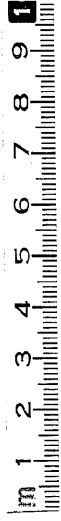


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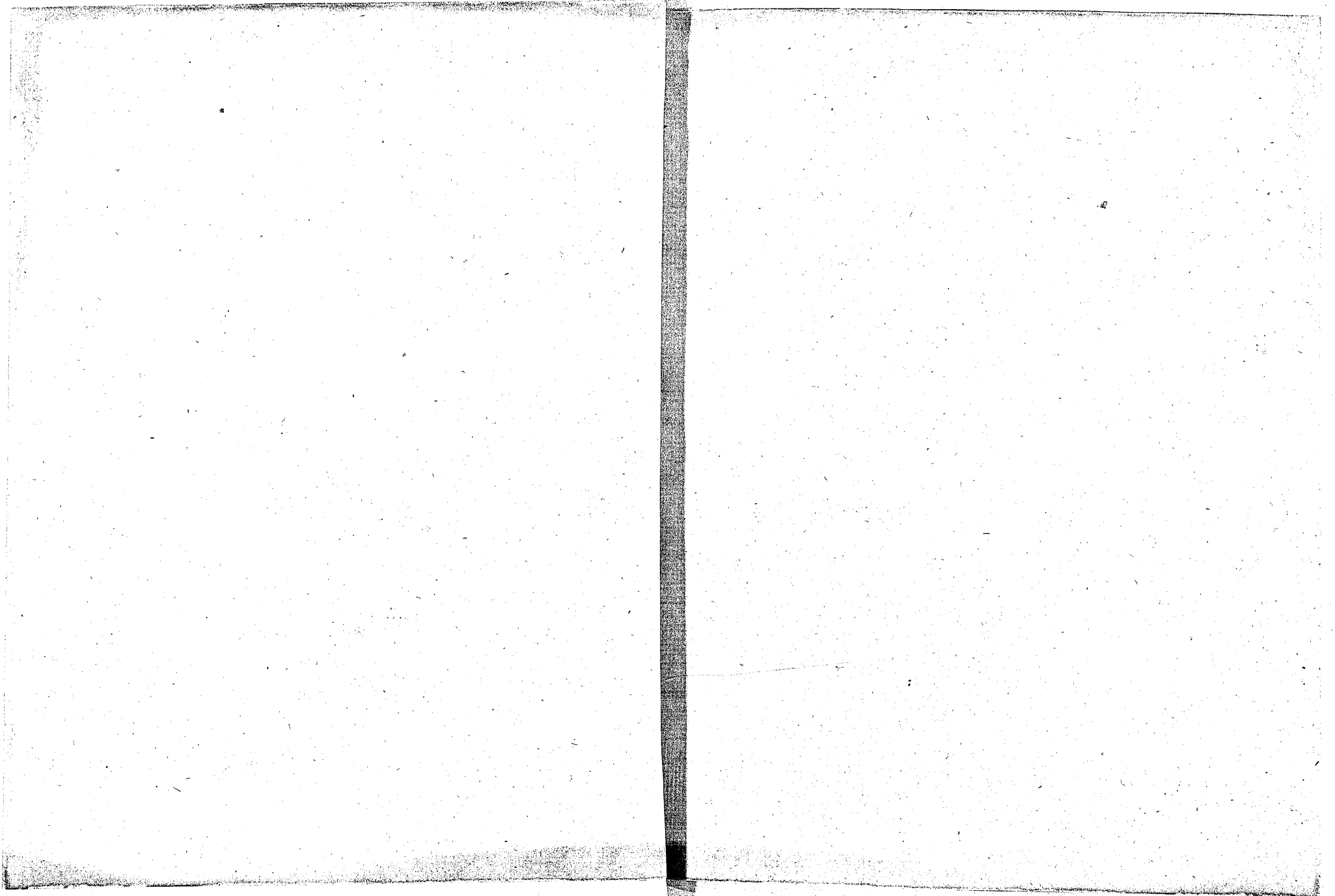


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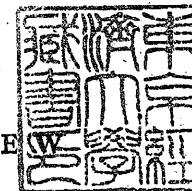
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- 切取、無断持出はやめま  
しょう



AN  
HISTORICAL VIEW  
OF THE  
ENGLISH GOVERNMENT.



A N  
HISTORICAL VIEW  
OF THE  
ENGLISH GOVERNMENT,  
FROM  
THE SETTLEMENT OF THE SAXONS IN BRITAIN  
TO  
THE ACCESSION OF THE HOUSE OF STEWART.

BY JOHN MILLAR, Esq.  
PROFESSOR OF LAW IN THE UNIVERSITY OF GLASGOW.

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TO THE

RIGHT HONOURABLE

CHARLES JAMES FOX.

SIR,

I SHALL, perhaps, be thought guilty of presumption, in wishing to draw your attention to the following publication. The truth is, it appears to me scarcely possible for any man to write a constitutional history of England, without having Mr. Fox almost constantly in his thoughts.

In delineating the progress of the English government, I have endeavoured to avoid those fond prepossessions which Englishmen are apt to entertain upon the subject, as well

as

as the prejudices peculiar to the two great parties, which the nature of our limited monarchy has produced. How far I have succeeded in this, must be left to the judgment of the public. But, whatever indulgence may be shewn to this Work, the ambition of its author will not be gratified; unless he can procure, in some degree, the approbation of a mind superior to prejudice; equally capable of speculation, and of active exertion; no less conversant in elegant literature, than accustomed to animate the great scenes of national business; possessed of the penetration to discover the genuine principles of the constitution, and of the virtue to make them an invariable rule of conduct.

Impressed with the highest esteem for such a character, permit me to declare the  
satisfaction

satisfaction I feel from your steady perseverance in a system, which, by tending to secure the natural rights of mankind, has led to a reputation the most exalted, and the most grateful to a generous mind.

I have the honour to be,

S I R,

Your most obedient

Humble servant,

College, Glasgow,  
4th Decr, 1786.

JOHN MILLAR.



C O N T E N T S.

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I N T R O-

## I N T R O D U C T I O N .

**T**HE great series of events in the history of England may be divided into three parts: the first, extending from the settlement of the Saxons in Britain to the Norman conquest; the second, from the reign of William the Conqueror to the accession of the house of Stewart; the third, from the reign of James the First to the present time. The important changes exhibited in the state of the country, and in the situation of its inhabitants, appear, like a sort of natural boundaries, to mark out these different periods, and to recommend them as objects of distinct and separate examination.

The first period contains the conquest of England by the northern barbarians, the division of the country under the different chiefs by whom that people were conducted, the subsequent union of those principalities under one sovereign, and the course of public transactions under the Saxon and Danish monarchs.

The reign of William the Conqueror, while it put an end to the ancient line of kings, introduced into England a multitude of foreigners, who obtained extensive landed possessions, and spread with great rapidity the manners and customs of a nation more civilized and improved than the English. The inhabitants were thus excited to a quicker advancement in the common arts of life, at the same time that the nation, by acquiring continental connections, was involved in more extensive military operations.

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By the union of the crowns of England and Scotland, upon the accession of the house of Stewart, the animosities and dissensions, with all their troublesome consequences, which had so long subsisted between the two countries, were effectually suppressed. By the improvement of manufactures, and the introduction of a considerable foreign trade, England began, in a short time, to establish her maritime power, and to assume a higher rank in the scale of Europe.

The same periods are also distinguished by remarkable variations in the form of government.

Upon the settlement of the Saxons in Britain, we behold a number of rude families or tribes feebly united together, and little accustomed either to subordination among themselves, or to the authority of a monarch. During the reigns of the Anglo-Saxon princes, we discover the effects produced by the gradual acquisition of property; in consequence of which some individuals were advanced to the possession of great estates, and others, who had been less fortunate, were obliged to shelter themselves under the protection of their more opulent neighbours. Political power, the usual attendant of property, was thus gradually accumulated in the hands of a few great leaders, or nobles; and the government became more and more aristocratical.

When the advances of the country in improvement had opened a wider intercourse, and produced a more intimate union, between the different parts of the kingdom, the accumulated property in the hands of the king became the source of greater influence than the divided property possessed by the nobles. The prerogatives of the former, in a course of time, were therefore gradually augmented; and

and the privileges of the latter suffered a proportionable diminution. From the reign of William the Conqueror in England, we may date the first exaltation of the crown, which, under his successors of the Plantagenet and Tudor families, continued to rise in splendor and authority.

About the commencement of the reign of James the First, great alterations began to appear in the political state of the nation. Commerce and manufactures, by diffusing a spirit of liberty among the great body of the people, by changing the system of national defence, and by increasing the necessary expences of government, gave rise to those disputes, which, after various turns of fortune, were at last happily terminated by the establishment of a popular government.

With reference to that distribution of property, in the early part of our history, which goes under the name of the feudal system, the constitution established in the first of these periods, may be called the *feudal aristocracy*; that in the second, the *feudal monarchy*; and that which took place in the third, may be called the *commercial government*.

Similar periods to those which have now been pointed out in the English history, may also be distinguished in the history of all those kingdoms on the continent of Europe, which were established upon the ruins of the Roman Empire, and in which the people have since become opulent and polished. Thus the reign of Hugh Capet in France, and of Otho the Great in Germany, correspond to that of William the Conqueror in England; as those of Lewis XIII. and Ferdinand II. in the two former countries, were analagous to that of James the First, in the latter.

In the following treatise, it is proposed to take a separate view of these periods of the English history, and to examine the chief differences of the political system in each of them. As the government which we enjoy at present has not been formed at once, but has grown to maturity in a course of ages, it is necessary, in order to have a full view of the circumstances from which it has proceeded, that we should survey with attention the successive changes through which it has passed. In a disquisition of this nature, it is hoped that, by considering events in the order in which they happened, the causes of every change will be more easily unfolded, and may be pointed out with greater simplicity. As the subject, however, is of great extent, I shall endeavour to avoid prolixity, either from quoting authorities and adducing proofs in matters sufficiently evident, or from intermixing any detail of facts not intimately connected with the history of our constitution.

With respect to the Saxon period, which comes first in order, many writers appear to have looked upon it as too remote, and as affording a prospect too barren and rude, to deserve any particular examination. But it ought to be considered, that the foundations of our present constitution were laid in that early period; and that, without examining the principles upon which it is founded, we cannot form a just opinion concerning the nature of the superstructure. To trace the origin of a system so singular in its nature may, at the same time, be regarded as an object of rational curiosity. The British government is the only one in the annals of mankind that has aimed at the diffusion of liberty through a multitude of people, spread over a wide extent of territory.

The

The ancient republics of Greece and Rome comprehended little more than the police of a single city, and in these a great proportion of the people, so far from being admitted to a share in the government, were, by the institution of domestic slavery, excluded from the common rights of men. The modern republics of Italy, not to mention the very unequal privileges which they bestow upon different individuals, are inconsiderable in their extent. The same observation is applicable to the government of the Swiss cantons. In the Seven United Provinces of the Netherlands, the government can hardly be considered as more extensive; for, notwithstanding the confederacy by which they are connected, every particular province, and even every single town of any consequence, belonging to each, having the exclusive power of making or consenting to its own regulations, forms in reality an independent political system. By what fortunate concurrence of events has a more extensive plan of civil freedom been established in this island? Was it by accident, or by design, or from the influence of peculiar situation, that our Saxon forefathers, originally distinguished as the most ferocious of all those barbarians who invaded the Roman provinces, have been enabled to embrace more comprehensive notions of liberty, and to sow the seeds of those political institutions which have been productive of such prosperity and happiness to a great and populous empire? To these questions it is hoped that, in the sequel, a satisfactory answer will be given.

## B O O K I.

OF THE ENGLISH GOVERNMENT, FROM THE SETTLEMENT  
OF THE SAXONS IN BRITAIN TO THE REIGN OF WILLIAM  
THE CONQUEROR.

## C H A P. I.

*Preliminary Account of the State of Britain under the Dom-  
inion of the Romans.*

**T**HE downfall of the Roman state, and the formation of those kingdoms which were built upon the ruins of it, may be regarded as one of the greatest revolutions in the history of mankind. A vast unwieldy empire, which had for ages languished under a gloomy despotism, was then broken into a number of independent states, animated with all the vigour, but subjected to all the violence and disorder, natural to a rising and unsettled constitution. The arts and literature which had grown up in the ancient world were, in a great measure, overthrown; and a new system of political institutions, together with a total change of manners, customs, and ways of thinking, spread itself over the greatest part of Europe.

The plan of government which the Romans adopted throughout the greatest part of their dominions, was uniform and simple. After that people had enlarged their city as far as was convenient by incorporating some of the neighbouring tribes, and had joined to it the possession of a considerable adjacent territory, they divided their future acquisitions.



acquisitions into distinct provinces; in each of which they placed a governor, invested with almost unlimited authority. It cannot escape observation, that the Roman patriotism, even in the boasted times of the commonwealth, was far from being directed by a liberal spirit; it proceeded from narrow and partial considerations: and the same people who discovered so much fortitude and zeal in establishing and maintaining the freedom of their capital, made no scruple in subjecting the rest of their dominions to an arbitrary and despotical government. The governor of every province had usually the command of the forces, and was invested with the supreme executive and judicial powers, together with the privilege of appointing the greatest part of the inferior officers, to whom the distribution of justice, or the care of the police, was intrusted. The oppressive taxes to which the inhabitants of the provinces were subjected, and the still greater oppression which they suffered from the arbitrary and illegal exactions of their different magistrates, are sufficiently known. The tribunals of Rome were at too great a distance to take a strict account of her provincial officers; and the leading men in the Republic, who expected, in their turns, to enrich themselves by the plunder of the provinces, were seldom disposed to enter very heartily into measures for restraining such enormities. The riches amassed by the offender afforded him, at the same time, the means of preventing any troublesome enquiry into his behaviour; and in proportion to the extent of his guilt, was commonly the degree of security which he afterwards enjoyed. Cicero affirms, that in the small government of Cilicia, after saving to the public the amount of a full million sterling, which the former governors had applied to their private use, he had,  
at

at the end of the year, about twenty thousand pounds of clear gain.

But while Rome was thus extending conquest and slavery over the world, she communicated to the conquered nations her knowledge, and her refinement in the arts of life. The great military establishment maintained in every province, in order to keep the inhabitants in subjection; the large body of civil officers necessary in the various departments of public administration; the numerous colonies, composed of Roman citizens, who settled in every part of the empire, and carried along with them the Roman institutions and customs; and, above all, the frequent resort of the chief provincial inhabitants to the capital of the empire, a natural consequence of their dependence; these circumstances produced an universal imitation of Roman manners, and throughout the dominions of Rome contributed to spread her language, arts, and literature. These advantages compensated in some measure, and were sometimes more than sufficient to counterbalance, the loss of independence. Wherever the Roman dominion was established, the ruder parts of the world were civilized.

Among all the countries subdued by the Romans, none was in a more uncultivated state than Britain; and it is probable that no country derived greater advantages from her subjection. A great part of the inhabitants, before they were incorporated in the Roman empire, seem to have been strangers to agriculture, and to have been maintained chiefly by their herds of cattle. They were divided into small independent tribes, under their several chiefs, as commonly happens in that early state of mankind; and these little societies being much addicted to  
C plunder,

plunder, and for that reason frequently engaged in hostilities, a regard to mutual defence had occasionally produced alliances among some of them, from which a variety of petty princes, or kings, had arisen in different parts of the country.

The Roman administration of Britain does not appear to have been distinguished from that of the other provinces at a distance from the seat of government. After the reduction of all that part of the island accounted worth the trouble of acquiring, the first great object was, to ascertain and preserve the conquest by a permanent military force. For this purpose the inhabitants were completely disarmed; and a standing army, composed, according to the lowest account, of three legions, amounting to upwards of thirty-six thousand foot and six thousand horse, was introduced, and regularly maintained\*. These troops were distributed over the province, and placed in stations where their service could be most useful, either by over-awing the natives, or by repelling the invasions of the unconquered tribes in the North. When not engaged in war, they were employed, according to the usual practice of the Romans, in public works; in building and repairing these two northern walls, which at different times were intended as the boundary of the province; in constructing forts; in clearing the country of its forests and marshes; and in opening a communication between different parts of it, by an uninterrupted chain of high roads.

There are said to have been, in the whole province, about a hundred and fifty Roman stations; which were connected with inferior fortresses, erected at convenient

\* *Hortely Brit. Rom.*—Whitaker Hist. Manchester, v. I. b. i. ch. 6.

distances,

distances, and garrisoned with regular troops\*. Each of these garrisons occasioned a resort of the neighbouring inhabitants, and probably gave rise to a sort of village or town, in which a promiscuous settlement was formed by Roman families, and those of the natives: the effect of such an intercourse, in the communication of manners and customs, may easily be conceived. In particular, as the military people were often rewarded by the public with landed possessions, their example could not fail to spread the knowledge and practice of agriculture, while their industry in the management of their estates contributed to beautify and improve the face of the country.

The connexion with Britain which the soldiers of the British army acquired by living in the country, was even seldom broke off when they were dismissed from the service. Though drawn originally from different parts of the empire, yet, having formed an attachment to the place in which they had so long resided, they were commonly disposed, in their old age, and when they had merited their dismissal, to pass the remainder of their days in the province. The offspring of these people became natural inhabitants; and Britain, in this manner, was continually receiving fresh supplies of Romans, who compensated for such of the natives as, in the course of recruiting the armies, were naturalized into other provinces.

After establishing a sufficient military force to maintain her authority, the attention of Rome was directed to the suppression of internal disorder among her subjects, by the regular distribution of justice. The jealousy entertained by the first emperors had suggested an important regula-

\* *Whitaker Hist. Manchester, v. I. b. i. ch. 8.*

tion for limiting the dangerous power of their provincial governors. From the time of Augustus, the provinces near the seat of the empire, as they enjoyed the prospect of tranquillity, were distinguished from such as were situated at a distance, and on that account more exposed to disturbance. In the former, the governor was merely a civil officer, and had no direction of the forces; but in the latter it was thought necessary that his authority should be rendered more effectual, by raising him to the head of the military, as well as the civil department\*.

The president or governor of Britain was in the latter situation; having the command of the army, together with the supreme jurisdiction, and the appointment of inferior magistrates. In the courts held by all these officers, the laws of Rome were considered as the standard of every decision. Wherever the Romans extended dominion, it was their constant aim to introduce their own jurisprudence; a system which was calculated to establish good order and tranquillity among the conquered people, as well as to promote the interest of the conquerors. The introduction of that system into Britain was more immediately necessary, to prevent those private wars, and to restrain those acts of violence and injustice, to which the inhabitants were so much addicted: it is not likely, however, that an innovation of such importance was accomplished all at once. In the public administration of the province, the Roman magistrates assumed an absolute authority; but, in matters of private property, the British chiefs and petty princes appear, for some time after the conquest, to have retained their ancient jurisdiction, and to have determined

\* Dio. Cass. 53.—Hein. ad lib. i. dig. tit. 16. 18.

the

the differences of their own tenants and dependants. But this jurisdiction became gradually more circumscribed, and seems at last to have been entirely annihilated. The continual migration of foreigners into the province, brought along with them the fashions acquired in other parts of the empire; while the multiplication and enlargement of the British towns, which, for the most part, were governed according to the policy of Rome, extended the influence of the Roman judges. The province of Britain is said to have contained about an hundred and forty towns, nine of which were of the rank of colonies; and the customs, as well as the notions of order and justice, which prevailed in those places of common resort, were easily propagated over the surrounding country. The long continuance of the provincial government, and the progress of the natives in civilization, disposed them more and more to neglect their original magistrates, and to court the favour of the ruling powers, by an immediate appeal to their protection.

To procure a revenue not only sufficient for defraying the expences of the civil and military establishments, but also capable of affording annual remittances to the emperor, was a third, and perhaps the principal object of his administration. The Britons were subjected to taxes of the same nature with those which were levied from the other provinces\*; the proprietors of arable land paid an annual quit-rent, supposed to be equal to a tenth part of the fruits; and the possessors of pasture ground were also loaded with a duty, proportioned to the number of their cattle†. The

\* See an account of the taxes throughout the Roman dominions, in Burman. de Vect. Rom.

† This tax upon cattle was called *Scriptura*.

customs

customs and excise, in this part of the Roman dominions, are said to have been remarkably heavy\*; but the impositions which excited most complaint were, a poll-tax, and a duty upon funerals: these, being levied at a fixed rate, without any regard to the poverty or riches of the people, and having no immediate dependance on the prosperity of trade and manufactures, were most easily increased at pleasure, and therefore seem to have been the usual expedients for raising supplies, when every other taxation had been found ineffectual †.

The charge of collecting the revenue was committed to an *imperial procurator*, who had the superintendance of all the inferior officers employed in this branch of administration; and in Britain, as well as in the other provinces, the principal taxes were let to farmers for the payment of a yearly rent. From this mode of collection, so liable to abuse, and from the nature of the government in other respects, it may seem unnecessary to remark, that the Britons were exposed to grievous extortions. If the countries near the seat of the empire, and within the observation of the sovereign, were abandoned to the arbitrary measures of the provincial officers, it cannot be supposed that those at a distance were in a better situation. Tacitus mentions, in terms of the highest indignation, the unfeeling rapacity of the Roman officers in Britain; which, at an early period, excited a general revolt of the inhabitants ‡.

It is well known, that the cities and provinces under the Roman dominion were often reduced, by the demands of

\* Strabo, lib. 4.

† See the terms in which Boadicea is made to complain of the two last-mentioned taxes. Xiphilinus in Nerone.

‡ Tacit. Agric. ch. 15.

govern-

government, to such distress, as obliged them to borrow money at exorbitant interest; and that, by taking advantage of their necessities, the monied men of those times were enabled to employ their fortunes in a very profitable manner. In this trade, though prohibited by law, and however infamous in its own nature, the best citizens of Rome (such is the force of example) were not ashamed to engage. Seneca the philosopher, whose philosophy, it seems, was not incompatible with the love of money, lent the Britons, at one time, above three hundred and twenty-two thousand pounds\*.

Were it possible to ascertain the extent of the revenue drawn from the province of Britain, we might thence be enabled to form a notion of the opulence and improvement attained by the inhabitants. Dr. Henry, who has made a very full collection of the facts mentioned by ancient authors concerning the provincial government of this Island, supposes that its annual revenue amounted to no less than two millions sterling †. But this is a mere conjecture, unsupported by any authority; and it should seem that no

\* *Χίλιας μυριάδας*, quadringenties tertium; viz. £.322,916. 13. 4. Xiphilinus in Nerone.

† This supposition is built upon a calculation of Lippius, who makes the revenue of Gaul amount to £.2,421,875. This calculation is only supported by a passage of Cicero, quoted by Strabo, which mentions the revenue of Egypt, in the time of Auletes, the father of Cleopatra, as amounting to that sum; and by a passage in Velleius Paterculus, asserting that Egypt in taxes yielded nearly as much as Gaul. But the evidence arising from this is too slight, when opposed to the authority of Suetonius, and that of Eutropius; who say, that Cæsar drew from Gaul only *quadringenties*, £.322,916. 13. 4. Supposing, however, the fact to be ascertained, that the revenue of Gaul was about two millions and a half, is there sufficient ground to infer from this that the revenue of Britain was, at least, two millions? Lippius de Magn. Rom.—Henry's Hist. v. I.

accounts

accounts have been transmitted by historians, from which the point can be determined.

The improvements made by the Britons in agriculture were such, as to produce a regular exportation of corn, for supplying the armies in other parts of the empire. Their houses were built in the same style of architecture; and many of them were adorned with statues and public structures, in the same taste of magnificence which prevailed in Italy. In this branch of labour, their mechanics were even so numerous, and had such reputation, as to be employed upon the neighbouring continent. In weaving cloth they appear also to have made considerable proficiency. We are informed, in particular, that linen and woollen manufactures were established at Winchester\*.

The foreign trade of Britain, arising from her valuable tin mines, and for which the Island was, at a very remote period, frequented by the Phenicians, and other commercial nations of antiquity, is universally known. When this branch of commerce, together with those of lead, wool, hides, and some other native productions, came to be secured of a regular market, under the eye and protection of the Roman magistrate, they were undoubtedly pushed to a considerable extent.

In taste and literature, the advances made by the Britons were no less conspicuous than in the common improvements of life. Even in the time of Agricola, "the youth of distinguished families," according to the great historian of that age, "were instructed in the liberal arts: inasmuch that those who but lately were ignorant of the language, began to acquire a relish for the eloquence of Rome. They became fond of appearing in the dress of the

\* Henry's Hist. v. I.

"Romans,

"Romans, and by degrees were led to imitate their vices, their luxury, and effeminacy, as well as their elegance and magnificence\*."

The fashion of travelling for education, and of residing in Rome, and in other learned and polite cities of the empire, was early introduced among the Britains; who, in a noted passage of Juvenal, are mentioned as being indebted to the Gauls for their eminent proficiency in pleading at the bar†. In Britain, as well as in other provinces, the utmost attention was given by government, to propagate the knowledge not only of the Latin and Greek languages, but of all those branches of science that enjoyed any reputation; and for this purpose, academies and schools, with public encouragement, are said to have been erected in the principal towns. From these different sources the Roman learning, in all its parts, was communicated to this Island; where it flourished for some time, and was afterward subjected to a similar decay as in all the other provinces of the empire.

The successive changes which happened in the political situation of the Roman Empire produced alterations in the administration of all the provinces, as well as of Britain in particular. The despotical government of Rome, as it had been at first established, so it was afterwards entirely supported by a military force; in its original, therefore, it contained the seeds of its destruction. As, by his tyrannical behaviour, the reigning emperor became naturally the object of detestation and resentment to his subjects, he was exposed to the continual hazard of insurrection, from the disgust or caprice of that army which he kept on foot for

\* Tacit. Agric. c. 21.

† Gallia caudicibus docuit facunda Britannos. Juv. Sat. 15.

maintaining his authority. It was, at the same time, impossible that he should command in person the different armies necessary for the defence of the whole empire, or that he should prevent the general of every separate army from acquiring influence and popularity with the troops under his direction. The greatest and most veteran of those armies were unavoidably employed on the frontiers, where their service was most needed, and where their courage and activity were most exercised; and their leaders being too far removed from the chief magistrate to meet with any disturbance in forming their ambitious plans, were frequently in a condition to render themselves independent, or to open a direct passage to the throne.

But the independence of the opulent and leading men in the distant provinces was increased by another circumstance of still greater importance. The first emperors, who possessed the extensive and rich countries lately subdued by the Roman arms, enjoyed an immense revenue, and their influence must have been proportionably great; but the oppressive nature of their government, and the unbounded licence which they gave to the plunder of their subjects, could not fail to discourage industry, and of course to reduce the people to poverty and beggary. The extent of the Roman Empire had, in the mean time, become so great that the expence of maintaining forces on a distant frontier, with a view of making any farther conquest, seemed to overbalance the advantages which it might be supposed to produce. Adrian, a prince no less distinguished for activity than wisdom, was induced to contract his dominions, and to abandon a part of what had been already acquired, that he might be able to preserve the remainder in greater security. Thus, while the old chan-

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nels of public revenue were drained, no new sources could be provided to supply the deficiency. In this situation the emperor felt a gradual decline of his authority; and as he became less able to protect the inhabitants of the provinces, or to punish their disobedience, they were more disposed to shake off their allegiance, and emboldened to follow the fortunes of any adventurer who found himself in a condition to disturb the public tranquillity.

