is no surer proof of the growing importance of the House of Commons during the latter half of the fifteenth century, than the competition which then began for seats in parliament. Formerly a seat had been looked on as a burden, and it had been found requisite to impose a fine by statute on members who absented themselves from their duty. The electors also looked on their franchise as a grievance, inasmuch as it imposed on them the necessity of paying wages to their representatives. The excuse that a borough was too poor to raise the money to pay their

[1] See the proceedings in Prynne's 3rd Register, p. 157.

burgesses in parliament was often set up, and often allowed by the sheriffs. Both county and borough members seem regularly to have received their wages to the end of Henry VIII.'s reign, and a few later instances have been found.[1] But there is good evidence that, during the reigns of the last Plantagenets, country gentlemen and others had begun to make eager canvass for places in parliament. The Paston Collection contains a curious letter on this subject, which also throws light on the creation or revival of boroughs. The writer tells Sir John Paston, "If ye miss to be burgess of Malden, and my lord chamberlain will, ye may be in another place; there be a dozen towns in England that choose no burgess, which ought to do it; ye may be set in for one of those towns an ye be friended." The date of this letter is 1472, in the reign of Edward IV. One effect of the Wars of the Roses, which had raged between this date and that of the statute of Henry VI., above referred to, had been to raise, in some respects, the importance of the House of Commons; as each of the contending parties eagerly sought the sanction of parliament to its title, and still more eagerly used the machinery of parliamentary attainders against its adversaries.

Notwithstanding the steady growth of parliamentary authority which may be traced during the fourteenth and fifteenth centuries, the kings of England were still possessed of great constitutional power; and even the best of them frequently committed acts of arbitrary power beyond the limits of the Constitution, under colour of royal prerogative. But, without trespassing on the supremacy of the law, monarchy could generally compass its ends. The king convened, and the king dissolved the parliament.

[1] See Hallam's *Middle Ages*, vol. iii. p. 171, note; and Prynne's 4th Register, as there cited.

The king could add at his will new members to its Upper House, by creating peers. The king could grant his royal charter to any place he pleased to select, and thereby constitute that place a borough, with the right of sending representatives to the House of Commons. This mode of influencing parliament was indeed, comparatively speaking, little used until the time of the Tudors, the agency of the sheriffs, in omitting or adding boroughs, being generally employed; but the more parliament succeeded in controlling the first abuse, the more active was the Crown in reviving or creating parliamentary boroughs by its charters. The king's concurrence with the Houses was essential for all legislation, and his power of refusing assent to their petitions or bills was then frequently exercised. Our sovereigns, also, during this period, used to issue ordinances, which were acknowledged to be binding, and the boundaries between these and regular statutes was not easy to define; though an ordinance usually dealt rather with individual cases, or was designed to declare and enforce laws already existing, whereas the introduction of a new law required a statute.[1] Sometimes ordinances were issued by the sovereign, on petition from parliament; but they were also frequently made by the king in Council, without any parliamentary authority. This was the king's "Concilium Ordinarium," or Privy Council, consisting of the chancellor, the treasurer, the lord steward, lord marshal, lord admiral, of the judges, and of other high officers of State, all nominated by the king, and all removable at his pleasure. This Council claimed also and exercised an anomalous judicial authority, which was the constant subject of parliamentary remonstrance, but which the frequent turbulence of the times, and the

[1] Cp. Reeve, vol. iii. p. 358.

insufficiency of the ordinary tribunals to deal with powerful offenders, must have rendered to some extent necessary. Another important power which was admitted in those days to belong to the Crown was that of dispensing with the observance of particular statutes by particular individuals in special cases. This, probably, was regarded as springing from the clear royal right of pardoning offenders. For it must have seemed natural that, if the king, when a statute had been broken, could pardon the offence, he might, by a kind of anticipatory pardon, dispense with its observance in a special instance. As supreme executive and judicial authority, the king appointed and dismissed as he thought fit, the chancellor, the judges of the supreme common law courts, and the judges who tried causes and prisoners on the circuits, who were not always the same as the judges of Westminster Hall. He appointed the sheriffs: and he appointed also and dismissed, at his discretion, the justices of the peace in the several counties. There had anciently been in each shire conservators of the peace, elected by the freeholders; but in Edward III.'s reign these were superseded by justices of the peace, receiving their appointment and commission from the Crown, and for many centuries these local representatives of the king were the chief local authorities in England, and were practically supreme except in the boroughs, where the municipal corporation usually had some powers of administration.

The king, as supreme head of the State, represented the State; or, rather, the king was the State in all dealings with other nations. He proclaimed war; he made treaties; he alone sent or received ambassadors; he was supreme chief of the military and naval forces of the kingdom; he had the absolute government of all foreign towns or

territories that were obtained by conquest; he had the government of all forts and castles within the realm; nor could any subject embattle his house or make a place of strength without the royal licence. Many other prerogatives of minor importance, such as that of coining money, of conferring all titular ranks and honours, of appointing ports and havens for the lawful transit of merchandise, and passengers into and out of the realm, and several of a fiscal nature, such as the right to deodands, and to waifs, and wrecks of the sea, might be mentioned. But the principal powers of royalty have been enumerated, and they prove abundantly enough the might of our Plantagenet kings.

The constitutional privileges of the peers have been sufficiently pointed out in the preceding pages. When we come to consider how political power was shared by the various classes of the nation, or the commonalty of the realm, the point that first calls for our attention is the elective franchise. But this has already been touched upon; and there is no need to recapitulate the old statutory provisions as to the qualifications of electors and members. Yet we may seek to ascertain, if possible, the relative proportion of the whole electoral body to the whole nation, and to gain some insight into the practical working of the representative system in those ages.

We shall find nothing approaching to universal suffrage. The labouring part of the agricultural population was certainly during the fourteenth and fifteenth centuries generally raised from a state of villeinage to a state of personal freedom. The process of emancipation went on rapidly during Edward III.'s reign; though the fearful insurrection in that of his successor shows how many wretched labourers were still in a state of bondage. After

that period we hear, by degrees, less and less of villeinage in England; and it was practically extinct when the Tudor dynasty came to our throne, though a few instances of it may be traced later. But the freed labourers in England were for long severely oppressed. The statute book, from Edward III.'s reign to the commencement of our modern poor-laws, in Elizabeth's time, abounds in enactments to regulate the wages, dress, and conduct of the inferior labourers, "which seem to have been framed with the same view, namely, to curb the aspiring exertions of industry and independency."[1] In describing this period an historian of pauperism describes the early examples of labour laws as "selfish and unjust."[2]

The labourer was never to better his condition. Imprisonment and branding on the forehead with a hot iron was the lot of the fugitive servant, although he had never *consented* to enter into the service of his lord, and had been compelled to do so for wages less than he was justly entitled to receive. Even "artificers, and people of mysteries," were liable to be *pressed* by the lord to get in his harvest,[3] and if a poor labourer's unmarried daughter of eighteen or twenty years of age had been "required to serve" any master, she must, under the statutory provisions, either have gone into the service, or have been committed to gaol for refusing. No child could be apprenticed to any useful craft unless its parents were owners of land yielding a certain amount of yearly rent, and the compulsory service, such as has been described, paid for by a rate of wages below the just level, would be a perpetual cause why servants should have endeavoured to free themselves from their bondage, and why the "valiant beggars," of whom we read, should have so greatly increased throughout the country.

The agricultural population of the country was many times more numerous than the town population; and the

[1] Eden's *State of the Poor*, vol. i. p. 42.
[2] Pashley on *Pauperism and Poor Laws*, p. 163.
[3] 13 Rich. II. c. 3.

agricultural labourers were probably a majority of the whole nation: a wretched majority—among whom it would be idle to look for either holders of franchise or bearers of office. When we come to the rural classes above them, to the possessors of some property, small or great, there is reason to believe that before Henry VI.'s time the right of voting for knights of the shire was very generally exercised. For by far the greater proportion of those, who then had any landed property at all, held it as freeholders;[1] and even after the 8th Hen. VI. restricted the county franchise to 40s. freeholders, the number still qualified to vote was greater than we might suppose, did we not know from Fortescue[2] and other authorities how large was the number of men worth at least 40s. a year in every English county.

The same property qualification was required for jurors as for county voters in Fortescue's time. His writings, especially his treatise on the Laws of England, present a most interesting and valuable picture of the political and social state of England towards the latter half of the fifteenth century. He was Lord Chancellor to Henry VI., and was the companion in exile of the young prince Edward of Lancaster, Henry's son and heir-apparent, during the Wars of the Roses. His treatise on the Laws of England was written for the instruction of that prince; and in it he described trial by jury as the prevailing mode of trial in England, and as the peculiar glory of our institutions, compared with those of other nations. There is also a curious record of Edward the Fourth's reign,

[1] Leases for years, though not unknown, were comparatively rare; nor was the stable customary possession by freemen of land held of lords by base service (*i.e.* copyhold) fully recognised till Edward IV.'s reign, if so early.

[2] *Fortescue de Laudibus*, pp. 86, 104, Amos's edition.

which proves how completely trial by jury was then, and long had been, regarded as an Englishman's constitutional privilege. "The rolls of parliament for the reign of Edward the Fourth,[1] contain a petition from two persons, Henry Bodrugan and Richard Bonethon, praying that their conviction may be annulled.[2] An Act had been passed in the 14th year of that reign which authorised the justices of the King's Bench to examine Bodrugan and Bonethon on a charge of felony, and provided that if the said Henry and Richard were by their examination found guilty, they then should have such judgment and execution as they should have had if they were of the same attaint by the trial of twelve men, and like forfeiture to be in that behalf. The accused parties refused to appear, and were convicted by default. They therefore petitioned the Crown that the judgment might be annulled, on the ground that a trial by justices in this mode was unknown to the laws of England, and was a novel and dangerous innovation."[3] "The very words of the petition are—'For so much as by the same Acte was ordeyned that the triall of the said offences should rest and be by examination, and not by the verdict of twelve men, after the common course of the laws of the land.' The king granted their prayer, and thus affirmed the principle of the indefeasible right of the subjects of this realm to be tried, as they have heretofore been accustomed, by a jury of their peers."[4]

When we turn to the trading part of the community, the dwellers in towns, we find reason to believe that, at least in all the cities and more considerable boroughs, by far the greater number of the inhabitants had, as burgesses,

[1] *Fortescue de Laudibus*, pp. 86, 104, Amos's edition.
[2] Rot. Parl. 133.
[3] Forsyth, p. 426.
[4] *Ibid.*

the right of voting for the parliamentary representatives of the borough, the right of acting as jurors in the borough courts of justice, and generally the right of taking active part in matters of local self-government. There are many conflicting theories respecting the early municipal constitutions of our boroughs, and as to the class of persons by whom the electoral franchise in boroughs was originally exercised. Sir James Mackintosh thought that from the earliest times to which borough voters can be traced, they were of the same variety of classes as in later times before the Reform Bill. "In some places the freemen; in others, the officers of a corporation; elsewhere, freeholders, burgage tenants, inhabitants contributing to public expense, or other inhabitants with scarcely sufficient qualification of property to afford a presumption of fixed residency;—these, and combinations of various sorts of them, were the principal classes among whom the elective franchise was in the earliest times shared."

But the learned researches of Serjeant Merewether and Mr. Stephens into our municipal archæology seem to have established that, at least before Henry VI.'s reign, every freeman who became a resident householder in a borough, capable of paying scot (*i.e.* his share of local taxation), and of bearing lot (*i.e.* of discharging in turn the local offices), was sworn and enrolled at the borough leet, and became a burgess. The boroughs were not then incorporated; the earliest instance of incorporation being in the eighteenth year of Henry VI.'s reign, when a charter of incorporation was given to Hull. This was soon followed by others; and our courts of law adopted the doctrine, that where no early charter of incorporation could be proved, an early but lost one should be presumed; in other words, they set up the doctrine of incorporation by prescription. The

mayor and leading men of the corporations, acting by the corporate seal, soon began to monopolise authority, and to exercise the power of selecting the burgesses, frequently among non-residents. The Crown also began to grant charters of incorporation, with clauses which gave exclusive powers to certain officers of the corporation, or to certain Select Bodies. By these means and by the capricious growth and establishment of an infinite variety of local usages, the electoral as well as the municipal system of our boroughs became widely changed from its primitive character; and a mass of abuses and anomalies grew up, which lasted down to the first Reform Bill and the Municipal Corporations Act of 1835.

But while the boroughs were untampered with, and while all freeholders in counties had a right to take part in elections during the best part of the two centuries we have been examining, the electoral franchise must have been in the hands, or within the reach, of almost all whom we can term the middle classes in England. The best defence of a system which excluded the whole of the labouring population from political representation may be found in the following passage from Guizot:—

It is beyond doubt, that at this period, setting aside the chief barons, whose personal importance was such that it was necessary to treat with each of them individually, the freeholders, the clergy, and the burgesses of certain towns could alone act as citizens. Those not comprised in one or other of these classes were chiefly poor husbandmen, labouring on subordinate and precarious means. They included all men invested with real independence, free to dispose of their person and wealth, and in a position to rise to some ideas of social interest. This it is which constitutes political capacity. This capacity varies according to time and place; the same degree of fortune and enlightenment is not everywhere and always sufficient to confer it, but its elements are constantly the same. It exists

wherever we meet with the conditions, whether material or moral, of that degree of independence and intellectual development which enables a man freely and reasonably to accomplish the political act he is required to perform. Assuredly, considering the masses, as they should be considered in such a matter, these conditions are not met with in England in the fourteenth century, elsewhere than among the freeholders, the clergy, and the burgesses of the chief towns. Beyond these classes, nothing is found but almost servile dependence and brutal ignorance. In summoning these classes, then, to join in the election, the electoral system summoned every capable citizen. It was derived, therefore, from the principle that capacity confers right; and among citizens whose capacity was recognised, no inequality was established.

Thus neither the sovereignty of the majority nor universal suffrage were originally the basis of the British electoral system. Where capacity ceased, limitation of right was established.

It was not until Bentham had taught that the happiness of all will be best promoted by a government in which all are represented, that the theory which has superseded the above doctrines came to be entertained and at last acted upon in England.

CHAPTER XV

State of the Constitution under the Tudors—Revival of Spirit in the House of Commons—Weak but arbitrary Character of the first two Stuart Kings—Charles I. sincere, but an aggressor on the Constitution—The Petition of Right.

THE gradual progress of the free principles of our Constitution is no longer visible under the Tudors. Various causes contributed to the political reaction. Slavish things were said and done in high places, and the House of Commons showed a want of independence. Not that the nation itself had grown false-hearted, or feeble; but because the order whence came its former leaders in struggles for liberty now no longer supplied it with chieftains, and the ranks of society whence the new reformers were to spring had not yet acquired strength and self-reliance. The dreadful civil wars of York and Lancaster had reduced the barons of England down to a scanty remnant, and the policy of Henry VII. and Henry VIII. made them more and more dependent on the Crown. But deep thought and bold inquiry were active throughout the nation, under the mighty impulses given to the mind by the general diffusion of the art of printing, by the revival of the study of the classics, by the thrilling interest of great geographical discoveries, and, above all, by the Reformation. Our parliaments were,

indeed, disgracefully submissive under the two l. Shameful also was the facility with which ve. guilty were obtained during the Tudor reigns from in State prosecutions. The judges in their applica and exposition of the criminal law were often servi. tools of the sovereign; and human life was lavished on the scaffold with such savage prodigality, that we cannot wonder if, when the peerage ceased to furnish hereditary tribunes of the people, men of inferior position shrank at first from coming forward as State martyrs :—

> Nec civis erat, qui libera posset
> Verba animi proferre et vitam impendere vero.

The Court of Star Chamber (as the old court of the king's Concilium Ordinarium was now called) exercised an extensive and anomalous jurisdiction, by means of which it inflicted arbitrary fines and imprisonments, and even cruel mutilations for any misconduct which the lords and prelates of the Council, or any minister of the Crown, might allege against individuals. The Star Chamber was really a court of administrative law swayed by motives of statecraft rather than principles of justice, and so long as it lasted under the Tudors and early Stuarts, the freedom of the individual was insecure. Nor was parliamentary control over taxation left unshaken. Money was frequently extorted without parliamentary assent, under the name of benevolences or loans. These things, and other violences, were endured to an extent which, under the Plantagenets, would have met with strong remonstrance, if not with armed resistance.

Yet even in the worst Tudor time there was no general taxation of the English people except by consent of parliament. The attempt which the most powerful

the most powerful king of this dynasty made to take by royal commission the sixth part of man's substance, was encountered not merely with murs, but with forcible opposition; and the men of ıe county had already risen against the Government, when the Crown yielded to the subject, and the obnoxious commissions were formally withdrawn. Hallam [1] has well pointed out the importance of this crisis in our Constitutional History. If our forefathers had submitted to this attempt to levy a general tax without parliamentary authority, "there would probably have been an end of parliaments for all ordinary purposes, though, like the States-General of France, they might still be convoked to give weight and security to great innovations." But as the old chronicler Hall, who lived at the time when Henry VIII. and Wolsey made this formidable effort to extend the royal prerogative, tells us in quaint but expressive language,—"when this matter was opened through Englande, howe the greate men toke it was marvel; the poore cursed, the rich repugned, the light wits railed; but, in conclusion, all people cursed the Cardinal and his coadherents as subversors of the lawes and libertie of Englande. For, thei saide, if men should geve their goodes by a Commission, then wer it worse than the taxes of France; and so, England should be bond and not free." Hall describes the practical measures that were taken in defence of the people's rights, as well as "the mutterynge through all the realme with curses and wepynges"; and how at last "the demaunde of money ceased in all the realme, for well it was perceived that the commons would none paie." [2]

[1] *Const. Hist.* vol. i. pp. 27-30.
[2] Hall, pp. 686-700.