For preventing these disorders, it was thought a prudent measure to associate different leaders in the supreme power. The first traces of this practice may be discovered about the time of Trajan and the Antonines, who partly, as it should seem, from affection, and partly from political motives, adopted in their own life-time a *Cæsar*, or successor to the crown. The same plan was farther extended by Dioclesian, who divided the sovereignty between two emperors and two Cæsars; and who seems to have thought that, to preserve the empire from falling in pieces, it was requisite to submit to the manifest inconveniences arising from the jealousy and bad agreement of so many independent heads. The emperor Constantine rendered this division more permanent, by erecting a great Eastern capital, which became the rival, and even superior, in opulence and dignity, to that of the west.

In conformity to such views of dividing the sovereignty among those leaders who might otherwise be disposed to tear the empire asunder, subdivisions were made in those territories which had formerly composed a single province; and in each subdivision a chief officer was appointed, whose authority might serve to limit and circumscribe that of him who had the government of the whole. Thus the same prince who founded Constantinople, having dis-

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banded the old prætorian guards, whose power had long been so formidable, distributed the whole empire into four great *præfectures*, corresponding to the four joint sovereignties already established. Each præfecture he divided into certain large territories, called *jurisdictions*, under their several governors; and each jurisdiction he parcelled out into smaller districts, under the denomination of *provinces*, which were committed to the care of deputy-governors.

Britain, which originally formed a single province, but which, by the emperor Severus, had been divided into two, was, according to this arrangement, multiplied into five provinces; and the *vicar*, or governor of the whole, enjoyed a paramount authority to that of its five deputy-governors.

The direction of the civil, and that of the military establishment, were, for the same reason, separated, and placed in different hands. After the dismissal of the prætorian guard, and of its commander, two military officers were appointed, the one of which had the command of the infantry, and the other of the cavalry, throughout the empire; and under them the number of generals, in particular districts, appears to have been considerably increased. The Roman forces in this Island came, in the later periods of its provincial government, to be under the direction of three independent officers; the *duke of Britain*, who commanded on the northern frontier; the *count of Britain*, who conducted the troops in the interior parts of the country; and the *count of the Saxon shore*, employed in superintending the defence of the southern and eastern coasts, which, from about the beginning of the third century, had been exposed to frequent incursions from the Saxons.

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All these precautions, however, by which the Roman emperors endeavoured to maintain subordination and dependence in the different parts of their dominions, were ineffectual in opposition to the prevailing current of the times. The same unhappy system which tended to loosen the bands of government, contributed also to render the military establishment unfit for defence against a foreign enemy. As all power and distinction were ultimately derived from the army, it was the interest of every general to court the favour of the troops under his command, not only by enriching them with donations and emoluments, but by treating them with every kind of indulgence. The natural consequence of such a situation was the procuring to the soldiers an exemption from the laborious duties of their profession. Feeling their own consequence, the military people set no bounds to their licentious demands, and were rendered inactive and effeminate, in the same proportion as they became haughty and insolent. The heavy armour, which in former times had been used with so much advantage, was therefore laid aside, as too cumbersome and fatiguing; and the ancient military discipline, the great cause of all their victories, was at length intirely neglected. It was thus that the Romans, being deprived of that superiority which they had formerly possessed, in their encounters with rude and ignorant nations, found themselves unable to resist the fierce courage of those neighbouring barbarians, who, about the fifth century, were invited to attack them by the prospect of plunder and of new settlements.

In this declining state of the Roman empire, the revenue of the provinces, by suffering a gradual diminution, became at length insufficient for the support of their civil and

and military establishments; and whenever any country had been reduced to such a degree of poverty as to be no longer able to repay the trouble and expence of maintaining it, good policy seemed to require that it should be abandoned. To such an unfruitful condition the distant provinces, and Britain more especially, appear to have been fast approaching, in the reign of Arcadius and Honorius, when a deluge of barbarians, pressing on all sides, threatened the state with sudden destruction, and made it necessary to withdraw the forces from this Island, in order to defend the richer and more important parts of the empire.

The situation of Britain, when thus deserted by the Romans, was no less new and singular, than it was alarming and unhappy. When mankind are formed into political societies, and have acquired property, they are usually provided with one set of regulations for repelling the attacks of their enemies, and with another for securing internal tranquillity. But the Britons, upon this extraordinary emergency, were left equally destitute of both. From the distrustful jealousy of Rome, they had been removed from all concern in military transactions, at least in their own country, and made to depend for their safety upon an army composed entirely of foreigners. In such a state they had remained for more than three centuries, enjoying the protection of their masters, without any call to exert themselves in their own defence; and cultivating those arts which tend to soften the manners, while they inspire an aversion from the dangers and hardships of a martial life. Thus the Britons, in their advances towards civility, lost the courage and ferocity of barbarians, without acquiring the skill and address of a polished nation; and

and they ceased to be warriors by nature, without being rendered soldiers by discipline and education.

But the departure of the Romans from Britain was no less fatal to all the institutions of civil government. The governors and other officers, who directed the administration of public affairs, the farmers engaged in the different departments of the revenue, the magistrates of Roman appointment, who determined both civil and criminal causes, and who had now acquired a complete jurisdiction over the whole province, had no longer occasion to remain in a country which was totally abandoned by its master, and in which, by the removal of the army, they had lost the means of maintaining their authority. The courts of justice, therefore, were dissolved; the taxes were abolished; and all order and subordination were destroyed. Even private individuals, of Roman extraction, who had acquired estates in Britain, endeavoured to dispose of their fortunes, and by leaving the Island, avoided the storm that appeared to be gathering around them.

The disasters which followed were of such a nature as might be expected from the anarchy and confusion which prevailed in the country. The Scots and Picts, who, in the northern part of the Island, had remained unconquered, and retained their primitive barbarous manners, took advantage of this favourable opportunity, to invade and plunder their more opulent neighbours. They met with little resistance from the Britons, who, giving way to their fears, and conscious of their inferiority, seemed to place their only refuge in the protection of their ancient rulers. The abject manner in which they, at different times, solicited that protection; the behaviour of their ambassadors, who in the presence of the emperor rent their garments, and putting



ting ashes upon their heads, endeavoured to excite commiseration by tears and lamentations; the letter which they wrote to Ætius, the præfect of Gaul, inscribed *the groans of the Britons*, and in which they say, *the barbarians drive us into the sea, the sea throws us back upon the barbarians, and we have only the hard choice left us, of perishing by the sword, or by the waves*; these particulars, which are handed down by historians, exhibit the shocking picture of a people totally destitute of spirit, and unable to collect resolution even from despair. Upon two occasions they obtained from Rome the aid of a military force, by which their enemies were surprized, and repulsed with great slaughter; but the relief which this afforded was merely temporary, and they received a peremptory declaration, that, from the embarrassed condition of the empire, no future supplies of this kind could be spared\*.

The consternation of the Britons, in this helpless condition, may easily be conceived, though in the rude annals of that period it is, perhaps, painted with some degree of exaggeration. Time and necessity, however, suggested the means of guarding against the evils to which they were exposed. The proprietors of land possessed a natural influence over the people whom they maintained upon their estates; and this was the source of a jurisdiction, which, during the subsistence of the Roman dominion, had been in great measure extinguished; but which, upon the dissolution of the Roman courts, was of course revived and rendered independent. The same influence enabled these persons to call out their tenants to war, and to assume the direction of their conduct during a military enterprize. By

\* Gildæ Hist.—Beda's Hist. Eccles.

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these two branches of authority, a very simple form of government was gradually introduced. The whole country was broken into separate districts, according to the extent of territory in the possession of individuals, and fell under the civil and military power of so many chiefs, the most opulent of whom appear to have been dignified with the title of princes. By the efforts of these leaders, it is likely that private robbery and violence were, in some degree, restrained, and the people were encouraged to return to their tillage and ordinary employments; from the neglect of which, it is said, a famine had been produced. But their great object was to oppose the northern invaders; for this purpose they elected a general of their united forces, upon whom, after the example of the Romans, they bestowed the appellation of the *duke of Britain*. The same person presided in the assemblies held by the chiefs, in which the great affairs of the nation appear to have been determined.

After the government had remained for some time in this channel, Voltigern, one of the most opulent of their princes, was promoted to that high dignity; and upon a new alarm of an invasion from the Scots and Picts, he is said to have called a national council, in which it was agreed to solicit the assistance of the Saxons. As this measure was fatal in its consequences, it has been univervally decried, and stigmatized as the height of imprudence; but we ought to consider that it proceeded from the same system of policy which has been practised and approved in all ages, that of courting the alliance of one nation, in order to form a balance against the formidable power of another; and the censures which, in this instance, have been so liberally

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26 STATE OF BRITAIN, &c. Book I.  
rally bestowed upon the Britons, are a plain proof how ready we are to judge of actions from the good or bad success which attends them; or how difficult it is to establish any general rules of conduct, that will not appear grossly defective in a multitude of the particular cases to which they may be applied.

C H A P.

CHAP. II. CHARACTER, &c.

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*Character and Manners of the Saxons.*

OF those barbarians who passed under the denomination of Saxons, and who, at the time when they were invited to assist the Britons, inhabited the Northern parts of Germany, it is of little moment to ascertain the origin, or to trace the several places in which they had previously resided. The Germans, who subdued the Western provinces of the Roman empire, have been supposed to possess a singular character among the rude inhabitants of the world, and to be distinguished by their eminent qualities and virtues; in particular by their love of liberty. Such an opinion may be ascribed to the elegant description of that people by the masterly pen of Tacitus; to the great revolutions which they achieved in Europe; and, above all, to that national vanity which is more extravagant than the vanity of individuals, because the multitude of persons who are influenced by the same weakness keep one another in countenance. But there is reason to believe that the ancient inhabitants of Germany exhibited the same dispositions and manners, and adopted similar institutions and customs, to those which may be discovered in such barbarians, of every age or country, as have been placed in similar circumstances.

Deriving their chief subsistence from the pasturing of cattle, they generally possessed considerable wealth in herds and flocks; but as they were little acquainted with tillage,

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they seem to have had no idea of property in land. Like the early nations described in the Sacred History, they were accustomed frequently to change their abode. Regarding chiefly the interest of their cattle, they often found it convenient to wander from one place to another, according as they were invited by the prospect of new pastures; and in their migrations, they were under no restraint, either from the cares of husbandry, or from the nature of their possessions.

But while the management of their cattle constituted the ordinary employment of these people, they were also frequently engaged in war. In common with all other barbarous nations, they were much addicted to theft and rapine. The right of property must be long established, before the violations of it can be regarded as heinous offences; and it is necessary that men should be habituated to an extensive intercourse of society, before they are prevented with sufficient inducements to sacrifice the immediate profits of fraud and violence to the distant but superior advantages derived from their living together upon good terms, and maintaining an amicable correspondence. The ancient Germans, inhabiting a country almost entirely over-grown with wood, or covered with marshes, were often reduced to great scarcity of provisions, and were therefore strongly instigated, by hunger and misery, to prey upon one another. Example, in such a case, found no difficulty to excuse or vindicate what custom had rendered universal.

The rude inhabitants of the earth appear, in all ages and countries, to have been divided into separate tribes and villages; a consequence of their narrow communication, and of their hostile dispositions. When, from accidental circumstances,

circumstances, a family of such people had been planted, at so great a distance from their friends and acquaintance as to prevent all correspondence with them, its members, from inclination, as well as from a regard to mutual defence, were usually disposed to live together, and to avoid much intercourse with neighbours by whom they were likely to be treated as enemies. If their multiplication rendered them too numerous to be all maintained under the same roof, they naturally subdivided themselves into different families, who erected their huts beside one another; and if at length their village had been so enlarged as to produce a difficulty in finding subsistence, they were led, by degrees, to remove that inconvenience, by sending out little colonies, with which, notwithstanding their distance, they frequently preserved an alliance and connection. The German tribes became larger and more extensive, according as, by the increase of their cattle, they were enabled to live in greater affluence. In that part of Germany which was known to the Romans, there have been enumerated about forty different tribes or nations, many of which appear to have enjoyed considerable opulence and power. But concerning the number or extent of the villages belonging to each of these, little or no account can be given.

The political regulations established among the ancient Germans were few and simple, and such as their situation could hardly fail to suggest. Every society, whether great or small, that had occasion to act in a separate military capacity, required a separate leader: for which reason, as every family was under the direction of the father, so every village had its own chief; and at the head of the whole tribe or nation there was a great chief, or king.

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How far the king, or the inferior chiefs, enjoyed their dignity by election, or by hereditary descent, it may be difficult to determine, but their authority was far from being absolute. It was the business of every chief to compose the differences, and, probably, to command the forces, of that village over which he presided. The king too seems to have acted with their advice in the ordinary administration of public affairs; but in matters of great moment, such as the making of laws, or the trial of capital offences, he was obliged to procure the concurrence of a great council, composed of all the heads of families\*.

The general character of these barbarians was such as might be expected from their manner of life; it consisted not of many features, but they were distinctly and strongly marked. As in the carnivorous brute animals, obliged very often to fight for their food, and exposed to continual strife and contention in the pursuit of mere necessaries, their

\* "In pace, nullus est communis magistratus; sed principes regionum atque pagorum inter suos jus dicunt, controversiasque minuunt. Ubi quis ex principibus in concilio dixit se duces fore—qui sequi velint profiteantur; confurgunt ii qui et causam et hominem probant, suumque auxilium pollicentur, atque ab multitudine conlaudantur: qui ex iis secuti non sunt, in desertorum ac proditorum numero ducuntur, omniumque iis rerum postea fides derogatur." *Cæsar de Bel. Gal.* 6. § 23.—"Reges ex nobilitate, duces ex virtute sumunt. Nec regibus infinita aut libera potestas; et duces exemplo potius quam imperio, si prompti, si conspiciuntur, si ante aciem agunt, admiratione præfunt."—"De minoribus rebus principes consultant, de majoribus omnes: ita tamen, ut ea quoque, quorum penes plebem arbitrium est, apud principes pertractentur."—"Ut turbæ placuit, confidunt armati. Silentium per sacerdotes, quibus tum et coercendi jus est, imperatur. Mox rex, vel principes, prout ætas cuique, prout nobilitas, prout decus bellorum, prout faciendia est, audiuntur, auctoritate suadendi magis quam jubendi potestate."—"Licet apud concilium accusare quoque, et discrimen capitis intendere."—"Elegantur in iisdem conciliis et principes, qui jura per pagos vicisque reddunt."—*Tacit. de Mor. German. c. 7. 11. 12.*

passions,

passions, though excited by few objects, were strong and violent. Their situation, at the same time, occasioned a wonderful similarity in the dispositions and habits of individuals. In every polished nation the labour and application of the people is usually so divided, as to produce an endless variety of characters in those who follow different trades and professions: The soldier, the clergyman, the lawyer, the physician, the taylor, the farmer, the smith, the shopkeeper; all those who earn a livelihood by the exercise of separate employments, whether liberal or mechanical, are led, by the different objects in which they are conversant, to contract something peculiar in their behaviour and turn of thinking. But the ancient inhabitants of Germany had made too little progress in arts to require that a single person should bestow his whole attention upon any one branch of labour, in order to acquire the usual degree of skill and proficiency in it. Every man therefore was accustomed to exercise indiscriminately the few employments with which they were acquainted. Every family built its own cottage, fashioned its own tools and utensils, managed its own cattle, and took precautions for its own support and defence. Thus the whole people, being employed nearly in the same manner, and having no pursuits but such as were suggested by their most immediate wants, were trained up in an uniform sort of discipline, and acquired that uniformity of manners and customs, which is commonly observed in persons of the same trade or profession. Even the nations inhabiting the most distant regions of that extensive country appear to have been no otherwise discriminated than by the different shades of barbarism and ferocity which the climate or situation, more or less favourable to improvement, might easily be supposed to produce.

Among

Among people who are constantly exposed to the attacks of their neighbours, and who are almost continually employed in war, courage and other military qualities are naturally intitled to hold the first rank. There is an *active* and a *passive* courage, which may be distinguished from each other, as they seem to depend upon different principles, and are not always to be found in the same persons. The former is displayed in the voluntary encountering of danger, the latter in bearing pain and distress with firmness and constancy. Valour, which demands a sudden and violent effort of resolution, may be regarded as a masculine quality; while fortitude, which, in many cases, is the fruit of calmer but more continued exertion, is often conspicuous in the weaker sex. In order that, with our eyes open, we may expose our lives to imminent danger, we must be excited by a strong desire of procuring esteem and applause, either from others, or from the reflection of our own minds. Efforts of this kind, it is evident, are most likely to be made in those countries where, from long practice, and frequent emulation in fighting, martial exploits have come to be universally admired, and looked upon by every one as the infallible road to honour and distinction. Fortitude under pain and distress may, on the contrary, be promoted by the opposite circumstances, by the want of sensibility, or by a conviction that our sufferings are beheld with unconcern and indifference. To complain or repine, in the midst of affliction, is an attempt to procure relief, or at least compassion, from others; and when we find that our complaints are disregarded, or treated with scorn and derision, we are led to exert our utmost resolution in order to smother and restrain them.

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The savages, who live by hunting and fishing, are placed in a situation more favourable to fortitude than to valour. Exposed by their manner of life to innumerable hardships and calamities, they are too much loaded by the pressure of their own wants and sufferings, to feel very sensibly those of their neighbours. They disdain, therefore, to solicit that sympathy, which they know by experience will not be afforded them; and having, from their daily occurrences, been long enured to pain, they learn to bear it with astonishing firmness, and even to endure every species of torture without complaining. As, on the other hand, they live in very small societies, and, in order to find subsistence, are obliged to remove their different villages to a great distance from one another, they are not apt to be engaged in frequent or extensive military enterprises, nor to attain any degree of refinement in the methods of conducting their hostilities. The punctilios of military honour are unknown to them. They scruple not to take any unfair advantage in fighting, and can seldom be brought to expose themselves in the open field. The unrelenting and blood-thirsty Indian of America is accustomed to lie concealed for weeks, that he may have a convenient opportunity of shooting his enemy, and may then with safety enter his cabin, to rob and murder the family.

Nations who subsist by pasturing cattle, as they live in larger societies, and are supplied with food in greater abundance, are more at leisure, and have greater incitements to cultivate their social dispositions. But their magnanimity, in bearing pain and affliction with apparent unconcern, is naturally diminished by their advancement in humanity; and according as individuals discover that their distresses meet with greater attention from their companions and acquaintance,

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ance, they are more encouraged to display their sufferings, and to seek the tender consolation of pity, by giving way to the expression of sorrow and uneasiness: they are also likely to acquire a much higher degree of the military spirit. The wandering life of shepherds is the occasion of bringing frequently into the same neighbourhood a variety of stranger tribes; among whom any accidental jealousy, or interference of interest, is apt to kindle animosity, and to produce quarrels and hostilities. In the frequent wars that arise from such a situation, and which are carried on with the ardour and ferocity natural to barbarians, the victors, having no fixed residence, are at full liberty to prosecute their success without interruption; and as, in every migration, such people are obliged to carry along with them their wives and children, and servants, together with their herds and flocks, and even their furniture and utensils, a decisive battle never fails to reduce one tribe completely under the power of another. With the same ease with which the conquerors may pursue their victory, they can incorporate with themselves the vanquished party, and make use of their assistance in any future enterprise. Thus by repeated successes, and by a gradual accumulation of forces, a single tribe may, in a short time, become so powerful, as to meet with no enemy in a condition to cope with them, and be excited with great rapidity to over-run and subdue a vast extent of country. History is accordingly filled with the rapid and extensive conquests made by nations in this early state of society; of which, in particular, there occur many celebrated examples among the Arabs and Tartars.

Such

Such was the condition of the ancient Germans; of whom it is remarked by the historian, that they were less distinguished by their patience of labour, or by their capacity to bear the extremities of heat and cold, of hunger and of thirst, than by their active courage, and their ardent love of military reputation\*. "They are more easily persuaded," says Tacitus, "to march against an enemy, and to expose themselves in the field, than to plough the earth, and to wait the returns of the season. They account it unmanly to acquire with sweat what may be procured with blood. When they engage in battle, it is a disgrace for the chief to be surpassed in valour; it is a disgrace for his followers not to equal the bravery of their chief; it is perpetual infamy to escape with safety, after the fall of their leader. To defend and protect his person, to devolve upon him the glory of all their brave actions, is the principal point of honour. The chiefs fight for victory, their followers for the reputation and dignity of the chief †."

The same circumstances which gave rise to frequent hostilities between the members of different tribes, produced a strong attachment between the individuals belonging to each of those little societies. United by a sense of their common danger, and by their common animosity, against all their neighbours, they were frequently required by their situation to defend and relieve one another, and even to hazard their lives for their mutual safety. Living

\* Laboris atque operum non eadem patientia; minimeque sitim æstumque tolerare, frigora atque inedia cœlo solvere assueverunt. Tacit. de Mor. German. c. 4.

† Ibid. c. 14.

in a small circle of acquaintance, and having scarcely any intercourse with the rest of mankind, they naturally contracted such prejudices and prepossessions as tended to flatter their own vanity, and to increase their partial regard for that village or tribe of which they were members. But however warmly attached to their kindred and friends, it could not be expected that, in their ordinary behaviour, they would exhibit much delicacy or refinement of manners. They were too little acquainted with the dictates of prudence and sober reflection, to be capable of restraining the irregular sallies of passion; and too little conversant in the arts of polished society, to acquire a facility of yielding up their own opinions, and of sacrificing their own inclinations and humours, to those of their companions. The head of every family; unaccustomed to bear opposition or controul, demanded an implicit submission and obedience from all its members. When he met with great provocation, it was not unusual for him to take away the life of a servant; and this was regarded as an exercise of domestic authority, for which he could not be subjected to any punishment\*. Even the feelings of natural affection did not prevent the children from being, in like manner, subjected to the arbitrary power of the father, and from feeling, on many occasions, the unhappy effects of his casual displeasure. Neither does the condition of the mother appear to have been superior to that of her children: the little attention which, in a rude age, is usually bestowed upon the pleasures of sex, and the inferiority of the women in strength, courage, and military accom-

\* "Occidere solent, non disciplina et severitate, sed impetu et ira, ut inimicum, nisi quod impune." Tacit. de Mor. German. c. 25.

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plishments, deprived them of that rank and consequence which they enjoyed in a civilized nation. There is great reason to believe that the husband commonly bought his wife from her father, or other male relations, and that he considered her in the light of a servant or slave. If she was guilty of adultery (a crime which, from the general simplicity of manners, was probably not very frequent, but which, by introducing a connection with a stranger, was highly prejudicial to the interest of the family) the punishment inflicted by the husband, was that of stripping her naked, turning her out of doors, and whipping her through the village\*.

In the intercourse of different families, and in their common amusements, their behaviour was suited to the spirit and disposition of a martial, but rude and ignorant people. Their military life, which was incompatible with industry, prevented the growth of avarice, the usual attendant of constant labour and application in every lucrative profession. Their employments were such as united them by a common tie, instead of suggesting the idea of a separate interest, or engaging them in a struggle for riches, by which the pursuits of every man are, in some measure, opposed to those of his neighbour. Their herds and flocks, in which their wealth principally consisted, being under the management and direction of a whole village or tribe, were considered, in some sort, as the joint property of all; so far at least, as to render individuals willing, on all occasions, to relieve their mutual wants, by sharing their goods with one

\* Tacit. de Mor. German. c. 18. 19. The conformity of the German manners with those of other barbarous nations, in relation to the condition of women and children, I have endeavoured to illustrate, in a treatise entitled, *An Enquiry into the Origin of Ranks.*

another.

another. Hence that hospitality and generosity which is so conspicuous among shepherd nations in all parts of the world. "No nation," says the author above quoted\*, "is more hospitable than the Germans. They make no difference, in this respect, between a stranger and an acquaintance. When a person has been liberally entertained in one house, he is conducted to another, where he is received with the same hearty welcome. If a guest, at his departure, should ask a present from his entertainers, it is seldom refused; and they will ask any thing of him with the same freedom. They are fond of making presents, which are scarcely understood to lay the receiver under any obligation."

Their military operations, no doubt, required a violent, though an irregular and transient exertion; but upon the conclusion of an expedition they were completely at liberty to indulge themselves in rest and idleness. From these opposite situations, they contracted opposite habits, and became equally restless and slothful. When not engaged in the field, the warriors disdained to assist in domestic offices, they even seldom exercised themselves in hunting; but, leaving the care of their cattle, and of their household, to the women and children, or to the old and infirm, they were accustomed to pass their time in listless indolence, having little other enjoyment but what they derived from food or from sleep†. That from such dispositions they found great delight in convivial entertainments, and were given

\* Tacit. de Mor. Germ. § 21.

† "Quoties bella non ineunt, non inultum venationibus, plus per otium transigunt, dediti somno, ciboque. Fortissimus quisque ac bellicosissimus nihil agens, deligata domus et penatum et agrorum cura feminis senibusque, et infirmis  
" cuique

given to great excesses in eating and drinking, may easily be supposed. By the pleasures of intoxication, they sought to dissipate the gloom of that languor and weariness with which they were oppressed, and to enliven the barren prospect which the ordinary course of their thoughts and sentiments was capable of presenting to them. For the same reason they were addicted to games of hazard; inasmuch that persons who had lost their whole fortune at play would afterwards, it is said, venture to stake their liberty; and having still been unlucky, would voluntarily become the slaves of the winner\*. The practice of gaming must have been carried to a high pitch, when fashion, even among such barbarians, had made it a point of honour to discharge a game-debt of that extraordinary nature. It is observable, that in countries where men have exhausted the enjoyments arising from the possession of great riches, they are apt to feel the same want of exercise and occupation, as in that simple age when they have not yet contracted those habits of industry by which wealth is acquired; and they are forced to make use of the same expedient to deliver them from that *tedium vite*, which is the most oppressive of all misfortunes. The opposite extremes of society appear in this respect to coincide; and excessive gaming is therefore the vice, not only of the most opulent

"cuique ex familia, ipsi habent: mira diversitate naturæ, cum iidem homines sic ament inertiam et oderint quietem." Tacit. de Mor. Germ. c. 15.

—"Diem noctemque continuare potando nulli probrum." Ibid. c. 22.

\* Aleam (quod mirere) sobrii inter serâ exercent, tanta lucrandi perdendique temeritate, ut cum omnia defecerunt, extremo ac novissimo jactu de libertate et de corpore contendant. Viginti voluntariam servitutem adit. Quamvis junior, quamvis robustior, adligari se ac venire patitur. Ea est in re prava pervicacia: ipsi fidem vocant. Tac. de Mor. Germ. c. 24.



and luxurious nations, but of the most rude and barbarous.

Among all the German nations, the Saxons, who appear to have been scattered over the peninsula of Jutland, and along the neighbouring shores of the Baltick Sea, were the most fierce and barbarous, as they were most completely removed from that civility and improvement which every where attended the progress of the Roman arms. Their maritime situation, at the same time, had produced an early acquaintance with navigation, and had even qualified them to undertake piratical expeditions to several countries at a distance. They had, accordingly, long infested the coasts of Britain and Gaul; insomuch that in the former country it was found necessary, as has been already observed, to appoint a military officer, with a regular force, to guard against their depredations.