Henry's policy, after he had cast Wolsey a
domineer, not in spite of parliaments, or without th
means of them. Bolingbroke's observations on this
notice. He says, "Henry VIII., by applying to his p
ments for the extraordinary powers which he exercis
and by taking these powers for such terms and under such
restrictions as the parliament imposed, owned indeed
sufficiently that they did not belong of right to the Crown.
He owned likewise, in effect, more than any prince who
went before him, how absolutely the disposition of the
crown of England belongs to the people of England, by
procuring so many different and opposite settlements of
it to be made in parliament."[1]

Henry was himself anxious to impress on foreign powers the belief that his was a parliamentary government. In a letter which he wrote to the Pope in 1529, he used these words:—"The discussions in the English parliament are free and unrestricted; the Crown has no power to limit their debates, or to control the votes of their members. They determine everything for themselves, as the interests of the commonwealth require."[2] The constitutional importance of trial by jury was solemnly acknowledged by Henry's statesmen, however much it might be tampered with in practice. The Chancellor Wareham, in his speech at the opening of a parliament, emphatically calls the twelve jurymen "the pillars of the State"—*Reipublicæ columnas, ut sunt duodecim homines jurati.*[3]

If indeed we were to look more to the letter of legislative and administrative documents than to the spirit in which the government was conducted, there are two

[1] Bol. vol. i. p. 375. [2] *State Papers*, vol. vii. p. 361.
[3] Journals of the House of Lords, vol. i. p. 1.

ıich might almost warrant us in pointing
'eign of Henry VIII. as one of important con-
ıial advancement. These are the Act 34 & 35
r VIII. c. 13, and the Act 34 & 35 Hen. VIII. c. 26.
) these statutes parliamentary representation was first granted to the principality of Wales and to the county palatine of Chester. Mackintosh has rightly drawn attention to the preamble of the first of these statutes, which recites the disadvantages of not being represented, as containing "a memorable recognition and establishment of the principles which are the basis of the elective part of our constitution." Mackintosh considers that old preamble to be equivalent to an avowal "that representation is essential to good government, and that those who are bound by the laws ought to have a reasonable share of direct influence on the passing of laws. The British Constitution was not thought to be enjoyed by a district till a popular representation was bestowed on it. Election by the people was regarded not as a source of tumult, but as a principle most capable of composing disorder in territories that had not been represented."

The independent power of the gentry, and of the wealthier portions of the middle classes, was steadily, though silently, increasing during the sixteenth century; and under the last three Tudors we find the parliament gradually resuming a more free tone and bearing, with that resolution to maintain and work out the rights of the people, which the great barons had formerly displayed at Runnymede and Lewes.[1] Under Elizabeth, the popular

[1] The pains taken by the Crown during these reigns to extend the royal influence in the House of Commons by creating new boroughs go to prove the importance of the parliament. See Hallam's *Const. Hist.* vol. i. p. 60. Of fourteen new charters granted by Edward VI., ten were in the royal Duchy of Cornwall.

party in the House of Commons was more than once successful in stemming reaction and promoting reform. The revolt against monopolies and the introduction of a poor law which is the foundation of the modern system of local taxation are cases in point. Much, indeed, in her reign was endured for her sake, and not for want of a knowledge of its unconstitutional character, or of spirit to resist it. Many a haughty speech and many a harsh act were forgiven and forgotten by Englishmen, when they thought of the true English heart and daring of the Queen, whom they had seen cheering her troops at Tilbury, who had defied the spiritual thunders of the Vatican, and the more perilous thunders of the Armada; who had sent out Drake, Raleigh, Cavendish, Hawkins, and Frobisher to beard England's foes and spread England's fame beyond the southern and western waves. But when Stuarts came to our throne, and made our national honour a byword abroad, while at home they paraded offensive claims to arbitrary power, no such patriotic forbearance could be expected. It was indeed perhaps fortunate for England that two such weak princes as the first James and Charles reigned next after Elizabeth; that we had not a succession of active and prosperous sovereigns, under whom overgrown prerogative might have been allowed to take too deep root, while the national liberties perished amid a blaze of national glory.[1]

The memory of Charles I. is entitled to benefit by the excuse, that he believed himself to be fully entitled to the arbitrary power which he attempted to exercise. Boling-

[1] The first session of James's first parliament deserves notice, as it was then that the right of the House of Commons to determine the qualification of its own members was formally established. See *Lord John Russell on the Constitution*, p. 57. It was in 1604 that a Committee of the Commons first tried a case of disputed elections.

broke correctly observes of the first Stuart, that "The doctrines which established the unbounded and ineffable prerogative of the king; which reduced the privileges of parliament to be no longer an antient and undoubted right and inheritance, but derived them from the permission and toleration of the Crown, and declared them liable to be retrenched at the will of the prince; and which by necessary consequence changed at once the nature of the English constitution, from that of a free to that of an arbitrary government: all these doctrines, we say, or the principles on which they were established, had been already publicly and frequently asserted by King James. They were the language of the Court; and a party had been formed in the nation who made profession of them. They were maintained in conversation. They were pleaded for in print; and they became soon afterwards the disgrace and profanation of the pulpit."[1] And he afterwards writes of Charles himself:

King Charles came a party man to the throne, and he continued an invasion on the people's rights, whilst he imagined himself only concerned in the defence of his own. We avow it as an opinion we have formed on reading the relations published on all sides, and to which, it seems to us, that all the authentic anecdotes of those times may be reconciled. This prince had sucked in with his milk those absurd principles of government which his father was so industrious, and, unhappily for king and people, so successful in propagating. He found them espoused, as true principles both of religion and policy, by a whole party in the nation, whom he esteemed friends to the constitution in Church and State. He found them opposed by a party, whom he looked on indiscriminately as enemies to the church and to monarchy. Can we wonder that he grew zealous in a cause which he understood to concern him so nearly, and in which he saw so many men who had not the

[1] Bol. vol. i. pp. 487, 488.

same interest, and might therefore be supposed to act on a principle of conscience, equally zealous? Let any one, who hath been deeply and long engaged in the contests of party, ask himself on cool reflection, whether prejudices concerning men and things have not grown up and strengthened with him, and obtained an uncontrollable influence over his conduct. We dare appeal to the inward sentiments of every such person. With this habitual bias upon him, King Charles came to the throne; and to complete the misfortune, he had given all his confidence to a madman. An honest minister might have shown him how wrong his measures were; a wise one how ill-timed. Buckingham was incapable of either. The violence and haughtiness of his temper confirmed his master in the pursuit of these measures; and the character of the first minister became that of the administration.[1]

But the circumstance that the king acted conscientiously, though mistakenly, in his aggressions on the Constitution, did not alter the fact of his being an aggressor, nor did it diminish the necessity of opposing his aggressions, as was done in the parliament to which we owe the Petition of Right.

The first two parliaments of Charles I. had been hastily dismissed by him, because they adhered to the old constitutional plan of making the grant of supplies depend upon the redress of grievances. Those grievances were actively continued by the Crown and its ministers; some of them being the arbitrary billeting of soldiers, the forcing of loans to the king, under the title of benevolences, the imprisoning those who refused to lend, several of whom, on suing out their writ of Habeas Corpus, were, in defiance of it, remanded to prison. Still, with whatever rigour unparliamentary methods of getting money were resorted to, Charles found, as the early Anglo-Norman kings had found, that no tyranny could extort so much

[1] Bol. vol. i. pp. 516, 517.

from the nation as could be gained from it if its consent to the levy was first obtained. His third parliament was therefore summoned, which met in March 1628, and continued with one prorogation till March 1629. A number of brave and skilful men now came forward to the rescue of the constitution. Wentworth (who had not yet gone over to the Court), Selden, Pym, Holles, Coke, Eliot, and Hampden were of this parliament, and others of energy and ability, intent "on vindicating our ancient vital liberties, by reinforcing our ancient laws made by our ancestors; by setting forth such a character of them as no licentious spirit should dare to enter upon them."[1]

The debates of the House of Commons, and their conferences with the House of Lords on this momentous subject (which are collected in the second volume of the *Parliamentary History*), are full of interest and instruction for the student of our constitution. "The liberty of the subject in person and estate" was the great theme of these discussions; and an amount of learning, spirit, sense, and eloquence (not unmingled with quaintness and pedantry) was brought to bear on it, almost without parallel in the records of our Parliamentary oratory. Besides passing resolutions which asserted the right of every Freeman not to be imprisoned or restrained, except for lawful cause expressed in a lawful warrant, and also his "ancient and undoubted right to have full and absolute property in his goods and estate, and not to be taxed without assent of parliament," the Commons applied to the Lords to join them in declaring and ascertaining the rights and liberties of the subject. This led to several conferences between the two Houses, in which, among the managers in behalf of the Commons, appeared Selden,

[1] Speech of Wentworth.

Coke, Glanville, Noye, and other lawyers of such eminence, that the Peers considered it fair that the Attorney-General, and other Counsel for the Crown, should be heard before them in support of the Royal Prerogative.

The principal argument of the Crown lawyers, in defence of the assumed Royal right of arbitrary imprisonment, was drawn from the words "*Vel per legem terrae*," in the clause of Magna Carta, which was relied on in behalf of the subject.[1] The Attorney-General admitted that the Great Charter was binding on the Crown, but he maintained "that it did not restrain the king from imprisoning a subject, but with this clause, *nisi per legale judicium parium suorum, vel per legem terrae*," and he said "how far *lex terrae* extends is, and ever was, the question." He further maintained that "the law hath ever allowed this latitude to the king or his privy council, which are his representative body, in extraordinary cases to restrain the persons of such freemen, as, for reasons of State, they find necessary for a time, without the present expressing the causes thereof: which, if it should be expressed, might discover the secret of the State in that point, and might easily prevent the service by that discovery." Selden, and the other managers of the Commons, denied the truth of this interpretation of the great clause of the Great Charter (which, if admitted, would authorise the king to kill as well as to imprison), and argued that the words "*per legem terrae*" meant "process of the law."

Many references were made on both sides to old law-books and reports, but the managers in behalf of the Commons had a clear superiority in this part of the argument. They referred, in particular, to a case in the sixteenth year of Henry VI.'s reign, in order to show that

[1] See p. 125, *supra*.

the mere command of the king to imprison a man was no justification for the imprisonment, even though the king ordered it in his royal presence. One of the counsel for the Crown, Serjeant Ashley, who had gone far beyond his leader the Attorney-General in arguing for the Royal Prerogative, was rebuked by the Lord President, and ordered into custody by the House of Lords, for the unconstitutional doctrines which he had advanced. Ashley, in his argument,[1] had boldly appealed to the right divine of kings. He explicitly "left fencing," and justified the actual case of a loan of money "required and refused, and thereupon a commitment," and he concluded, "that for offences against the State, in cases of State government, the king or his council hath lawful power to punish by imprisonment without showing particular cause, where it may tend to the disclosing of the secrets of State government."

The House of Lords showed their repudiation of such tenets of royal arbitrary power by their own somewhat arbitrary punishment of the advocate who enounced them. But the zeal of the Lower House was not fully communicated to the Upper one, and several delays took place, during which the king endeavoured to soothe the Commons with vague promises; but Sir Edward Coke warned them that general words were no sufficient satisfaction for particular grievances. "Did ever parliament rely on messages? The king must speak by a record, and in particulars, and not in generals. Let us put up a Petition of Right; not that I distrust the king, but that we cannot take his trust save in a parliamentary way."

The Petition of Right was accordingly drawn up by the Commons. The Lords proposed in a conference to add

[1] *Parliamentary History*, vol. ii. p. 315.

the following clause:—"We humbly present this Petition to your Majesty, not only with a care of preserving our own liberties, but with due regard to leave entire that *sovereign power* with which your Majesty is entrusted for the protection, safety, and happiness of your people." The Commons saw clearly the dangerous effect of this stipulation in favour of the royal prerogative, and peremptorily refused to concur in the amendment. The expressions used on this occasion by some of the vigilant guardians of our liberties are remarkable.[1] On the return of the Commons to their own House from the conference, the proposed addition was debated. The first speaker was Alford, who said, "Let us look into the Records and see what they are; what is 'sovereign power'? Bodin saith, that it is free from any conditions. By this we shall acknowledge a regal, as well as a legal power. Let us give that to the king the law gives him, and no more."

Pym.—"I am not able to speak to this question, for I know not what it is. All our Petition is for the laws of England, and this power seems to be another distinct power from the power of the law. I know how to add sovereign to the king's person, but not to his power; and we cannot 'leave' to him a 'sovereign power'; for we never were possessed of it."

Hackwell.—"We cannot admit of these words with safety; they are applicable to all the parts of our Petition: it is in the nature of a saving, and by it we shall imply as if we had encroached on his prerogative. All the laws we cite are without a saving: and yet, now, after the violation of them, must we add a saving? I have seen divers petitions where the subject claimed a right, yet there I never saw a saving of this nature."

Sir Edw. Coke.—"This is magnum in parvo. This is propounded to be a conclusion of our Petition. It is a matter

[1] See *Parl. Hist.* vol. ii.

of great weight; and, to speak plainly, it will overthrow all our Petition; it trenches to all parts of it; it flies at loans, at the oath, at imprisonment, and at billeting of soldiers: this turns all about again. Look into all petitions of former times; they never petitioned wherein there was a saving of the king's sovereignty. I know that prerogative is part of the law, but 'sovereign power' is no parliamentary word. In my opinion it weakens Magna Charta, and all the statutes; for they are absolute, without any saving of 'sovereign power'; and should we now add to it, we shall weaken the foundations of law, and then the building must needs fall. Take we heed what we yield unto: Magna Charta is such a fellow, that he will have no 'sovereign.' I wonder this 'sovereign' was not in Magna Charta, or in the confirmations of it. If we grant this by implication, we give a 'sovereign power' above all laws. Power, in law, is taken for a power with force: the sheriff shall take the power of the county; what it means here, God only knows. It is repugnant to our Petition; that is, a Petition of Right, grounded on acts of parliament."

Selden referred to the attempt made by Edward I. to render illusory his confirmation of the Great Charter by inserting the words, "*Salvo jure coronae nostrae*," reminding his hearers of the resistance which was made to that dangerous interpolation, and how the king gave way, and the obnoxious words were given up. The House of Lords, on being informed of the objections made by the Commons to their addition, sought to fortify it by reasons which were reported to the Lower House by the Lord Keeper. He said (among other things) that "they meant to give the king nothing now but what was his before; and, as to the words 'sovereign power,' as he is a king, he is a sovereign, and must have power; and the words were easier than the word 'prerogative.'" Mason thereupon combated the reason of the Lord Keeper in a long and able speech, in which he pointed out that if the Lords' addition to the Petition of Right were adopted, the judges

would infallibly construe the Petition as a solemn parliamentary acknowledgment of the king's having, beyond his ordinary prerogative (by which he could not impose taxes, or imprison), an extraordinary and transcendent "sovereign power," for the protection of the people, for which purpose he might tax, imprison, or billet soldiers as he pleased. He warned the House that all such acts of sovereign power would be said to be for the protection of the people, and that the king alone would determine whether they were so or not. He pointed out the impossibility of such questions being dealt with by a parliament "which is a body made up of several wits, and may be dissolved by one commission," and if the matter were to be brought before the courts of law, "why then the judges and the judgments may be easily conjectured."—Glanville, in a subsequent conference with the Lords, urged these and other arguments against the addition with force and skill; and Sir Henry Martyn appealed to the conduct and demeanour of the Commons as entitling them to the full support of the peers.

"The moderate and temperate carriage of the House of Commons in this parliament," said Sir Henry, "be it spoken without vanity, and yet in much modesty, may seem to deserve your lordships' assistance in this Petition *ex congruo et condigno*: especially if you would be pleased to consider the discontents, pressures, and grievances, under which themselves in great number, and the parts for which they serve, lamentably groaned, when they first arrived here: and which was daily represented unto them by frequent packets and advertisements out of their several counties, all which, notwithstanding, have not been able to prevail upon our moderation, or to cause our passion to overrule our discretions; and the same yet continueth in our hearts, in our hands, and in our tongues: as appeareth

in the mould of this Petition, wherein we pray no more but that we may be better treated hereafter. My lords, we are not ignorant in what language our predecessors were wont to express themselves upon much lighter provocation; and in what style they framed their petitions: no less amends could serve their turn than severe commissions to inquire upon the violators of their liberties; banishment of some, execution of other offenders: more liberties, new oaths of magistrates, judges, and officers, with many other provisions written in blood. Yet from us there hath been heard no angry word in this Petition. No man's person is named. We say no more than what a worm trodden on would say (if he could speak), 'I pray tread on me no more.'"

At length, after considerable discussion, the peers gave way, and the bill having passed both Houses as the bill, the whole bill, and nothing but the bill, awaited only the royal assent to become law, and "to form a memorable era in the English Government."[1]

On the 2nd of June, A.D. 1628, the peers were assembled, the Commons summoned, and the king appeared in the House of Lords to give his answer in parliament to the bill. But, to the surprise of all men, Charles, instead of using the well-known ancient form of words by which such a bill receives the royal assent, addressed the parliament and told them, "The king willeth that right be done according to the laws and customs of the realm, and that the statutes be put in due execution, that his subjects may have no cause to complain of any wrong or oppression contrary to their just rights and liberties; to the preservation whereof he holds himself in conscience as well obliged, as of his prerogative."

[1] Hume.

The Commons returned highly incensed at this evasive circumlocution. They forthwith begun to assail the favourites of the Crown, and impeached a Dr. Manwaring, who had preached a sermon, which had afterwards been printed by the king's command, in which discourse the right divine of kings to deal as they pleased with their subjects' property on emergencies, whether parliament consented or not, and the duty of passive obedience in the subject, were openly and unreservedly maintained. The Commons procured the trial and condemnation of this satellite of arbitrary power, and were proceeding to assail others higher in Charles's councils, when the king's obstinacy at length gave way, and the Petition of Right received the royal assent in the customary form of Norman French, and this second great solemn declaration of the liberties of Englishmen was declared to be the law of the land, amidst the general rejoicings of the nation.

PETITION OF RIGHT

3 Car. I. c. 1

The Petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the Subjects, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty.

Humbly shew unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled, that whereas it is declared and enacted by a statute made in the time of the reign of King Edward I.,

commonly called *Statutum de tallagio non concedendo*,[1] that no tallage or aid shall be laid or levied by the King or his heirs in this realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other the freemen of the commonalty of this realm; and by authority of Parliament holden in the five-and-twentieth year of the reign of King Edward III., it is declared and enacted, that from thenceforth no person should be compelled to make any loans to the King against his will, because such loans were against reason and the franchise of the land; and by other laws of this realm it is provided, that none should be charged by any charge or imposition called a benevolence, nor by such like charge; by which statutes before mentioned, and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge not set by common consent, in Parliament.

II. Yet nevertheless of late divers commissions directed to sundry commissioners in several counties, with instructions, have issued; by means whereof your people have been in divers places assembled, and required to lend certain sums of money unto your Majesty, and many of them, upon their refusal so to do, have had an oath administered unto them not warrantable by the laws or statutes of this realm, and have been constrained to become bound to make appearance and give utterance before your Privy Council and in other places, and others of them have been therefore imprisoned, confined, and sundry other ways molested and disquieted; and divers other charges have been laid and levied upon your people in several counties by lord lieutenants, deputy lieutenants, commissioners for musters, justices of peace and others, by

[1] This supposed statute found a place among our records very early, and its recognition by the Petition of Right gave it *thenceforth* the authority of a statute. But Blackstone, in his work on the Charters, has shown that it was originally nothing more than an intended compendium of the Confirmatio Cartarum.

command or direction from your Majesty, or your Privy Council, against the laws and free customs of the realm.

III. And whereas also by the statute called "The Great Charter of the liberties of England," it is declared and enacted, that no freeman may be taken or imprisoned, or be disseised of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner detroyed, but by the lawful judgment of his peers, or by the law of the land.

IV. And in the eight-and-twentieth year of the reign of King Edward III., it was declared and enacted by authority of Parliament, that no man, of what estate or condition that he be, should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law.

V. Nevertheless, against the tenor of the said statutes, and other the good laws and statutes of your realm to that end provided, divers of your subjects have of late been imprisoned without any cause shewed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.

VI. And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm, and to the great grievance and vexation of the people.

VII. And whereas also by authority of Parliament, in the five-and-twentieth year of the reign of King

Edward III., it is declared and enacted, that no man shall be forejudged of life or limb against the form of the Great Charter and the law of the land; and by the said Great Charter and other the laws and statutes of this your realm, no man ought to be adjudged to death but by the laws established in this your realm, either by the customs of the same realm, or by Acts of Parliament: and whereas no offender of what kind soever is exempted from the proceedings to be used, and punishments to be inflicted by the laws and statutes of this your realm: nevertheless of late time divers commissions under your Majesty's great seal have issued forth, by which certain persons have been assigned and appointed commissioners with power and authority to proceed within the land, according to the justice of martial law, against such soldiers or mariners, or other dissolute persons joining with them, as should commit any murder, robbery, felony, mutiny, or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law, and as is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the martial law.

VIII. By pretext whereof some of your Majesty's subjects have been by some of the said commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by no other ought to have been judged and executed.

IX. And also sundry grievous offenders, by colour thereof claiming an exemption, have escaped the punishments due to them by the laws and statutes of this your realm, by reason that divers of your officers and ministers of justice have unjustly refused or forborne to proceed against such offenders according to the same laws and statutes, upon pretence that the said offenders were punishable only by martial law, and by authority of

such commissions as aforesaid; which commissions, and all other of like nature, are wholly and directly contrary to the said laws and statutes of this your realm.

X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge without common consent by Act of Parliament; and that none be called to make answer, or to take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusal thereof; and that no freeman, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings, and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom

Quâ quidem petitione lectâ et plenius intellectâ per dictum dominum regem taliter est responsum in pleno parliamento, viz. Soit droit fait comme est desiré.

There has been no necessity to enter into the controversies associated with the name and fate of Charles I., while our attention has been directed to the action of his earlier parliaments, especially to that which framed the Petition of Right.

We are not obliged to base our approbation of these proceedings on the testimony of writers hostile to the Crown. The authority of the royalist Clarendon is here unexceptionable and unmistakable. Clarendon says of Charles's first three parliaments,[1] "I do not know any formed act of either House that was not agreeable to the wisdom and justice of great courts upon those extraordinary occasions. And whoever considers the acts of power and injustice of some of the ministers in the intervals of parliament, will not be much scandalised at the warmth and vivacity of those meetings." He goes on to say :—

In the second parliament there was a mention, and intention declared of granting five subsidies, a proportion (how contemptible soever in respect of the pressures now every day imposed) scarce ever before heard of in parliament. And that meeting being upon very unpopular and unplausible reasons immediately dissolved, those five subsidies were exacted throughout the whole kingdom with the same rigour, as if, in truth, an Act had passed to that purpose. Divers gentlemen of prime quality, in several counties of England, were, for refusing to pay the same, committed to prison, with great rigour and extraordinary circumstances. And could it be imagined, that those men would meet again in a free convention of parliament without a sharp and severe expostulation, and inquisition into their own right, and the power that had imposed upon that right? And yet all these provocations, and many other, almost of as large an extent, produced no other resentment than the Petition of Right (of no prejudice to the Crown), which was

[1] *History of the Rebellion*, vol. i. p. 8.

likewise purchased at the price of five subsidies more, and in a very short time after that supply granted, that parliament was likewise, with strange circumstances of passion on all sides, dissolved.

So far, therefore, as the passing of the Petition of Right, it is possible to proceed in the reign of Charles I. without entering "the ground debateable," though even here I feel that after every possible caution—

Incedo per ignes
Suppositos cineri doloso.

But it would be hopeless to go further, and to seek to deal coldly with "that momentous period of our history which no Englishman ever regards without interest, and few without prejudice—the period from which the factions of modern times trace their divergence, which after the lapse of two centuries still calls forth the warm emotions of party spirit, and affords a test of political principles." So Hallam has correctly styled the period commencing with the struggle between Charles I. and the Long Parliament that met in 1640. The same remarks might with equal truth be applied to the ten preceding years, during which "the king had in a manner renounced the constitution, and instead of governing with the assistance and concurrence of a parliament, governed by illegal acts of power."[1] They apply, indeed, to the whole time between the dissolution of the parliament that passed the Petition of Right, in 1629, and the restoration of Charles II. in 1660. A work which is designed to be kept as clear as possible from party doctrines, may pass over these thirty years—years of unparalleled interest in history; but years rather of abnormal and revolutionary struggles, than of English constitutional development.

[1] Bolingbroke.

CHAPTER XVI

The Restoration—Affection of the English Nation for their old Institutions — Effects of the Period of Revolution — Military Tenures abolished—Habeas Corpus Act—Custom of fining Jurors for their Verdicts pronounced illegal—Revolution of 1688—The Bill of Rights—The Act of Settlement—Kingship in England since the Revolution—Its Limitations—Its Constitutional Value—House of Lords—Attempt to check Creations of Peers—Advantages and Evils of the House of Peers—House of Commons—Borough Members—Rotten Boroughs—Reform Bill of 1832.

THE restoration of monarchy in 1660, with the enthusiastic consent and joy of the whole nation, except a few disappointed military adventurers, and a few high-minded zealots for republican government in Church and State, is a great fact in our history. It proves how deeply an affection for our ancient institutions was rooted in the heart of the English people. It proves that the genius of our nation was incapable of reconciling itself either to an abstract theory of equality, or to the stern regimen of a military autocrat, whatever lustre it might derive from the successes of his foreign policy. But still the nation had not passed through these thirty eventful years between 1629 and 1660, without experiencing some permanent changes in the national character. From the time of the great revolutionary crisis, the English people had the good fortune to profit by experience, and the good sense not to give themselves up to extreme parties. It is

from the reign of Charles II. that this good sense, which is the political intelligence of a free people, has presided over the destinies of England. The revolution through which the English nation had just passed had terminated in three great results.

In the first place, the king could never again separate himself from the parliament. The monarchy was indeed restored, but the absolute monarchy was lost for ever. Theologians and philosophers, like Filmer or Hobbes, might preach the dogma or maintain the principle of absolute power, and their ideas might excite the indignation or the favour of speculative thinkers or vehement partisans. In the opinion of the nation, however, the question was practically decided: Cavaliers and Roundheads came as Tories and Whigs to regard the close union of Crown and parliament as the right of the country, and as necessary to its interests.

In the second place, the House of Commons soon became the preponderant branch of the parliament. Its direct or formal sovereignty was a revolutionary principle, and as such was now generally condemned; and the Crown and the House of Lords had recovered their dignity and honours. "But their overthrow had been so violent and complete, that, even after the fall of their enemies, they were unable to re-establish themselves in their ancient ascendency; and neither the faults nor the reverses of the House of Commons could obliterate the effect of its terrible victories. The Royalist party were now masters in an assembly which, in its relations to the Crown and the administration of the country, inherited the conquests of the Long Parliament. In spite of some appearances of an opposite tendency, the preponderant influence of the House of Commons over the affairs of the

country was, from the reign of Charles II., daily more obvious and decisive.

"These two political facts were accompanied by one of still higher importance, relating to the religious condition of the country: the complete and definitive ascendency of Protestantism in England was the other great result of the Revolution."[1]

No attempt was made after the Restoration to revive some of the instruments of royal misgovernment which the Long Parliament had overthrown. The Court of Star Chamber had been abolished, nor was it ever revived. The vexatious profits of the military tenures had been laid aside, and the 12 Car. II. c. 24, abolished military tenures altogether, converting them into common freeholds, and thus swept away those feudal rights of the Crown to wardships, primer seisins, aids, homages, etc., which had long been so burdensome to the nobility and gentry, who held lands by military tenure. There are some other statutes of this reign which deserve mention on account of their constitutional importance.

The first regular parliament of Charles passed an important Act to prevent the Legislature being overawed and their votes coerced in future by riotous and seditious mobs under the guise of petitioners. That statute (13 Car. II. st. 1, c. 5) is still in force, and enacts that "no person or persons whatsoever shall repair to his Majesty or both or either of the Houses of Parliament, upon pretence of presenting or delivering any petition, complaint, remonstrance, declaration or other addresses, accompanied with excessive number of people, nor at any one time with above the number of ten persons."

The Habeas Corpus Act, also, which was passed in this

[1] Guizot on the English Revolution.

reign (31 Car. II. c. 2), is of great constitutional value, though it by no means introduced any new principle into our system, or formed any such epoch in the acquisition of the national liberties, as some writers represent. But it made the remedies against arbitrary imprisonment short, certain, and obtainable at all times and in all cases. The statute enacted in substance as follows:—

"1. That on complaint and request in writing by or on behalf of any person committed and charged with any crime (unless committed for treason or felony expressed in the warrant; or as accessory or on suspicion of being accessory before the fact to any petit treason or felony; or upon suspicion of such petit treason or felony plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process), the Lord Chancellor or any of the judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be indorsed as granted in pursuance of this Act, and signed by the person awarding them. 3. That the writ shall be returned, and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another without sufficient reason or authority (specified in the Act),

shall for the first offence forfeit £100, and for the second offence £200 to the party grieved, and be disabled to hold his office. 5. That no person once delivered by *habeas corpus* shall be recommitted for the same offence, on penalty of £500. 6. That every person committed for treason or felony shall, if he requires it, the first week of the next term, or the first day of the next session, of *oyer* and *terminer*, be indicted in that term or session, or else admitted to bail, unless the king's witnesses cannot be produced at that time; and if acquitted, or not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize. 7. That any such prisoner may move for and obtain his *habeas corpus* as well out of the Chancery or Exchequer, as out of the King's Bench or Common Pleas, and the Lord Chancellor or judge denying the same on sight of the warrant or oath that the same is refused, forfeits severally to the party grieved the sum of £500. 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the Islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting or convicts praying to be transported, or having committed some capital offence in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than £500, to be recovered with treble costs; shall be disabled to bear any office of trust or

profit; shall incur the penalties of *praemunire*; and shall be incapable of the king's pardon" (3 *Black. Com.* 137).[1]

These enactments, and especially the Habeas Corpus Act, make the name of Charles II. figure creditably in our statute-book, and there is one judicial decision of this reign which established a constitutional principle of the highest value, or rather which put an end to a long-continued abuse of the most perilous character.

Under the Tudor princes the Court of Star Chamber assumed the power of punishing jurors by fine and imprisonment for returning verdicts contrary to the evidence. Such was the pretext on which the Court pretended to act; but the real cause of their dangerous and oppressive interference generally was, that the jury had acquitted the prisoner in a State trial, contrary to the wishes of the Crown and its ministers.

Attempts were made to exercise, through the Courts of Common Law, the same violent means of perverting justice. It is to be recollected that, under all our kings, prior to the Act of Settlement, the judges were not merely appointed by the king, but held their commissions only during his pleasure, and it will readily be understood how, in State prosecutions, a trial before a jury, who knew that

[1] Such is the substance of that great and important statute. But as the Act is confined to imprisonments on *criminal*, or supposed *criminal*, charges, the 56 Geo. III. c. 100, was passed, extending the power of issuing a writ of *habeas corpus* to other cases. By this statute it was enacted, that where any person shall be confined or restrained of his liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit), it shall and may be lawful for any judge or baron, upon complaint made to him by or on behalf of the party so confined or restrained, if it shall appear by affidavit or affirmation that there is probable and reasonable ground for such complaint, to award in vacation time a writ of *habeas corpus ad subjiciendum* returnable immediately.

they would be themselves ruinously fined and cruelly imprisoned if they acquitted the prisoner, must have become "a mockery, a delusion, and a snare." But in 1670, on a trial of the celebrated Quaker Penn and Mead at the Old Bailey for an unlawful assembly, a juryman named Bushel (who deserves the imperishable gratitude of Englishmen [1]) was firm, and encouraged his fellow-jurors to be firm against all the threats of the Court, and acquitted the prisoners. The recorder (who tried the case) set a fine of forty marks on each of the jurors for perverseness and contumacy. Bushel refused to pay the fine, and the recorder thereon committed him to prison. He sued out a writ of Habeas Corpus from the Court of Common Pleas, and on a return being made to it that he had as a juror acquitted Penn and Mead "*contra plenam et manifestum evidentiam*," the subject was elaborately discussed; and Chief Justice Vaughan, "in a judgment replete with masculine sense, luminous argument, and profound historical research," pronounced the return insufficient, and the fine and imprisonment illegal. From that time forth the invaluable doctrine, that a jury in the discharge of their duty are responsible only to God and their consciences, has never been shaken or impeached.[2]

[1] See an excellent epitome of this trial, and the subsequent proceedings in the Common Pleas, in Phillimore's *History of the Law of Evidence*, p. 250; see also Hepworth Dixon's *Life of Penn*.

[2] In very early times, when the jurors were themselves witnesses, and gave a verdict from their own personal knowledge of the transaction in question, they were punishable for a wilfully false verdict (that is, for wilfully false evidence) by a writ of attaint. For this purpose twenty-four other jurors were summoned, who reinvestigated the case, and according to whose decision of it the first jury were either freed from blame or severely punished. As jurors ceased to be witnesses, and heard and acted upon the testimony of others, the process of attaint fell into disuse. Sir T. Smith, in Elizabeth's reign, speaks of it as then obsolete. It was not formally abolished until George IV.'s reign.

Chief Justice Vaughan's conduct in Bushel's case is, however, an almost solitary exception to the infamous character of the State Trials and other judicial proceedings in Charles II.'s reign. There are, indeed, few periods in our history more discreditable and more unpleasing to dwell on, than the twenty-eight years between the Restoration and 1688. They must certainly be studied in order fully to perceive the necessity and rightly to appreciate the full benefits of the glorious Revolution. But the limits of the present volume are unsuited for the purpose; and, indeed, the great historical work with which Lord Macaulay enriched our literature has made the leading scenes of 1688 and the immediately preceding years familiar to every educated Englishman. I can but sketch their outlines here; and there is no need of long comments. Differences of opinion as to many points in the characters of the first three Stuart kings will be found in writers of eminence, but there is no discrepancy as to the last. Even Hume, the artful and unscrupulous partisan of the House of Stuart, confesses of James II., that almost "the whole of this short reign consists of attempts always imprudent, often illegal, sometimes both, against whatever was most loved and revered by the nation." Some of the grievances whereof the English in those days complained most bitterly —those, namely, which arose from the king's open encouragement of Roman Catholics, in defiance of the laws respecting members of that church, and from his evident zeal for making that creed the established religion of the land, in lieu of the Protestant—may not press with the proper amount of importance on the minds of some modern readers, unless they bear in mind the condition of Europe at that time, and consider how completely the bigotry and the ambition of Louis XIV. had identified the progress of

Roman Catholicism with the progress of despotic principles. James was the hireling of Louis, and was animated by the same feelings. He strove to gain a simultaneous triumph over Church and State in England, and to lay the national faith beneath the Pope's feet, while he cast down the national liberties beneath his own.