Making allowance, however, for such differences as might arise from this peculiarity of situation, their character and manners were similar to those of other inhabitants of Germany, and, in general, to those of the wandering tribes of shepherds in every age or country.

Upon the whole, when we examine the accounts delivered by the best historians, concerning the ancient inhabitants of Germany, as well as the Saxons in particular, we find nothing, either in their public or private institutions, or in their habits and ways of thinking, which we can reasonably suppose to have occasioned any peculiarity in the government established by the latter people in Britain. Whatever peculiarity therefore is observable in the Anglo-Saxon government, it must have arisen from causes posterior to the migration of that people into Britain; from the nature of the country in which they settled; from the  
manner

manner in which their settlements were formed; or from other more recent events and circumstances.

Some writers fondly imagine, that they can discover, in the political state of the Saxons, while they remained in their native forests, the seeds of that constitution which grew up in England during the government of the Anglo-Saxon princes. With respect to those innate principles of liberty which have been ascribed to this people, it must be observed, that in proportion as mankind recede from civilized manners, and approach to the infancy of society, they are less accustomed to authority, and discover greater aversion to every sort of restraint or controul. In this sense the Saxons may be said to have possessed a stronger relish for freedom than many of the other German tribes; as the present Indians of America, who are mere hunters and fishers, discover a still freer spirit than appeared among the Saxons. But as this love of liberty proceeds from the mere want of the common means of improvement, and from no original peculiarity of character, it is not likely to be retained by such barbarians, after they have opportunities of improving their condition, by acquiring property, and by extending the connexions of society. When the Saxons in Britain became as opulent as the German or Scythian tribes, who settled in other provinces of the Roman empire, there is no reason to believe, that in consequence of their primitive poverty and barbarism, they were with more difficulty reduced into a state of subordination, and submission to civil authority. The ancestors of almost every civilized people may be traced back to the most rude and savage state, in which they have an equal title to be distinguished, as men impatient of all restraint, and unacquainted with the commands of a superior.

## C H A P. III.

*Settlement of the Saxons in Britain.*

THE Saxons accepted with joy and alacrity the proposals made to them by the Britons; and it appears to have been stipulated, that they should immediately send a body of troops into Britain, to be employed in the defence of the country, and to receive a stated hire during the continuance of their services\*. In consequence of this agreement Hengist and Horsa, two brothers, and persons of distinction among the Saxons, with about sixteen hundred followers, landed in the isle of Thanet, in the year 449; and having defeated the Picts and Scots, confined them, in a short time, within their ancient boundaries. The Saxon troops immediately after were stationed by Voltigen partly upon the confines of the Northern wall, and partly upon the Kentish coast, the two places that had been usually secured with garrisons under the late dominion of the Romans. In such a situation these auxiliaries, who formed the principal strength of the country, could hardly fail to perceive their own importance, and to entertain the design of extorting a permanent settlement from the inhabitants. With this view, Hengist is said to have persuaded the Britons to hire an additional number of his countrymen, as the only effectual means for securing themselves from the

\* Stillingfleet Orig. Brit. — Bede says, that the Saxons first took occasion to quarrel with the Britons, by demanding an increase of their *allowance*, to which he gives the name of *annona*. Hist. Eccles. lib. i. c. 15.

future

future incursions of the enemy; and, upon an application for that purpose, was joined by a new body of Saxons, amounting to five thousand men. By this reinforcement he found himself superior to the disjointed and unwarlike forces of the country. Having therefore secretly concluded a treaty of peace with the Picts and Scots, and pretending that the articles of the original agreement, with relation to the pay of his troops, had not been observed, he ventured to throw off the mask, and openly to make war upon the Britons. His example was followed by other adventurers, among the same people, who, at the head of different parties, allured by the hope of plunder, and of a new settlement, invaded the coasts of Britain, and endeavoured to penetrate into the country: their attempts were crowned with success, and the most valuable part of the Island was at length reduced under their dominion. This great event, however, was not accomplished without a violent struggle, nor in less than a hundred and seventy years; during which time many battles were fought, with various fortune. It is remarkable that, notwithstanding their fears and pusillanimity, when first abandoned by the Romans, the Britons, in the course of their long-continued contest with the Saxons, defended themselves with more obstinate resolution, than, upon the downfall of the Roman empire, was discovered by any of the other provinces, though supported by the armies of Rome. The want of any foreign assistance was, in all probability, the cause of this vigorous and spirited behaviour; as it called forth the exertion of their powers, and produced in them a degree of courage and discipline, which the provinces enjoying the protection of the Roman government were not under the same necessity of acquiring.

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We have no full account of the circumstances attending the settlement of the Saxons in Britain; but we may form an idea of the manner in which it was completed, from the general situation of the people, from the imperfect relations of this event by our early historians, and from the more distinct information that has been transmitted concerning the settlement of other German nations, in some of the Roman provinces upon the continent of Europe.

The followers of any particular leader having gained a victory, became the masters of a certain territory, and enriched themselves with the spoil of their enemies. Willing to secure what they had obtained, they were led afterwards to offer terms of accommodation to the vanquished; with whom they appear, on some occasions, to have made a formal division of their land and other possessions. But even in those cases, where no express treaty of this nature had been formed, the same effects were produced, from the mere situation of the combatants; and upon the conclusion of a war, the parties were understood to have the property of the respective districts which they had been able to occupy or to retain. Such of the Britons as had been made captives in war were doubtless, in conformity to the general practice of the ancient Germans, reduced into a state of servitude; but those who had escaped this misfortune resided in the neighbourhood of the Saxons, and often maintained a friendly intercourse with them.

The ambition, however, and avidity of these barbarians, incited them, in a following period, to renew their former hostilities, and these were generally followed by new victories, and by a farther extension of conquest. In this manner, after a long course of time, the country was completely subdued by these invaders; and the ancient inhabitants

tants were, according to accidental circumstances, partly degraded into a state of slavery, and partly, by particular treaties, and by long habits of communication, incorporated with the conquerors.

From the declamatory representations of some early annalists, the greater part of historians have been led to suppose, that such of the Britons as escaped captivity were either put to death by their barbarous enemies, or, disdain- ing submission, and expecting no mercy, retired into Wales, or withdrew into the country of *Armorica* in France, to which, from them, the name of *Bretagne* has been given. An acute and industrious antiquary, Mr. Whitaker, has lately shown, I think in a satisfactory manner, that this extraordinary supposition is without any solid foundation. That many of the Britons were at that period subjected to great hardships, and, in order to save themselves from the fury of their enemies, were even obliged to quit their native country, may be easily believed; but that the Saxons were animated with such uncommon barbarity, as would lead them, in direct opposition to their own interest, to root out the ancient inhabitants, must appear highly improbable. Of the total extirpation of any people, by the most furious conquerors, the records of well-authenticated history afford not many examples. It is known, at the same time, that no such cruelty was exhibited by any of the German nations who conquered the other provinces of the Roman empire; and it must be admitted, that the situation of all those nations was very much the same with that of the Saxons, as also that they were a people in all respects of similar manners and customs. There is even complete evidence that, in some parts of the Island, the Britons were so far from being

ing extirpated, that they were permitted to retain a certain proportion of the landed property; and it is remarkable, that this proportion, being a third part of the whole, was the same with that retained by the ancient inhabitants, in some of those provinces, upon the continent of Europe, which were conquered by the other German tribes. Though, in other cases, the vestiges of such early transactions have not been preserved, it is highly probable that a similar division of the land was made, either by express contract, or by tacit agreement. There can be no reason to believe that the same Saxons would, in one part of the Island, exhibit such moderation and humanity to the vanquished people, and in another, such unprecedented ferocity and barbarity.

It is further to be observed, that the language which grew up in Britain after the settlement of the Saxons, in which a large proportion of the *British* and the *Latin* tongues were incorporated with the *Saxon*, affords a sufficient proof that the inhabitants were compounded of the different nations by whom these languages were spoken.

When the Saxons invaded Britain, they were entirely a pastoral people; but as they came into a country which had been long cultivated, they could scarcely fail to acquire, very rapidly, a considerable knowledge of agriculture. Having obtained a quantity of land that was formerly employed in tillage, and having procured a proportionable number of servants, already acquainted with the various branches of husbandry, it may easily be imagined that they would avail themselves of this favourable situation, for the prosecution of an employment so conducive to their comfortable subsistence.

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In consequence of a general attention to agriculture, they must have been induced to quit the wandering life; since, in order to practise the employment of a farmer with any advantage, a continued residence upon the same spot is necessary. In the occupancy and appropriation of landed estates, those persons who had been most connected in war were most likely to become neighbours; and every little knot of kindred and friends were commonly led to build their houses together, that they might be in readiness to assist one another in their labour, and to unite in defending their possessions. The villages of German shepherds were thus converted into villages of husbandmen, which, in proportion to the progress of their arms, and to their advances in improvement, were gradually enlarged and spread over the country. It should seem that, upon the first settlement of the Saxons, the whole people were distributed into little societies of this kind; and no individual was so opulent, that he could expect to live in security, without maintaining an alliance and intimate communication with others. This custom of resorting to villages, introduced by necessity, in times of extreme barbarism and disorder, is even at present retained by many of the farmers in England; although, from a total change of manners and circumstances, it is evident that a separate residence, upon their different farms, would often be much more convenient.

While the Saxons, by their intercourse with a more civilized people, were thus excited to a considerable improvement of their circumstances, the Britons were, from an opposite situation, degraded in the same proportion, and continued to sink in ignorance and barbarism. Engaged in a desperate conflict, in which every thing dear to them was at stake, and having to cope with an enemy little practised

practised in the refinements of humanity, they were obliged, in their own defence, to retaliate those injuries which they were daily receiving; and by the frequent exercise of depredation, they became inured to rapine and injustice. The destructive wars, in the mean time, which were incessantly kindled, and which raged with so much violence in every quarter of the country, were fatal to the greater part of its improvements. The numerous towns which had been raised under the protection and security of the Roman government, and which now became the usual refuge of the weaker party, were often sacked by the victorious enemy, and after being gradually depopulated, were at length either laid in ruins, or left in the state of insignificant villages. In these times of universal terror and confusion, the ancient schools and seminaries of learning were abandoned, and every person who cultivated the arts subservient to luxury and refinement, was forced to desert these useless occupations, and betake himself to employments more immediately requisite for preservation and subsistence. In the course of two centuries, within which the conquest of the more accessible and valuable parts of Britain was completed, the monuments of Roman opulence and grandeur were entirely erased; and the Britons who remained in the country, and who retained their liberty, adopted the same manner of life with their Saxon neighbours, from whom they were no longer distinguishable, either by the places of their residence, or by their usages and political institutions.

Those conquerors of Britain who received the general appellation of Saxons had issued from different parts of the German coast, at some distance from one another, and belonged to different tribes or nations: they have been  
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divided, by historians, into three great branches, the *Angles*, the *Jutes*, and the *Saxons*, properly so called. As the leaders of the several parties belonging to any of these divisions possessed a separate influence over their own adherents, and prosecuted their enterprises in different parts of the country, so they naturally rejected all ideas of subordination, and endeavoured to acquire a regal authority; the result of which was, that, after various turns of fortune, no less than seven independent states, each under its own particular monarch, were at length established.

The followers of Hengist and Horfa, composed of Jutes, acquired a settlement in the East corner of the Island, and established their dominion in what is now the county of Kent. Different parties of the proper Saxons occupied a much larger territory, and laid the foundations of three different kingdoms. Those who, from their situation, were called the Southern Saxons, established themselves in the counties of Suffex and Surrey; the West-Saxons extended their authority over the counties to the Westward, along the Southern coast; and the East-Saxons took possession of Effex, Middlesex, and a considerable part of Hertfordshire. The Angles were still more numerous, and the territories which they occupied were much more extensive; by them were formed the kingdom of the East-Angles, in the counties of Cambridge, Norfolk, and Suffolk; that of Northumberland, extending over all the country which these barbarians had subdued, from the Humber to the Frith of Forth; and that of Mercia, comprehending the inland counties, which were in a manner included by the other kingdoms of the Heptarchy.

In the Western part of the Island, from the Land's End to the Frith of Clyde, the ancient inhabitants were still able

to maintain their independence; and in this large tract of country were erected four British principalities or kingdoms; those of Cornwall, of South-Wales, of North-Wales, and of Cumberland. To the North of the Friths of Forth and Clyde the Picts and Scots retained their ancient possessions.

The changes produced in the manners and customs of the Saxons, by their settlement in Britain, were such as might be expected, from the great change of situation which the people experienced, in passing from the state of shepherds to that of husbandmen. As in following the employment of the latter, they necessarily quitted the wandering life, and took up a fixed residence, they were enabled to acquire *property in land*; with which it is probable they were formerly unacquainted. The introduction of landed property among mankind has uniformly proceeded from the advancement of agriculture, by which they were led to cultivate the same ground for many years successively; and upon the principle that every man has a right to enjoy the fruit of his own labour, became entitled, first, to the immediate crops they had raised, and afterwards to the future possession of the ground itself, in order that they might obtain the benefit of the improvement which their long cultivation had produced. In this appropriation, of so great importance to society, the Saxons in Britain were undoubtedly stimulated, and instructed, from the cultivated state of the country, as well as from the example of the people whom they had subdued.

This alteration in their circumstances had necessarily a mighty influence upon the conduct of their military operations. As a great part of their property was now incapable of being transported, the inhabitants of each village were

were induced to fortify, in some degree, the place of their abode, for the preservation of their most valuable effects; and therefore, in going out to meet an enemy, instead of carrying along with them their cattle, and other moveables, and being accompanied by their wives and children, as well as by the aged and infirm (the usual practice in the pastoral life) none but the actual warriors had occasion to take the field. The immediate plunder, therefore, arising from a victory, was rendered more inconsiderable; and even this the victors were commonly obliged to secure at home, before they could conveniently undertake a new enterprize. Thus, after the settlement of the Saxons in Britain, they were less in a condition to carry on wars at a great distance; and they appear to have laid aside, for the most part, their foreign piratical expeditions.

The permanent residence of the people tended likewise to open a regular communication between different villages; the inhabitants of which, by remaining constantly in the same neighbourhood, were led by degrees to contract a more intimate acquaintance. From the acquisition of landed possessions, which by their nature are less capable than moveables of being defended by the vigilance and personal prowess of the possessor, the necessity of the public interposition, and of public regulations for the security of property, must have been more universally felt. From these causes, it is natural to suppose that the connections of society were gradually multiplied, and that the ideas of justice, as well as of policy and government, which had been entertained by the primitive Saxons, were considerably extended and improved.

The introduction of landed property contributed, on the other hand, to increase the influence and authority of

individuals, by enabling them to maintain upon their estates a greater number of dependents than can be supported by persons whose possessions are merely moveable. The heads or leaders of particular families were thus raised to greater consideration; and, in the respective communities of which they were members, obtained more completely the exclusive direction and management of public affairs. The influence of the great leader, or prince, by whom they were conducted in their common expeditions, was proportioned, in like manner, to his private estate, and extended little farther than to his own tenants; for which reason, in the several kingdoms of the Heptarchy, the sovereign possessed a very limited authority, and the principal powers of government were lodged in a *Witenagemote*, or national council, composed of the independent proprietors, or leading men in the state.

Although the monarchs of these different kingdoms claimed an independent sovereignty, yet, in their struggles with the Britons, they often procured assistance from one another, and were combined against the ancient inhabitants of the country, their common enemies. The direction of their forces was, on those occasions, committed to some particular monarch, who, in conducting their joint measures, was frequently under the necessity of calling a *witenagemote*, or great council, from all the confederated kingdoms. Thus the idea of a permanent union among all the kingdoms of the Heptarchy, and of a leader, or chief magistrate, at the head of that large community, together with a set of regulations extending to all its members, was gradually suggested: according to the opulence or abilities of the different Saxon princes, they were, by turns, promoted to that supreme dignity; which became, of course, the

the great object of their ambition, and the source of those violent animosities which, for a period of about two hundred years, continually subsisted among them. The most powerful of the states belonging to this confederacy were those of Wessex, Mercia, and Northumberland, to which the rest were gradually reduced into a kind of subordination; till at length, about the year 827, the several kingdoms of the Heptarchy were subdued by Egbert, the king of the West-Saxons, who transmitted to his posterity the sovereignty of these extensive dominions. The same prince extended his authority over all the Britons on the South side of the Bristol channel, and became master of a considerable part of Wales, and of the Cumbrian kingdom. From this time the distinctions among the different Saxon states were in a great measure abolished, and the several territories, united under Egbert, received the general name of England; as the people, from the union of the two principal nations, and in contradistinction to their countrymen in Germany, were called the Anglo-Saxons.

Several circumstances appear to have contributed to the accomplishment of this great revolution. With the bravery and military accomplishments usual among the chiefs and princes of that age, Egbert, who had been educated in the court of Charles the Great, is said to have united an uncommon degree of political knowledge and abilities; his own kingdom, situated along the Southern coast of Britain, was probably the most improved, if not the most extensive, of those which had been erected by the Anglo-Saxons. In almost all the other kingdoms of the Heptarchy, a failure of the lineal heirs of the crown had given rise, among the principal nobility, to a contest about the succession: Northumberland, in particular, was weakened by intestine

intestine disorders, and in no condition to resist a foreign power; so that, by the conquest of Mercia, the only other independent state, the king of Wessex was left without a competitor, and found no difficulty in establishing an universal sovereignty\*.

There can be no doubt that the reduction of all these different kingdoms into one monarchy contributed to improve the police of the country, and to civilize the manners of the people. The scene of anarchy and violence which was constantly exhibited during the conquest of Britain by the Saxons was incompatible with any attention to the arts of civil life, and in a great measure extinguished the remains of Roman improvement. The beginning of the seventh century, which falls about the conclusion of that period, may, therefore, be regarded as the æra of greatest darkness and barbarism in the modern history of Britain. The advances, however, that were made, even after this period had elapsed, were very slow and gradual. So long as the country was divided into a number of petty states, independent of each other, and therefore often engaged in mutual hostilities, the persons and property of individuals were not secured in such a manner as to encourage the exercise of useful employments.

It appears, indeed, that the monarchs in several of those kingdoms were anxious to prevent disorders among their subjects, and, with the assistance of their national councils, made a variety of statutes, by which the punishment

\* It must not however be supposed that the power of all the kings of the Heptarchy was at this period entirely destroyed; they retained a subordinate authority, founded upon their great property. The princes of Northumberland and Mercia still retained the title of *king*; and in the reign of Alfred we find them still claiming independence.—See William of Malmabury.

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of particular crimes was defined with great exactness. Such were the laws of Ethelbert, and some of his successors, in the kingdom of Kent; those of Ina, the king of the West-Saxons; and Offa, of the Mercians\*. These regulations, however, were probably of little avail, from the numerous independent states into which the country was divided, because an offender might easily escape from justice, by taking sanctuary in the territories of a rival or hostile nation; but when the different kingdoms of the Heptarchy were united under one sovereign, private wars were more effectually discouraged; justice was somewhat better administered; and the laws established throughout the Anglo-Saxon dominions were reduced to greater uniformity. We are not, however, to imagine that, from this period, the same regulations in all respects were extended over the whole English monarchy. The system of private law, being formed in good measure by long usage, was necessarily different in different districts; and the customs which prevailed in the more considerable had obtained a currency in the smaller states of the Heptarchy. Thus we find that the law of the West Saxons was extended over all the states on the South side of the Thames †, while the law of the Mercians was introduced into several territories adjacent to that kingdom ‡. In a subsequent period a third set of regulations, probably a good deal different from the two former, was adopted in the Northern and Eastern parts of the country.

\* See the Collections of the two former, in Wilkins Leg. Anglo-Sax.—The laws of king Offa have not been preserved.

† Called Westsaxenlaga.

‡ Called Mercenlaga. The inhabitants were denominated, from the kind of law which they observed. See Ran. Higdan Polychron.—In France the Pais de Droit acrit, and the Pais des Coutumes, were distinguished from a similar circumstance.

C H A P.



## C H A P. IV.

*Similarity in the Situation of the Anglo-Saxons, and of the other Barbarians who settled in the Provinces of the Western Empire. — How far the State of all those Nations differed from that of every other People, ancient or modern.*

**D**URING the same century in which the Anglo-Saxons began their settlements in England, the other provinces of the Western empire were invaded by a multitude of rude nations, from Germany and the more Easterly parts of the world. Allured by the prospect of booty, these barbarians had long made accidental incursions upon the frontier provinces; and having, by repeated successes, discovered the weakness of the Roman state, they at length endeavoured to gain more solid advantages, by settling in the countries which they had subdued. The Roman emperors were not only obliged to submit to these encroachments, but were even forced, in many cases, to enter into an alliance with those invaders, to employ them as auxiliaries in the armies of Rome, and to bestow upon them landed possessions, upon condition of their defending the country. But these were merely temporary expedients, which in the end contributed to increase the power of the barbarians. Different swarms of these people advancing in succession, and pushing each other forward in quest of new possessions, continued to penetrate into the Roman dominions, and at last entirely over-ran and dis-

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membered the Western provinces. The Franks, the Burgundians, and the Wisigoths settled in Gaul. Another branch of the Wisigoths established their dominion in Spain. Africa became a prey to the Vandals. Italy, for a long time the center of Roman wealth, and of Roman luxury, invited, in a particular manner, the attacks of poverty and barbarism; and after it had suffered from the successive inroads of many different nations, a great part of the country was subjected to the Ostrogoths, and in a subsequent period, to the Lombards.

As the original manners and customs of all these nations were extremely analogous to those of the Saxons in England, and as their conquest and settlement in the Western empire were completed nearly in the same manner, it was to be expected that they would fall under a similar government. It has happened, accordingly, that their political institutions are manifestly formed upon the same plan, and present, to the most careless observer, the same aspect and leading features, from which, as in the children of a family, their common origin may clearly be discovered. They differ, no less remarkably, from all the other systems of policy that have been recorded in ancient or modern history. It may be worth while, therefore, to examine the causes of the uniformity, so observable among all those nations, and of the peculiarities, by which they are so much distinguished from the other inhabitants of the world. In this view, there occur five different circumstances, that seem to merit attention.

1. The settlement of the barbarous nations, upon the Western continent of Europe, as well as in England, was effected by the gradual subjection of a more civilized people, with whom the conquerors were at length completely incorporated.

The rude and ignorant tribes who subdued the Roman provinces, were too little connected with one another, and too little accustomed to subordination, to unite in prosecuting any regular plan of conquest; but, according as they were excited by provocation, or met with any encouragement, they made occasional inroads, with different degrees of success; and when they had overrun a particular district, they commonly chose to remain in the country, and frequently concluded a treaty of peace with the ancient inhabitants.

Having, on those occasions, become masters of a large territory, which had been long occupied in tillage, and having, by repeated victories, obtained a number of captives, whom they reduced into slavery, they found it an easy matter to employ their slaves in cultivating the land which they had procured. In this situation they soon made such progress in agriculture, as determined them more and more to relinquish their wandering life, and apply themselves to the acquisition of separate landed estates. By their intercourse, at the same time, with such of the old inhabitants as retained their freedom, they necessarily acquired a variety of knowledge, and became acquainted with many of the common arts of life to which they had formerly been strangers.

It was not to be expected, however, that these barbarians would long remain at rest; or that they would have any difficulty in finding pretences for quarrelling with a people whom they meant to strip of their possessions. In a course of time, therefore, new animosities broke out, which were followed by repeated military enterprises, attended with similar circumstances; till at last, by successive extensions of territory, and after several centuries had

had elapsed, the whole of the Western empire was dismembered, and reduced under the power of these invaders.

The events by which this great revolution was accomplished, could not fail to produce very opposite effects upon the ancient inhabitants of the country, and upon the new settlers. The former, while, in consequence of the violence and disorder which prevailed, and of their intercourse with the barbarians, they sunk very rapidly into poverty and barbarism, communicated, in their turn, to the latter, a few great lines of that cultivation, which had not been entirely effaced among themselves. In the end, those two sets of people were entirely blended together; and their union produced such a compound system of manners and customs, as might be expected to result, from the declining state of the one, and the rising state of the other.

The destruction of the Roman provinces struck out, in this manner, a sudden spark of improvement, which animated their victorious enemies, and quickly pervaded the new states that were founded upon the ruins of the Western empire. In the earliest accounts of the modern kingdoms of Europe, we find the people, though evidently retaining very deep marks of their primitive rudeness, yet certainly much advanced beyond the simple state of the ancient Germans. Their husbandry, no doubt, continued for ages in a very low and imperfect condition, inasmuch that extensive territories were often permitted to lie waste and desolate; yet such as it was, it procured the necessaries of life in greater plenty, and produced, of course, a more universal attention to its conveniences. Their permanent residence in one place gave room and encouragement to the exercise of different employments, from which, during their former migrations,

migrations, they were in a great measure excluded. Their houses were built of more lasting materials, and rendered more commodious, than the moveable huts in which they formerly sheltered themselves. Particular persons, having acquired very great landed estates, were enabled, by the remaining skill of Roman artificers, to erect such fortresses as were sufficient to defend them from the sudden incursions of an enemy; and lived, in suitable magnificence, at the head of their tenants and domestics. The numerous, and opulent towns, which had been scattered over the dominions of Rome, though they suffered greatly in the general wreck of the empire, were not, however, universally destroyed or deserted; and such of them as remained, were frequently occupied and inhabited by the leaders of the conquering tribes. In these, and even throughout the whole of the country, that policy, which had become familiar to the old inhabitants, was, in many respects, continued; and in the early codes of laws, collected by the princes of the barbarous nations who settled in the Western empire, we often discover a close imitation of the Roman jurisprudence.

In these particulars, the situation of the modern states of Europe appears to have been a good deal different from that of every other nation, of whom any accounts have been transmitted to us. In many parts of the world, the rude inhabitants have continued unconnected with any other people more improved than themselves; and have therefore advanced very slowly in the knowledge of arts, as well as in the progress of the social life. From the remotest period of antiquity, the Arabs and Tartars have remained, for the most part, in a pastoral state; and are still almost entirely ignorant of husbandry. The Indians  
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of America still derive their principal subsistence from hunting and fishing; and are in a great measure strangers to the invention of taming and rearing cattle. In early ages men are destitute of sagacity and reflection, to make use of those discoveries which fortune may throw in their way; and their improvement is much retarded by those habits of sloth which, being fostered by the primitive manner of life, are not to be overcome without extraordinary incitements to labour and application.

Among the instances, preserved in history, of nations who have acquired a connection with others, by means of a conquest, we meet with none that are similar to those exhibited in Europe, during the period which we are now considering. The conquest in Asia, by Alexander and his successors, was that of one opulent and civilized people over another; and produced no farther alteration in the Greek states, but that of inspiring them with a taste of Asiatic luxury and extravagance.

The first military efforts of the Romans were employed in subduing the small neighbouring states of Italy, whom they found in the same barbarous condition with themselves; and they had become a great nation, firmly established in their manners and political system, before they directed their forces against the refined and cultivated parts of the world. Besides, the Roman virtue disdained, for a long time, to imitate the talents and accomplishments of the people whom they had subdued.