The natural consequence of this was, that a spirit of ultra-Protestantism mingled with and became an animating principle of the opposition which was raised against his assaults upon the constitution. The political struggle became necessarily for the time a religious one. And in that age a successful maintenance of Protestant ascendency happily involved the advancement of constitutional freedom and religious toleration.

James II. came to the throne in 1685, and found, in the circumstances of that period, peculiar facilities for the advancement of arbitrary power. During the last years of his predecessor's reign the Crown had succeeded in humbling the popular party, and in destroying many of its chiefs. The attempts which Charles II.'s last parliament had made to assert the power of the House of Commons had been successfully punished by dissolution; and much had been done to render any future House of Commons as subservient to the Crown as had been the case in the worst years of Henry VIII. This had been effected by a daring, but crafty, attack on the charters of the corporate boroughs, which were the strongholds of the popular party. The Crown lawyers, in 1683, filed an information against the corporation of the city of London, alleging that its Charter had been forfeited for certain imputed misdemeanours; and the packed judges of the Court of King's Bench gave, as a matter of course, judgment in favour of the Crown. The corporation of the capital was then

remodelled, so as to make it subservient to the royal will. The same course was taken against other corporate places; and very many more were intimidated into surrendering their charters to the Crown, and receiving new ones, which were framed on a far more oligarchical plan, and even gave to the Crown the right of appointing the first members.[1] This course was steadily pursued during the last years of Charles II.'s reign, and the first of that of James; and its effect was to place in the hands of the Crown the nomination of a large proportion of the members of the House of Commons, and also to give its adherents the power of domineering in all the daily detail of local municipal politics over their Whig fellow-townsmen. The great mass of the nation, weary of the turbulent struggles of recent years, was for some time blind in its subservience to the royal will. Abroad, James could reckon on the ready support of Louis XIV., the most powerful monarch of the age. James defeated easily, in the beginning of his reign, two insurrections, which, under Argyle in Scotland and Monmouth in England, were attempted against him by the violent part of the enemies of his House; and the truth of the adage, that an unsuccessful revolt strengthens the force against which it is directed, was seemingly exemplified in the passive submission of the nation to the cruelties with which those revolts were visited by the military and the judicial ministers of the royal will. King James established and maintained a disciplined army of 20,000 men, though in profound peace, and though, so far from having any transmarine possessions of his Crown to coerce or protect, he had in Ireland an apparently inexhaustible supply of fanatic and devoted followers, to repress any possible

[1] See Hallam, *Const. Hist.* vol. ii. p. 614.

movements that England might attempt in defence of Protestantism and constitutional law.

Providentially for this country, James was too eager to be crafty, or even prudent, in the execution of his schemes. He was as ostentatious in the premature display of his designs against both Church and State, as he was pusillanimous when those designs called forth resistance, though at an earlier period of his life, when admiral of our fleets in battle, he had exhibited courage of the highest order. He commenced his reign by a violation of the cardinal principle of the constitution, which forbids the taking of the subjects' money by the Crown, save by consent of parliament. James showed of how little value the safeguards of the Great Charter, or the Petition of Right, and of the numerous other statutes in confirmation of them, would be to the people who endured his reign, by arbitrarily levying, at his accession, the Customs and Excise duties, the parliamentary grant of which to the Crown had been limited to the life of the late king. James, however, was not averse to parliaments, provided they would appoint his revenue as he desired, and would register his edicts with the same submissive facility which his royal brother of France found in the parliaments of Paris.[1] He called a parliament, which met May 19th, 1685. Not content with relying on the effect of the royal war against the corporations, which has already been alluded to, the Court put in force every artifice, and used injustice and violence of the grossest kind throughout England to manage the elections. An eminently servile House of Commons was the result, which granted to James, for his life, a revenue of two millions a year. This

[1] See his speech to his parliament, and the comments on it, in Wingrove Cooke's *History of Party*, vol. i. p. 391.

was an ampler income than any former king of England had enjoyed; and, aided by the subsidies which James received from Louis XIV., made him independent of parliament for the rest of his reign, so far as regarded the important point of pecuniary supplies. But James dismissed even this compliant assembly, because they hesitated to carry into effect his projects in favour of the Roman Catholic against the Protestant Church. James now "showed plainly that, with a bench of judges to pronounce his commands, and an army to enforce them, he would not suffer the mockery of constitutional limitations to stand any longer in his way."[1] He openly carried into execution his assumed right to dispense, by royal prerogative, with the observance of the laws of the land; and eleven out of the twelve judges pronounced a judgment in favour of that right, in a case which the king caused to be brought before them, having first carefully weeded the bench of those members who retained any scruples of conscience, and having appointed new judges in their stead.[2]

Under the same claim of possessing a kingly prerogative superior to all law, James, in 1686, set up a high court of ecclesiastical commission, in direct defiance of the Act of Parliament passed in Charles I.'s reign, which put down the High Commission Court then existing, and provided that no new court should be erected with the like power, jurisdiction, and authority. Among other acts of lawless tyranny committed by this infatuated prince, are his expulsion of the fellows of Magdalen College, Oxford, for refusing to elect as their president, in obedience to royal mandate, and in violation of the

[1] Hallam, vol. iii. p. 83.

[2] See Hales' case, *State Trials*, xi. 1166; and see the comments on it of Hallam, *Const. Hist.* vol. iii. p. 86, and Mackintosh's *Review of the Causes of the Revolution*, chap. ii.

law of the land, and their oaths, a Roman Catholic nominee of the Crown; his command to all clergymen to read publicly in their churches the royal declaration of indulgence, by which the king abrogated a large number of statutes; and his prosecution of the seven bishops as seditious libellers, for presenting to him a petition, wherein they respectfully stated their unwillingness to put into execution an illegal order.

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

I have already alluded to the important influence which the general abhorrence and dread of Popish ascendency

exercised in extending and animating the national resistance to King James. Many were roused into action by that feeling who might have regarded with apathy any amount of royal encroachment upon merely civil rights. And both by the well-known character of James himself, and by the conduct of the zealous priests and confessors who were his favourite councillors, it was made manifest that the declarations of general toleration which James put forward were mere pretences. Even the Dissenters, who had suffered much at the hands of the Anglican Church, saw that the king's object was to restore Roman Catholicism in England; and that he would not scruple, when he thought that a convenient time had arrived, to employ for that purpose means as savage and unsparing as those by which his patron and model King Louis XIV. was striving to extirpate Protestantism and all liberty of conscience in France.

A good and brave man, in the beginning of 1688, might have felt all this; and yet might have shrunk from that tremendous remedy of armed opposition to established government, which can never be rightly attempted while there is any rational hope of deliverance by other means. Before that memorable year was half over, no such hope remained. There was no longer any prospect that, if the nation were patient for a few years under James, it might recover its liberties without strife or peril under a wiser and more temperate successor to the throne. This idea might have been entertained during the first years of James's reign, while the Protestant Princess Mary, the wife of William of Orange, was immediate heir to the English Crown. But the birth (June 10th, 1688) of James's son by his second Queen, Mary of Modena, put an end to all such hopes; and deprived even the most timid

conspirators among the patriotic party of all pretexts for delay.[1]

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

[1] See Hallam's remarks, *Const. Hist.* vol. i. p. 112.

a party triumph by the sacrifice of their country's independence.[1]

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

[1] The ninth chapter of Sir James Mackintosh's *Review of the Causes of the Revolution* is a masterly examination of the causes and circumstances by which alone a people can be justified in taking up arms against established government. Though written with immediate reference to the Revolution of 1688, it is also a lucid and argumentative statement of general principles on this all-important point, which the historical student and modern politician will find invaluable especially with reference to revolutionary movements in foreign countries.

Whitehall to Feversham on the 10th of December; he was accidentally discovered there and brought back: but on the 18th he again left Whitehall, and lingered for a few days at Rochester. On the 23rd, he finally left England, and fled to France, where he landed on the last day of the year.

Entering the capital, December 19, 1688, William assembled the Lords Spiritual and Temporal then in London, and also all gentlemen who had been members of any parliament in Charles the II.'s reign, together with the municipal authorities of London. By their advice and at their request, he assumed the Provisional Government of the country, and issued letters summoning a Convention of the estates of the realm.

Under these writs the House of Lords, consisting of about ninety peers and bishops, and a House of Commons regularly elected by the various counties and boroughs, assembled on the 22nd of January, 1689. On the 28th, the House of Commons passed their great vote, that King James had abdicated, and that the throne was thereby vacant. The House of Lords at first were less resolute, and many of that body were in favour of appointing a regent, but continuing the title of James as nominal king. After long and interesting discussions on this and several other important points, the House of Commons prevailed, and their vote was assented to by the Lords, who thereupon forthwith passed a resolution that the Prince and Princess of Orange should be declared King and Queen of England, and all the dominions thereunto belonging. The Commons wisely interposed a solemn declaration of the people's rights, which was embodied in the Bill of Rights in the following year.

William, on taking the throne by virtue of the final

resolution in his favour, to which both Houses came on the 13th of February, 1689, summoned a regular parliament; and one of the first acts of that parliament was to pass the great statute which has just been named, and which is the third great bulwark of English liberty. The preamble of the Bill of Rights narrates clearly, forcibly, and fully the violations of the known laws and free institutions of the realm which the late king had committed, and establishes guarantees against similar wrongs. I will at once transcribe this most important of modern statutes, adding a few brief explanatory notes to some of its provisions.

AN ACT DECLARING THE RIGHTS AND LIBERTIES OF THE SUBJECT, AND SETTLING THE SUCCESSION OF THE CROWN. A.D. 1689.

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing all the estates of the people of this realm, did, upon the thirteenth day of February . . . present unto their Majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following; viz. :—

Whereas the late King James II., by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom :—

1. By assuming and exercising a power of dispensing[1]

[1] See *supra*, chap. xiv., as to the dispensing power exercised by our early kings. James assumed the power of dispensing generally with the observance of a whole class of statutes by a whole class of people. See authorities as to the dispensing power in Amos's *Fortescue*, p. 31. Lord Coke, while admitting the legality of it in special cases and

with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the said assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognisable only in Parliament; and by divers other arbitrary and illegal courses.

9. And whereas of late years partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

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within particular limits, had reprobated in the most forcible manner the notion that the Crown had a general power of abrogating or changing laws.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II. having abdicated the government, and the throne being thereby vacant, his Highness the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and divers principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons to represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January . . . in order to such an establishment, as that their religion, laws and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal, and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties, declare:—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown,

by pretence and prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law.[1]

7. That the subjects which are Protestants, may have arms for their defence suitable to their conditions, and as allowed by law.[2]

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

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[1] See Comment on this, *infra.*

[2] "In connection with the rights of personal liberty and security, is the right of the subject to carry arms for his defence, suitable to his condition and degree, and such as are allowed by law. There is an ancient enactment, however [2 Edw. III. c. 3], against going armed under such circumstances as may tend to terrify the people, or indicate an intention of disturbing the public peace; and by the unlawful Drilling Act, 1819, the training of persons without lawful authority to the use of arms is prohibited, and any justice is authorised to disperse such assemblies of persons as he may find engaged in that occupation, and to arrest any of the persons present."—Stephens' *Commentaries*, 14th ed. vol. i. p. 87.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue, to the Princess Anne of Denmark, and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

III. And that the oaths hereafter mentioned be taken by all persons of whom the oaths of allegiance and supremacy might be required by law, instead of them;

and that the said oaths of allegiance and supremacy be abrogated.

I, A. B., do sincerely promise and swear, That I will be faithful and bear true allegiance to their Majesties King William and Queen Mary: So help me God.

I, A. B., do swear, That I do from my heart abhor, detest, and abjure as impious and heretical, that damnable doctrine and position, that Princes excommunicated or deprived by the Pope, or any authority of the See of Rome, may be deposed or murdered by their subjects, or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state, or potentate hath, or ought to have, any jurisdiction, power, superiority, pre-eminence, or authority ecclesiastical or spiritual, within this realm: So help me God.

IV. Upon which their said Majesties did accept the Crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in Parliament assembled, for the ratifying, confirming and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of Parliament, do pray that it may be declared and enacted, That all and

singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts think, and do hereby recognise, acknowledge, and declare, that King James II. having abdicated the government, and their Majesties having accepted the Crown and royal dignity as aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royal State, Crown, and dignity of the said realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions, and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested and incorporated, united, and annexed.

VIII. And for preventing all questions and divisions in this realm, by reason of any pretended titles to the Crown, and for preserving a certainty in the succession thereof, in and upon which the unity, peace, tranquillity, and safety of this nation doth, under God, wholly consist and depend, the said Lords Spiritual and Temporal, and

Commons, do beseech their Majesties that it may be enacted, established, and declared, that the Crown and regal government of the said kingdoms and dominions, with all and singular the premises thereunto belonging and appertaining, shall be and continue to their said Majesties, and the survivor of them, during their lives, and the life of the survivor of them. And that the entire, perfect, and full exercise of the regal power and government be only in, and executed by, his Majesty, in the names of both their Majesties during their joint lives; and after their deceases the said Crown and premises shall be and remain to the heirs of the body of her Majesty: and for default of such issue, to her Royal Highness the Princess Anne of Denmark, and the heirs of her body; and for default of such issue, to the heirs of the body of his said Majesty: And thereunto the said Lords Spiritual and Temporal, and Commons, do, in the name of all the people aforesaid, most humbly and faithfully submit themselves, their heirs and posterities, for ever: and do faithfully promise, That they will stand to, maintain, and defend their said Majesties, and also the limitation and succession of the Crown herein specified and contained, to the utmost of their powers, with their lives and estates, against all persons whatsoever that shall attempt anything to the contrary.

IX. And whereas it hath been found by experience, that it is inconsistent with the safety and welfare of this Protestant kingdom to be governed by a Popish Prince, or by any King or Queen marrying a Papist, the said Lords Spiritual and Temporal, and Commons, do further pray that it may be enacted, That all and every person and persons that is, are, or shall be reconciled to, or shall hold communion with, the See or Church of Rome, or shall profess the Popish religion, or shall marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the Crown and government of this realm, and Ireland, and the dominions thereunto belonging, or any part of the same, or to have,

use, or exercise any regal power, authority, or jurisdiction within the same; and in all and every such case or cases the people of these realms shall be and are hereby absolved of their allegiance; and the said Crown and government shall from time to time descend to, and be enjoyed by, such person or persons, being Protestants, as should have inherited and enjoyed the same, in case the said person or persons so reconciled, holding communion, or professing, or marrying as aforesaid, were naturally dead.

X. And that every King and Queen of this realm, who at any time hereafter shall come to and succeed in the Imperial Crown of this kingdom, shall, on the first day of the meeting of the first Parliament, next after his or her coming to the Crown, sitting in his or her throne in the House of Peers, in the presence of the Lords and Commons therein assembled, or at his or her coronation, before such person or persons who shall administer the coronation oath to him or her, at the time of his or her taking the said oath (which shall first happen), make, subscribe, and audibly repeat the declaration mentioned in the statute made in the thirteenth year of the reign of King Charles II., intituled "An Act for the more effectual preserving the King's person and government, by disabling Papists from sitting in either House of Parliament." But if it shall happen that such King or Queen, upon his or her succession to the Crown of this realm, shall be under the age of twelve years, then every such King or Queen shall make, subscribe, and audibly repeat the said declaration at his or her coronation, or the first day of meeting of the first Parliament as aforesaid, which shall first happen after such King or Queen shall have attained the said age of twelve years.

XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present Parliament, and shall stand, remain, and be the law of this realm for ever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and

Commons, in Parliament assembled, and by the authority of the same, declared, enacted, or established accordingly.

XII. And be it further declared and enacted by the authority aforesaid, That from and after this present session of Parliament, no dispensation by *non obstante* of or to any statute, or any part thereof, shall be allowed, but that the same shall be held void and of no effect, except a dispensation be allowed of in such statute, and except in such cases as shall be specially provided for by one or more bill or bills to be passed during this present session of Parliament.

XIII. Provided that no charter, or grant, or pardon granted before the three-and-twentieth day of October, in the year of our Lord One thousand six hundred eighty-nine, shall be any ways impeached or invalidated by this Act, but that the same shall be and remain of the same force and effect in law, and no other, than as if this Act had never been made.

"The Glorious Revolution" has been described as a mere oligarchical movement. Against this adverse criticism we may quote the judgment of Guizot:—"It has often been said in France, and even in England, that the Revolution of 1688 was exclusively aristocratic; that it was planned and achieved by the higher classes for their own advantage, and was not accomplished by the impulse or for the good of the people." This view is, he declares, "a remarkable example, among many others, of the confusion of ideas and the ignorance of facts which so often characterise the judgments passed on great events."

After stating in somewhat exaggerated language the popular character of the political and religious settlement achieved after the expulsion of the Stuarts, the great French historian continues:—

"The Revolution of 1688 was popular in its principles

and results, and was aristocratic only in the mode of its execution; the men of weight and mark in the country by whom it was conceived, prepared, and carried through, being the faithful representatives of the general interests and sentiments. It is the rare felicity of England that powerful and intimate ties were early formed, and have been perpetuated, among the different classes of society. The aristocracy and the people living amicably, and deriving prosperity from their union, have sustained and controlled each other. The natural leaders of the country have not held themselves aloof from the people, and the people have never wanted leaders. It was more especially in 1688 that England experienced the benefit of this happy peculiarity in her social order. To save her faith, her laws, and her liberties, she was reduced to the fearful necessity of a revolution: but she accomplished it by the hands of men disciplined in habits of order and experienced in government, and not by those of revolutionists. The very men who were the authors of the change contained it within just limits, and established and consolidated the institutions to which it gave birth. The cause of the English people triumphed by the hands of the English aristocracy: this indeed was the great characteristic of the Revolution, and the pledge of its enduring success."

The provisions in the Bill of Rights which declare that it is illegal to raise or keep a standing army within the kingdom in time of peace, unless with consent of parliament, deserve particular attention; not only because they take away the ordinary instrument of despotism against freedom, but because they ensure the observance of the great constitutional rule which the statute afterwards ordains—the rule that parliaments ought to be held frequently. The maintenance of a regularly-disciplined force has long been indispensable for the defence of the British

Empire. The consequence has been, that ever since the Bill of Rights, an annual Act of Parliament has been passed authorising the keeping on foot a defined number of troops, and giving the Crown the power of exercising martial law over them. This annual Act was called the Mutiny Act; but in 1879 reforms were introduced, and since 1881 a short annual Army Act has been passed specifying the number of soldiers which the Crown may maintain during the year. The Act is in force for a year only; so that there must be a session of parliament every year, and a new Act passed, or the army would be disbanded.[1] In addition to this important guarantee for the regular meeting of parliament, a system of settling the royal revenue was established in William's reign, which necessitated the observance of the same constitutional principle. The House of Commons then determined no longer to vote to the Crown certain general large sums of revenue, to be applied to particular purposes according to the royal discretion, but they appropriated specific parts of the revenue to specific purposes of government. This principle had been previously attempted, but it is only since 1688 that it has been steadily enforced. The modern system of public accounts perfected by Mr. Gladstone in the Exchequer and Audit Act of 1866 has given the House of Commons so effectual a control over the executive power,—or rather, has made its concurrence and participation in all expenditure and taxation so vital, that no administration can possibly subsist without its concurrence; "nor can the session of parliament be intermitted for an entire year

[1] For the laws governing our military and naval forces see Stephens *Commentaries* (14th edition), vol. ii. p. 566 *sqq.* See also for the whole subject of control over finance both by the House of Commons and the Treasury a recent *Report on National Expenditure* by a Select Committee of the House of Commons, No. 387 of 1902.

without leaving both the naval and military force of the kingdom unprovided for."[1]

In order to obviate the confusion that was likely to arise as to the right of the Crown, in the event (which actually occurred) of there being no surviving issue of William and Mary, of the Princess Anne, or of William, it was found necessary, in 1700, to fix more definitely the succession of the Crown, and it was now further limited to the Princess Sophia, Electress of Hanover, and her heirs, she being grand-daughter of James I., and the next in succession who held the Protestant faith. In the statute by which this was done, called the Act of Settlement, several very important constitutional provisions were introduced. Eight articles were inserted in the Act, to take effect from the accession of the House of Hanover:—

1. That whosoever shall hereafter come to the possession of this Crown, shall join in communion with the Church of England as by law established.

2. That in case the Crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which do not belong to the Crown of England, without the consent of parliament.

3. That no person who shall hereafter come to the possession of this Crown, shall go out of the dominions of England, Scotland, or Ireland, without consent of parliament.

4. That from and after the time that the further limitation by this Act shall take effect, all matters and things relating to the well governing of this kingdom, which are properly cognisable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by

[1] Hallam, *Const. Hist.* vol. iii. p. 159.

such of the Privy Council as shall advise and consent to the same.

5. That, after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although to be naturalised or made a denizen—except such as are born of English parents), shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments, from the Crown, to himself, or to any other or others in trust for him.

6. That no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons.

7. That, after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament, it may be lawful to remove them.

8. That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.

Some of these provisions require a little comment and explanation.

The second, third, and fifth were obviously caused by the jealousy that was felt of a new and foreign dynasty. The third, which sought to impose so marked a restraint on the personal freedom of the sovereign, was repealed in the very first year after George I. became king. The fourth was designed to be a far more important constitutional regulation, and it draws our attention again to the subject of the king's *Concilium Ordinarium*, or Privy Council, which has been spoken of at an earlier part of this work.[1]

It has there been pointed out that our sovereigns had

[1] See p. 219, *supra*.

their regular council, consisting of the chief officers of State, and of such persons as the king thought fit to summon. They took an oath of fidelity and secrecy, and these were the king's privy councillors. The obnoxious judicial power which was practised first by the Council, and afterwards by a portion of it organised as the Court of Star Chamber, has also been referred to. The abolition of this tribunal did not interfere with the existence of the Privy Council in its natural and legitimate capacity.

The number of the privy councillors was gradually found inconvenient for practical government, and the custom grew up of a few members of it, who really were the active and confidential ministers of the Crown, deliberating apart. This select body acquired the name of the "Cabinet Council," with which we are all practically familiar, though the term "Cabinet Minister" is unknown in constitutional forms. For some time it appears to have been usual for the Cabinet Council, when they had resolved upon a measure, to lay it before the Privy Council for their assent and adoption, but no further discussion took place, and the ratification was a mere formality. Out of a desire to ascertain more easily the main individual promoters and advisers of State measures, it was endeavoured in the Act of Settlement to revive the old system, to compel the discussion of all State affairs in full Privy Council, and to discriminate between those who promoted and those who dissuaded each resolution, by making all who voted for it sign their names to it. It was, however, soon perceived that this system would cause infinite delay and embarrassment in governing the kingdom, and the clause was repealed by a statute in Queen Anne's reign, before the time when its provisions were to have come into operation.[1]

[1] See Hallam's *Const. Hist.* vol. iii. p. 249.

The practice above referred to, of summoning all the Privy Council to adopt and ratify the previously-arranged measures of the Cabinet, has also long become obsolete. And it is correctly stated that "the office of privy councillor, as distinct from cabinet minister, is now little more than a titular distinction, conferring the title of right honourable on the bearer of it." Royal proclamations and orders still emanate, as the law requires, from the Privy Council, but by long-established usage no privy councillor attends, unless specially summoned. Each, however, though he be not a cabinet minister, and though he be in actual opposition to the Ministry of the day, has the right of attending, and that right was exercised in a very memorable and important crisis in our constitutional history, when Queen Anne was on her death-bed, and when the Dukes of Argyll and Somerset suddenly appeared in the council-chamber at Kensington Palace, and disconcerted all the measures of Bolingbroke and his coadjutors for bringing in the Pretender after the queen's decease.[1]

[1] For the present position of the Privy Council, its relation to the various government departments, and the important functions that several modern statutes have vested in a portion of the Council, called the "Judicial Committee of the Privy Council," see Sir William Anson's *Law and Custom of the Constitution*, Part II., "The Crown." It has been mentioned in the text that the king's orders and proclamations are issued in Privy Council. This is in several cases required and authorised by statute; but the sovereign has also a general constitutional prerogative of issuing proclamations, which is vested in the sovereign alone, though exercised by him in and by the advice of his Council. It has been observed as to this part of the prerogative, "These proclamations have then a binding force, when (as Sir Edward Coke observes) they are grounded upon and enforce the laws of the realm. For though the making of laws is entirely the work of a distinct part—the legislative branch of the sovereign power—yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate; and therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subject, while they do not either contradict the old laws or tend to establish new ones, but only enforce the execution of such laws as are already

The sixth article in the Act of Settlement was designed to put a stop to the rapidly-increasing influence which the Crown was acquiring over the House of Commons, by being able to confer places and pensions on its members. This power had been made an engine of extensive and grievous corruption during the last bad reigns, and had excited just popular indignation. But the framers of the Act of Settlement, though laudably anxious to check this abuse, went into the opposite extreme, which Mr. Hallam truly calls "the preposterous extremity of banishing all servants of the Crown from the House of Commons."

This sweeping clause of the Act of Settlement never came into operation. It was repealed in the fourth year of Anne's reign. Another Act on the subject was passed in the same reign, by which every member of the House of Commons, accepting an office under the Crown, except a higher commission in the army, must vacate his seat, but may be re-elected; and by which, also, persons holding offices created since the 25th of October 1705 were incapacitated from being elected or re-elected members of parliament. The statute excluded at the same time all such as held pensions during the pleasure of the Crown; and, to check the multiplication of placemen, it was enacted that no greater number of commissioners should be appointed to execute any office than had been employed in its execution at some time before that parliament.

in being, in such manner as the king [*i.e.* his government] shall judge necessary." Departmental orders are frequently issued by departments of the Government in order to carry out the powers with which they are entrusted by statute. Sir William Anson defines a royal proclamation as the formal announcement of an executive act such as a dissolution or summons of parliament, or a declaration of peace or war. It should be clearly understood that the king is legally irresponsible in all cases. The Government or a single minister is responsible for whatever action is taken by royal authority. And such action must never contravene the law.

The seventh article of the Act of Settlement, that which provides for the independence of the judges, is the most important of all. The Stuart kings had been in the habit of systematically packing the bench, in order to secure decisions favourable to the Crown, on all points of law; and in order also that unscrupulous partisans of the Court should preside at all State trials, and work out the royal partialities and hatreds. Men who showed any independence in such matters, or who were known to be opposed to the views of the Court, were summarily dismissed from the bench, and more obsequious tools of the Government were appointed on the eve of any important judicial proceeding. While this could be done, the liberties of the subject were never safe. There was not one that might not be brought in some form before a court of law, to be upheld or nullified; and the sovereign who could garble at his will the administration of the laws, need care little who made them. Without open violence, it was always in his power "constitutionally to ruin the constitution."[1] The Act of Settlement gave the remaining necessary bulwark to our national freedom, when it made the judges irremovable, except on the joint requirement of both Houses of Parliament; and when also, by requiring their salaries to be fixed and ascertained, instead of depending on the caprice of the Crown, it freed them from all influence, and from all suspicion of being under the influence of corruption or intimidation.

It is to be observed that the Act of Settlement, while it gave a new dynasty the right to reign in England, solemnly acknowledged on that solemn occasion the existence and authority of all the subjects' rights. The conclusion of the Act of Settlement is as follows:—

[1] The phrase is Vergniaud's.

"IV. And whereas the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same; the said Lords Spiritual and Temporal, and Commons, do therefore further humbly pray, That all the laws and statutes of this realm for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed, and the same are by his Majesty, by and with the advice and consent of the said Lords Spiritual and Temporal, and Commons, and by authority of the same, ratified and confirmed accordingly."

It would be superfluous to point out categorically how completely this Act, the Petition of Right, and the Bill of Rights, recognise and confirm the primary great constitutional principles which the Great Charter first established. But, before proceeding to the Reform Bill of 1832 (which seems next in constitutional importance), it may be useful to consider shortly the actual state of the English Government and nation soon after the Revolution of 1688, and during the early part of the last century.

With the expulsion of the Stuarts the long struggle between the king and the people ended; and the substitution on the English throne of a line of princes, who derived their title confessedly through the nation's will, extinguished all those absurd dogmas as to the right divine of kings, the patriarchal principle of government, the duty of the subject to submit to all royal orders, and the like, which had previously been never-failing pretexts for sanctioning or excusing violations of constitutional

right, and graspings after absolute power. Indeed, since the reign of William, the royal heads of our limited monarchy, with the single exception of George III., have exercised comparatively little personal interference in State affairs. Our kings and queens have carried on the government of the country through ministers, who have been, and necessarily must be, dependent on parliament for their tenure of office. Not that the personal opinions or character of the sovereign of this country ever can be unimportant. "His habits and tastes are always matters of notoriety, and often of imitation. Access to his society is always coveted. He may give that access in a manner useful, or mischievous, or absolutely indifferent. He may call to his Court those who are most distinguished by genius or by knowledge; or those whose only merit is their birth or their station; or parasites, buffoons, or profligates. Even in the appointment of ministers he may sometimes exercise a sort of selection. He is sometimes able to delay, for a short period, the fall of those whom he likes, and the accession of those whom he dislikes; and he can sometimes permanently exclude an individual."[1]

He might, indeed, do more than this, provided parties were nearly balanced. In such a state of things the personal adherents of the sovereign (and a band more or less numerous of such there will always be) might conceivably turn the scale, and determine the adoption or rejection of measures of the greatest moment both in foreign and domestic policy. The influence exercised by George III., in very critical times, by means of "the king's friends" is notorious. The power of dissolving parliament was once a strong engine in the sovereign's hands whereby he could protect himself from ministers personally dis-

[1] *Edinburgh Review* on Brougham's *Political Philosophy*.

tasteful to him, and gain at least the chance of seeing a House of Commons returned whose feelings might harmonise with his own. But if the national will, as expressed by the representative assembly, is decided and strong on one side of a question, the sovereign is powerless to oppose it. Unless parliament passes the customary annual Mutiny Bill, and unless it gives the customary annual votes for pecuniary supplies, the armed forces of the State must be disbanded, and the whole machinery of government must be stopped.

The principle that our monarchy is hereditary has been maintained in practice ever since the accession of the House of Hanover. We all feel the advantages of an old limited hereditary monarchy, if it be only on account of the quiet and good order which its principle of succession ensures, compared with the mischief which may follow when the post of chief magistrate is intrigued for by the leaders of factions, or fought for by ambitious soldiers. It is, of course, impossible to secure a succession of good and wise princes; nor can human foresight calculate when a Marcus Aurelius will be followed by a Commodus. Hence, our Constitution is rightly cautious and restrictive. It is framed not for a single generation, or with reference to the personal qualities of a particular ruler, but it is the fruit of the experience of many ages, and is designed for duration and permanence. It therefore provides checks and securities against the ambition, and passions, and weaknesses of human nature; and it fixes limitations sufficient to secure good government, and to protect liberty, even under a bad prince. But at the same time it leaves open a field for the exercise of the virtues of a good one. The constitutional sovereigns of England who understand and act up to their true political duties, with-

out seeking to overstep them; who also employ the high influence of their station and example for the encouragement of social and domestic virtue, for the advancement of learning and the well-judged patronage of art, deserve the gratitude of the people.

Our House of Lords, at the Revolution of 1688, consisted of about 150 temporal peers and 26 bishops. I have before indicated the causes that originally made the English an hereditary peerage: and gradually it became a fixed maxim that the individual whom the sovereign summoned by his royal writ to the House of Lords acquired thereby not only the right to sit in the particular parliament during which the writ issued, but a right for himself and heirs to become and be thenceforth a peer of the realm. Thenceforth every peer of full age has been held entitled to his writ of summons at the commencement of every parliament. But although it is not in the power of the Crown to sway the deliberations of the House of Lords by excluding old peers, the prerogative of creating new temporal peers at discretion has always rested in the Crown, though a strong effort was made in George I.'s reign to cut down this important constitutional prerogative. A bill limiting the House of Lords, after a very small increase should have been made, to its then actual members was brought in by Lord Sunderland's ministry, and carried easily through the Upper House, but lost in the Commons. The House of Lords would then have been free from all constitutional check; whereas now the prerogative of the Crown in making new peers should be an effective controlling power in the hands of a ministry.

In modern times the necessity of a second chamber is frequently questioned. Such a second chamber, in

order to be of the least use, must not be a mere duplicate of the House of Commons; but must, if elective, be chosen on a different plan, for different periods, and by different constituencies from those which elect the House of Commons. But it must not depend on wealth; for a chamber elected solely by the wealthy class of the community would be more oligarchical and obstructive to reform than the House of Lords has ever been.

The House of Commons long continued to consist of knights of shires, and representatives of cities and boroughs. The introduction of members for the Universities of Oxford and Cambridge was hardly material in point of number, though it illustrated the working of educational representation. The mode in which particular boroughs acquired, lost, or regained the right of sending representatives has become a topic of comparatively little practical interest since the Reform Bill of 1832. It seems probable that under the Plantagenets every town of consequence received a writ, directing it to return burgesses to parliament; but it is clear that, from the commencement of our representative system, some very inconsiderable places returned members. Sometimes the negligence or partiality of the sheriffs omitted towns that had formerly received writs; and frequently new boroughs, as they grew into importance, or from some private motive, acquired the right of representation. Gradually it became a recognised principle that the right of a borough to return members having once existed, could never be lost: and the 111 cities and towns which returned members at the accession of Henry VIII. continued to do so down to 1832, though many had sunk into tiny hamlets.