China, and some other of the great Asiatic kingdoms, have been frequently over-run and conquered by several hords of Tartars, accidentally combined under a great leader; but the conquest, in these cases, was not carried on slowly and gradually, as in the provinces of the Western  
empire:

empire: it was completed by one or two great and rapid victories; so as, on the one hand, to prevent the learning and civilization of the vanquished people from being destroyed by a long-continued course of war and devastation; and, on the other, to prevent the conquerors, by long neighbourhood and acquaintance, from being incorporated with the former inhabitants, in one common system of manners, customs, and institutions. The final success, therefore, of the victorious army, produced no farther revolution, than by suddenly advancing their General, together, perhaps, with some of his principal officers, to the head of a great and civilized empire; of which the native country of the conquerors became only a tributary province.

The same observation is applicable to the dominion acquired by Mahomed, and some of his immediate successors; which was not established by a gradual settlement of Arabian tribes, in the rich countries of Asia; but by a rapid conquest, that gave rise to no intimate coalition of the victors with those who submitted to the Mahometan yoke. No other change, therefore, was produced in the state of conquered nations, than what arose from subjecting them to a new religion, and to a new set of monarchs; while the wandering Arabs, the original followers of Mahomed, remained, for the most part, in their primitive state of barbarism. The conquest of the Saracens, and of the Eastern empire, by the Turks, had a greater resemblance to the progressive inroads of those who conquered the Western provinces; but it was far from proving equally destructive to the former civilization of the conquered people, or from reducing them to the level of their barbarous conquerors.

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2. The German or Gothic nations, who settled in the Western part of Europe, were enabled, in a short time, to form kingdoms of greater extent, than are usually to be found among people equally rude and barbarous.

Of all the arts which contribute to improve or to embellish society, that of government requires the most enlarged experience and observation; for which reason, its progress towards perfection is proportionably gradual and slow. In that simple age, in which labour is not yet divided among separate artificers, and in which the exchange of commodities is in a great measure unknown, individuals, who reside at a distance from one another, have no occasion to maintain an intimate correspondence, and are not apt to entertain the idea of establishing a political connection. The inhabitants of a large country are then usually parcelled out into separate families or tribes, the members of which have been led, by necessity, to contract habits of living together, and been reduced under the authority of that leader who is capable of protecting them. These little communities are naturally independent, as well as jealous of one another; and though, from the dread of a common enemy, they are sometimes obliged to combine in a league for mutual defence, yet such combinations are generally too casual and fluctuating to be the foundation of a comprehensive and permanent union.

But those barbarians who conquered the Western empire were quickly induced, and enabled, to form extensive associations; partly, from the circumstances attending their conquest; and partly, from the state of the country in which they formed their settlements.

With respect to the circumstances attending their conquest, it is to be observed, that their tribes were far from  
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being large or numerous, and that they over-ran and subdued a very large tract of country; in consequence of which, the members of the same tribe were enabled to occupy great landed estates, and came to be settled at a proportionable distance from one another. Individuals who had belonged to a small community, and who had been accustomed to fight under the same leader, were thus dispersed over an extensive territory; and, notwithstanding this change in their situation, were naturally disposed to retain their former connections and habits. The notion of uniting under a single chief, which had been established among the members of a wandering tribe of shepherds, continued, therefore, to operate upon the same people, after they had acquired ample possessions, and had reduced multitudes under their dominion.

The extent of the kingdoms, erected by those barbarous nations, was likewise affected by the state of each Roman province, in which their settlements were made.

As every Roman province constituted a part of the whole empire; so it formed a distinct society, influenced by national views, and directed by a separate interest. Among the inhabitants of the same province, united by their local situation, by the ties of friendship and acquaintance, and even by that common system of oppression to which they were subject, a regular intercourse was constantly maintained. Those who lived in villages, or in the open country, carried on a variety of transactions with the several towns in the neighbourhood, where they found a market for their goods, and were supplied with those conveniences which they required. The inhabitants of these towns, and of the whole province, were, at the same time, closely connected with the capital, where the  
governor

governor resided in a kind of regal pomp and magnificence, and directed the various wheels and springs of administration. Here the public money, accumulated from different parts, was again distributed through the various channels of government; and hither men of all descriptions, the poor and the rich, the idle and the industrious, were attracted from every quarter, by the views of profit, of pleasure, or of ambition.

The changes which at different periods were made in the political constitution of Rome, produced no great alteration, as has been already observed, either in the extent or condition of her provincial governments. The ancient boundaries of the provinces appear to have been generally retained under the later emperors; though, in order to secure the public tranquillity, they were often subdivided into particular districts, which were put under the direction of subordinate officers. The connections, therefore, between the several parts of the same province, were gradually strengthened from the length of time during which they had subsisted.

As, by the conquest of those countries, the ancient inhabitants were not extirpated, it is natural to suppose that their former habits of intercourse were not obliterated and forgotten; but, on the contrary, were in some degree communicated to the conquerors. They who had lived under the same government were still disposed to admit the authority of a single person, and to remain in that state of union and subordination to which they had been accustomed. Particular chiefs having occupied the remaining towns belonging to a Roman province, were of course rendered masters of the adjacent territory; and he who had set himself at the head of the most powerful district,

trict, was in a fair way of becoming sovereign of the whole.

It may also be worthy of notice, that as the conquering tribes adopted a number of the Roman institutions, their principal conductor was frequently in a condition to avail himself of that authority, however declining, which the Roman government continued to maintain; and by assuming, or obtaining, the dignity which had belonged to the chief magistrate of a province, was enabled with greater facility to extend his dominion over the territories which had formerly acknowledged the jurisdiction of that officer. Thus we find that Clovis, who conquered a great part of Gaul, was, near the end of his reign, invested with the title of *consul*, and probably with that of *pro-consul*, by the emperor Anastasius; and that the posterity of Clovis were at the pains to procure, from the emperor Justinian, a resignation of all the rights of the empire over that nominal branch of his dominions\*.

In like manner Theodoric, the king of the Ostrogoths, who had been invested, in the Eastern empire, with the title of *patrician* and *consul*, and who had obtained for himself and his followers a settlement in Thrace, was afterwards commissioned by the emperor Zeno to conquer Italy, and to take possession of the country †.

From these causes, countries at a great distance from one another were forced into a sort of political union: and the boundaries of a modern kingdom came, in most cases, to be nearly of the same extent with those of an ancient Roman province.

\* Hist. de l'Établissement de la Mon. Fran. par l'Abbe Du Bos. liv. 4. ch. 18. liv. 5. ch. 7.

† Ibid. liv. 4. ch. 3.

As

As Italy, which comprehended the numberless villas, and highly-cultivated pleasure grounds, belonging to the opulent citizens of Rome, was the object of more attention than those parts of the empire which lay at a greater distance, it was early subjected to a more accurate police, and divided into smaller districts. It was distributed, by Augustus, into eleven *regions*; and in the time of the emperor Adrian that country, together with Sicily, Sardinia, and Corsica, included no less than seventeen divisions. The smallness of the districts into which it was thus broken by the Roman government had, no doubt, an influence upon the new arrangements which it underwent from the invasion of the barbarians; and made it fall more easily into a number of petty states, under the several dukes, or nobles, who assumed an independent authority.

In England, though the most part of the territories which had composed the ancient Roman province were at last united in one kingdom, yet this union was effected more slowly, and with greater difficulty, than in many of the other European countries. The settlement of the Anglo-Saxons was produced in a different manner from that of the other German nations who settled upon the continent of Europe. As the expeditions of the latter were carried on, for the most part, by land, it was usual for the whole of a tribe or nation to advance in a body, and after they had defeated the Roman armies, to spread themselves over the extensive territory which fell under their dominion. The original connections, therefore, among the individuals of the conquering nation, co-operated with the circumstance of their settling in the same province, to facilitate their reduction, either by conquest

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or confederacy, under one supreme leader. The naval incursions of the Anglo-Saxons were, on the other hand, made by small detached parties, collected occasionally by any single adventurer, who, for the sake of a precarious settlement, was willing to relinquish his kindred and acquaintance. The followers of every separate leader were therefore too inconsiderable to occupy great landed possessions; and as they invaded England at different times, and in different places, with scarce any previous concert, and with little attachment to one another, they discovered so much the stronger disposition to remain in separate states, and to preserve their primitive independence. From these circumstances, we may account for the division of England into so many independent kingdoms; which were not reduced under one monarch till between three and four centuries after the first settlement of those invaders.

3. The great extent of the kingdoms that were formed upon the ruins of the Western empire, together with the rudeness of the people by whom they were established, appears to have occasioned that system of feudal tenures, which is commonly regarded as the most distinguishing peculiarity in the policy of modern Europe.

The disposition to theft and rapine, so prevalent among rude nations, makes it necessary that the members of every family should have a watchful eye upon the conduct of all their neighbours, and should be constantly upon their guard to preserve their persons from outrage, and their property from depredation. The first efforts of civil government are intended to supersede this necessity, by punishing such offences, and enabling the individuals of the same community to live together in peace and tranquillity.

quillity. But these efforts, it is evident, are likely to be more effectual in a small state than in a large one; and the public magistrate finds it much more difficult to extend and support his authority over a multitude of individuals, dispersed through a wide country, than over a small number, confined to a narrow district. It is for this reason that government has commonly been sooner established, as well as better modelled, in communities of a moderate size, than in those which comprehend the inhabitants of an extensive region.

In proportion to the great number of people, and the great extent of territory, in each of the modern European kingdoms, the advances of authority in the public were slow, and its capacity of restraining violence and disorder was limited. The different families of a kingdom, though they acknowledged the same sovereign, and were directed by him in their foreign military enterprises, were not, upon ordinary occasions, in a situation to feel much dependence upon him. Acquiring great landed possessions, and residing at a distance from the capital, as well as in places of difficult access, they were often in a condition to set the whole power of the crown at defiance; and disdain- ing to submit their quarrels to the determination of the civil magistrate, they assumed a privilege of revenging with their own hands the injuries or indignities which they pretended to have suffered. When not employed, therefore, in expeditions against a public enemy, they were commonly engaged in private hostilities among themselves; from the frequent repetition of which there arose animosities and feuds, that were only to be extinguished with the life of the combatants, and that, in many cases, were even rendered hereditary. In such a state of anarchy  
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and confusion, the strong were permitted to oppress the weak; and those who had most power of hurting their neighbours, were the most completely secured from the punishment due to their offences.

As the individuals of a nation were thus destitute of protection from government, they were under the necessity of defending themselves, or of seeking protection from one another; and the little societies composed of near relations, or formed accidentally by neighbourhood and acquaintance, were obliged to unite in the most intimate manner, to repel the attacks of their numerous enemies. The poor were forced to shelter themselves under the influence and power of the rich; and the latter found it convenient to employ a great part of their wealth, in order to obtain the constant aid and support of the former. The head of every family was commonly surrounded by as great a number of kindred and dependents as he was capable of maintaining; these were accustomed to follow him in war, and in time of peace to share in the rural sports to which he was addicted; it was their duty to espouse his quarrel on every occasion, as it was incumbent on him to defend them from injuries. In a family so small, that all its members could be maintained about the same house, a mutual obligation of this kind was naturally understood from the situation of the parties; but in larger societies it was rendered more clear and definite by an express agreement. A man of great opulence distributed part of his demesne among his retainers, upon condition of their performing military services; as, on the other hand, the small proprietors in his neighbourhood, being incapable of maintaining their independence, were glad to purchase his protection, by agreeing to hold their land upon the same terms.

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Hence the origin of vassalage in Europe, the nature of which will be more particularly explained hereafter. Every considerable proprietor of land had thus a number of military servants, who, instead of pay, enjoyed a part of his estate, as the reward of their services. By this distribution and arrangement of landed possessions, the most natural remedy was provided for the evils arising from the weakness of government. Men of inferior station, who singly were incapable of defending their persons or their property, obtained more security, as well as consideration, under their respective superiors; and the inhabitants of a large territory, being combined in societies, who had each of them a common interest, were in a better condition to resist the general tide of violence and oppression.

From these observations we may discover how far the connections between the superior and vassal, and the various parts of what is called the feudal system, are peculiar to the modern states of Europe, or belong to them in common with other nations.

In Greece and Rome, or in any of the small states of antiquity, there are few or no traces to be discovered of the feudal institutions. From the inconsiderable number of people collected in each of those ancient states, and from the narrowness of the territory which they inhabited, the government was enabled, at an early period, to extend its protection to all the citizens, so as to free them from the necessity of providing for their own safety, by associating themselves under particular military leaders. If any sort of vassalage, therefore, had been introduced in the infancy of those nations, it appears to have been abolished before they were possessed of historical records.

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In many rude nations of greater extent, both in ancient and modern times, we may discern, on the contrary, the outlines of the feudal policy. This, if we can trust the relations given by travellers, is particularly the case at present in several of the kingdoms in Asia, and upon the Southern coast of Africa. In these kingdoms, the number of barbarians collected under one sovereign has probably rendered the government so feeble, as to require a number of subordinate associations, for the protection of individuals; but the coalition of different families being neither so extensive, nor produced in the same rapid manner, as in the modern states of Europe, the regulations to which it has given occasion are neither so numerous and accurate, nor have they been reduced into so regular a system.

4. The custom of duelling, and the peculiar notions of honour, which have so long prevailed in the modern nations of Europe, appear to have arisen from the same circumstances that produced the feudal institutions.

The political establishment, in all those nations, was, for a long time, incapable of preventing the unlimited exercise of private hostilities; and every family, being exposed to invasion from all its neighbours, was obliged to be constantly in a posture of defence. In these circumstances, the military spirit of the people was not only raised to a high pitch, but it received a peculiar direction, and was attended with peculiar habits and opinions.

In a war between two great nations, when large and well-disciplined armies are brought into the field, there is little room for individuals to acquire distinction by their exploits; and it is only expected of them, that, like the parts of a complex machine, they should perform, with steadiness and regularity, the several movements for which they

they are destined; neither are those who belong to the opposite armies likely to entertain much personal animosity, the national quarrel being lost in that promiscuous multitude among whom it is divided. But in the private wars that took place between the several families of modern Europe the case was very different; for the number engaged upon either side was commonly so small, and they had so little of military discipline, that every single person might act a distinguished part, and in the time of action was left in some measure to pursue the dictates of his own bravery or prudence; so that a battle consisted of little more than the random combats of such particular warriors as were led by inclination or accident to oppose one another. The natural consequence of such a situation was to produce a keen emulation between the individuals of the same party, as well as a stated opposition, and often a violent animosity, between those of different parties. In a long course of hostilities, the same persons were often led to encounter each other; and having fought (perhaps on different occasions) with various success, were at length excited by a mutual challenge to a comparative trial of their strength, courage, or skill. By repeated struggles of this nature a continual jealousy was kept up between the members of different families, who in prosecuting their quarrels became no less eager to support their military character, and to avenge any insult or indignity, than to defend their possessions.

The private wars between different families, which gave rise to mutual emulation and jealousy, as well as to violent animosity and resentment, continued in Europe for many centuries, notwithstanding that some improvements were made by the people in the common arts and modes of

living. To assassinate those from whom great provocation had been received was, among the primitive conquerors of the Roman empire, a method of revenge pursued without scruple, and beheld without censure. By degrees however the love of military glory prevailed over the gratification of resentment, and those who aimed at maintaining the rank of gentlemen became ashamed of taking an unfair advantage of an enemy, which might imply a confession of inferiority in prowess; but thought it incumbent upon them, whatever was the quarrel, to invite him to an open contest, in which the superiority might be decided upon equal terms. Thus the practice of *duelling*, the most refined species of private vengeance, was rendered more and more fashionable; and in every country of Europe, according to its progress from barbarism, assassination became less frequent, and was held in greater detestation. In Spain and Portugal, the least improved of those countries, it never has been completely extirpated; and the inhabitants have not yet attained that refinement of the feudal manners, which the rest of Europe, from a still higher pitch of improvement, are now seeking to lay aside.

So far was the government from restraining the custom of duelling, that the efforts of the civil magistrate tended rather to encourage it. Those who had sustained an affront thought it dishonourable to apply for redress to a court of justice; but when a dispute had arisen in matters of property, and had become the subject of a law-suit, it frequently happened, that in the course of the debate the parties, by their proud and insolent behaviour, affronted each other; which made them withdraw their cause from the court, in order to determine it by the sword; the judge was unable to prevent this determination, but he endeavoured

endeavoured to diminish the bad consequences that might arise from it. By regulating the forms of the encounter, and superintending the ceremonies with which it was conducted, he availed himself of the punctilios of honour which fashion had established, and restrained the friends of either party from interfering in the quarrel. Hence the *judicial combat*, which has been erroneously considered by some as the origin of duelling, but which undoubtedly tended to support and extend the practice, by giving it the sanction of public authority. It has, accordingly, been observed, that as, in a judicial controversy, the most common provocation consisted in the parties contradicting each other in point of fact; so *giving the lie* has become that sort of offence, on account of which custom has rendered it most indispensably necessary to require *satisfaction* by fighting.

The institutions of *chivalry*, and the *jousts* and *tournaments*, were the natural appendages of the custom of duelling, or rather of that state of manners which gave rise to it.

In the battles of the feudal ages, men of opulence and rank enjoyed many advantages over the common people, by their fighting on horseback, by the superior weapons and armour which they made use of, and above all, by that skill and dexterity which they had leisure to acquire. To improve these advantages was the great object of the gentry, who from their early years devoted themselves to the profession of arms, and generally became attached to some person of experience and reputation, by whom they were trained up and instructed, not only in the several branches of the military exercise, but in all those qualifications that were thought suitable to their condition. To

encourage these laudable pursuits, a mark of distinction was bestowed upon such as had gone through a complete course of military education, and they were admitted, with peculiar ceremonies, to the honour of knighthood; from which their proficiency in the art of war, and in the virtues and accomplishments connected with that employment, were understood to be publickly ascertained and acknowledged.

Among the multitude of knights belonging to every country, who became professed candidates for fame, and upon that account rivals to one another, military sports, that afforded an opportunity of displaying those talents upon which the character of every gentleman chiefly depended, were of course the favourite entertainments. As these became the ordinary pastime among private persons, so they were exhibited, on particular occasions, by princes and men of high rank, with great pomp and solemnity. The *tournaments* were the greater and more public exhibitions, the *jousts* were those of an inferior and private nature; to both of which all who enjoyed the dignity of knighthood were made welcome: they were also invited to that *round table*, at which the master of the ceremony entertained his company, and of which the figure is said to have been contrived on purpose to avoid any dispute concerning the precedence of his guests.

These public spectacles were begun in France under the kings of the second race; and were thence, by imitation, introduced into the other countries of Europe. They are said to have been first known in England, during the reign of Stephen, and to have been rendered common in that of Richard the First.

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There can be no doubt that these institutions and practices, by which badges of distinction were given to military eminence, and by which numbers of individuals were brought to contend for the prize of skill and valour, would contribute to swell and diffuse the idea of personal dignity by which they were already elated, and to inflame that mutual jealousy by which they were set in opposition to one another. The same opinions and sentiments acquired additional force from those extraordinary enterprises in which the people of different European countries were accidentally combined against a common enemy; as in the wars between the Moors and Christians, and in the expeditions undertaken by the latter for the purpose of rescuing the holy sepulchre from the hands of infidels. The competition arising on those occasions among the numerous warriors collected in the same army, was daily productive of new refinements upon the military spirit of the times, and contributed to multiply and establish the forms and ceremonies which, in every dispute of honour, were held indispensably necessary.

From these causes the custom of duelling has become so deeply rooted as, notwithstanding a total change of manners and circumstances, to maintain its ground in most of the countries of Europe; and the effect of later improvements has only been to soften and render more harmless a relic of ancient barbarity, which they could not destroy. In England, where the lower ranks of men enjoy a degree of consideration little known in other countries, the military spirit of the gentry has even descended to the common people, as appears from the custom of *boxing* peculiar to the English; by which they decide their quarrels according

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to such punctilios of honour as are dictated by the pure and genuine principles of chivalry.

In other ages and countries there is perhaps no instance of any people whose situation could lead them to entertain the same notions of military dignity which have been displayed by the modern inhabitants of Europe. The independent families or tribes of shepherds, in Tartary or in other parts of the world, have seldom occasion to reside so long in the same neighbourhood as to create a stated opposition and jealousy between their different members. The nations of husbandmen, upon the Southern coast of Africa, and in several parts of Asia, who have in some degree adopted the feudal policy, are too little advanced in civilization to admit of any refinement in their methods of executing revenge. In those ancient states that were most addicted to war, as in Rome and Sparta, the people were early brought under the authority of government, so as effectually to prevent the exercise of private hostilities. A Roman or a Spartan, therefore, was never under the necessity of supporting his military dignity, in opposition to his own countrymen; but was constantly employed in maintaining the glory of his country, in opposition to that of its enemies. The prejudices and habits acquired in such a situation were all of a patriotic nature. The pride or vanity of individuals was exerted in acts of public spirit, not in private animosities and disputes.

M. Voltaire imagines that the practice of duelling, in modern Europe, has arisen from the custom, among the inhabitants, of wearing a sword, as an ordinary part of dress; but the ancient Greeks, as we learn from Thucydides, were, at an early period, accustomed to go armed; and

and there is ground to believe that the same custom has prevailed in all barbarous countries, where the people found themselves continually exposed to danger. The continuance of this practice in Europe longer than in other countries appears to be the effect, not the cause of duelling; or rather it is the effect of that peculiar direction given to the military spirit, of which duelling is the natural attendant.

5. The same situation produced the romantic love and gallantry by which the age of chivalry was no less distinguished than by its peculiar notions of military honour.

The appetite of the sexes, which, in the greater part of animals, nature has, for wise purposes, connected with exquisite pleasure, is in the human species productive of sentiments and affections, which are of great consequence to the general intercourse of society, as well as to the happiness of individuals. These two sources of enjoyment, though in reality inseparable, and though the latter is ultimately derived from the former, are not always increased and refined by the same circumstances. The mere animal instinct seems to be strengthened by every circumstance that gives occasion to habits of indulgence; but the peculiar passions that nature has grafted on this enjoyment appear on the contrary to be raised to the highest pitch, by the difficulty attending their gratification; which, as it fixes the imagination upon the same object, has a tendency to exalt its value, and to debase that of every other in proportion.

In the ages of poverty and barbarism, mankind are commonly too much occupied in pursuit of mere necessities, to pay much regard to the intercourse of the sexes; and

and their simple desires with relation to this point being easily gratified as soon as they arise, are not likely to settle with much predilection or preference upon any particular person.

The first great improvements that are made in any country, with respect to the means of subsistence, being calculated to multiply the comforts and conveniences of life, enable the inhabitants to extend the circle of their pleasures, and to refine upon every enjoyment which their situation affords; the pleasures of sex become therefore an object of greater attention, and being carried to a higher degree of refinement, are productive of more variety in the taste and inclination of different persons; by which they are often disappointed in the attainment of their wishes, and their passions are proportionably inflamed. The introduction of property, which, being accumulated in different proportions, becomes the foundation of corresponding distinctions of rank, is at the same time the source of additional restraints upon the free commerce of the sexes. By the innumerable pretensions to dignity and importance, derived from the vanity of opulence, or the pride of family, individuals have often to surmount a variety of obstacles in order to gratify their passions; and in contracting what is accounted an unfruitful alliance, they are commonly checked and controuled, not only by the watchful interposition of their relations, but still more by the rules of propriety and decorum, which custom, in conformity to the state of society, has universally established.

The effect of great wealth and luxury, in a polished nation, is on the other hand to create an immoderate pursuit of sensual pleasure, and to produce habits of excessive indulgence in such gratifications. In such a situation particular  
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attachments are apt to be lost in the general propensity; and the correspondence of the sexes becomes in a great measure subservient to voluptuousness, or to the purposes merely of elegant amusement.

The passion of love, therefore, is likely to attain the highest degree of refinement in a state of society equally removed from the extremes of barbarism and of luxury.

The nations formed in the Western part of Europe, upon the downfall of the Roman empire appear to have continued for many centuries in that condition. They were possessed of such opulence, and of such improvements in society, as to stamp some value upon the pleasures of sex, without creating much incitement to debauchery. Their distinctions of rank, arising from the very unequal distribution of property, and the mutual apprehension and jealousy which a long course of private hostilities had introduced among different families, occasioned, at the same time, in their whole correspondence, a degree of caution and distrust unknown in other ages and countries. The women of every family, as well as the men, were taught to over-rate their own dignity, and to look upon it as disgraceful to give any encouragement to a lover, whose rank and worth did not entitle him to a preference in the opinion of the world, and in that of her own prejudiced relations.

As no man in that age was allowed to claim any merit, unless he had acquired a military reputation, the warrior who had been inspired with a youthful inclination could not expect any marks of regard, far less a return of affection, without signaling his fortitude and prowess, by encountering a variety of hardships and dangers. Before he had in this manner deserved the favour of his mistress,

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it was held inconsistent with her character to divulge any impression she had received to his advantage; and the laws of delicacy required that she should behave to him on all occasions with distance and reserve, if not with insolence and scorn. By the delays, the disappointments, the uncertainty of success, to which he was thus exposed, his thoughts were long engrossed by that favourite object; and the ardours of a natural appetite were at length exalted into a violent passion.

The romantic love, peculiar to the ages of chivalry, was readily united with the high sentiments of military honour, and they seem to have mutually promoted each other. An accomplished character in those times required not only the most undaunted courage and resolution, supported by great generosity, and a contempt of every sordid interest, but also the most respectful regard and reverence for the ladies, together with a sincere and faithful passion for some individual. Persons possessed of these accomplishments, or who desired the reputation of possessing them, devoted themselves to the particular profession of protecting the feeble, of relieving the distressed, of humbling and restraining the insolent oppressor. Not content with ordinary occasions of acquiring distinction, there were some who thought it necessary to travel from place to place, with the avowed purpose of redressing grievances, and of punishing the injuries to which, from the disorderly state of the country, the unwarlike and defenceless, but especially the female sex, were daily subjected.

It happened indeed in those times, as it naturally happens wherever mankind have been directed by fashion to admire any particular sort of excellence, that the desire of imitating the great and gallant actions of heroes and lovers,

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was often disfigured and rendered ridiculous by affectation, and became productive of artificial and fantastic manners. The knight-errant, who found no real abuses to combat, endeavoured to procure distinction by adventures of no utility, and which had no other merit but the danger attending them, as he who had never felt a real passion, tortured his mind with one merely imaginary, complained of rigours that he had never met with, and entered the list, to maintain that superior beauty and merit which he had never beheld.

It is unnecessary to remark, that these institutions and customs, and the circumstances from which they proceeded, were peculiarly unfavourable to trade and manufactures. The Saxons in England, as well as the other nations who settled about the same time upon the Western continent of Europe, though immediately after their settlement they had been excited to a considerable improvement in agriculture, and in some of the common arts of life, remained afterwards for ages in that hostile and turbulent state which gave little room or encouragement for the exercise of peaceable occupations. The manners introduced into those countries in early times being thus confirmed by long usage, have become proportionably permanent, and notwithstanding the changes of a subsequent period, have left innumerable traces of their former existence.

## C H A P. V.

*The State of Property, and the different Ranks and Orders of Men, produced by the Settlement of the Saxons in Britain.*

THE distribution of property among any people is the principal circumstance that contributes to reduce them under civil government, and to determine the form of their political constitution. The poor are naturally dependent upon the rich, from whom they derive subsistence; and, according to the accidental differences of wealth possessed by individuals, a subordination of ranks is gradually introduced, and different degrees of power and authority are assumed without opposition, by particular persons, or bestowed upon them by the general voice of the society.

The progress of the Saxon arms in Britain produced an appropriation of land and moveables, by all the free members of the community. Every warrior considered himself as entitled to a share of the spoil acquired by the conquest; and obtained a number of captives, and a landed territory, proportioned to his valour and activity, or to the services which he had performed. It is probable that the several conquering parties were seldom at the trouble of making a formal division of their acquisitions, but commonly permitted each individual to enjoy the booty which he had seized in war, and to become master of such a quantity of land, as by means of his captives, and the other members

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of his family, he was enabled to occupy and to manage. Such of the ancient inhabitants, on the other hand, as remained in the country, and had preserved their liberty, were in all probability understood to retain the property of those estates of which they had been able to maintain the possession.

There is good reason to believe that, for some time after the settlement of those barbarians in England, the landed estates acquired by individuals were generally of small extent. The Saxons were among the poorest and the rudest of the German nations who invaded the Roman empire; and Britain was, on the other hand, one of the least cultivated of all its provinces; at the same time that the progress of the conquerors in the appropriation of land (which from these causes must have been proportionably slow and gradual) was further obstructed by the vigorous opposition of the natives, who seem to have disputed every inch of ground with their enemies.

We accordingly find that, from the beginning of the Anglo-Saxon government, the land was divided into *hides*, each comprehending what could be cultivated by a single plough. This, among a simple people, becomes a natural boundary to the possession of those who live in the same house, and are jointly at the expence of procuring that useful but complicated instrument of husbandry. The general estimation of the Anglo-Saxon lands, according to this inaccurate measure, points out sufficiently the original circumstance which regulated the extent of the greater part of estates. When, by the progress of cultivation, and by future successes in war, the landed property of individuals was increased, the ancient standard of computation remained; and the largest estates, by comparing them with

the

the smallest, were rated according to the number of *hides* which they contained\*.

While the estates possessed by the Anglo-Saxons were small, they were cultivated under the immediate inspection of the owner, his kindred or servants, who lived in his own house, and were fed at his table. But when the territory acquired by any person became too extensive, and the members of his family became too numerous, to render this mode of living any longer convenient, a part of his land was parcelled out into different farms, and committed to the management of particular bondmen, from whom, at the end of the year, he required an account of the produce. A part of any great estate came likewise to be occupied by the kindred and free retainers of the proprietor, to whom, in return for that military service which they undertook to perform, he assigned portions of land for a maintenance.

Hence the distinction between what the Saxons called *in-land*, and *out-land*: the former was what lay next the mansion-house of the owner, and was retained in his own hands; the latter, which lay at a greater distance, was in the possession and management either of his retainers or servants†.

The *out-land* of every opulent person came thus to be possessed by two different sorts of people; the bond-men, who laboured their farms for the benefit of their master, and those freemen (most commonly his kindred) who had become bound to follow him in war, and upon that condition were entitled to draw the full produce of their pos-

\* See Spelm. Gloss. v. *Hyda*.

† See Spelman on Feuds and Tenures by Knight-service, ch. 5.

sessions.

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sessions. The former have been called *villains*, the latter vassals.

Considering the right of the latter to the lands which they possessed, in contradistinction to that of the person from whom they derived their possession, the landed estates of the Anglo-Saxons have been divided into *allodial* and *feudal*. The allodial estates were those of every independent proprietor; over these the owner enjoyed a full dominion, and he had a right to alienate or dispose of them at pleasure; upon the death of a proprietor, they descended to his heirs, according to certain rules of succession which custom had introduced, and they were not burdened with service of any kind in favour of a superior.

The feudal estates were those possessed by vassals upon condition of military or other services; these were held originally during the pleasure of the superior, though it appears that custom had early secured the possession of the vassal for a limited time. When he had ploughed and sowed his ground, it was thought equitable that he should be allowed to reap the crop arising from his labour and expence. Thus a year came soon to be acknowledged as the shortest period, upon the conclusion of which he might be deprived of his possession. Even after this period it was not likely that a superior would think of putting away his relations and ancient retainers, with whose personal attachment he was well acquainted, and of whose valour and fidelity he had probably been a witness. The possessions, therefore, of the greater part of the vassals, though not confirmed by any positive bargain, with respect to the term of their continuance, were in fact usually retained for life; and even upon the death of the possessor were frequently



quently enjoyed by his posterity, whom, out of affection to the ancestor, the superior commonly preferred to a stranger, or to any distant relation. When the lands of a vassal had, by a positive bargain, been only secured to him for life, or for a limited period, they were called *benefices* \*.

The differences which I have mentioned in the condition of estates, gave rise, most probably, to the celebrated distinction of *boc-land* and *folc-land*. The former, comprehending the estates of the nobler sort, was *allodial*, and being held in absolute property, was conveyed by a deed in writing; the latter was the land possessed by people of inferior condition, who having no right of property, but holding their possessions merely as tenants, for payment of rents or services, did not obtain any written title for ascertaining their rights †.

It may be remarked that *boc-land* might belong either to the king or to a subject; and that it implied no obligation to feudal services, in the latter case, more than in the former. It is true that subjects who enjoyed *boc-land* were bound to defend the kingdom from enemies by sea or land, and to build or repair bridges and castles ‡; but these services they owed to the public as citizens, not to the king as vassals. These were duties imposed by a general law of the kingdom, and which were laid upon the possessors of *folc-land* as well as of *boc-land*, upon the clergy as well as laity, in short, upon all the free members of the community §.

\* V. Feud. Conuet. lib. i. tit. i. § 1. 2.

† Spelm. on Feuds and Tenures by Knight-service, chap. 5.

‡ *Expedition, Burghbote, and Brigbote.*

§ See Spelman on Feuds and Tenures by Knight-service, chap. 8. 9. 10. 11.

Such

Such was the original state of property in the Anglo-Saxon government; from the consideration of which, together with the early circumstances and manners of the nation, the inhabitants, exclusive of the sovereign, may be distinguished into three different ranks or orders.

1. The first and most conspicuous was that of the military people. It is probable that for some time after the settlement of the Saxons in England, this comprehended all the free men of the nation. The general character of those adventurers, and the views with which they invaded Britain, were such as disposed every man, who had the direction of his own conduct, to become a foldier, and to engage in every enterprize by which either plunder or reputation might be procured. These warriors, who in general were denominated *thanes*, came soon to be arranged in two classes; the one consisting of those heads of families who had acquired allodial property; the other of such retainers as held lands, by a military tenure, either of the king, or of any other allodial proprietor. Both these classes of people were accounted gentlemen, and were understood to be of the same rank; in as much as they exercised the honourable profession of arms; though in point of influence and power there was the greatest disparity, the vassals being almost intirely dependent upon their superior. The foldiers of this lower class appear to have received the appellation of *les*, or *inferior thanes* \*.

2. The peasants composed a second order, greatly inferior in rank to the thanes of either class. They appear to have consisted chiefly of such persons as had been reduced into captivity during the long wars between the Britons and the

\* Spelman, in the treatise above quoted.

N

Saxons,

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Saxons, and had afterwards been entrusted by their masters with the management of particular farms; they were called *ceorls*, *carles*, or *cburles*. Some of them, no doubt, were kept in the house of their master, and employed in cultivating the land in his own possession; but the greater number were usually sent to a distance, and placed, as it happened to be convenient, upon different parts of his estate. The former being under his eye, and acting on all occasions from his orders, remained for a long time in their primitive servile condition; the latter, on the contrary, being withdrawn from his immediate inspection, had necessarily more trust and confidence reposed in them, and were thence enabled, with some degree of rapidity, to improve their circumstances. From their distance, the master was obliged to relinquish all thoughts of compelling them to labour, by means of personal chastisement; and as, from the nature of their employment, he could hardly judge of their diligence, otherwise than by their success, he soon found it expedient to bribe their industry, by giving them a reward in proportion to the crop which they produced. They were thus allowed to acquire property; and their condition became similar, in every respect, to that of the *adscripti glebae* among the ancient Romans, to that of the present colliers and salters in Scotland, or of the bondmen employed in the mines in several parts of Europe. In this situation some of them, by industry and frugality, found means to accumulate so much wealth, as enabled them to stock their own farms, and become bound to pay a certain yearly rent to the master.

It must be acknowledged, the writers upon Saxon antiquities have generally supposed that the *ceorls* were never in a servile condition; that from the beginning they were free

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free tenants, forming a distinct class of people, and holding an intermediate rank between the villeins or bondmen, and those who followed the military profession. But this supposition, so far as I know, is made without any shadow of proof: it probably took its rise from observing that the free tenants, towards the end of the Anglo-Saxon government, were very numerous, without attending to the circumstances from which they obtained their freedom. It is not likely, however, that in so rude and warlike an age any set of men, who had not been debased by servitude, and restrained by their condition, would attach themselves wholly to agriculture, and be either unfit for war, or unwilling to engage in it. If the *ceorls* had not been originally in some degree of bondage, they would undoubtedly have been warriors; and we accordingly find that when, from the circumstances above mentioned, they had afterwards acquired considerable privileges, they were advanced to the rank and employment of thanes.

Though the peasants were chiefly employed in agriculture, they were sometimes engaged in other branches of labour, as a collateral profession. From the poverty and rudeness of the country, for some time after the settlement of the Saxons in Britain, it may easily be imagined that little encouragement was given to mechanical arts, and that artificers and tradesmen were not of sufficient consequence to become a separate order in the community. Some mechanics, even in that simple age, were doubtless necessary to procure the ordinary accommodations of life, but the demand for their work was too narrow to occupy the sole attention of any individual. Such of the bondmen as had attained a peculiar dexterity in performing any branch of manual labour, were naturally employed by the master

in the exercise of it, and thus were led, by degrees, to make some proficiency in particular occupations. But they were not hindered by these employments from cultivating the ground; and they obtained a maintenance in the same manner with the other peasants, either by living in the house of their master, or by the possession of separate farms upon his estate. As these mechanical employments were accounted more unwarlike and contemptible than the exercise of husbandry, there was yet less probability that any freeman would be willing to engage in them.

3. A third order of men, who in this period of the English history became more and more distinguished, was that of the clergy. The numerous body of church-men introduced by the Christian religion, especially in the Western part of Europe, the extensive power and authority which they gradually acquired, together with the peculiar views and motives by which they were actuated, amidst the disorder and barbarism of the feudal times, are circumstances of so much magnitude, as to deserve particular attention in tracing any modern system of European policy. A few remarks, however, concerning the nature and origin of ecclesiastical jurisdiction, and the primitive government of the Christian church, will be sufficient, upon a subject that has been so often and so fully examined.

SECT.

SECT. I. *Of the chief Regulations attending the Establishment of Christianity in the Roman Empire, and in the modern Kingdoms of Europe.*

After the Christian religion had been extended over a great part of the Roman dominions, it was at last, in the reign of Constantine, taken under the protection of government, and obtained the sanction of public authority. The uniformity of circumstances attending the introduction of this new religion, produced throughout the whole empire an uniform set of ecclesiastical regulations.

In every province, religious teachers had taken up their residence wherever they met with encouragement; and the country was, by degrees, divided into small districts, or parishes, in each of which a particular clergyman had gained an establishment.

As the inhabitants of a parish were accustomed to assemble at stated times for public worship, and were by that means united in a religious society, so the zeal with which they were animated in support of their religion disposed them to inspect the conduct and theological opinions of all their members. For the regulation of these, and of all their common affairs, the heads of families, belonging to every congregation, frequently held meetings, in which their pastor was naturally allowed to preside, and gradually obtained the chief direction of their measures. Even in secular matters, the people were disposed to be guided by his judgment; and when a controversy had arisen between individuals, he was esteemed the most proper person to compose the difference; which was therefore  
most

most commonly referred by the parties to his determination.

The advancement of Christianity opened a communication between the professors of this religion belonging to different parishes, who in like manner were accustomed to deliberate upon their common religious concerns. Some particular clergyman became the ordinary president in those cases; and upon that account acquiring superior consideration and rank, was at length exalted to be superintendent, or bishop, of a large district or diocese. When these diocesan meetings were greatly multiplied, the attendance of the laity being found inconvenient, and appearing to them of less consequence, was gradually neglected, so that the business came to remain entirely in the hands of the clergy.

The minister of every parish was at first maintained by the occasional bounty of those who reaped the benefit of his instructions; and such was the attachment of the primitive Christians to their teachers, and to one another, that they cheerfully made contributions not only for that purpose, but also for the maintenance of their poor. In the declining state of Rome, when the decay of knowledge, by infusing a strong leaven of superstition, had corrupted the purity of the Christian religion, the clergy found means to obtain a more independent revenue, by persuading persons upon their death-bed to make donations to the church, in order to atone for their offences. In the reign of the emperor Constantine, when Christianity became the established religion of the empire, testamentary bequests in favour of societies, which had formerly been prohibited by the Roman law, came to be permitted without controul; and from this time the fashion of leaving legacies to the church

church for pious uses became so universal, that the clergy were enabled to accumulate large estates, both in moveables and land.

The management of these estates, as of all other matters concerning religion, was naturally devolved upon the clergy of every diocese, who assumed a discretionary power of distributing the produce in such a manner as they thought most expedient, or most conformable to the purpose of the donors. As the bishop, however, acquired more influence in ecclesiastical meetings, he was in a capacity of appropriating to his own use a greater share of that revenue which fell under their disposal. His dignity became more conspicuous; and for supporting it a suitable estate was deemed necessary. His cathedral was enlarged and rendered more magnificent, a more pompous form of worship was introduced into it, and a number of clergymen were appointed to assist in the religious services, or other branches of duty, that were supposed to belong to his department.

The rise of a bishop over the clergy of his diocese may be compared to that of a rude chief over the members of his tribe; as in both cases a superiority of station, derived from personal qualities, put it in the power of a single person to acquire superior wealth, and thence to become the permanent head or leader of a society: but the original pre-eminence of the chief arose from his military talents, that of the bishop, from the veneration paid to the sanctity of his character and profession. This makes the only difference in the nature of their advancement.

While those who had the direction of religious matters were thus advancing in opulence and power, there arose a new set of fanatics, who divided the esteem and admiration

tion of the people, and were at length admitted into the clerical profession.

The erroneous notions entertained in the dark ages, concerning the Supreme Being; the supposition that he is actuated by anger and resentment, in a literal sense, against those who transgress his laws, and that these passions are to be gratified by the mere suffering of his creatures; suggested to persons impressed with a strong feeling of their own guilt, and tortured upon that account with sorrow and remorse, the idea of submitting to voluntary penances, in order to appease an offended Deity, and to avert that future punishment which they were conscious of having deserved. From views of this kind, particular persons became disposed to retire from the world, and to deny themselves almost all the comforts and enjoyments of life; societies were afterwards formed, who expressly bound themselves not only to submit to actual punishments, but to renounce all those pleasures and gratifications to which mankind have the greatest propensity; and who for this purpose came under the vows of poverty, of chastity, and of obedience to the rules of their community. As Christianity took a firmer hold of the mind than any of the religions which had been formerly established, this perversion of its doctrines was attended with consequences proportionably more extensive.

These misguided votaries to mortification being originally poor, were supported either by alms or by their manual labour; but their exemplary lives, and the austerities which they practised, having excited universal admiration, enabled them to follow the example of the secular clergy, by procuring donations from the people; and hence, notwithstanding

withstanding the poverty still professed by individuals, their societies acquired the possession of great riches. The members of these communities were by degrees admitted into holy orders; and became no less instrumental in promoting the influence of the church, than in communicating religious instruction.

As the affairs of a diocese had fallen under the chief direction of a bishop, those of a monastery were conducted by an *abbot*, who presided in the meetings of the society; and who, by obtaining authority in consequence of that distinction, was at length permitted to assume the distribution and disposal of their property.

Although the authority and jurisdiction of the church in this early period of Christianity, and the subordination among different ranks of churchmen, proceeded in good measure from the nature of the business committed to their care, and the influence derived from their profession, yet the general fabric of ecclesiastical government was likewise a good deal affected by the political circumstances of the Roman empire. The person exalted to the head of a diocese was very often the minister of the most considerable town of that district, who from the greater weight and importance of his flock enjoyed a proportionable consideration among his brethren of the clergy. As by the civil policy of the empire many of those districts were united in what, according to the later division of the country, was called a *province*, the clergy of this larger territory were led frequently to hold provincial synods, in which the bishop of the capital city, acquiring respect from his residence near the seat of government, became the regular president, and was thence exalted to the dignity and title of a *metropolitan* or *archbishop*. In the yet more extensive

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tentive divisions of the empire, which were called *jurisdic-  
tions*, the clergy were induced, upon some occasions, to deli-  
berate; and in those greater meetings the right of presid-  
ing was claimed by the bishop, who resided in the same city  
with the governor of each respective *jurisdiction*. Hence there  
arose a still superior rank in the church, that of an *exarch*  
or *patriarch*, who obtained certain prerogatives over the  
clergy of that great division. Of all the patriarchs in  
Christendom those of Rome and Constantinople, the two  
great capitals of the empire, became soon the most distin-  
guished, the former of which enjoyed a pre-eminence  
over all the clergy in the Western, the latter over those  
in the Eastern provinces.

Upon the conquest of the Western empire by the barbarous  
nations, the ancient inhabitants, who had for a long time  
been declining in arts and knowledge, experienced at once  
a violent change of situation, and were suddenly plunged  
into the darkness and barbarism of their conquerors. As  
those conquerors, however, embraced the Christian religion,  
they submitted implicitly to the discipline of the church,  
and to all the forms of ecclesiastical government which they  
had found established. The Roman clergy, therefore, remained  
upon their former footing, and were far from losing any of  
their former privileges; they even endeavoured, amidst the  
general destruction of science, to preserve a degree of that  
literature which, in order to propagate and defend the tenets  
of their religion, they had been under the necessity of acquir-  
ing, and which was the great support of their influence and  
popularity. With this view, and for the instruction of the  
people, more especially of those that were to be admitted  
into holy orders, they erected schools in their cathedrals  
and monasteries,  
and

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and thence laid the foundation of those communities pos-  
sessed of ecclesiastical powers and privileges which have  
received the exclusive appellation of *colleges*.

From these two circumstances, from the gross igno-  
rance and the consequent superstition of the people, and  
from the comparative knowledge and abilities of the  
clergy, the latter were enabled to reap the utmost advan-  
tage from their situation, and to acquire an almost unlim-  
ited ascendancy over the former. Hence the doctrines of  
the church concerning her influence in the remission of sins,  
and concerning the distribution of rewards and punishments  
in a future state, came to be modelled in such a manner  
as was plainly calculated to promote her temporal interest.  
From this period, therefore, the donations of land to the  
church were greatly increased, and the bishops, abbots,  
and other dignified clergymen, who reaped the chief advan-  
tage from these benefactions, became possessed of estates,  
which enabled them in some degree to rival the greater  
thanes of the country. From the same causes the contri-  
butions made by every congregation for the support of  
their minister, were gradually augmented: to augment  
these contributions, and to render them permanent, the  
church employed the utmost address and influence of all  
her members. What was at first a voluntary offering came  
afterwards, by the force of custom, to be regarded as a  
duty. Having gradually raised this taxation higher and  
higher, the clergy, after the example of the Jewish priests,  
demanded at length a tenth part of the annual produce  
of land, as due to them by divine appointment. Not  
contented with this, they in some places insisted upon  
the same proportion of the annual industry; and it came  
to be maintained, that they had even a right to the tenth  
part of

the alms given to beggars, as well as of the hire earned by common prostitutes in the exercise of their profession\*. To enforce the obligation of submitting to these monstrous exactions, was for a long time, it is said, the great aim of those discourses which resounded from every pulpit, and of the pious exhortations delivered by each ghostly father in private. The right of levying *tythes*, which was first established in France, and which afterwards made its way through all the Western parts of Christendom, created to the church a revenue of no less value than what she derived from her landed possessions†. The tythes of every parish were collected by its own minister, but a large proportion of those duties came to be demanded from the inferior clergy by the bishop of the diocese.

When the provinces of the Western empire were broken into a number of independent kingdoms, it might have been expected that the church establishment in those countries would experience a similar revolution, and that the clergy of every separate kingdom, being detached from those of every other, would form a separate ecclesiastical system. It is not difficult, however, to discover the circumstances which prevented such a separation; and which, notwithstanding the various oppositions of civil government, united the churches of all the Western countries of Europe in one great ecclesiastical monarchy.

The patriarchs of Rome and Constantinople, of whom the one, as has been already observed, became the head of the Western, and the other of the Eastern part of Christendom, were in a different situation with respect to the establishment of their power and dignity. The patriarch

\* F. Paul's History of Benefices.

† The council of Mafcon, in 585, excommunicated all those who refused to pay tythes. Ibid.

of

of Constantinople, from his connection with the principal seat of government, appears for some time to have been exalted above his Western rival, and to have enjoyed superior authority. But after he had attained a certain pitch of exaltation, the very circumstance which had hitherto promoted his advancement, tended immediately to stop the progress of it; for no sooner did he become an object of jealousy to the civil power, than the vicinity of the imperial residence contributed the more effectually to thwart and controul every project for the extension of his privileges. The Roman pontiff, on the other hand, when he had risen to such opulence and dignity as might have excited the envy and disgust of the civil magistrate, was by the dissolution of the Western empire freed from the troublesome inspection of monarchs, who probably would have checked the growth of his power; and being placed in the situation of an independent prince, was at full liberty to put in practice every politic measure which might either enlarge his temporal dominions, or extend his authority over that numerous body of clergy who already owned his supremacy.

It may further explain the history of the Western church to observe, that while the bishop of Rome was thus in a condition to avail himself of that superiority which he had acquired, the circumstances of the clergy were such as made it their interest to unite in one body, and to court his protection. The character of churchmen was, from the nature of their profession, a good deal different from that of the laity, and incited them to very opposite pursuits. The former, in a military and rude age, were generally drawn from the inferior ranks of life; at the same time that, from the prevalence of superstition, they possessed

great

great influence over the minds of the people, and were daily advancing their claims to power and emoluments. By the ancient nobility, therefore, or leading men of every country, and still more by the sovereign, the haughtiness, the insolence, and the rapacity of these upstarts, was often beheld with indignation and resentment, and produced continual jealousies and disputes between those of different orders; the latter endeavouring to maintain and to extend a set of immunities and privileges, which the former were no less eager to restrain. In such a contest the ecclesiastics of any particular kingdom were as much inferior to their adversaries in direct force, as they were usually superior in skill and dexterity; and their situation naturally pointed out the expedient of soliciting assistance from their brethren in the neighbouring kingdoms: that assistance they very seldom failed to procure. The controversy of every individual was regarded as the common cause of the whole order. By adhering to one another, however disjoined in point of civil government, they became sufficiently powerful, not only to avoid oppression, but even to defend their usurpations; and by combining, like the soldiers of an army, under one leader, their forces were directed to the best advantage.

The opportunities which this great leader enjoyed, of augmenting his revenue, and of increasing his power, may easily be conceived. In the multitude of disputes which occurred between the clergy and laity in the different nations of Europe, the former, in order to obtain his protection, were obliged to submit to various taxes, and to the extension of his prerogatives. Hence the payment of the *first fruits*, and such other impositions upon the livings of churchmen, were established in favour of the holy see.

In

In like manner, during the wars that were carried on between the different potentates of Europe, the contending parties, finding that the countenance and approbation of the Roman pontiff would give great weight and popularity to their cause, were sometimes under the necessity of purchasing his favour, by ratifying his titles, and permitting the exercise of his claims over their subjects. From the same circumstances, the temporal dominions of the pope in Italy were greatly enlarged, and his authority, as an independent sovereign, was recognized. Upon the conquest of Lombardy by the king of France, his holiness, who had thrown his whole influence into the scale of the latter, was rewarded with a great proportion of the conquered territory; and, at the same time, was enabled to assume the privilege of conferring the imperial dignity upon the conqueror.

The disputes among the clergy themselves, more especially between the secular and regular clergy, were another source of the papal aggrandizement. Every society of monks was subject originally to the bishop within whose diocese their monastery was situated, but as they advanced in riches and popularity, they were led to assert their independence; and in supporting their pretensions, having to struggle with the whole body of secular clergy, they were induced to court the head of the church, by such obedience and compliances as were likely to gain him over to their interest.

In the Eastern church, where these causes did not operate in the same degree, neither the authority of the clergy, nor that of the patriarch of Constantinople, rose to the same height. The payment of tithes, though it was there warmly asserted by churchmen, as well as in the West,

was



was never enforced by public authority; nor was the head of the church in that part of the world in a condition to establish such an extensive revenue as had been acquired by the Roman pontiff.

It may be observed, on the other hand, that the same circumstances which produced an independent ecclesiastical jurisdiction in Christendom, have been productive of similar effects in other religions, and in different parts of the world. Among illiterate nations, maintaining an intercourse with one another, and professing a common religion, the clergy, who have been raised to importance either by the explanation of theological opinions, or by the direction of mysterious rites and ceremonies, appear naturally to form a separate class of the people; and, by extending their ideas of a common interest beyond the bounds of a single kingdom, are easily reduced under one great ecclesiastical leader. This was formerly the situation of the Celtic nations, who inhabited a great part of Europe: they were under the influence of a common religion, the ministers of which are said to have possessed a jurisdiction superior to that of the civil magistrate. These *druids* were, at the same time, united in one society, independent of the different political states to which they belonged; and were under the direction of a *chief druid*, who resided in Britain, and whose authority extended over the laity as well as the clergy, in all the nations of Celtic original.

The authority of the grand *Lama* or *high-priest* of the Tartars, which is acknowledged by many tribes or nations totally independent of one another, has, in all probability, the same foundation. This ecclesiastical monarch, who resides in the country called Little Thibet, is also a temporal prince. The numerous clergy, in the different parts  
of

of Tartary, who acknowledge his supremacy, are said to be distinguished into different ranks or orders, somewhat analogous to those which take place in Christendom; and the ordinary priests, or lamas, are subjected to the authority of bishops, whose jurisdiction is subordinate to that of the sovereign pontiff. Without pretending to ascertain, with any degree of accuracy, the church-history either of the Celtic or Tartar nations, we cannot avoid remarking the general analogy that appears in the origin and constitution of all these different Hierarchies.

SECT. 2. *The Establishment of Christianity in Britain, under the Roman Dominion, and in the early Government of the Anglo-Saxons.*

Christianity made its way into Britain, in the same gradual manner as into all the other parts of the Roman empire. It is supposed to have obtained a permanent footing in the country, under the government of Marcus Aurelius, at which time a bishop of Rome is said, upon the application of Lucius, a British king, to have sent over, to this island, several learned men, to preach and propagate the gospel. But whatever degree of credit may be due to this account, it is certain that, in the reign of the emperor Constantine, this religion was taken under the protection of government, in Britain, as well as in all the other provinces of Rome; and that it continued in this situation until the island was abandoned by the Romans. During this period the Christian church had received the same form as in all the other parts of the empire. Particular clergymen had obtained a settlement in small districts or  
P  
parishes,

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parishes, according to the number and situation of the inhabitants\*. Many of these districts were united under the inspection of a bishop, the minister of a cathedral church; and a metropolitan, or archbishop, was exalted over the whole clergy of a province. But though it is probable that this ecclesiastical establishment was modelled according to the situation of the great towns, and the chief divisions introduced by the civil government of the country; yet neither the number of the British prelates, nor the churches in which they were settled, appear to be known with any degree of certainty †. Mention is made of three archbishops, who, it should seem, corresponded to three of the provinces, in the late arrangement which the Romans made of their British territories. The first resided in London; the second in York; and the third, whose jurisdiction extended over Wales, appears, at different times, to have had a different place of residence ‡. That the Hierarchy had early acquired a settled condition in Britain, and that its bishops held some rank among those of other churches, is evident from their sending representatives to the council of Arles, called in the year 314, and to other remarkable councils, that were afterwards convened in different parts of Christendom §.