We have, in a previous chapter, examined the subject of who were the electors in the boroughs in early times; and

it has been pointed out that, as the power of the House of Commons increased, the composition of the electoral bodies became an object of growing attention to the Crown; and how, especially under the Tudors and Stuarts, sedulous efforts were made to mould and influence the municipal composition of those parliamentary boroughs which were also corporate cities and towns. By machinations of this kind, by the silent effect of "the great innovator, Time," in reducing many places which had once been populous into wretched hamlets, and by many boroughs having (as has before been mentioned) been originally selected by the Crown to return members on account of their liability to Crown influence,[1] a large number of the parliamentary boroughs became the mere instruments of powerful individuals, who owned the few houses in them which gave a right of voting, or who purchased the suffrages of a little clique of self-elected electors. These close, or rotten boroughs, as they were familiarly termed, gave great facilities for the increase of the indirect influence of the Crown, and of the great nobles. In the ninth year of Queen Anne, the landed aristocracy sought to secure its ascendency for ever, by excluding the rest of the community from parliament, and actually obtained the passing of an Act by which every member of the Commons, except those for the universities, was required to possess, if a knight of the shire, a freehold or copyhold estate of clear £600 per annum, and, if representative of a borough, a like landed qualification to the amount of £300 per annum. It has

[1] The latest instance of the Crown creating a borough with a right to send members was in Charles II.'s reign. This caused some little debate in the Commons, but was ratified by them. The Commons, in subsequent reigns, would unquestionably have resisted any further exercise of this power, "on the broad maxim of having exclusive privilege in matters relating to their own body, which the House was become powerful enough to assert against the Crown."

been shown that the old statute of Henry VI., requiring county representatives to be chosen from "notable knights, or such as shall be able to be knights," had fallen into desuetude; but the new law went far beyond it, and would, if effectually carried out, have converted our House of Commons into an odious deputation of landed oligarchs. This law, however, was systematically evaded, nor were the provisions of a later statute,[1] which made personal as well as real property qualify its owner for parliament, much more efficacious in attaining what was said to be its proper object, that of preventing needy adventurers from obtaining seats in the House. Neither of these Acts having required a member to possess the stipulated qualification during all the time that he continued to be a member, it always was enough to procure for the occasion a colourable transfer from some person, who really held the requisite property, which transfer was cancelled or reversed directly the member had taken his seat. This practice may be almost said to have received the sanction of the Legislature by what took place when the 33 Geo. II., c. 30, was passed. That statute, which first made it necessary for the newly-elected member to swear to his qualification on taking his seat, contained, when it was first brought forward, a clause requiring every member who should at any time during the continuance of the parliament to which he was elected, sell, dispose of, alien, or in any wise encumber the estate which made his qualification, to deliver in on oath a statement for a new or further qualification, before he should again presume to sit or vote as a member of the House of Commons. But the Legislature rejected this clause; and thus deliberately sanctioned the system by which men of no property,

[1] 1 & 2 Vict. c. 48.

who could find wealthy friends with confidence in their honour, obtained seats as English members.[1]

At length, in the year 1858, the necessity for a property qualification for a seat in the House of Commons was formally abolished by 21 & 22 Vict. c. 26; and the Constitution was thus relieved of a restrictive barrier, which, though in general a mere fiction, was sometimes made to operate as an annoyance and a hardship to individuals.

The laws which regulate the duration of parliament also belong to the period between the Revolution and the accession of George III.; they are not only of great constitutional importance, but have often occasioned sharp political controversy. By an ancient statute of Edward II.'s reign (5 Edw. II. c. 29[2]), which is principally a confirmation of the Magna Carta, it was provided:—"Forasmuch as many people be aggrieved by the king's ministers against right, in respect to which grievances no one can recover without a common parliament; we do ordain that the king shall *hold* a parliament once in the year, or twice if need be." And a statute of the next reign (4 Edw. III. c. 14) enacted that "a parliament shall be holden every year once, and more often if need be." These Acts are generally supposed to have only provided that there should be an annual meeting of parliament, and not that there should be a new parliament every year. Certainly they were little heeded in practice, and there was no explicit enactment as to how often there should be a new parliament until the Triennial Bill of 1642 was passed by the Long Parliament. After the Restoration this salutary statute was repealed at the king's special request; and one of Charles II.'s parliaments, which was found eminently

[1] See Smollett's *History of England*, book iii. c. 13, sect. 56.
[2] *Statutes of the Realm*, i. 165.

loyal and corruptible, was prolonged in mischievous existence for the enormous period of seventeen years. In the year after the Great Revolution a bill was brought in and passed both Houses to limit the duration of parliament to three years. King William refused his assent to it; but the Commons were insistent; a repeated exercise of the royal veto [1] would have been perilous to its possessor, and a Triennial Bill became law in 1694. But in 1717 it was deemed unsafe by the ministers of the newly-arrived Hanoverian king to risk a general election, and the celebrated Septennial Act was passed, which has hitherto stood firm against the repeated attempts that have been made to obtain a return to triennial parliaments. But if a shorter period were substituted on the ground that after a time parliament loses touch with the country, four or five years would probably now be preferred to three.

The last, and in some senses the most important, of the statutory changes in our Constitution between 1688 and 1832 were the two Acts which converted it from an English to a British Constitution—the Act of Union with Scotland, passed in 1707, and the similar Act with regard to Ireland, passed in 1800. By these Acts the two countries lost their separate political existence. Their parliaments were dissolved, and their systems of taxations were assimilated to that of England.

The influence of the middle classes, which had been considerably developed and augmented during the period between the Revolution and the death of George the Second, went on increasing in a rapidly accelerated ratio during the long and eventful reign of George the Third. The following picture of the political and social changes

[1] It is not uninstructive to contrast the disuse of the royal veto in England since William III.'s reign with its frequent exercise by the American Presidents.

which came on the English nation in the second half of the eighteenth century are from the pen of MacCulloch, a careful and trustworthy writer of the next generation :—

The extension of commerce and manufactures, after the Treaty of Paris, in 1763, was rapid and unprecedented. Large manufacturing and commercial towns arose in all parts of the country, the inhabitants of which were but little influenced by those powerful ties which generally connect an agricultural population with the superior landowners. With the increase of opulence and population consequent upon the increase of manufactures and trade, education and the desire of political information became more generally diffused. The press acquired great influence. Political journals were established in every considerable town, in which the conduct of public men and the policy of all the measures of Government were freely canvassed. The improved facilities of internal communication afforded the means of conveying intelligence with astonishing rapidity from one part of the country to another ; so that most persons began to take an interest, not only in what was going on around them, but in public affairs, and in the concerns of the remotest part of the empire. Prejudices and established opinions of all sorts were openly attacked. The structure of the political fabric, and rights and privileges of the different ranks and orders of society, were subjected to a searching investigation, and their claim to respect began to be tried by reference to their usefulness rather than their antiquity. Public opinion, expressed through the medium of a thousand different channels, became a check on the executive scarcely inferior in efficacy to the existence of a popular assembly. Under such circumstances we need not wonder that the enterprising citizens of great manufacturing and commercial towns, as Manchester, Birmingham, Sheffield, etc., felt daily more dissatisfied at being denied the privilege possessed by so many inferior boroughs, of sending representatives to the House of Commons. They began, during the American war,

publicly to manifest their impatience at such exclusion; and, deriving confidence from their numbers, their wealth, and their intelligence, they prosecuted their claims to participate directly in the privileges of the constitution with a boldness which would probably have been long ago successful if the progress of peaceful reformation had not been arrested by the violence of the French Revolution. The alarms occasioned by that event, and the war that grew out of it, suspended for a while the demand for a remodelling of the representative system. But after the peace of 1815, these solicitations were renewed; and the reasonableness of the claim, united with the great accession of popular influence and the excitement occasioned by the movements on the Continent in 1830, made it imprudent any longer to disregard it.

Undoubtedly the wars originating from the French Revolution had the effect of postponing political reform in England for more than a generation. But when at length Reform came, it was the more radical in its features and the more revolutionary in its train of consequences.

The long reign of the territorial aristocracy came to an end at last with the passing of the Reform Bill of 1832. By that statute, the number of county members for England and Wales was increased from 95 to 159; the number of members for the metropolis and its adjacent districts was augmented to 18; 56 parliamentary boroughs were wholly, and 31 partially, disfranchised; and 43 new boroughs were created, 22 of which returned two members, and 21 one member each. With respect to the county franchise, the old forty-shilling freeholders were retained; except freeholders for life in certain cases, where the amount of yearly value required was £10. But three other new classes of voters were introduced. These were:—First, copyholders of £10 a year; secondly,

leaseholders, if lessees, or assignees, of a term of sixty years, of £10 yearly value; if of a term of twenty years, of £50 yearly value; and the sub-lessees or assignees of under-leases, respectively, of the yearly value of £10 and £50, subject to conditions as to length of possession; thirdly, occupying tenants, without reference to the length of the tenancy, but at a yearly rent of £50. No condition of residence was imposed on county voters. In cities and boroughs some ancient rights were reserved, but subject to important restrictions as to residence. But the great feature of the Reform Act was the new household franchise which it introduced and gave to £10 householders, subject, however, to conditions as to residence and payment of rates, and to temporary loss through the receipt of parish relief.

Such in brief are the provisions of the celebrated Reform Bill of 1832; it brought about a transformation of the House of Commons and marked the beginning of a great era of legislative activity. Its general effect undoubtedly was to transfer political power into the hands of the middle classes, whose ideas, guided by Bentham, Cobden, and Mill, may be said to have predominated for the next thirty or forty years.

CHAPTER XVII

Population and Electors — Distribution of Political Power — The Crown and the Cabinet—Reform Bills of 1867 and 1884—Local Self-Government — Executive and Judiciary — Civil Service—House of Lords—Influence of Public Opinion — Right of Free Discussion and Liberty of the Press.

THE total number of the inhabitants of England and Wales at the time of the last Census (1901) was 32,526,000, having more than doubled in sixty years and more than trebled in the course of the nineteenth century.[1] During the last thirty years, since the great fall took place in the price of corn, there has been a considerable diminution in the number of agricultural labourers and a consequent decline of population in most of the rural counties. About one-sixth of the population is qualified to vote at parliamentary elections. On the parliamentary register for 1902 there were in England and Wales 5,464,000 electors, in Scotland 705,000, and in Ireland 721,000. But owing to the system of plural voting, by which persons with property in more than one electoral area may vote more than once, the number of persons who were

[1] The population of Scotland has progressed at a slightly slower rate, from 1,608,000 in 1801 to 2,620,000 in 1841 and to 4,472,000 in 1901. Between 1801 and 1841 the Irish population grew from 5,319,000 to 8,175,000. Then came the terrible famine, and in 1851 the population was only six millions and a half. Until the end of the century emigration continued, and in the census of 1901 the population was only 4,458,000.

voters was smaller than the number of electors on the register. The local government franchise is wider than the parliamentary, as women who possess the necessary qualifications are allowed to vote in the same way as men for most local authorities. Let us now examine the constitutional rights which are or may be exercised by citizens of the United Kingdom.

First, we are to consider who participate directly or indirectly in legislation; and we are to remember that in a State where no taxes can be levied, save by express law, the legislative function includes the taxing function. Next we must turn our attention to administrative duties. What are the offices and magistracies of the State? who are eligible to them, and how appointed? Thirdly, we must ascertain who take part in the dispensation of justice.

Before, however, we discuss these three classes of political functions, we may touch upon the position of the Crown. The king was once the supreme and is still a constituent part of the imperial legislative power. He summons, prorogues, and dissolves parliament. In all matters of civil government, in all that relates to the inner life of the State, the king is in form chief magistrate of the nation, and all other magistrates act by his commission. In all that relates to the outer life of the State, in its dealings with other States, the king is still in form the chief representative of the majesty of the State, and it is perhaps in foreign affairs that his influence is most real. He has the sole prerogative of making war or peace, though this prerogative is of course exercised by the responsible ministry of the day; it is in his name that all treaties are concluded, and all international duties and courtesies performed.

The command of all the military and naval forces of the State is nominally also in the king's hands. In judicial matters he is regarded by the Constitution as the fountain of justice, and is "over all persons, and in all causes, as well ecclesiastical as civil, in these his dominions, supreme."

But while royalty may easily be represented as "the roof and crown" of our Constitution, history shows that the checks imposed by the ancient ordinances of the Constitution on the free will and free power of individual sovereignty were many and strong; and the limitations of custom and practice are stronger still. The necessity of obtaining annual supplies of money for the enormous expenses of the State, and the necessity of an annual renewal of the Army Act in order to keep our military forces embodied, make annual sessions of parliament inevitable. The sovereign must rule through responsible advisers; and these responsible advisers or ministers cannot carry on the affairs of the State without the sanction of the House of Commons, on which they are really dependent for their tenure of office. Since the reign of George III. parliament has been omnipotent both in legislation and administration, though its principal administrative powers have been delegated to the Cabinet, which, in the words of Mr. John Morley, "is nothing but a joint committee from the two Houses of Parliament maintained in power at the will and pleasure of one of them." But though the government of the country is in the hands of the Cabinet, and the Cabinet may be destroyed at any moment by a vote of the House of Commons, two important points are to be noted as regards the relations of the Cabinet to the House of Commons. In the first place, this "joint committee" is not chosen

by the House of Commons, but by the Prime Minister. It is a committee therefore in fact but not in form. In the second place, the real obstacle to the development of the popular will through the representative assembly is no longer the king but the House of Lords, which still possesses a constitutional right to amend and even to throw out the bills passed by the House of Commons. An adverse vote of the House of Lords has no effect upon the administrative action of Government, and its legislative power is severely curtailed by the custom which exempts the Budget and the financial clauses of bills from its purview. Nevertheless the House of Lords, with its present powers and constitution, is almost bound to find itself in perpetual conflict with the House of Commons, whenever the House of Commons is dominated by a Liberal majority. Since the Reform Bill the Liberal element in the House of Lords has gradually dwindled, until now, at the beginning of the twentieth century, it can muster scarcely one-tenth of the whole body of Peers temporal and spiritual.

Although the forms of the Constitution have been most carefully preserved, a complete political revolution has been gradually and peacefully consummated; for the rule of the middle classes which took the place of an aristocracy in 1832 was slowly converted into a democracy. After 1832 the advocates of a further extension of the franchise began to point out that an important change had taken place among the working classes of our town population in their desire and capacity for political power. By the middle of the nineteenth century half the population of England lived in the towns.

But the artisans and mechanics were not only different in number, they were wholly different in spirit, from their apathetic predecessors. The concentration of labour

and capital in large towns, the progress of education (lamentably imperfect as it still was), the springing up of a cheap press and a cheap literature, the ferment caused in men's minds first by the American War of Independence, then by the French Revolution, and finally by the upheavals of the year 1848, the growing habit of combining and acting in organised bodies,—these, and other causes, had worked a great alteration.[1] There might be much vice, much violence, much ignorance among these masses; but no one who knew them could deny that they contained hundreds and thousands of honest hardworking men, who read, studied, and discussed the political events of the day with growing interest and intelligence; who supported by their contributions a vast weight of taxation, and whose manual toil heaped up national wealth.

Under the Act of 1832, though the borough franchise could not be obtained unless a man took a £10 house and resided in it, the county franchise of 40s. freehold was easily attainable by any man who possessed or could save a very moderate sum. Societies began to be formed for the purchase of estates and multiplication of small freeholds in the counties, for the express purpose of fortifying the cause of reform. From 1852 Reform Bills were constantly before parliament. Gladstone's bill of 1866 was defeated, but in the following year Disraeli "dished the Whigs" by extending household suffrage to the towns. After this the extension of the suffrage to the labouring classes in country districts was only a question of time, and in 1884 household suffrage was extended to the counties. Thus, with the enfranchisement of the

[1] There is in the second volume of Bancroft's *American War* a graphic account of England as it was in 1763 which deserves an attentive perusal for the important contrasts which it shows between that England and the England of 1850.

agricultural labourers, the development of representative government, commenced in 1832, was practically completed.

Hitherto we have been reviewing the participation of citizens in the deliberative, and legislative, and taxing functions of the central government. We have been speaking of parliamentary power only. This undoubtedly is the highest and grandest form of political work; for not only is our parliament the great organ of the English Constitution, but it is also the great organ of the Constitution of the British Empire; of England and her sister kingdoms of Scotland and Ireland, and also more remotely of her magnificent colonial and other transmarine dominions in North America, in Australia, in India, in almost every region of the habitable globe. In the beautiful if somewhat rhetorical language of Burke: "The Parliament of Great Britain sits at the head of her extensive empire in two capacities: one, as the local legislature of this island, providing for all things at home, immediately, and by no other instrument than the executive power. The other, and, I think, her nobler capacity, is what I call her imperial character, in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any."[1]

But though our parliament is the mightiest of governing assemblies:—though, when we bear in mind the paramount influence which the House of Commons now exerts on the Government of England, as well as the unparalleled extent to which England's policy influences the fortunes of the world, we may safely assert

[1] Speech on American Taxation, 19th of April 1774. The self-governing colonies, of course, are now practically independent except as regards foreign policy. On points of law, however, there is still an appeal from their supreme courts to the Privy Council.

that the position of a member of the English House of Commons, if honourably acquired, and well and wisely used, is the most splendid that ever was opened to civilised man; insomuch, that even the haughty station of a senator of Old Rome in the palmiest days of her Commonwealth appears poor by comparison:—though we feel, therefore, that the privilege of a voice in the selection of the members of that House is the franchise most earnestly to be sought, and most conscientiously to be exercised:—though we gladly acknowledge all these attributes of parliamentary supremacy, we must also rejoice in the fact, that an Englishman's direct exercise of deliberative and legislative powers is not confined to parliament (of which but very few can ever become members); nor is his acquaintance with electoral duties and the working of political machinery restricted to the occasions when he votes for representatives in the House of Commons. There are almost innumerable other spheres of political action, and though each may seem humble and limited in itself, collectively they are of infinite importance, on account of the universality of their operation, and of their influence upon the daily life of the community. Every parish has had since 1894 its parish council or parish meeting, at which the inhabitants meet together for the dispatch of their common affairs and business. The parish is the smallest area of local self-government. Then come rural and urban districts, which are administered by rural and urban district councils. These bodies, which attained their present form in 1894, are local sanitary authorities and have to carry out the provisions of the Public Health Acts. The common affairs of the county are administered by the county council, which is now also the local Education

authority throughout the rural parts of the county. Every borough also has its town council, which still retains in the aldermanic system some traces of a less popular constitution dating from the Municipal Corporations Act of 1835. Lastly, the local administration of the poor, subject to a severe and rigid central control, is entrusted to a distinct body called the Poor Law Guardians, who were constituted by the great Poor Law Reform of 1834. Their administration is closely regulated and supervised by the Local Government Board partly by means of orders and partly by its inspectors. The local area for which they act is the Poor Law Union, and is composed of one or more parishes.