The arrival of the Saxons in this island was productive of great disorder in the religious, as well as in the civil

\* Gildas.—Also Whitaker, Hist. of Manchester.

† According to the monkish tradition, there were twenty-eight bishops in Britain, during the Roman government of that island. These corresponded to the twenty-eight considerable cities in the province. See Ranulph. Higden. lib. i.—This number of British cities is mentioned by Gildas, Bede, and others; and their names are transmitted by Nonnius.

‡ Ranulph. Higden. lib. i.

§ Stillingfleet, Orig. Britan.

establishment.

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establishment. In those parts of the country which fell under the dominion of the Saxons, the Christian churches were frequently demolished; the public worship was interrupted; and the clergy, in many cases, could neither be provided with a maintenance from the public, nor continue the regular exercise of their jurisdiction. The altars of Thor, and Woden, were often substituted for those of Jesus Christ; and the life and immortality which had been brought to light by the gospel, were obscured and eclipsed by the fictions of Hela's dreary abode, and Valhalla's happy mansions, where heroes drink ale and mead from the skulls of enemies whom they have slain in battle.

Wherever the ancient inhabitants were able to preserve their independence, their ecclesiastical policy remained without any alteration. This was particularly the case in the whole Western part of the island, from the Southmost point of Cornwall to the Frith of Clyde; not to mention the country to the Northward, which the arms of the Saxons had not penetrated. In the territories where that people had formed their settlements, there is ground to believe that, after the tumult and violence attending the conquest had subsided, the two nations frequently maintained an amicable correspondence, were in some measure united in one society, and enjoyed the free exercise of their religion\*. As their long neighbourhood produced,

\* This was so much the case, that among the East-Angles, according to the testimony of Bede, the Christian worship, and the Saxon idolatrous rites, were performed in one and the same church; such good neighbourhood was maintained between the two religions. "Atque in eodem fano et altare haberet ad sacrificium Christi et Arulam ad victimis dæmoniorum. Quod videlicet sanum, ex ejusdem provincie Aldulf, qui nostra ætate fuit, usque ad suum tempus perdurasse, et se in pueritia vidisse testabatur." Bed. Hist. Eccl. lib. ii. ch. 15.

by degrees, a communication of civil institutions and customs, it was likewise, in all probability, attended with some approximation of religious opinions and observances; and in this particular, it can hardly be doubted that the regular and well-established system of Christianity, to say nothing of its genuine merit in other respects, would have great advantage over the unformed and loosely connected superstition of the barbarians. In the ardour of making profelytes, and in the capacity of propagating their tenets, the professors of the former must have greatly surpassed those of the latter; and it was natural to expect that the Saxons, in England, would at length follow the example of all the rude nations, who had settled in the provinces upon the continent, by adopting the religion of the conquered people.

What laid the foundation for a general and rapid conversion of the Saxons, was an event, which happened about an hundred and fifty years after their settlement in Britain. Ethelbert, the sovereign of Kent, having married Bertha, the daughter of a king of the Franks; this princess, already a Christian, made open profession of her religion, and brought over a French bishop to reside at the Kentish court. This incident suggested to the Roman pontiff, Gregory the Great, a man of unbounded ambition, the idea of converting the Anglo-Saxons to Christianity, and, at the same time, of establishing his authority over the British clergy, who had hitherto neither acknowledged the papal jurisdiction, nor yielded an exact conformity to the tenets and observances of the Roman church. For these two purposes, he gave a commission to Augustine, one of the monks of a convent at Rome, with about forty assistants, to preach and propagate the gospel in Britain.

Britain\*. By the industry of these, and of succeeding missionaries, the Christian religion was, in the course of about half a century, established universally in all the kingdoms of the Heptarchy. The authority of the church of Rome went hand in hand with Christianity; and though the British clergy struggled for a considerable time to maintain their independence, and their peculiar doctrines, they were at length born down by the prevailing system, and reduced into a subordinate branch of the Roman Hierarchy†.

The conversion of the Anglo-Saxons has been commonly regarded as an entirely new plantation of the gospel, in the territories which fell under the dominion of that people; and it seems to be imagined, that when Augustine entered upon his mission, there were no traces of Christianity remaining in those parts of the country. This opinion appears to have arisen, partly from the supposition, that the settlement of the Anglo-Saxons was accompanied with a total expulsion of the ancient inhabitants, and partly from a disposition in subsequent ecclesiastical writers to undervalue that system of church-discipline and faith which had obtained in Britain, before it was fully subjected to the papal jurisdiction.

With respect to the general extirpation of the Britons, it seems to be a perfect chimera. Neither is there any reason to believe that they underwent any persecution from the Saxons upon account of their religion. The rude polytheism, professed by those conquerors, does not seem to have taken a firm hold of their minds, or to have inspired much animosity against foreign deities or modes of

\* Bed. Hist. Ecclesiast. lib. i. c. 23. 25.

† Bed. Hist. Eccles. lib. ii. seq.—Stillingfleet, Origin. Brit.—Henry's Hist. of Great Britain.

worship;

worship; and if, during the immediate conquest of the country, the British clergy were sometimes plundered or massacred, this, in all probability, proceeded from no peculiar enmity to their religion, but from the ferocity natural to barbarians, who, in the heat of a military enterprise, could not be expected to shew much regard to the distinction of characters or professions. The effect of these disorders, however, was only partial and temporary. It appears that, even in those parts of the country where the Saxons had remained the longest, the ancient church buildings were far from being entirely destroyed; for we learn from Bede, that, upon the arrival of Augustine in Kent, he first preached in a church, which had been erected by the Romans in honour of St. Martin, and that soon after, when the monarch of that kingdom had been baptized, orders were given to build or *repair* churches, for the accommodation of the Christian missionaries\*.

Upon the full restoration of Christianity in these parts of the country, which had been corrupted by the mixture of Saxon superstition, the religious establishments, which had been introduced under the dominion of the Romans, and which had always been preserved in the unconquered parts of the island, were completely revived; with this difference, that the British churches, in the degree of their submission to the papal authority, were brought into a greater conformity with the churches upon the continent. It is probable that the ancient parochial divisions had not been entirely lost; more especially in those districts, which the Anglo-Saxons had but recently subdued when they embraced the religion of the former inhabitants. †

\* Hist. Eccles. l. i. c. 26.

† Whitaker, Hist. of Manchester; and the authorities quoted by him.

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The number of bishops, it is natural to suppose, and the extent of their jurisdiction, were likewise directed, in some measure, by the antecedent arrangements in the provincial government of Britain; though, from the changes produced in the state of the country, many variations were, doubtless, become necessary. Of the three *archbishops* who had formerly acquired a pre-eminence over the whole of the British clergy, one appears to have been sunk by the disjunction of Wales from the English monarchy; so that there came to be only two metropolitans under the Saxon establishment. The archbishop of the Northern department resided, as formerly, at York; but the seat of the other, from the residence of Augustine, who obtained the chief ecclesiastical dignity, was transferred from London to Canterbury\*.

The revenue for maintaining the clergy was the same in Britain as in all the churches acknowledging the jurisdiction of the Roman pontiff. It consisted, partly of contributions levied in every parish; and partly of landed estates, which the superstition of the people had led them to bequeath for pious uses: but the former of these funds remained longer than in the more Southern parts of Europe, before it was converted into a regular tax, and exalted to a tenth of the whole yearly produce.

\* Ranulph. Higden. lib. i.

C H A P.

## C H A P. VI.

*Institution of Tythings, Hundreds, and Counties.*

**I**N every nation it must be a great object to provide for defence against the invasion of neighbouring states; but in a rude age, the provisions requisite for this purpose are few and simple. The great body of the people are foldiers, willing and ready to take the field whenever their service is necessary. From the mutual depredations frequent among a rude people, they become inured to hardships, and familiar with danger; and having little employment at home, they are glad to embrace every opportunity of acquiring military reputation, or of enriching themselves with the spoil of their enemies. Every person is therefore accustomed to arms as soon as he is capable of using them, and acquainted with the simple manner of fighting practised among his countrymen; so that, as the chief magistrate finds no difficulty in raising troops upon any occasion, he is put to little or no trouble in training and preparing them for those military operations in which they are to be engaged.

The appointment of certain leaders in particular districts, to collect the forces upon any emergency, and to command them in time of battle, seems to be all that is wanted, in such a situation, for putting a whole kingdom in a complete posture of defence. A few regulations of this nature, arising obviously from the circumstances of a barbarous people, were, at an early period, established among the Saxons

in

## CHAP. VI. HUNDREDS, AND COUNTIES. 113

in England, as well as among their neighbours upon the continent.

Every feudal superior was the military leader of his own dependents; but upon the settlement of the Saxons in Britain the landed estates acquired by the greater part of individuals were at first so small as to render the number of their vassals inconsiderable; and the *allodial* or independent proprietors were therefore under the necessity, amidst the disorder that prevailed in those times, of associating for mutual protection and security. Different families, connected by the ties of consanguinity or otherwise, found it expedient as well as agreeable to settle in the same neighbourhood, that they might on all occasions be in a condition to assist one another. Thus the inhabitants came to be distributed into villages of greater or less extent, according to circumstances; and the members of every village, accustomed from their infancy to live together, and finding themselves united by a common interest, were led to acquire the strongest habits of intimacy and attachment. These little societies received the appellation of *vills, towns, or free-bourgs*.

As these villages were formed upon the plan of defence, and were frequently employed in the exercise of hostilities, there naturally arose in each of them a leader, who by having the privilege of conducting their military enterprises, obtained also a degree of authority in the management of civil affairs. To this person the name of *head-borough* or *borsholder* (a word supposed by some to be contracted from *borough's elder*) was commonly given.

According to the early policy of the Anglo-Saxons, each of their villages was divided into ten *wards*, or petty districts; and hence they were called *tythings* or *decennaries*,

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as

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as their leader was denominated a *decanus* or *tything-man*. This regulation appears to have been extended over all the kingdoms upon the neighbouring continent; and in all probability it originated from the influence of ecclesiastical institutions\*.

As, upon the first establishment of Christianity, under the Roman dominion, the form of church government was in some respects modelled by the political constitution of the empire, so the civil government, in the modern states of Europe, was afterwards regulated in many particulars according to the system of ecclesiastical policy. When the Western provinces of the Roman empire were conquered by the barbarous nations, and erected into separate kingdoms, the conquerors, who soon embraced the Christian religion, and felt the highest respect for its teachers, were disposed in many cases to improve their own political institutions, by an imitation of that regularity and subordination which was observed in the order and discipline of the church.

In the distribution of persons or of things, which fell under the regulation of the Christian clergy, it appears that, in conformity to the customs of the Jewish nation, a decimal arrangement was more frequently employed than any other. By the Mosaic institution the people were placed under rulers of thousands, of hundreds, of fifties, and of tens. A Jewish synagogue, corresponding to a modern parish, appears at a subsequent period to have been

\* The term *frei-burg* is sometimes applied not to the whole tything or village, but to each of those wards into which it was divided. [See the laws ascribed to William the Conqueror. Wilkins, c. 32.] But more frequently a free-burg and tything are understood to be synonymous. See the Glossaries of Spelman and Du-Cange, v. *Fri-borga*.

put

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put under the direction of *ten elders*, of whom one became the chief ruler of that ecclesiastical division\*. A tenth part of the annual produce was appropriated for the support of the Levites, as the same proportion of ecclesiastical livings was claimed by the high-priest. Hence we find that, in modern Europe, the members of a cathedral church, as well as those of a monastery, were divided into ten branches, each of which was put under a director, and the tenth of these persons, or *decanus*, was intrusted with a superintendance of all the rest†. Hence too the modern institution of tythes, and the pretensions of the Roman pontiff, the Christian high-priest, to the tenth of all the revenues of the clergy‡.

When the Western part of Europe, upon the dissolution of the Roman government, had been reduced into a state of barbarism, by which the inhabitants were necessarily divided into separate villages or small towns, each of those little communities was naturally formed into one congregation, and annexed to a single church. The same people who

\* Dr. Lightfoot's Harmony of the Four Evangelists, part 3. on Luke chap. 4. ver. 15.—Lewis's Antiquities of the Hebrew Republic, b. 3. ch. 21.—Goodwin's Moses and Aaron, b. 2. ch. 2.—also Vitringa Archisynagogus illustratus.—This author agrees with Dr. Lightfoot, in supposing that the *decem aliofi*, mentioned as requisite in every synagogue, were officers employed in the business of that society; though he differs as to the particular employments that were allotted to them.

† Burn's Eccles. Law.—Kennet's Paroch. Antiq.

‡ Though the distribution of persons and things according to *tens*, appears to have been immediately borrowed by the Christian clergy from the Jews, we find among many other nations a tendency to follow the same arrangement. Those natural instruments of notation, which every man carries about with him, the fingers, have probably been the original cause of the common arithmetical progression by *tens*, and of the general propensity to be governed by this number in the classification of objects.—The land-tax upon the Roman provinces is said to have been a tenth of the produce.

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joined in public worship were also combined in their military expeditions; and the same arrangement, under different rulers, that had been adopted in the former capacity, was easily communicated to them in the latter. This division of a village, with the corresponding territory belonging to its inhabitants, into ten little *wards* or *districts*, probably arose in those European kingdoms which had first attained a regular form, and was afterwards extended to the Saxons in England, and to the inhabitants of other countries, who remained longer in a state of anarchy and confusion.

But while the members of every Anglo-Saxon town or village were thus intimately united, a connection of the same sort was gradually introduced between the inhabitants of a larger territory. Those who belonged to different towns or villages in the same neighbourhood had frequently occasion to assist one another against a common enemy; and in consequence of many joint expeditions, directed by a sense of mutual interest, were induced to form a regular association, under a permanent military officer.

The extent of these associations was at first perhaps arbitrary and variable, but was at length settled in an uniform manner, according to the system of ecclesiastical policy which prevailed both in England and in other European kingdoms. Upon the principle which has been formerly mentioned, every ten churches of a diocese were united under an ecclesiastical inspector, who in England, in contradistinction to a similar officer belonging to a cathedral or monastery, was called a *rural dean*\*. In like manner

\* Kennet's Paroch. Antiq.—Burn's Eccles. Law, v. *Dean and Chapter*.

every

every ten villages or tythings, which were of the same extent with parishes, formed a military district, which obtained the appellation of a *hundred*, and its commanding officer that of a *centenarius* or *bundred*\*.

The connections of society being still farther extended, the members of different hundreds were also associated for their common defence, and fell under the direction of a greater officer, called the *heretoch*, a title which, in the Saxon language, is said to be synonymous with that of duke, and which appears to have been originally given to some of those leaders in the Heptarchy, who afterwards assumed the title of kings. The districts belonging to these heretochs, which were greater or less according to accidents, and had been varied on different occasions, were gradually ascertained and established, so as at length to correspond entirely with the territories that were placed under the ecclesiastical jurisdiction of the several bishops. These districts were called *shires*; and the officer who presided over them seems, at a later period of the Anglo-Saxon government, to have changed his title for that of *alder-man* or *earl*. It is a common opinion, however, that the heretoch and the alder-man were different persons, intrusted with different departments; and that the former was the chief military, as the latter was the chief civil, officer of the shire.

In some parts of the country a smaller number of hundreds were associated, so as to compose an intermediate district, called *lathe*, *rape*, or *tything*; and several of these districts were united in forming a shire. But this arrange-

\* *Hundredus autem Latini, says Ralph Higden, five Cantredus, Wallicè et Hibernicè, continet centum villas.* [Polychronicon, lib. i.]

ment,

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ment, peculiar to some shires, and depending upon the same principles with the divisions already mentioned, is of little consequence in our present view of the subject.

Such were the military institutions of the Anglo-Saxons, which appear to have arisen almost imperceptibly from the rude state of the country, from the natural divisions of the people, and from their progressive attempts in forming more extensive and permanent associations.

From the great deficiency of Saxon records, there are many particulars concerning these institutions, which remain in obscurity, and which have given rise to various disputes and conjectures. The earliest historians, who have said any thing upon this subject, appear, for the most part, to have lived at a period when these institutions had undergone many variations, and in several respects had fallen into disuse. They were, at the same time, ignorant annalists of a barbarous age; and their accounts, which appear to have been chiefly derived from tradition, are short and unsatisfactory. It seems to have been uniformly imagined by these authors, that the institutions above mentioned were peculiar to the government of the Anglo-Saxons; and that they were introduced by the singular policy of king Alfred, to whom the admiration of English writers has commonly ascribed every important regulation during the Saxon period. But it is now generally known, that the establishment of tythings, hundreds, and shires, was prior, in England, to the time of Alfred; and that it was not peculiar to this country, but was probably extended over all the barbarous nations who settled in the provinces of the Western empire.

With respect to the establishment of tythings and hundreds, it has been the general opinion that the former consisted

consisted of ten families, and that the latter, of course, were composed of an hundred families. That such was the exact number of families comprehended in each of these divisions, the respective names affixed to them appear to have been thought sufficient evidence.

But when we examine this opinion, after all the pains that have been taken by late writers to render it plausible, it seems to be attended with insuperable difficulties. To divide the whole people into military parties of ten and of an hundred families, without any regard to their places of residence, would mark a degree of art and contrivance hardly to be expected in a barbarous age: not to mention that it would be a most absurd regulation, as it would frequently separate near relations, and place them under the command of different officers, instead of uniting them under one common leader, with whom they had acquired a natural connection; for as the accidental collections of kindred and acquaintance, who lived in the same village or neighbourhood, could not be regularly composed of ten families, nor of any given number, they must of necessity have been split and jumbled with strangers, in order to make up the several tythings into which the people were thus artificially divided. If such a regulation ever had place in England, we must suppose that it was introduced by a political projector, neglecting to avail himself of the usual sources of authority in a rude nation, for the sake of introducing a finical regularity, and by a legislator invested with such absolute power, as might render him capable of enforcing measures diametrically opposite to the natural course of things; a supposition which is neither applicable to the character nor to the condition of the early monarchs of Britain.



As the institution of tythings, together with that of hundreds, and of shires or counties, was not limited to England, but had place in most if not all of the feudal countries, there is good reason to believe that it was not derived from artificial or distant views of policy, suggested to any particular prince; but that it proceeded from a concurrence of circumstances in the European kingdoms, by which it was recommended to the great body of the people.

That a tything was originally the same thing with a village, and that it did not comprehend any precise number of persons or families, may be concluded from this, that in the ancient law-language of England the words *vill*, *town*, *decennary*, and *tything*, have all the same signification\*. If a tything have the same meaning with a vill or town, it is surely impossible that it can signify a collection of ten families only, without relation to the place of their residence. Should we, on the other hand, suppose that a tything was regularly composed of so many families, the members of the same tything must frequently have resided in different towns or villages; in which case it would sometimes be necessary, in describing or pointing out those persons, to mention the *town* which they inhabited, as distant from the tything to which they belonged, and these two terms therefore, so far from being synonymous, would come, upon such occasions, to be used in direct opposition to each other.

But what puts this matter in a yet more conspicuous point of view, is an early regulation mentioned by the English lawyers, that every tything should have a church, with celebration of divine service, sacraments, and bu-

\* Blackstone's Comment. vol. I. Introd. § 4.

rials.

rials\*. If the limits of a tything, and of a town or village, were the same, a regulation of this sort would naturally be established. It affords complete evidence that a parish and tything were of the same extent; but how is it possible to conceive that a parish comprehended only ten families? According to this doctrine every eleventh house must have been a church, and the clergy must have composed the eleventh part of the whole people.

To obviate this objection, it is held by some authors that a family is not to be understood in a literal sense, but as comprehending all the vassals and tenants of a proprietor, who in some cases were pretty numerous. Admitting, however, this explanation in its fullest extent, it will only vary, instead of remove the difficulty. It would still be in vain to expect that a village or town should always contain exactly ten of these enlarged families, or even any number of tens; so that it would often be requisite to patch up a tything from the remnants of different towns or villages; and it would follow that these outcasts did not belong to the church in their neighbourhood, but, however dispersed over the country, and intermixed with other parishes, were united in one congregation, and were provided with a separate church and minister of their own.

The establishment of tythings, hundreds, and shires, was primarily intended for the mutual defence of the inhabitants, but it was likewise rendered subservient to other very salutary purposes. When the people had been assembled in those meetings to engage in a military enterprise, or upon the conclusion of it to divide their booty, they had occasion to hear complaints of the injuries and dif-

\* Blackstone's Comment. vol. I. Introd. § 4.

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orders

orders committed among themselves. Every feudal superior was the natural judge of his own tenants and vassals; but when a dispute had arisen between different allodial proprietors of the same tything, there was no single person possessed of sufficient authority to terminate the difference. The parties being independent of each other in point of property, and therefore masters of their own conduct, were under no necessity, in a matter of that kind, of submitting to the orders of any individual. They acted in the same manner with respect to the exercise of their civil rights, as with relation to peace and war. In both cases they considered themselves as free men, subject to no restraints, but such as arose from the nature of their confederacy, or were imposed by their common consent.

The same motives, however, which induced a village or tything to enter into joint measures for their defence against a foreign enemy, determined them also to take precautions for composing animosities and differences among their own members. Roused by the danger of a quarrel which might be fatal to their union, and which might render them an easy prey to their neighbours, they readily interposed with all their influence to reconcile the parties, and to enforce their observance of the rules of justice. A judicial power was thus gradually assumed by every tything over the allodial or independent proprietors of which it was composed. The hundred, in like manner, came to exercise a power of determining the differences between the members of the several tythings, within the bounds of that larger district; as the meetings of the shire established a similar jurisdiction over the different hundreds comprehended in that extensive territory. These courts took cognizance of every cause, whether civil or criminal; and

and as they enjoyed the sole jurisdiction, in the first instance, within the respective boundaries of each, they became naturally subordinate one to another; so that from the decision of the tything there lay an appeal to the hundred, and the sentences of this latter tribunal were reviewed in the greater meetings of the shire.

These courts were held originally by all the allodial proprietors of each particular district; and the same persons had the same right of presiding in their judicial procedure, as when their meetings were called to deliberate upon military affairs.

It is probable that every kind of law-suit was at first determined in full assembly, and by a plurality of voices; but in the larger meetings of the hundred, and of the shire, it should seem that when the authority of those tribunals had been confirmed by custom, and their duty had become somewhat burdensome by the increase of business, convenience introduced a practice of selecting a certain number of their members, to assist their president in the determination of each particular cause. Hence the origin of *juries*, the precise date of whose establishment is uncertain, because it probably arose from no general or public regulation, but from the gradual and almost imperceptible changes, authorized by common usage in the several districts of the kingdom. The number of jurymen was for some time different upon different occasions; till the advantages of an uniform practice produced a general rule, which determined that no less than twelve persons should be called in all ordinary causes\*.

Concerning

\* The custom of choosing twelve men for distributing justice, is frequently mentioned in the Anglo-Saxon laws. Thus, in a law of king Ethelred, it is said, " Et

Concerning the institution of tythings, there is one regulation, connected with the administration of justice, that has been much taken notice of by historians, and has excited the admiration of all political writers: the members of every tything are said to have been responsible for the conduct of one another; and the society, or their leader, might be prosecuted, and compelled to make reparation for an injury committed by any individual.

“ ut habeantur conventus in quolibet wapentachio, et exeant seniores duodecim  
 “ thani, et prefectus cum iis, et jurent super sanctuarium quod iis in manus datur,  
 “ quod nolent ullum innocentem accusare, nec aliquem noxium celare.”—[Wilkins,  
 p. 117.] In another law, ascribed to the same king, commonly called the *senatus-  
 consultum de monticulis Wallia*, it is enacted, for the mutual benefit of the English  
 and Welch, that controversies between them shall be determined by twelve law-men,  
 the half of whom shall be Englishmen, the other half Welchmen. [Wilkins,  
 p. 125.]

These twelve persons correspond, it should seem, to the *Racimburgi* and the *Scabini*, who under the first and second races of the kings in France assisted in the decisions of the count and of the centenarius.

It has been supposed by some authors that both were not upon the footing of modern jurymen, chosen out of the free men of a district for each cause, but that they were permanent assessors of the magistrate and members of the court. See Brady's complete Hist. of Eng.—Hickes's Diff. Epistol.

But that either these twelve men, or the *Racimburgi*, or *Scabini*, were permanent members of the court, appears improbable, for the following reasons: 1. Because these twelve men were chosen among the *thanes*; and it is not likely that the same persons, of that rank, would subject themselves to the drudgery of being constant assessors to the magistrate. 2. The number of *Racimburgi* or *Scabini* appears to have been varied, according to the importance of the causes which they decided. This supposes a new election in each cause. 3. If there was a regular bench of assessors to the chief magistrate of a county, it is wonderful that no traces of that institution should be found at present, more especially in Scotland, where the county-courts have been continued upon the ancient footing.

Accordingly Horn, an author who lived in the time of Edward I. says expressly, in his *Mirroir de Justice*, that king Alfred put to death a number of his judges for deciding causes without a jury.

If

If we look upon a tything as regularly composed of ten families, this branch of its police will appear in the highest degree artificial and singular; but if we consider that society as of the same extent with a town or village, we shall find that such a regulation is conformable to the general usage of barbarous nations, and is founded upon their common notions of justice.

Among barbarians in all parts of the world, persons who belong to the same family are understood to enjoy a community of goods, and to be all jointly subjected to the same obligations. In those early ages when men are in a great measure strangers to commerce, or the alienation of commodities, the right of *property* is hardly distinguished from the privilege of *using* or *possessing*; and those persons who have acquired the joint possession of any subject are apt to be regarded as the joint proprietors of it. At the same time, when a debt is contracted by one of several persons who have a perfect community of goods, it must of necessity be discharged from the common funds; and the obligation of every individual becomes therefore a burden upon the whole society.

After a family has been enlarged, and subdivided into different branches, their possessions are not upon this account entirely separated, nor their notions of common property altogether effaced. Though the different families, who are thus formed into a tribe or village, reside in different houses, their neighbourhood allows them still to maintain a promiscuous intercourse; and their situation disposes them to act in concert with each other in all their important employments and pursuits. As, in their expeditions of war and hunting, they go out in a body, so,  
 according

according to the primitive state of agriculture, they labour in the field, and gather in the harvest in common; and what has been acquired by their united exertions, before it is divided among them by consent is naturally conceived to be the joint property of all.

It is no hardship, that persons connected in so intimate a manner should be liable for the obligations of one another; and when an individual has become bound to a stranger, who cannot easily know for whose benefit the debt was incurred, it seems reasonable that the creditors should be allowed to demand payment from the community, who alone have access to distinguish the rights of their particular members.

But the greater part of the debts contracted in a barbarous age arise from injuries and hostilities; for which it is usual to make atonement by pecuniary compositions: and as in such cases it commonly happens, either that the offence was originally committed by a whole village, or, if it arose from a single individual, that the quarrel was afterwards adopted and prosecuted by the other members of the community, this appears a sufficient reason for subjecting them to a share of the punishment.