All these local authorities have power to spend and tax. Each of them has its clerk, and the larger ones have a staff of officials and a small army of workmen. They are all representative bodies, elected or renewed every year or every three years. But these local authorities are also invaluable as training grounds for parliament. They are themselves local parliaments. Their councils and their committees bring the principles and the practice of legislation and of representation home to every man's door, and they familiarise every man with them in his daily life. They diffuse, so to speak, a parliamentary atmosphere throughout the land. They habituate us to public speaking; and they accustom us to hear and to think, as well as to speak. They train us to due observance of the necessary forms and restrictions of public discussion. They arouse and maintain public spirit. They mature in us that aptitude for orderly association, and that capacity for organised energy, which seem to be instinctive in men of the Anglo-Saxon race. They foster the principle of acquiescence by the minority in

carrying out the resolutions of the majority, so long as those resolutions are unreversed, together with the freest action by that minority in endeavouring to procure a legitimate reversal of those resolutions. They aid in creating, and they materially strengthen among us, that rare and difficult sentiment which Grote, in his remarks on certain of the Athenian institutions, has finely termed "a Constitutional Morality—a paramount reverence for the forms of the Constitution, enforcing obedience to the authorities acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts, combined too with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own."

The diffusion of such a spirit through the whole community is the indispensable condition of a government at once free and peaceable; since any powerful and obstinate minority might render the working of free institutions impracticable, without being strong enough to conquer ascendency for themselves. In the time of Grote parliamentary obstruction had hardly been heard of, nor had a means of combating it been invented. Nevertheless, in spite of the invention of the closure, we can still endorse the words of the political philosopher and historian when he adds:—"Nothing less than unanimity, or so overwhelming a majority as to be tantamount to unanimity, on the cardinal point of respecting constitutional forms, even by those who do not wholly approve of them, can render the excitement of political passion bloodless, and yet

expose all the authorities in the State to the full licence of pacific criticism."

We come next to the second class of constitutional functions, the Administrative or Executive. They are rightly placed by the old Greek teacher after the Deliberative or Legislative, as subordinate to them. He who bears office in a constitutional State must act according to law; and the makers of law are, therefore, his superiors. Great Britain differs from the Great Powers of the Continent in nothing more than in this, that here there is no distinction between private and administrative law. The ministers and the subordinate officials of the Government are judged in the same courts and by the same rules of law as private citizens. For this reason an Englishman can claim to possess more freedom and security than a Frenchman or a German.

Our parliament, indeed, not only makes laws, but it practically controls every measure of administration, either foreign or domestic. But though it can direct or prevent, and though it, and it alone, furnishes the means by which every measure can be executed, it, of itself, performs no executive duties. Let us then proceed to examine the chief executive and administrative offices of the State, whether of general or of merely local authority. Offices of a judicial nature will be reserved for the third head of the classification of Constitutional Functions which we have adopted; nor need we repeat here what has been already mentioned more than once, that the right of appointment to all military and naval commands rests with the Crown, that is, with the ministry as represented by the Secretary of State for War and the First Lord of the Admiralty, the Crown being itself dependent on parliament for the maintenance of the armed forces of the

nation, and of course responsible to parliament for these appointments.

The highest offices of State are unquestionably those held by the constitutional and responsible advisers of the Crown, who, in the name of their sovereign, carry on the administration of this great empire in all matters both of domestic administration and of external policy. These Cabinet ministers are generally from fifteen to twenty in number. They are called κατ' ἐξοχήν the Ministers of State. They are all privy councillors, and they alone form "the Cabinet," a term which has been previously explained. The chief of them, who has chosen and of course presides over the Cabinet Council, is commonly referred to as the Premier, or the Prime Minister. Among the other more important Cabinet offices are those of the Chancellor of the Exchequer, who controls national finance and taxation: and those of the five Secretaries of State, three of whom hold the seals for Home, Foreign, and Colonial affairs respectively, while the fourth is the Secretary for War, and the fifth the Secretary for India. Another member of the Cabinet is the Lord Chancellor, who sits on the woolsack as Speaker of the House of Lords and presides over the supreme judicial tribunals both of kingdom and empire. The Prime Minister himself is usually First Lord of the Treasury. He has sometimes combined with his office that of Chancellor of the Exchequer, at others, that of Foreign Secretary. Another high office in the Cabinet is that of Lord President of the Council. The Lord Privy Seal and the Chancellor of the Duchy of Lancaster are also Cabinet ministers, and in recent times, with the growing importance of Irish affairs, the office of Irish Secretary has always brought Cabinet rank. The President of the Board

of Trade is always a member of the Cabinet, and in recent years the Presidents of the Local Government Board and of the Board of Agriculture have been similarly recognised, for reasons which will be readily understood by any one who acquaints himself with the great and growing work of these comparatively modern departments.

When a statesman is asked by the king to form a Government, there are in law and theory few restrictions upon his choice of colleagues; but practically the choice is very limited. Inasmuch as a ministry can only carry on the government by means of parliamentary majorities, the presence of ministers in parliament is indispensable; and it is necessary that a large proportion of them, both as to number and as to talent, shall be members of the House of Commons. This, with the heavy expense attendant on official life in this country, and the natural unwillingness of many of the ablest men, who are engaged in commerce or other active occupations, to sacrifice their business for a precarious tenure of office, contribute materially to the operation of party cliques, of family influences, and of personal jealousies, in depriving the country from time to time of the services of some of its best men. This of course is inevitable. Nor can it be said that the party system is to blame. Indeed the country is not deprived of the services of the party in opposition. The power of the leaders of the opposition in parliament is second only to that of ministers, and their opportunities of influencing the course of administration are very numerous. Hence the happy phrase "His Majesty's Opposition."

Outside parliament are certain territorial officers whom the Crown appoints in each county. Of these the highest in rank are the lord-lieutenant and the sheriff, but far the most important are the justices of the peace, who

still perform ministerial duties of importance, besides those which devolve on them in a purely judicial capacity. The lord-lieutenant, who is the highest Crown officer in each shire, and assists the Lord Chancellor in appointing justices of the peace, is usually a wealthy local landowner. Until 1871 he represented the sovereign as sole commander of the old common-law military force of each county. The Army Regulation Act of 1871 reinvested most of the lord-lieutenant's military powers in the Crown; but even now, in case of invasion, or menaced invasion, or of rebellion, it would be through the lord-lieutenant that the prerogative of the Crown to call on citizens to bear arms and serve against the enemy would be exercised. The lord-lieutenant must therefore still be regarded as the titular chief of the county militia.

The lord-lieutenancy is an office of comparatively modern date, not to be distinctly traced before the times of Philip and Mary. Its establishment, by transferring from the sheriff the military authority in every county, considerably diminished the importance of the ancient office of the shrievalty; though still in theory "the executive government of every county is vested in the sheriff," who is charged with all the king's business in his bailiwick, and to whom the royal warrant, by which he is appointed, solemnly entrusts "the custody of the county." The sheriff is still nominally chief conservator of the king's peace within his shire; but his functions have been severely cut down by numerous statutes which have been consolidated in the Sheriff's Act 1887. Most of his police functions have been transferred to the chief constables acting under borough and county councils. But he is still in theory the chief officer to execute the sentence and the process of the king's courts,

both criminal and civil; and, besides the officers regularly employed by him for those duties, he may, if requisite, command the aid of any person in his county; and may even summon the whole force of the county, called by our lawyers the *posse comitatus*, a summons which every able-bodied commoner must obey under penalty of fine and imprisonment. It is his duty to summon juries for superior courts. Lastly, he is the chief functionary at parliamentary elections. When a new parliament is to be summoned, the Clerk of the Crown (by the Lord Chancellor's warrant) issues a writ under the Great Seal to the sheriff, or returning officer for the election of members to the new House of Commons. A separate writ is issued for each county or borough division, and within a day or two after receiving it the returning officer must give public notice of nomination day, and, if there is more than one candidate, of polling day. When the election has been duly held under the Ballot Act of 1872, the sheriff announces the result of the poll, and declares the successful candidate's return to parliament. We have seen that the authority of the sheriffs in parliamentary elections was formerly made the engine of much interference by the Crown, and of much fraud and oppression. But abuses of this nature have long been obsolete; and the modern evils of elections are those against which the Corrupt Practices Act is directed.

The sheriff was anciently elected by the inhabitants of the county, but has for some centuries past been appointed yearly by the sovereign out of a list of three recommended by the judges and other high officers of the Crown. No express law prescribes any qualification of residence or property; but by usage he is a person of wealth, residing in the county for which he is to act. It should be added

that every county and every county of a city has its sheriff, now in the main an ornamental dignitary.

The next in order, though first in importance when their work is considered, of the administrative district officers appointed by the Crown are the justices of the peace. Their functions were largely *administrative*, but are now almost entirely *judicial* or *quasi-judicial*, in consequence of the transfer of their administrative powers to municipal corporations in 1835, to county councils in 1888, and to district and parish councils in 1894. They were formerly called Conservators of the Peace, and were chosen by the freeholders in the county court, but since the beginning of the reign of Edward III. the Crown has appointed by commission "keepers of the peace," who, when judicial powers were conferred on them in a later period of the same reign, took the more dignified title of justices. The county justices were usually appointed from among the resident gentry on the recommendation of the lord-lieutenant. But the property qualification prescribed by statute (with certain exemptions) of £100 a year landed property in England or Wales was abolished in 1906. The office is determinable at the pleasure of the Crown. Justices have special power to keep the peace, and they have an important *preventive* authority, in being empowered to require sureties for good behaviour. They are also the licensing authority. All inns and public houses require the annual licence of the justices of the peace for the district. The justices also share with borough and county councils in the control of the police.

But in London, and a number of large towns, paid police magistrates or "stipendiary magistrates" are appointed by the Home Secretary (under statute) from the ranks of the legal profession, and usually from barristers

who have had considerable practice and experience. With this exception the local officers whom we have been considering—the lords-lieutenant, the sheriffs, and the justices—are unpaid.

The institution of justices of the peace has been eulogised by Gneist and many other writers as calling into social and political activity the unbought energies of the country gentry and of the middle classes in towns to perform local work which in continental Europe is discharged by paid officers under the direct or indirect control of the central government. The picture was overdrawn. But it must be owned that the administration of the county justices was thrifty if unenterprising, and the complaints levied against the judicial work which they still carry on are not always well founded.

The contrast between the English and Continental systems of local government becomes more remarkable, as we watch how the numerous administrative duties of social and civic order are discharged. From the Saxon times downwards, each local district has in local matters governed itself, or at least been governed by some local inhabitant. We have never known what is called an administrative hierarchy: that is to say, a supreme central authority sending its prefects, its sub-prefects, and other salaried officials into every department, and directing and performing by them every duty of police and the like, and professing to provide through them for every local emergency. There was indeed, as we have seen, under the Tudors and early Stuarts, a moment in English history when it seemed quite possible that the bureaucratic system of government would prevail and that a centralised administration would challenge and beat down the supremacy of law. When that danger disappeared, it might

have been expected that local representative institutions would have been developed out of the rudimentary forms contained in the Poor Law statutes of Elizabeth. But as we read the history of the seventeenth and eighteenth centuries this expectation is disappointed. The municipal corporations deteriorate. The common funds are wasted or dissipated by close bodies, and any improvements that are required (the paving or lighting of streets, or the provision of water or of sewers) are usually done by Boards or Commissioners specially appointed *ad hoc*. By the end of the eighteenth century grave abuses had overtaken even the administration of the Poor Law. The reformed parliament of 1832 swept away the abuses of municipal corporations and imposed a municipal code which gave a uniform system of municipal government to all towns. Almost at the same time the Poor Law was remodelled and the principle of a strict departmental control introduced. But this administrative control is exercised by responsible ministers, and is therefore parliamentary, though not in the direct sense in which parliament through private bill committees supervises all local legislation.

We have maintained these free principles in our internal government, while we have matured a concentrated State government for the general interests of the realm. It has been our happiness to combine the system of local distribution of power in matters of local importance with a centralised authority in matters of imperial and national policy.[1] We have seen in an earlier part of this work how fortunate it has been that we have had *one* parliament for all England, and not separate legislative and taxing

[1] See De Tocqueville, *De la Democratie en Amérique*, vol. i. c. 5, for the distinction between *Centralisation gouvernementale* and *Centralisation administrative*

assemblies for separate counties or separate provinces; and the fact that the principle of local self-government has always prevailed among us is at least equally important. The practice of our nation for centuries establishes the rule, that except as regards matters of direct general or national interest, the central authority should not act directly. To this Bentham and his disciples,[1] upon whose principles the great municipal reforms of the nineteenth century were based, have added that it is the duty of the central authority to enlighten local authorities and to supervise local administration. The following passage from Sir Edward Creasy expresses the contrast between local government at home and abroad as it appeared in the middle of the last century :—

We are all apt to be struck at first sight with the superior regularity, harmony, and quiet vigour of action which centralised administration seems to secure in favourable instances abroad; while the brawls, the jobbing, and the capriciousness of our own local boards and popular officers force themselves upon every man's notice at home. But we must look deeper, and judge more comprehensively. In examining foreign countries, we must not limit our attention to capital cities, and to the most frequented lines of communication with them; we must not take the temporary energy which the strong will of a single remarkable autocrat may diffuse through his officials, as a permanent and general proof of the benefits of centralisation. We must ascertain the state of remote provinces and obscure towns. We must learn what has been the customary spirit and conduct of administrative functionaries under successive sovereigns. We must consider the condition of more empires than one at the present time as to good or bad government, as to the venality or

[1] John Stuart Mill was a pupil of Bentham, and his great books on *Representative Government* and *Liberty* were a guide and inspiration to English reformers in the third quarter of the nineteenth century.

integrity, as to spirit or apathy in local regimen, and in local public works. On the other hand, let us look below the rough husks of local self-government in our own country. We shall find superior fairness in design, and superior honesty in execution. We shall find infinitely more force than centralisation ever could produce; we shall find that force to be far more general in its operation; and we shall find it far more enduring and certain, because it springs, not from the accidental idiosyncrasy of an individual ruler, but from the national spirit, and from the ancestral habits of a whole people. We ought to reflect also upon the pernicious indirect effects which administrative centralisation produces in a State, and on the advantages which we as a nation derive from being self-trained and locally practised in the discharge of political duties. We should listen to the testimony of intelligent foreigners, of men who have lived under the plausible administrative hierarchy which we have looked at, and who speak feelingly as to its effects. The fifth chapter of the well-known masterpiece of the great French statesman, De Tocqueville, is devoted to the exposition of this truth—to the distinction between centralisation in matters of imperial government and centralisation in administrative matters of local interest; to demonstrating the necessity of the first, and the pernicious effects of the second, notwithstanding its specious appearances.[1]

Professor Lieber, a learned contemporary of Creasy, by birth and education German, but by choice and adoption a citizen of the United States, after describing in his work

[1] "De notre temps nous voyons une puissance, l'Angleterre, chez laquelle la centralisation gouvernementale est portée à un très-haut dégré. L'état semble s'y mouvoir comme un seul homme; il soulève à sa volonté des masses immenses, réunit et porte partout où il le veut tout l'effort de sa puissance. L'Angleterre, qui a fait de si grandes choses depuis cinquante ans, n'a pas de centralisation administrative. . . . Je pense que la centralisation administrative n'est propre qu'à énerver les peuples qui s'y soumettent," etc., etc. Sir Robert Peel bore testimony to the value of De Tocqueville's work as a study for English statesmen.

on Civil Liberty the principles of the American Congress and the English parliament as free institutions, added,

Yet the self-government of our country or of England could be considered by us little more than oil floating on the surface of the water, did it consist only in Congress and the State legislatures with us, and in Parliament in England. Self-government, to be of a penetrative character, requires the institutional self-government of the county or district; it requires that everything which without general inconvenience, can be left to the circle to which it belongs, be thus left to its own management.

In his treatise on Political Ethics the same author bore personal witness to the results of the centralising system:

It is necessary to have seen nations, who have been forced for centuries to submit to constant and minute police interference, in order to have any conception of the degree to which manly action, self-dependence, resoluteness, and inventiveness of proper means can be eradicated from a whole community. On this account, systematic interference weakens Governments, instead of strengthening them, for in times of danger, when popular energy is necessary, when "every man must do his duty," or the State is lost, men, having forgotten how to act, look listlessly to the Government, not to themselves. The victories of Napoleon over the many States east and south of France were, in a great measure, owing to this natural course of things.