Thus, by the general custom of rude nations, the vengeance of the injured party for murder and other atrocious crimes is not confined to the guilty person, but is extended to his family, and even to the whole village or tribe of which he is a member. The prosecution of claims, founded upon this general custom, makes a considerable part of the history of mankind in the early periods of society. Traces of this primitive law of nations may be discovered even in some civilized countries; where,  
upon

upon account of enormous offences, the criminal, together with his innocent children, and other relations, have been condemned to the same common punishment\*.

Among the Jews, when a person was found murdered in the neighbourhood of a city, and the murderer was unknown, it seems to have been thought that the punishment might with justice be extended to all the inhabitants; who are, upon that account, directed to perform an expiatory sacrifice. "And all the elders of the city that is next unto the slain man, shall wash their hands over the heifer that is beheaded in the valley. And they shall answer and say, Our hands have not shed this blood, neither have our eyes seen it. Be merciful, O Lord, unto thy people Israel, whom thou hast redeemed, and lay not innocent blood unto thy people Israel's charge. And the blood shall be forgiven them." †

When it is customary to demand satisfaction from a whole village for the highest personal injuries committed by an individual, it cannot appear surprizing that the same privilege should be claimed upon account of the ordinary violations of property.

I am assured, from the most respectable authority, that, in the villages belonging to the Highlands of Scotland, a rule of this kind has been immemorially established. The stealing of cattle was formerly the only species of theft from which the inhabitants of that country could suffer any great prejudice; and when stolen cattle could be traced within the district of any particular village, the inhabitants were liable to repair the damage, unless they could point

\* See instances of this quoted by the acute author of *The Historical Law Tracts*.

† Deuteron. chap. xxi.

out the track of the cattle, passing again without their territories. This law, which was founded merely upon long usage, remained in force at least as far down as the beginning of the present century\*.

It was a custom, we are told, among the ancient Irish, "that the head of every *sept*, and the chief of every kindred, or family, should be answerable and bound to bring forth every one of that sept, and kindred under it, at all times, to be justified, when he should be required, or charged with any treason, felony, or other heinous crime †." It is probable that this Irish regulation was analogous to that of the other Celtic nations.

From the code of Gentoo laws published in 1776, it appears that a similar regulation has been introduced among the ancient inhabitants of Indostan. If the footsteps of a thief have been traced, or if stolen goods are found, within a certain distance from any town, the thief is presumed to be concealed in it.—And whenever a robbery or theft is committed in the neighbourhood of any town or city, the *head-person* of that town or city is bound to make up the loss ‡.

Upon some parts of the coast of Guinea, the villages or towns, it should seem, are liable for the obligations of every sort contracted by any of their members; for we are informed, that when a person in that country neglects to pay a debt the creditor is under no necessity of arresting the real debtor, but, in the district where he resides, has

\* It does not seem to be supposed by historians, that the Saxon regulations concerning tythings were extended to a country so inaccessible as the Highlands of Scotland.

† Spencer's View of the State of Ireland.

‡ Code of Gentoo laws, ch. 17. sect. 4. 6.

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the liberty of seizing, at pleasure, such a quantity of goods as will satisfy the demand, leaving the sufferers to indemnify themselves in the best manner they can\*.

About the middle of the thirteenth century, it appears that the states of Germany had very generally adopted a similar practice; which is mentioned by historians as a proof of uncommon rudeness and barbarism †.

The inhabitants of the same foreign country happening, at any one time, to reside in London, were formerly viewed in the same light, and any one of them might be prosecuted for the debts contracted by his countrymen. In a treaty between Edward the Second and Alphonso king of the two Castiles, it is agreed, that the merchants of Bilbao, and the other towns of Biscay, shall not for the future be arrested, nor have their goods distrained, for the debts of any Spaniard, for whom they have not become personally bound ‡. It is probable that the small number of Spanish merchants residing in London, and the distance of their native country, made them appear as much connected

\* Hist. Gen. des Voyages. Mod. Univ. Hist.

† The following passage is quoted from Pufendorf's Abregé Chron. de l'Histoire d'Allemagne. "Je ne puis passer sous silence une autre nouveauté, qui prouve, on ne peut pas mieux, et le malheur de ces tems, et la barbarie des mœurs du siècle. C'est le droit d'*Otage*. [Jus obstagiorum] Rien de plus bizarre que ce droit. Un souabe, un Bourgeois d'Ulm, lésé par un Liegeois, ne se donnoit pas la peine de poursuivre sa partie, devant sa justice ordinaire; il se contentoit de mettre la main sur le premier Liegeois qu'il pouvoit rencontrer, et le constituoit prisonnier a Ulm, c'est là qu'il faisoit juger sa cause, et l'*Otage* n'étoit point relâché que la sentence ne fût exécutée. L'histoire et les Archives nous fournissent mille exemples de ces procès singuliers: et Leibmann rapporte que les citoyens de Spire ont fait déclarer par des lettres patentes, qu'ils n'étoient point sujets de leur Evêque, et que par conséquent l'onne pouvoit les arrêter légitimement pour les causes que regardoient les sujets de ce prince.

‡ Anderfon's History of Commerce.

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as if they had been members of a single rude village or tribe.

This noted regulation concerning the Saxon tythings is therefore to be regarded as the remains of extreme simplicity and barbarism, rather than the effect of uncommon refinement or policy; and in this view, it may be observed that, in consequence of some improvement in the manners of the people, the original obligation imposed upon every tything, to repair the injuries committed by any of its members, was, in a period subsequent to that which we are at present examining, subjected to certain limitations. By a law which has been ascribed to William the Conqueror, but which is probably of an earlier date, we find it enacted, that, if a crime is committed by any member of a decennary, who escapes from justice, his tythingman, with two others of the same tything, together with the respective tythingmen, and two others, out of the three neighbouring tythings, shall assemble to examine the state of the fact, and if the tything to which the criminal belongs is purged by the oath of these twelve persons, it shall be freed from the obligation to pay the damage\*. The progress of government, by enlarging the general intercourse of society, contributed to diminish the peculiar connexion among the inhabitants of the same village, and made it appear an intolerable hardship, that they should, without distinction, be accountable for the misdeeds of one another.

Beside these two branches of business which I have mentioned, the defence of the country and the decision of law-suits, that were canvassed in the Saxon tythings, hun-

\* See the laws collected by Roger de Hoveden, and said by this author to have been made by William the conqueror in the 4th year of his reign, with the advice of his barons, nobles, wise men, &c.

dreds,

dreds, and shires, those meetings were accustomed to deliberate upon matters of still greater importance. They received complaints concerning such abuses in administration, or grievances, as had occurred within their several districts, and by introducing new regulations endeavoured to apply a proper remedy. Thus the heads of families or independent proprietors of every village, or tything, exercised a legislative power within their own liberties, but were liable to be controuled, in this respect, by the meetings of the hundred, which enjoyed the same power in a larger territory; and both of these were subordinate to the meetings of the shire, which possessed a legislative authority over all the hundreds of that extensive division. How the meetings of the shire were liable to be controuled by a still greater assembly, I shall now proceed to enquire.

## C H A P. VII.

*Of the Wittenagemote.*

**B**Y the gradual extension of intercourse between the different families or tribes of the Anglo-Saxons, and by the advancement of their political union, the inhabitants of larger territories were led to assemble for the regulation of their public concerns. As the freemen or allodial proprietors of a tything, of a hundred, and of a shire, determined the common affairs of their several districts, and were convened for that purpose by the tything-man, the hundreder, and the alderman; so the union of people belonging to different shires produced a greater assembly, consisting of all the allodial proprietors of a kingdom, and summoned by the king, the great military leader, and chief magistrate of the community. This national council received the appellation of the *mickle-mote*, or *Wittenagemote*.

During the continuance of the Heptarchy, each of the Saxon kingdoms had its own Wittenagemote; and there can be no doubt that those national councils, though sometimes they might act in concert, were independent of one another. But when all the dominions of the Anglo-Saxons were reduced under one sovereign, the Wittenagemotes of each particular kingdom were dissolved, and there was formed a greater assembly of the same nature, whose authority extended over the whole English nation. The circumstances attending this important revolution are lost  
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in obscurity; and we have no means of discovering with certainty, whether it was produced by the mere influence of custom, or by an express regulation. It is probable that when Egbert had subdued the different states of the Heptarchy, the members of every separate Wittenagemote were invited to that great council of the monarchy which was then established; and that, in consequence of this, they would scarcely think it worth while to continue their attendance in those inferior meetings with which they had formerly been connected.

Of the particular class or description of persons who composed the Saxon Wittenagemotes, either in the respective kingdoms of the Heptarchy, or in the monarchy which was formed from the union of these, the historians of that period have given us little or no direct information. But, from a variety of circumstances, it appears highly probable that those ancient assemblies, as I already have hinted, were composed of all the members of the community who enjoyed landed estates in full property; that is, of all those who had the appellation of the *Greater Thanes*.

1. From the state of the country after the Saxon conquest, these persons, being independent with respect to their possessions, were masters of their own conduct; and were under no necessity of adopting public measures to which they had not consented, or upon which they had not at least had an opportunity of deliberating and giving their suffrage. Without their advice and concurrence, therefore, the king could seldom adventure to transact any important national business; and from the frequent practice of consulting them, they were gradually formed into a regular assembly, and became an established branch of the constitution.

tution. The rest of the inhabitants were either *vassals*, whose benefices, if not held precariously, were secured to them only for a limited period; or *peasants*, whose condition was yet more dependent and servile. That the king should find it necessary or expedient to summon either of these classes of people to his great council, cannot easily be conceived. Their support and assistance might be expected, of course, in the execution of every measure which had been approved by their superiors; and therefore the voice of the allodial proprietors of land might, on every public emergency, be regarded as the voice of the nation.

2. The usual designations given, by ancient authors, to those who sat in the Saxon Wittenagemote, seem perfectly to coincide with this idea of its constituent members. The persons present in that assembly, when they happen to be particularly specified, are commonly said to be the *bishops and abbots*, together with the *aldermen*, the *chiefs*, the *nobles*, or the leading men of the kingdom\*. These expressions are peculiarly applicable to the allodial proprietors of land. It is to be observed, that in those times there was no such personal wealth as could create any authority; neither was there any distinction between what is now called a nobleman and a gentleman; but every individual, possessed of landed property, was a sort of leader, and maintained a degree of influence and rank corresponding to his fortune. The dignified clergy were distinguished by their profession, as the aldermen, or governors of shires, were by their office; for which reason, in speaking of the persons who composed the Wittenagemote, those two classes of

\* Principes, optimates, magnates, proceres, &c. See Spelman on Parliaments—Dr. Brady, Answer to Petyt—and the series of great councils before the conquest—Tyrrell's Bibliotheca Politica, Dial. 6.

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men are frequently mentioned in particular, while the other proprietors of land are only pointed out by a general appellation expressive of their condition.

3. The same conclusion receives an additional support from the obvious analogy between the Wittenagemote, and the inferior meetings of the tythings, hundreds, and shires. These inferior meetings were plainly of the same nature with the great national council. The former deliberated upon the public affairs of the several districts to which they belonged: the latter, upon the public affairs of the whole nation. Both of these appear to have arisen from the same circumstances; and probably the one was introduced in imitation of the other. It was because the chief magistrate of every inferior district had not, of himself, sufficient authority to execute public measures, that he was accustomed to call meetings of those inhabitants whose concurrence he thought was expedient; and it was upon the same account that the king was accustomed to assemble the great national council. There is great reason to believe, therefore, that all these meetings were constituted in the same manner; and, as it seems to be universally agreed, that the court of every tything, hundred, and shire, was composed of the respective proprietors of land in those districts; it can hardly be doubted that the constituent Members of the Wittenagemote were the people of a similar description throughout the whole kingdom.

Lastly; The probability of this opinion is farther increased, when we examine the state of the national councils, which existed about the same time in the other European kingdoms. In all those kingdoms, the sovereign was under the necessity of transacting the more important parts of the public business with the concurrence of a great proportion of his



his subjects; and the councils which he convened for this purpose appear, in every country, to have been composed of that part of the people who enjoyed a degree of influence over the rest of the community. Thus in France, the country of modern Europe in which the greatest number of particulars concerning the primitive government has been transmitted to us, the supreme concerns of the kingdom fell under the deliberations of the assemblies of the *field of march*; so called from the time of their principal meetings. From the accounts delivered by some of the French writers, these councils appear to have been composed of all the freemen of the nation. According to others, they consisted of the leading men or nobility\*. These accounts are, at bottom, not very different. In the early periods of the French monarchy, no person could be denominated free, unless he had the independent property of land; and every landed proprietor was, in reality, a sort of chief or nobleman †.

In consequence of the disputes between the king and the people, that took place in England after the accession of the house of Stewart, there arose two political parties; the followers of which have maintained very opposite opinions concerning the constituent members of the Anglo-Saxon Wittenagemote. The supporters of the prerogative, in order to shew that the primitive government of England was an absolute monarchy, and that the privileges enjoyed

\* See Observations sur l'Hist. de France par M. l'Abbe Mably—and Memoires Historiques du Gouvernement de France, par M. le Comte de Boulainvilliers.

† Hinc haud ægre colligere est, unde nostri appellarent parlamenta procerum totius regni conventus.—Du Cange v. Parliamentum. The Salic laws are said to have been made with the consent of the *proceres* or the *optimates*.—And even charters from the crown usually bear, that they were granted *cum consensu fidelium nostrorum*,—or *in nostra et procerum presentia*. Mably, *ibid*.

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by the people have all flowed from the voluntary grants and concessions of the sovereign, were led to assert that the original members of the Wittenagemote were persons under the king's immediate influence and direction; from which it was concluded, that, so far from being intended to controul the exercise of his power, this council was called of his own free choice, for the purpose merely of giving advice, and might of consequence be laid aside at pleasure. Hence it was contended, that beside the bishops and abbots, and the aldermen, both of which were supposed to be in the nomination of the crown, the other members of the Wittenagemote, who received the appellation of *wites* or *wise men*, were the lawyers or judges of the kingdom, who sat in the privy-council, and were likewise in the appointment of the sovereign\*.

Those writers, on the contrary, who defended the rights of the people, appear, from their eagerness in combating this opinion, to have been betrayed into the opposite extreme. In their endeavours to prove the independent authority of the ancient national council, they were induced to believe, that, from the beginning, it had been modelled upon the same plan, as at present; and that it was originally composed of the nobility, the knights of shires, and the representatives of boroughs †.

It requires no great sagacity or attention, at this day, to discover that both of these opinions are equally without foundation. They may be regarded as the delusions of prepossession and prejudice, propagated by political zeal, and

\* Hume's Hist. of England, Appendix to Anglo-Saxon period.

† Sir Robert Atkyns' Power, Jurisdiction, and Privileges of Parliament.—Petyt, Rights of the Commons asserted.—Jani Anglorum facies nova.—Argumentum Antinormanicum.—Tyrrel's Bibliotheca Politica.—Lyttelton's Hist.

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nourished with the fondness and credulity of party attachment. Nothing can be more improbable, or even ridiculous, than to suppose that the lawyers or judges of England were, immediately after the settlement of the Anglo-Saxons, a body of men so considerable as to compose the principal part of the Wittenagemote, and, from a title peculiar to themselves, to fix the general denomination of that great assembly. In a very rude age, the business of pleading causes is never the object of a separate profession; and the deciding of law-suits does not form a characteristical distinction in the chiefs or leading men, who are occasionally employed in that manner. We may as well suppose that, in the period of English history now under consideration, the Anglo-Saxon *wites*, or *wise men*, were the physicians, the surgeons, and apothecaries, or the mathematicians, the chymists, and astronomers of the country, as that they were the retainers of the law. We have surely no reason to believe that the latter were, by their employment, more distinguished from the rest of the community than the former.

Besides, if the *wites* are understood to be judges and lawyers, it will follow, that the ancient national assembly was often composed of that class of men exclusive of all others; for, in ancient records, it is frequently said, that laws were made, or public business was transacted, in a council of *all the wites* of the kingdom. But it is universally admitted, that the bishops and abbots, as well as the aldermen or governors of shires, were members of the Wittenagemote; from which it is a natural inference, that these two sets of people were comprehended under the general appellation of *wites*.

This may easily be explained. The term *wite* signifies, primarily, a man of valour, or military prowess; and hence  
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a man of high rank, a nobleman\*. It has been used, in a secondary sense, to denote a *wise man*, from the usual connection, especially in a rude age, between military skill and experience or knowledge; in the same manner as *an old man*, or *grey-headed man*, is, according to the idiom of many languages, employed to signify a ruler or governor. As far as any conclusion, therefore, can be drawn from the appellation of Wittenagemote, or council of the wites, it is likely that this national assembly comprehended neither judges nor lawyers, considered in that capacity, but that it was composed of all the leading men, or proprietors of landed estates; in which number the dignified clergy, and the governors of shires, if not particularly distinguished, were always understood to be included †.

The other opinion is not more consistent with the state of the country, and the condition of its inhabitants. It supposes that in England, soon after the settlement of the Anglo-Saxons, the lower ranks of men were so independent of their superiors, as to form a separate branch of the community, invested with extensive political privileges. This opinion supposes, in particular, that the mercantile part of the inhabitants were become a distinct order of the people, and had risen to such opulence and authority as entitled them to claim a share in the conduct of national measures. There is not, however, the least shadow of probability in this supposition. Whatever improvements in trade and manufactures had been made in Britain, while it remained under the provincial government of Rome,

\* Somner's Sax. Dict. v. *Wita*.

† By a law of king Ina, it is enacted, that if any person fought in the house of an alderman, or of any other illustrious wite, he should pay a fine of sixty shillings. See Wilkins' Anglo-Saxonica, Leges Inæ, c. 6.

these were almost entirely destroyed, by the convulsions which attended the Saxon conquest, and the subjection of a great part of the island to the dominion of a barbarous people. The arts which remained in the country after this great revolution, were reduced to such as procure the mere necessaries, or a few of the more simple conveniences of life; and these arts, as has been already observed, were hardly the objects of a separate profession; but were practised occasionally by the inferior and servile part of the inhabitants. How is it possible to conceive, in such a state of manufactures, that the trading interest would be enabled to assume the privilege of sending representatives to the great council of the nation? Even in those European states, whose advancement in arts was much earlier than that of the Anglo-Saxons, it was long posterior to the period we are now examining, before the trading towns were formed into corporations; an event which must have preceded their acting in a political capacity, and, consequently, their being represented in the national assembly.

But, independent of this consideration, which can hardly fail to produce conviction in such as are well acquainted with the early history of modern Europe; the fact in question may be determined in a manner still more decisive and satisfactory. If the representatives of boroughs, and the knights of shires, were constituent members of the ancient Wittenagemote, it is inconceivable that no traces of their existence should have been preserved in the annals of the Saxon princes. From the numerous meetings of that assembly, which are mentioned in many authentic records, and of which accounts are given by historians, who lived either in that period, or not long after it, a variety of expressions must have occurred, by which the fact might be ascertained

ascertained in a manner admitting of no doubt or hesitation. Had it been a common practice for the towns and shires to choose representatives in the national assembly, is it possible to believe that this practice would never once have been alluded to upon any occasion whatever; or that, when mention is made so frequently, of the bishops and other dignified clergy, of the aldermen, of the wites, or leading men, who sat in this meeting, another part of its members, consisting of a class of people totally different from the former, would in no case, either from accident or design, have been pointed out in clear and unequivocal terms? It cannot be disputed, however, that, notwithstanding the most diligent search into our ancient histories and records, by men of great industry and learning, and eager to prove their hypothesis, not a single unambiguous expression, to that effect, has ever been found: and this observation is not limited to the time of the Heptarchy, but may be extended from the settlement of the Anglo-Saxons to the Norman conquest.

The attempts to prove that there were representatives of boroughs and shires in the Wittenagemote consist, therefore, in giving a forced interpretation to certain vague and general phrases, which happen to be employed by ancient authors, concerning the members of that assembly. The word *alderman*, for example, denoting a *ruler*, may be extended to the ruler, or chief magistrate, of a town, as well as of a shire; and therefore it is contended, that when the aldermen are mentioned in old records, as a constituent part of the national council, we are to understand the representatives of boroughs, as well as the governors of shires. It is, in like manner, asserted that, by chiefs, or leading men, and by wites, or wife men, the persons chosen

to represent the commons are as properly described, as the nobility, or proprietors of land\*.

According to this reasoning, the representatives of the commons, in every shape, and of every description, as they exist at present, though not separately mentioned, are included in almost every designation, applied to the ancient members of the Wittenagemote. How far this mode of argument may be extended it is difficult to say. The *aldermen* and the *wites* have, each of them, the capacity of lord Peter's *bread*, containing the quintessence of beef, mutton, veal, venison, partridge, plum-pudding, and custard.

In the accounts given by ancient authors of those that were called to the national council, mention is made, in some cases, not only of the bishops, abbots, aldermen, and chiefs, but also of the *people*; and the persons present are sometimes distinguished by the appellation of a *great multitude* †.

But

\* Tyrrell's *Bibliotheca Politica*, Dial. 6. — It seems to be the opinion of this author, however, that the existence of the knights of shires, in the Saxon Wittenagemote, is more doubtful than that of the representatives of boroughs.

† Thus in the record of a Wittenagemote held by Ethelbert in 605, it is said, "*Convocato igitur communi concilio tam cleri quam populi.*"

A general council is said to have been held by Ethelwolf, in 855, *Presentibus et subscribentibus Archiepiscopis et Episcopis Angliæ universis, nec non Beorredo rege Mercia, Edmundo East-Anglorum rege, Abbatum et Abbatissarum, Ducum, Comitum, Procerumque totius terræ, aliorumque fidelium infinita multitudine, qui omnes regium chirographum laudaverunt, dignitates vero sua nomina subscripserunt.*

Canute, in the fifth year of his reign, is said to have held a great council, of his archbishops, dukes, earls, abbots, *cum quamplurimus gregariis militibus, ac cum populi multitudine copiosa.*

In some other instances, expressions of a similar nature occur; such as *vulgi consensus*, and *populo audiente et vidente*. [See the authors above quoted—as also Gurdon's

History

But it cannot escape observation, that if this proves any thing, it will prove too much: it will prove that all the inhabitants, even those of the lowest rank, instead of sending representatives, were personally allowed to vote in the national council. By the appellation of *the people*, it appears that, on some occasions, the lay-nobles are understood, in opposition to the dignified clergy; and on others, the ordinary proprietors of land, in opposition to those of distinguished opulence. There is, at the same time, good reason to believe, that the multitude, said to have been present at some of those meetings, was partly composed of mere spectators, who might possibly, by their acclamations, testify their approbation of the measures proposed.

There is produced an instance of a Wittenagemote, held by one of the kings of Mercia, in the year 811, in which a royal charter is said to have been signed before "the Mercian chiefs, bishops, leaders, aldermen, *procurators* and relations of the sovereign, together with Cuthred, the king of Kent, and Suthred the king of the East Saxons, and all those who were present in the national council\*." As the members of the Wittenagemote had

History of the Parliament.] In many of these expressions a distinction is clearly pointed out between the members of the meeting and the inferior people that were merely spectators. It ought also to be remembered, that the greatest number of those general phrases, quoted for proving that the commons were represented in the Wittenagemote, are used only by writers after the Norman conquest; who, in translating Saxon laws, or in speaking of Saxon usages, may be supposed to accommodate their language to the ideas prevalent in their own times.

\* *Merciorum Optimates, Episcopi, Principes, Comites, PROCURATORES, meoque propinquos, nec non Cuthredum regem Cantuariorum, atque Suthredum regem Orient. Saxon. cum omnibus qui testes nostris synodaliibus conciliabulis aderant.* [Annals of Winchelcomb.]

immemorially

immemorially the privilege of appointing any person to act for them in their absence, it has been supposed, with great probability, that the *procurators* here mentioned were the proxies of absent nobles. In support of this conjecture, it is observed, that they are placed next in order to the nobles, and immediately before the king's relations\*.

But although there is no ground for believing that the representatives of the commons were ever admitted into the Wittenagemote, there can be as little room to doubt that, when the different Anglo-Saxon kingdoms were first united under one monarch, it composed a very numerous assembly. As, upon the settlement of the Saxons in Britain, few persons were in a condition to occupy large estates, the number of allodial proprietors was proportionably increased. It is probable that the estates of the greater part of individuals extended to no more than a *hide* of land, or what could be cultivated by a single plough, and that this property constituted the primitive qualification for voting in the several Wittenagemotes of the Heptarchy. We hear of no particular limitation in this respect, either in the reign of Egbert, or in any preceding period.

It has been imagined by some authors, that the privilege of sitting in the Wittenagemote was originally confined to such as possessed forty hides of land; a property of great extent, which few individuals, it is natural to suppose, could have an opportunity of acquiring; whence it seems to be inferred, that a small part only of the landed gentry

\* Gurdon's History of the Parliament.—In a charter of Athelstan, the *procurators* are also mentioned. But this charter was not granted in the Wittenagemote. [Ibid.]

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were admitted into the councils of the sovereign\*. This opinion is founded upon a passage in the register of Ely, which mentions a distinction in point of rank, enjoyed by such of the nobles as possessed estates amounting to forty hides of land. But this passage refers to the state of the kingdom in the reign of Edward the confessor; when property had been subjected to the most important revolutions; and government had widely deviated from its original institution. No inference can thence be drawn, concerning the primitive constitution of the national council; which must have arisen from the state of the inhabitants at the time when it was framed. How far the authority above mentioned is sufficient to justify that conclusion, with respect to the later periods of the Anglo-Saxon government, will fall to be afterwards examined. It is therefore highly probable that the Wittenagemote of the Anglo-Saxons was originally so constituted, as to admit a great proportion of the people into a share of its deliberations; and it merits attention, that even such of the inhabitants as were excluded from this assembly, were either the slaves, or the tenants and vassals of those who sat in it. The former were thus placed under the protection of the latter. Men of inferior rank, though not formally represented in the national council, enjoyed, therefore, a degree of security from the influence of their master or superior, who had an interest to defend them, from every injustice but his own; and whose jealousy was ever watchful to guard them from any oppression of the sovereign.

The *powers* exercised by the Saxon Witenagemote, were such as might be expected from the independent situation,

\* Dugdale's preface to his Baronage. Hume's Hist. of England, appendix to Anglo-Saxon period.

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and the opulence, of its members. It possessed a similar authority over the whole kingdom, to that of any tything, hundred or shire, over its own subordinate division. In general, the Wittenagemote seems to have taken under its cognizance all those branches of government, which were of sufficient importance to merit its attention, and which, at the same time, could be directed, in consistency with the delays arising from the deliberations of a numerous assembly.

1. It exercised, first of all, the power of providing for the defence of the kingdom, and of determining the public military operations\*. This was, in all probability, the primary object in calling that assembly; and for which, according to the most ancient custom, it was regularly held twice in the year: in the spring when the seed-time was over, to resolve upon such expeditions as were thought expedient; and, in the autumn, before the harvest began, to divide the plunder. A people so rude, as the early Saxons, had little other business of importance but what consisted in the sowing and reaping of their grain; and were generally disposed to employ the greatest part of the summer, either in private rapine, or in hostilities against a foreign enemy. The same seasons were observed, for the meetings of the national council, in the other kingdoms of Europe. We are informed that, in France, the vernal meetings were originally in the beginning of March; but that afterwards, from greater attention, it should seem, to the cares of husbandry, they were delayed till the first of May †.