One more authority may be cited against the bureaucratic centralisation of local government. Perhaps no one was ever better fitted to judge correctly of such matters than the German historian Niebuhr. He was a man (like our own historian Grote) before whose eyes the annals and institutions of almost every State, ancient or modern, were made to shed light on the annals and institutions of the

rest. He was also a man of practice and action: frequently employed by his own Government in arduous duties, and personally conversant with many of the greatest men of a great epoch. Niebuhr had spent part of his early manhood in England, and knew, therefore, the working of our system of local government, as well as of the centralised system which then prevailed in Prussia; and having these means of knowledge, he at the close of the war in 1815, in order to induce, if possible, the Prussian Court to reorganise the Prussian State on better principles, edited a work on the *Internal Administration of Great Britain*, in which it is maintained that "British liberty depends at least as much on the local self-appliances of local government as it does upon parliament."[1] Long afterwards, under the influence of Gneist, the local govern-

[1] In his edition of De Lolme, published in 1848, M'Gregor remarked:—"Within the last two years, when for several days after the first resignation of Lord John Russell it was said, 'there was no Government,' a distinguished foreigner in conversation with the editor in the portico of the Athenæum Club, alluded to the absence of excitement in such an event, to the tranquillity and security which prevailed in the town and country; and he then remarked 'that nothing could be more instructive to legislators, statesmen, and rulers than the condition of England at that time. In France,' he said, 'the idea of the country being without a Government for a day would create consternation. Here industry is not in the least impeded; the funds and public securities are not disturbed; tranquillity prevails everywhere; everybody is attending to his particular pursuit; ships arrive and depart, discharge and take on board their cargoes; railway traffic is as brisk as ever; public and private carriages roll on as usual; prices are not disturbed; intercourse by your steam-packets and by post goes on as usual; and were it not for a leading article in the newspapers, it would be difficult to ascertain that the Ministry had resigned, or whether a new Ministry was likely to be formed.' The truth is, that in Great Britain we govern ourselves; each locality has its self-government, and every British house is, in fact, a little government within itself. This is the secret of the tranquillity and security which has so long prevailed in our streets, and in our towns, in our fields and highways, while the nations of Continental Europe have been plunged in the calamities of revolution and bloodshed."

ment of Prussia was somewhat modified in the light of these and similar criticisms.

We have mentioned the higher local functionaries in each shire, but our limits forbid any detailed description of the great and growing army of local officials in town and country who are concerned with justice, police, roads, public health, and Poor Law administration, subjects which, though sadly neglected by political philosophers, are of far more importance to our safety, comfort, and social well-being than the more showy and ceremonious privileges and duties which attach to the ancient functionaries of the county. It should be observed that the members of our local authorities, both in town and country, receive no salary. The old rule of our Constitution is, that it is a man's duty to "bear lot" in maintaining good order and in upholding the social economy of the district in which he resides. But with the constantly rising standard of local needs the powers and duties of local authorities have been continually on the increase. To provide good water and modern systems of drainage, to keep the roads in a high state of efficiency, to construct tramways, and to improve education—all these things require large staffs of skilled officials and workmen. Every local authority, except perhaps the small parish council, has its paid clerk; and a large borough or county council has quite a hierarchy of well-paid officials who form the permanent staff and carry on the machine of government in accordance with the policy of the council and its committees. The municipal civil service is one of the most remarkable political developments of modern times. And with the exception of the police force and the chief constable who is its local head, over whom the Home Office exercises some control, and certain Poor Law and sanitary officials

who have to look to the Local Government Board, or to the Boards of Trade and Agriculture as well as to their immediate local superior, this new civil service is quite detached from that of the Government. Parliament has made the local authorities by statute, but so long as they carry out the law and neither exceed their powers nor fail to carry out their statutory duties, parliament cannot interfere with their administration. The Local Government Board, indeed, and other departments, issue orders and regulations for the guidance of the local councils in their administration of Acts of Parliament. But these orders and regulations, like the bye-laws of the local authorities themselves, must be in accordance with the law, and their validity may at any time be challenged in the Courts of Justice. Thus the grand principle of the British Constitution—the supremacy of law over administration—has been continuously and completely maintained.

Parliament, however, shows its omnipotence here also; for it is supreme judge as well as supreme legislator and administrator. Parliament is a high court as well as a deliberative assembly. The House of Commons, though it has delegated some of its judicial powers, still retains the formidable, though apparently obsolete, weapon of impeachment; and the peers are still judges in cases of impeachment. The House of Lords is still the highest court of appeal in all cases of law and equity for the whole United Kingdom. It might seem perilous for such a body, which is itself one of the branches of the legislature, to hold supreme judicial authority in cases where political interests are involved, and party feelings interested; but this objection is removed by the forbearance of the great body of peers from interference in judicial matters. The House has always contained peers of the highest judicial

rank. To these (commonly called the Law Lords) the other peers leave the entire decision of the cases brought before the House.

Passing to the administration of justice, and beginning with criminal law, we find that the great constitutional principle of trial by jury is still respected so far as regards all trials for offences of a graver character, which subject the person convicted of them to severe punishment. The judges at the assizes, the justices in each county, and the recorders of the principal cities and boroughs, at their respective sessions, preside at the trials of prisoners against whom charges of this description are preferred:[1] it is still necessary that the grand jury should consider that the witnesses for the prosecution make out a *primâ facie* case of guilt before the accused party is put upon his trial; and the question of fact as to guilty or not guilty is still determined by the verdict of the petty jury, the twelve good and lawful men, the ancient guardians of English liberty. But for upwards of a century the practice of exposing persons charged with minor offences to trial and "summary conviction" by one or two justices of the peace has been growing more and more prevalent.

With regard to civil causes, in those which are carried on in the superior courts of common law questions of fact are still frequently though not necessarily determined by the verdict of a jury, and the same tribunal assesses the amount of damages where a wrong is proved or admitted. A very large proportion of the civil legal business of the country is (and long has been) carried on in the High Courts of Justice. Of this since the amalgamation of the procedure of common law and equity there are two divisions, the one presided over by common law judges,

[1] The most serious cases are tried at the assizes exclusively.

and the other by equity judges. It is only due to nineteenth-century law reformers to bear witness to their honourable activity in sweeping away absurd technicalities, tedious processes, irrational subtleties, and other abuses of our legal system, which for ages had defied the great constitutional maxim, that Justice and Right shall be sold, denied, or deferred to no man. In this field of reform much has been done, "but more remains to do" in the consolidation and simplification of our statute law.

Our Ecclesiastical Courts, our Admiralty Courts, our Bankruptcy and other tribunals, which would require description in a more strictly legal treatise, may be passed over here. But attention must be briefly drawn to the county courts, where jurisdiction dating from the time of Alfred the Great was enlarged by a number of statutes in the reign of Victoria from 1845 to 1888. They are now regulated by the County Courts Act, 1888, by which all the preceding statutes were consolidated, amended, and repealed. There are about 500 county court districts. The county court judges are appointed by the Lord Chancellor. Their jurisdiction generally covers cases where the debt or damage claimed does not exceed £50; but it is subject to the proviso that where the claim, if in contract, is over £20, or, if in tort, over £10, the defendant may, on giving security and obtaining a certificate from the judge that important questions of law or fact are involved, cause the action to be stayed and compel the plaintiff to proceed by writ in the High Court. There can be no doubt that these courts have brought justice home to the poor man in an infinity of small cases in which it was once practically denied him. How far the extension of their authority should go is an open question. An Englishman has a right not only to ready and cheap law, but to good law; without which there

cannot be justice, either ready or slow, cheap or dear. The main thing is to improve the quality of our judges both in the county courts and in the High Courts.

It may have occurred to the reader of these pages that besides the great power now vested in the Crown by reason of the large number of magistracies and offices which it appoints for the internal administration of the kingdom, the vast increase of our over-sea dominions, in size, wealth, and population, has placed countless other military, judicial, and civil appointments in the gift of the Crown, and thereby created an amount of influence which an active sovereign of ambitious views and arbitrary temperament, if unwatched even for a short time by parliamentary control, might employ in a manner fatal to the national liberties. Considerations of this nature led a majority of the House of Commons, in the latter part of the eighteenth century, to pass, in compliance with Mr. Dunning's motion, their celebrated resolution,[1] that "the influence of the Crown had increased, was increasing, and ought to be diminished." Whatever foundation there may have been for such an alarm in Dunning's time, when George III. was king, when the House of Commons was unreformed, and when the power of the press, and, consequently, of public opinion, was immature, compared with their present development, this danger has now disappeared. What is done in the name of the king and under the old forms of royalty is done by the Cabinet (which is the Executive Commitee of the House of Commons) or by some responsible minister. The constant dependence of the Crown upon parliament vests this vast amount of patronage in reality in the hands of responsible ministers, who are always subject to parliamentary inquiry and criticism as to their

[1] 6th April 1780.

use or abuse of it, and who can only retain their position as ministers in virtue of the support of a parliamentary majority. That parliamentary majority cannot be retained by them long in the House of Commons if the current of popular opinion sets strongly and steadily against them. The temper of the nation may not be reflected in the House of Commons so rapidly or so vividly as some may desire; but though a temporary popular caprice may be slighted, a deep-felt and wide-spread popular opinion will always rule at a general election; and members of the party in power are disinclined to support ministers in unpopular acts and so expose themselves to certain rejection, by waiting for the inevitable recurrence of a general election under the Septennial Act before they adapt their votes to their constituents' desires.

At first sight our Second Chamber would seem to be utterly inaccessible to the agency of public opinion, or only accessible to it when a popular ministry causes the royal prerogative of creating peers to be put suddenly and largely in force.[1] But the House of Lords, which has

[1] The important constitutional question whether the Crown can confer a peerage, *with the right of sitting in the House of Lords*, for life only, was seriously agitated, though not decided, in 1856. Her Majesty in that year conferred on Sir James Parke, one of the Barons of the Court of Exchequer, letters patent, by which that eminent judge was created, or was intended to be created, a Baron of the United Kingdom for life, with the title of Baron Wensleydale. The validity of this was promptly called in question by Lord Lyndhurst, who moved in the House of Lords for a Committee of Privileges to examine and report on the subject. This motion was carried; and the Lords' Committee examined witnesses as to old precedents. A report was agreed to by the Committee, and was adopted by the House, "that neither the letters patent purporting to create Sir James Parke a Baron of the United Kingdom for life, nor the said letters patent with the usual writ of summons in pursuance thereof, could entitle the grantee therein named to sit and vote in Parliament." The difficulty was evaded by the Crown granting to Lord Wensleydale a new patent in the usual form. The debates on this subject (in the 140th volume of Hansard) are of some constitutional interest.

gradually come to consist almost entirely of members of the Conservative party, does not as a rule vote against great measures passed by the Commons, however much they offend against its principles and convictions. Though theoretically co-equal with the House of Commons, it is notoriously of inferior authority. It has no influence over administration. It cannot touch financial measures, and even its claim to check hasty legislation, and to give an opportunity for an appeal to the people by a dissolution of parliament, has been much weakened by its refusal to interfere with such a radical bill as the Workmen's Compensation Bill or such an unpopular measure as the Education Act of 1902, when passed by the House of Commons under the auspices of a Conservative Government. The Lords' action in the first case was the more striking because they had destroyed a much less revolutionary measure—the Employers' Liability Bill of the previous Liberal administration. If parties are equally, or nearly equally, balanced in the Commons and in the country, the House of Lords, however, can undoubtedly reject a bill like the Home Rule Bill of 1893. But on great national questions, the Lords themselves own that they are bound ultimately to give way to a clear and deliberate expression of national feeling. The debates in the House of Peers on the Repeal of the Corn Laws were of high constitutional interest from this point of view. The champions, in the Upper House, of the landed aristocracy, though they asserted with truth that they had a majority of the peers who in their hearts were in favour of the Corn Laws, never held out the idea or the hope that the House of Lords could permanently stop the free-trade movement. The most that they ever claimed was an opportunity of taking the sense of the people on the subject by rejecting the proposal once. But

even this idea was abandoned, although no proposal to abolish protection had ever been laid before the constituencies. Lord Derby's words on this subject were so explicit, that we may quote a short passage from his speech against the second reading of the Corn Importation Bill, May 25th, 1846:—

My Lords, if I know anything of the constitutional value of this House, it is to interpose a salutary obstacle to rash and inconsiderate legislation; it is to protect the people from the consequences of their own imprudence. It never has been the course of this House to resist a continued and deliberately expressed public opinion. Your Lordships always have bowed, and always will bow, to the expression of such an opinion; but it is yours to check hasty legislation leading to irreparable evils.[1]

The real constitutional difficulty now is that the House of Peers, remaining unreformed, only represents the feelings of the country when the country happens to be favourable to the Conservative party. As a distinguished Conservative writer, Mr. Sidney Low, puts it in his book on *The Governance of England*, a good deal of their theoretical usefulness as a checking and revisionary organ has thus disappeared.

When the Conservatives are in power the Peers are slow to interfere with any great political measure, for fear of giving an advantage to the party which the majority of their number dislike and distrust. They remain languid and quiescent, with their constitutional functions largely in abeyance, until the advent of a Liberal Ministry recalls them to activity, as it did in 1893. The standing Conservative majority in the House of Lords then becomes of some effect, whether for good or evil.

[1] Hansard, vol. lxxxvi. p. 1175. See also the debates of 1906 on the Trades Disputes Bill.

It is not only parliament but the healthy influence of public opinion in England that gives intellectual and moral value to English constitutional liberty. Our country is the peculiar domicile of the authority of reason in politics. A man without a seat in parliament may largely influence public opinion, and as a speaker, or as a writer, acquire a degree of moral and political power that may be felt far beyond his own island, and long after his own lifetime. Freedom of discussion, and the freedom of the press, are constantly claimed as peculiar glories of our Constitution; and a treatise such as the present would be palpably deficient were it to end without some notice of their slow but sure development. Attempts to overawe the legislature by riotous mobs, under the pretence of coming as petitioners, caused a statute against tumultuous petitions to be passed in Charles II.'s time. And when, under the guise of meeting for public discussion, attempts have been made to assemble immense masses of people (sometimes armed with offensive weapons, and sometimes with partial military organisation), and by violent language to excite them to acts of treason and breaches of the peace,—whenever this, or anything similar, has been done or attempted, the common law has held all implicated in such proceedings to be liable to punishment for the peril they cause to society, and for the intimidation which such proceedings, if unchecked, must exercise on freedom of opinion.

But the right of men to meet peaceably and discuss public matters openly and fearlessly is as undoubted as it is invaluable. It is for a jury to determine, if necessary, whether this right has been fairly exercised, "making full allowance for the zeal of speakers, though they may sometimes exceed the just bounds of modera-

tion," or whether, in the opinion of rational and firm men, it has been abused so as to endanger the public peace, and make the commission of crime and outrage a natural and probable consequence.

The freedom of the press, though its first and most magnificent vindication was Milton's *Areopagitica*, cannot be said to have commenced in this country before the reign of William III. It was then that the last Licensing Act expired. And even after the withdrawal of that restriction, when men could print and publish their thoughts without obtaining the "imprimatur" of an ecclesiastic or civil official, the law of libel pressed heavily on writers, and still more on newspaper proprietors. The growing power of the press, as an organ both for expressing and for rousing public opinion, was felt and used by all parties; but men in power, who were most exposed to the wounds of newspaper warfare, often sought eagerly to crush their assailants by putting in force the criminal law against libels. The judges felt naturally little predilection for a press that generally seemed presumptuous to men in authority, and was often licentious and calumnious. They established the doctrine, that to possess the people with an ill opinion of the Government was a libel; and they further established, that in a criminal proceeding for libel the truth of the matters stated was no defence. Jurors were naturally, under such circumstances, unwilling to convict: and a controversy grew up as to the province of a jury in a trial for libel. The courts sought to establish the rule that the province of the jury was simply to determine whether the defendant published the libel, and whether the libel had the meaning assigned to it in the indictment. But it was contended by many that the jury were also at

liberty to consider whether that meaning was criminal or innocent, and whether the thing which was said to be a libel was a libel or not. This controversy was determined in favour of the more extended power of the jury by Charles James Fox's Act, in the 32nd year of George III. A great protection was thereby given to writers and publishers against arbitrary and harsh prosecutions; and the benefit of it to the public was soon amply proved by the increased sense of responsibility of English journalists. But still the monstrous restriction remained, by which a man indicted for a libel was forbidden to show that it was true. The maxim of "the greater the truth the greater the libel" continued long in English law. But by Lord Campbell's Act (6 & 7 Vict. c. 96), on the trial of any indictment or information for a defamatory libel, the accused party, having notified by his plea the defence that he is about to set up, may defend himself by showing the truth of the matters charged, and also that it was for the public benefit that the said matters charged should be published. If he can satisfy a jury on these points, he is to be acquitted; if not, he is justly punishable. It would be impossible to provide better for the objects which are stated in the commencement of the Act,—"For more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty." Lord Campbell's Act, though comparatively modern, deserves to be classed high in the list of statutes that mark our constitutional and legal progress.

We have now traced the English Constitution from its origin; and we have watched the first development of its principles at a time when the newly-formed English nation consisted of not more than two millions of human beings; one-half at least of whom were in an abject state of

serfdom, while the other half, the freemen of the land, the "liberi homines" of Magna Carta, were divided into proud and powerful barons, each girt with his band of armed retainers and personal dependants; into smaller landowners, equal in birth but inferior in possession to the great peers; into a class of still smaller owners of land, our free yeomanry, and into citizens and burgesses, who were beginning to revive the old Roman system of municipal self-government, and to reawaken the spirit of commercial energy and enterprise. First framed in those troubled times, and for that scanty and ill-matched population, our Constitution has expanded with the expanse of civilisation, numbers, and power; and while it has preserved its integral parts and primary attributes, it has become the Government of a great and free nation of forty millions, whose language, laws, manufactures, and institutions are spread in every region of the world. To the blessings of that Government, to the security and order which it guarantees, and to the independent energy and freedom which it sanctions and inspires, every good citizen is alive and should be able to testify by knowledge as well as by experience. Our Constitution must from time to time require remedial changes; and at present the necessity of relieving the congestion of parliamentary business by systematic devolution is engaging the anxious attention of statesmen. He who has studied our Constitution the most deeply will venerate it the most; and, while he vigorously extirpates abuses, and steadily works out its vital law of growth and development, he will religiously defend its primary institutions alike from revolution and reaction.

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