\* Selden's Notes on Gov. of England, collected by Nath. Bacon, part i. chap. 20. and the authorities referred to.

† This change is said to have been made about the beginning of the second race of the French kings.

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It may here be worth while to remark, that the power of declaring peace and war, which belonged indisputably to the Saxon Wittenagemote, affords complete evidence that its members were allodial proprietors of land; for, upon the supposition of their being the vassals of the crown, they must have been bound, when called upon, to attend the sovereign in war, and consequently their consent would not have been requisite in undertaking any military enterprise.

The same authority, by which military enterprises were determined, made likewise a provision for carrying them into execution. As from the circumstances of a rude nation, every man was in a condition to furnish a number of soldiers proportioned to the extent of his property; it was a general law in the Saxon government, that the proprietors of land should be rated, for military service, according to the number of *bides* which they possessed; and if any person refused to contribute his proportion, he was liable to forfeit his possessions, and to be deprived of the public protection.

The erecting and repairing forts and castles, as a defence against the sudden incursions of an enemy, and the maintaining a free communication, by roads and bridges, between the different parts of the kingdom, were objects of police which, in the same view, attracted the notice of the Wittenagemote, and for which individuals were assessed in proportion to their wealth. The magnificent works of this nature, which were executed by the Romans, in all the provinces of their empire, contributed much to facilitate the progress of their arms, and to establish their dominion over the conquered people. From their example, it is likely that the Saxons, in Britain, as well as the other

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nations, who settled upon the continent of Europe, were incited to improvements of this nature which they would not otherwise have thought of.

2. When the members of the Wittenagemote had been assembled, and when they had settled every point relating to their martial operations, their attention was frequently turned to other objects of national concern. Whatever inconveniencies had been felt from the manner of conducting public business, whatever abuses had been committed in the administration of government; these were canvassed; and regulations were made for preventing the like evils for the future. It is not disputed that the Wittenagemote exercised a legislative power over the whole kingdom; and, of consequence, the power of repealing and altering the regulations introduced by the meetings of any particular tything, hundred or shire\*. The imposition of taxes, the most important appendage of legislation, was likewise undoubtedly assumed by this great assembly, so far as taxes existed in that early period; but these were, in a great measure unknown; the ordinary expence of government being defrayed out of the private estate of the king, and from the various emoluments annexed to the regal dignity.

3. To this legislative power was added that of directing and controlling the exercise of the royal prerogative. Thus the demesnes of the crown were considered as not entirely the private estate of the king; but as in some measure the property of the public, which fell to be managed and disposed of under the public inspection. The alienation, therefore, of crown-lands, though proceeding in the name of the king, was not effectual without the concurrence of

\* The preface to most of the collections of Saxon laws published by Wilkins.

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the *wites*; and hence royal charters were frequently granted in the Wittenagemote, and subscribed by a number of its members\*.

The coining of money, in order to save the trouble of weighing and assaying the metals which pass in exchange, was a privilege early assumed by the king in the respective kingdoms of Europe; and even by the nobles or great proprietors of land in the territories under their jurisdiction. In the exercise of this privilege, great frauds had been committed on many occasions, by debasing the coin below its usual standard, for preventing which abuses, the Wittenagemote, in England, appears to have superintended the behaviour both of the king and of the nobles, and to have regulated the coinage throughout the whole kingdom †.

The members of this great council had no less authority in the government of the church than in that of the state. That they were early accustomed to take cognizance of the established religion, appears from what is related of Edwin king of Northumberland, who being solicited to embrace Christianity, is said to have answered, that in a matter of such importance he would be determined by the advice of his wives and princes. In the Wittenagemote, all ecclesiastical laws were made; the king's nomination of bishops and other dignified clergy was confirmed, and their number, as well as the extent of their livings, was regulated.

The same national council gave sanction to the establishment of monasteries, and of the revenues with which they were endowed ‡.

\* Of this privilege of the Wittenagemote there occurs a remarkable instance in the reign of Egbert, in 836. Spelm. concil. t. i. p. 340.

† Wilkins leges Athelstani.

‡ Selden's Notes collected by N. Bacon. part i. ch. 20. and the authorities to which this author refers.

Not

Not contented with directing the exercise of the executive power, the nobles and wites assumed, in extraordinary cases, the privilege of calling the sovereign to account for the abuses of his administration. Of this a remarkable instance occurs in the reign of Segebert, a king of the Western Saxons; who, for his tyrannical behaviour, and after he had treated with contempt the remonstrances of his people, was, by a general assembly of the nation expelled the kingdom; and another prince of the royal blood was elected in his place. This event is said to have happened in the year 755\*.

Lastly, when the members of the Wittenagemote had met to deliberate upon public business, they were accustomed also to hear complaints concerning such great quarrels and acts of injustice, as could not be effectually redressed by inferior judicatories, and to endeavour, by their superior authority, either to reconcile the parties, or to decide their differences; by frequent interpositions of this nature, that great council was at length formed into a regular court of justice; and became the supreme tribunal of the kingdom; in which appeals from the courts of each particular shire, as well as original actions between the inhabitants of different shires, were finally determined.

\* Saxon chronicle.

## C H A P. VIII.

*State of the Sovereign in the primitive Anglo-Saxon Government.*

THE different parties of the Saxons, who invaded Britain, were each of them under the conduct of some adventurer, whose fortunes they had followed, either from personal attachment, or from a confidence in his abilities. After they had settled in the country, the same person continued to have the command of their forces, and became also the chief civil officer of the community. The longer he had remained in that high station, his possession of it was rendered more secure by the continuance of the same circumstances which had originally produced his elevation. His military talents deriving lustre and importance from the distinguished point of view in which they were beheld, excited the admiration and respect of his followers; while the dangers with which they were surrounded, and a sense of their common interest, united them in fighting under his banner. By every new expedition they became more accustomed to submit to his direction; and the oftener they had found it necessary to solicit his protection and assistance, under those calamities to which they were exposed, they felt more sensibly the advantages derived from his favour, as well as the inconveniences arising from his displeasure.

In the early history of the Anglo-Saxons, the leader of every separate tribe or party, is accordingly represented as possessing



possessing a permanent office, with the title of *heretoch* or duke, in place of which that of *king* was afterwards assumed.

The king was in possession of a landed estate, acquired in the same manner with that of every inferior leader, by whose assistance the conquest had been made. As the booty, arising from any successful enterprise, was divided among the free people or heads of families concerned in the adventure, and, as on those occasions, each individual obtained a portion, both of land and moveables, suited to his rank and abilities; it may easily be conceived that the property accumulated, in a course of time, by the sovereign, would be much greater than that of any one of his subjects. His estate was naturally distributed among his dependents, according to the same plan which was adopted by every other landed proprietor. A part of it was bestowed upon his kindred or free retainers, under the condition of military service; and the remainder was cultivated by his villains, or bondmen, for supporting the expence of his household. Over these two classes of people, he exercised the rights of a superior, and of a master. Throughout the rest of the kingdom, exclusive of his own particular estate, his authority was much more limited. Every allodial proprietor, unaccustomed to subjection, and supported by his own retainers, was more or less in a condition to maintain his independence; and those who had acquired considerable property, beholding with jealousy the superior dignity and pretensions of the king, were commonly ready to combine against him, either in resenting or opposing, whatever they deemed an infringement of their liberties.

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The powers with which the sovereign came to be invested, either in the different states of the heptarchy, or in the subsequent monarchy which arose from the union of those kingdoms, were such as, in order to prevent confusion and promote the dispatch of public business, were tacitly devolved upon him, or as, from the nature of his situation, he had found encouragement to assume, and had, without opposition, been permitted to exercise. The dignity and office of the king, though higher in degree, were perfectly similar to those of the tythingman, the hundreder, and the earl; and he possessed nearly the same powers over the whole kingdom, which those inferior officers enjoyed in their own particular districts.

1. By having the command of the forces in the time of battle, the original source of his greatness, he was led to direct their movements on other occasions; to take preparatory steps for bringing them into the field; to suggest particular enterprises, to plan the measures for conducting them, to execute treaties with foreign states, and in general to superintend the defence of the kingdom, and the whole course of its military operations.

2. In consequence of his being at the head of the military department, the king was led also to exert his authority in suppressing internal disorders, in quelling tumults and insurrections, in restraining private rapine and violence; in seizing offenders, and preventing their escape from justice; in a word, he obtained the province of maintaining the ordinary police of the country, and the security of its inhabitants.

3. As, from these two branches of power, he became the prime mover, and proposer of public measures, and as, in matters of great moment, the concurrence of the Wit-

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tenagemote was necessary; he acquired, of course, the exclusive privilege of calling that assembly, and of presiding in all its deliberations. The influence which he thence obtained, with regard to its determinations, may easily be imagined. The president of every numerous assembly has many opportunities of moulding the business that comes before it, into such a shape as will promote his own designs; more especially, if by the permanent enjoyment of that office, he has leisure to form a regular plan of management; and if, by having a discretionary power of calling the particular meetings, he may regulate his motions according as the assembly happens, in different conjunctures, to be attended by different members. But while, by these favourable circumstances, the sovereign was capable of advancing his political interest, he enjoyed the additional advantage of superior opulence and dignity; which put him in a condition to intimidate, as well as to over-reach opposition. To a prince, therefore, possessed of much prudence, and of popular talents, it was not difficult, in ordinary cases, to procure the consent of the Wittenagemote to those measures which he thought proper to suggest; and the resolutions of that assembly, while they appeared to limit and controul the power of the crown, were at bottom, very often directed by the monarch, and rendered subservient to his will.

4. As the Wittenagemote enacted laws, distributed justice in the last resort, and regulated the administration of public affairs; so the duty of enforcing the decrees and regulations of that assembly, and, in general, the executive part of the government, were naturally devolved upon the king. That great officer, who conducted the military force of the kingdom, could hardly fail to assume the province  
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of causing the punishments decreed against offenders to be regularly inflicted, and of compelling every individual to fulfil the decisions of the law. The same person was led to procure information with respect to the commission of heinous crimes, and to direct that they should be prosecuted before the proper tribunals. In these employments, the sovereign acted as the head and representative of the community. In the same capacity, he obtained the nomination of many inferior officers in church and state; the privilege of coining money, and of superintending weights and measures; together with the exercise of all those powers which, from their nature, could not be conveniently devolved upon a popular assembly.

These prerogatives, which, from the natural course of things, and probably without any formal or express regulation, were gradually annexed to the crown, became the source of such perquisites and emoluments, as more than compensated the trouble with which they were attended. The chief executive officer, who prosecuted a crime in the name of the public, had a plausible pretence, upon the same account, for levying the fine or forfeiture arising from the conviction of the criminal. Besides, in government, as well as in religion, the bulk of men are commonly so engrossed by the image or picture, as to forget the original, and to bestow upon the representative the sentiments due to the object it represents. Thus the sovereign, who appeared to direct, and put in motion, all the wheels and springs of government, who enforced the laws, who vindicated offences, and took upon himself the whole burden of providing for the public safety, was apt to be considered as exercising, in his own right, those powers with which the community had invested him. Those laws

which he enforced were conceived to be more immediately calculated for his own benefit: those officers whom he appointed were looked upon as the servants of the crown; and those crimes, which he prosecuted and punished, were regarded as crimes committed against him in particular, for which he was, therefore, entitled, of himself, to demand reparation.

The public revenue of the Anglo-Saxons, therefore, by which the rank of the sovereign was maintained, and out of which the various expences of government were defrayed; consisted almost entirely of two branches: the original demesnes of the king, acquired in the same manner with the private estate of each allodial proprietor; and the various forfeitures and fines, whether of land or moveables, which, from time to time accrued, or were transmitted to him, as the head of the community. From this latter source he derived a continual accumulation of wealth. The disorder and violence, that prevailed so universally, gave occasion to the forfeiture of many rich individuals; and the king was commonly disposed to neglect no opportunity of seizing and improving such favourable conjunctures. In the greater part of crimes, as it frequently happens in the infancy of government, the criminal was not punished in a manner adequate to the purposes of public justice, but was admitted to atone for his offence, by making a pecuniary composition with the sufferer. In those cases, the king exacted a composition as well as the private party; and the profits arising to the crown, from the innumerable fines and amerciaments, to which this gave occasion, were one great cause of the long continuance of that imperfect mode of punishing offences.

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In this early stage of the constitution, the revenue above mentioned was sufficient for all the charges of public administration; which were then inconsiderable. There was no mercenary army to be paid by the king. The judges were either willing to determine differences among individuals, and to take cognizance of crimes, without any consideration for their trouble; or they obtained a compensation, by exacting fees from the parties who came before them. Taxes therefore were almost entirely unknown. Their introduction belongs to the history of a more advanced period of society.

But even this primitive revenue of the crown appears to have laid a foundation for the Wittenagemote to interfere in the disposal of it; since the estate, acquired by the king, in the character of the chief executive officer, and as representing the community, was, in a proper sense, the estate of the public. This conclusion was not, indeed, applicable to the whole, though it undoubtedly was, to a considerable part of the royal demesnes. But it was not the genius of that age to make nice distinctions; and the interposition of the national council, in the management of some branches of the crown revenue, might easily be extended to others that were placed in different circumstances.

We find that, not only in England, but in the other states upon the continent of Europe, the arrangements which took place in the management of the king's household, and private estate, had necessarily great influence upon the government of the kingdom. According as the sovereign advanced in opulence and dignity, he was led to employ a greater number of servants in the several branches of his domestic economy; and the same persons,

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who enjoyed the chief confidence of their master in that private capacity, became, in course of time, his ministers in conducting the business of the nation. In all the European feudal kingdoms, the management of the king's household was anciently divided into five principal departments; and fell under the inspection of so many great officers.

1. The first of these was the *steward*, or master of the household, called, upon the continent, the *major domo*, the *mayor of the palace*, or *seneschall*; who had originally the care of the king's table. Upon him was naturally devolved the business of gathering in the rents of the crown lands: for, as those rents were all payable in kind, and were intended for immediate consumption, it was most convenient, that they should be delivered into the hands of that person by whom they were afterwards to be laid out for the support of the king's family.

We may easily believe that, from the nature of his office, the master of the household was in a condition to acquire much influence over all the tenants and vassals of the crown. He was the person with whom they were obliged to settle their accounts; and who, from his minute acquaintance with their circumstances, was the most capable of giving his master information concerning them. He was, therefore, the person most likely to be employed in adjusting their differences with one another; and in consequence of his being the deputy judge upon the royal demesne, he came, at a subsequent period, to be intrusted by the crown, with a similar power over the whole kingdom\*.

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\* Spelman v. major domo. This author supposes three different orders of *major domo* in the household of the Gothic monarchs. The first, who had the care of the king's

2. As the collection and management of the victuals, with which the king's table was supplied, fell under the direction of the steward; so the care of the liquors was committed to a separate officer, the *cup-bearer*, or *butler*. In all the Gothic nations, persons of wealth and distinction lived in great splendor, and were much addicted to drinking; for which reason, it is not surprising that the accommodation of the sovereign, in this respect, was exalted into a separate employment, and became an object of suitable importance.

3. The care of the chambers was committed to a third officer, the *chamberlain*; whose business it was to superintend the *lodging* of his master's family. As this officer was entrusted with whatever required to be locked up in the house, for the future service of the household, he seems, upon this account, to have become the keeper of the wardrobe, and, at a subsequent period, when the crown rents were paid in money, the king's treasurer or superintendent of the finances\*.

4. Another of the king's principal servants obtained the inspection of the stable; and was denominated the *comes*

king's table: the second, who presided over the whole household: and the third, who was employed under the king as chief executive officer of the kingdom. It seems evident, however, that these officers were originally derived from one, who, as he became great, appointed deputies to discharge the inferior branches of duty incumbent upon him.

In England the steward, in the king's household, is mentioned under the name of *Oeconomus* as early as the year 749. [See discourse on this office by Mr. Thynn in Hearne's Coll. of Antiquities.] But he does not seem to have acquired great power, as a minister of the crown, till the Norman conquest. [See same collection.]

\* It is probable that the butler [*pincerna*] was, for a long time, not separated from the steward; and in the early history of England neither he nor the chamberlain seem to have been much distinguished.

*stabuli,*

*stabuli*, or *constable*. When, by the keeping of many horses, this department was rendered extensive, it appears to have been divided into two branches; the one belonging to the chief groom, or constable; and the other to the *mareschal*, or smith. It is difficult to mark the period when this division was completed: nor is it an easy matter to ascertain the relative degrees of importance and rank which might then be annexed to these two kindred employments.

When the use of cavalry in war became frequent, we may easily suppose, that the persons, who had been accustomed to rear and manage the king's horses, would stand forth, as claiming superior distinction, and as having a peculiar title to be consulted. They were thus employed, under the sovereign, in conducting that important part of the troops; and, by an easy transition, acquired a jurisdiction in such controversies, as were either of a military nature, or had arisen in the army while it remained in the field\*.

5. The writing of the king's letters, and the executing of the charters, or other deeds, that issued from the crown, became also the subject of a distinct occupation, that of the *secretary*. In those times, when the clergy had acquired great influence, and when a proficiency in the art of writing supposed an uncommon degree of literary education, the only person likely to be qualified for this employment was the *chaplain*; who might be considered as, in some degree, the keeper of the king's conscience; and who, from the nature of those religious offices which he per-

\* This officer was known to the Anglo-Saxons under the name of *Stallarius*. Spelm. Gloss. v. *Constabularius*. The *mareschal* seems to have been considered as the deputy of the constable.

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formed, could seldom fail to acquire the confidence of his master.

When signatures were introduced, for ascertaining the authenticity of writings, the office of keeping the king's seal, and of appending it to his deeds, was committed to the same person who had been employed in writing them.

As in determining law-suits, it was found expedient, in many cases, to take down the sentence of the judge in writing, the secretary was naturally employed for this purpose; and became keeper of the records of the king's court. From this branch of his duty, he got the appellation of *chancellor*; which is said to have originally denoted a *scribe*, or *notary*; being derived from *cancella*, the place under the Roman government, allotted to persons of that profession for carrying on their business\*.

As this arrangement in the domestic administration of the sovereign, supposes considerable wealth and magnificence; it was probably of a later origin in England than in several of the kingdoms upon the continent. It is reasonable to suppose that the whole of the king's household was at first committed to one principal servant; whose business having been, by little and little, augmented and rendered more burdensome, was at length divided into these five different departments. A similar plan of administration, in a more limited sphere, was adopted by every great landed proprietor; who naturally multiplied his chief domestics in proportion to the extent of his wealth; and often followed the example of the king, by dividing the affairs of his household into the same number of branches †.

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\* This officer is clearly distinguishable in the Anglo-Saxon government. Spelm. v. *Cancellarius*.

† Pasquier in speaking of these great officers of the household observes, that they were

The longer these great officers had been established, they rose to higher degrees of consideration; and their authority was farther extended, from the superintendence of the king's household, to the direction and management of the kingdom. As, for the most part, they were originally chosen by the sovereign, upon account of their superior wealth, or abilities, which rendered them capable of supporting his dignity in the execution of the business committed to them; so the trust and confidence which he reposed in them, together with the share of public administration which they enjoyed, afforded them numberless opportunities of augmenting their private fortunes, and of increasing their influence. In proportion to their advances in wealth and power, they were in a condition to render their offices more permanent. They were originally nominated by the king during pleasure; but that superiority, which had been the inducement to their first promotion, became commonly more and more conspicuous during the continuance of their employments. It was, therefore, seldom found convenient to displace them: and, even after their decease, the heir of that estate which they had acquired was naturally regarded as the person best qualified, and who had a preferable claim to inherit their dignity. By long usage, these offices were thus rendered hereditary in particular families. To this observation, how-

were gradually established in the families of the great lords and gentlemen. "Par-  
" quoy estoient dessus tous, cinq estats plus estimez, le chancelier, grand chambellan,  
" grand maistre, grand eschançon, que nos anciens apelloient grand bouteiller, et  
" connestable. Nous estant par cecy monstrée une grand œconomie: car aussi n'y  
" a il maison qui vueille tant soit peu paroître, en laquelle ces cinq estats ne se trou-  
" vent estre nécessaires, encore que ce ne soit avec titres de telle splendeur." Recherches de la France. liv. ii. chap. 12.

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ever, the office of chancellor, in most European countries, is an exception. As the chancellor was unavoidably a clergyman, who held his rank in the church, and the estate connected with it, only during life, he would commonly have neither any opportunity of securing the office to his family, nor any desire of annexing it to his ecclesiastical dignity.

Of the influence established by the great officers of the king's household, the political constitution of Germany affords a remarkable instance. When the dominions of that empire, by the conquest of large territories in Italy, and in the Southern part of France, had been so enlarged as to comprehend three distinct kingdoms, the emperor was induced, in that situation, to appoint three different secretaries\*. The officers of his household were, upon this account, increased to the number of seven. In the progress of the German government, the power of these great officers advanced, as that of the emperor declined; and after the imperial dignity had become intirely elective, they assumed the privilege of *proposing*, to the national assembly, the successor to the crown; from which they at length proceeded to claim the sole right of electing him. Hence the origin of that precise number of persons who composed the primitive German *electors*.

The steward was originally the officer of greatest importance in the king's household; because the supplying of his majesty's table with provisions was regarded as the chief concern of the family. We accordingly find that, in

\* The first was the secretary for Germany, properly so called; the second for Italy, and the third for Arles. It is remarkable that these chancellors, having become secular princes, their offices have been attached to their ecclesiastical dignity.

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several countries of Europe, the person who enjoyed this hereditary office, attained a degree of rank and opulence which rendered him formidable to the sovereign. In France, the mayors of the palace, after having for a long time possessed the real power and authority of the crown, were at length emboldened to throw off the mask, and openly to mount the throne.

When the use of cavalry in war had become very extensive, and when that part of the feudal armies had the principal share in deciding the fate of battles, the constable, or marshal, was frequently in a condition to dispute the superiority with the steward or mayor of the palace. Thus, in Germany, when the throne happened to be vacant, the Elector Palatine, the mayor of the palace, was anciently appointed, for preventing the bad consequences of an inter-regnum, to be the *vicar of the empire*. But in a subsequent period, this high dignity was claimed by the elector of Saxony, the constable; and, after violent disputes, and various determinations of the *diet*, was at last divided between those powerful competitors.

In the ages of greater civility and improvement, when, from the complicated connections of society, its laws became numerous and of difficult interpretation, and when, from the anxiety of individuals to ascertain their rights, the charters and writings proceeding from the crown were multiplied in proportion, the secretary, or chancellor, to whom the king committed that branch of business, was invested with powers of the greatest consequence, and therefore was exalted to the highest rank.

In those opulent and polished nations which have long been reduced under an equal and regular government; in which the impartial distribution of justice is looked upon

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as almost a matter of course; and in which the sovereign is accustomed to govern by influence, more than by the exertion of his prerogative; in such nations, the person who presides over the public treasury, who may be regarded as the substitute of the chamberlain, becomes the great channel through which the revenue of the state is conveyed, and by which the authority of the crown is maintained.

It is hardly necessary to remark, that this distribution of the business in the king's household, into five departments, reaches far below the simple period of the Anglo-Saxon government which we are now considering. But, on the other hand, it merits attention, that when the exaltation of the sovereign had multiplied the occupations belonging to these different branches, it became expedient, in some of them, to appoint a variety of deputies; many of whom, in particular kingdoms, rose by degrees to such consideration and rank, as to appear no longer in a subordinate station, and even to make the origin of their appointment be forgotten. This circumstance must not be overlooked in perusing the enumeration, given by many historians, of the principal officers in the court, or household of particular princes.

From the foregoing imperfect sketch of the powers of the sovereign, as well as of the constitution and privileges of the Wittenagemote, we may be enabled, notwithstanding the darkness of our ancient history, to form an idea of the original English constitution. How remote this was from an *absolute monarchy*, must be apparent to every one, who considers that the privilege of legislation, together with that of determining peace and war, and even that of controuling the executive power, was lodged in the national

tional assembly. Neither can this government be deemed in a high degree, aristocratical; since the national council was composed, not of a small junto of nobles, but of all the landed proprietors, comprehending a great proportion of the whole people. It seems, in fact, to be that sort of political system which is likely to be established in all rude and extensive countries; before a few individuals have accumulated so much wealth as enables them to domineer over their inferiors; and before the king, in consequence of his high station and prerogatives, has had leisure to acquire a revenue sufficient to overthrow and bear down any opposition that can be apprehended from the most opulent of his subjects. It cannot, however, escape observation, that, although the powers committed to the monarch by the early Saxon constitution, were small, they were not accurately defined; and that in the exercise of them he enjoyed, upon this account, a good deal of latitude. Accurate limitations of power, and a regular system of subordination, the fruit of experience and foresight, cannot be expected to characterize the institutions of a simple people; who are usually guided by their feelings more than by reflection, and who attend more to the immediate effects of any measure, than to its remote consequences. As the Anglo-Saxon princes were entrusted with every branch of public administration, in which the Wittenagemote did not think proper to interfere; their conduct was directed in a great measure, by particular conjunctures, and by the different unforeseen events which accidentally required their interposition. We need not be surpris'd, therefore, if in perusing the history of that period, while we discover strong marks of the weakness of the crown, we should also meet with some extraordinary exertions of the prerogative; and should at the

the same time observe, that these were suffered to pass without censure, or even without notice. It is a common source of mistake, among political writers, to consider these extraordinary exertions as proofs of the ordinary state of the government; and to adduce as an illustration of the general practice, what is only the random and casual exercise of a power, not yet brought to a regular standard. We shall now examine the changes produced in the English constitution from the reign of Egbert to the Norman conquest.



## C H A P. IX.

*Of the principal Events from the Reign of Egbert to the Norman Conquest.*

WHILE England, by the union of the different states of the heptarchy, was emerging from barbarism, and laying the foundation of a great and powerful kingdom, a new enemy involved her in a series of fresh calamities; and contributed to retard the progress of her improvements. The inhabitants of the Northern part of Germany, who retained their ancient manners, and were still much addicted to piracy, continued to infest the coasts of Britain and France, and of such other European countries as, by some advancement in cultivation, presented an inviting prospect of plunder. About the reign of Egbert, several bands of those pirates, known by the general name of Danes, landed in England; and, after committing great ravages, were generally successful in carrying off their booty. Upon the death of that prince, whose vigour had kept them under some restraint, their incursions became bolder and more frequent; they made their attacks in larger parties; and, having been often victorious over the forces that could be assembled against them, they were at length encouraged to form settlements in different parts of the country. From the time when the kingdoms of the heptarchy were united, to that of the Norman conquest; a period extending to about two hundred and fifty years, and comprehending a series of nineteen monarchs; the English were,

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were, with little interruption, engaged in a course of hostilities with those invaders; and subjected to perpetual inquietude and disorder. In the reign of Alfred, the grandson of Egbert, the Danish arms had been so successful, and their acquisitions had become so extensive, as to threaten an entire conquest of the kingdom.

The history of that prince exhibits a pattern of the hero and statesman, equal to whatever is recorded of ancient patriotism, and even to whatever correct fiction has been able to suggest, in order to excite admiration and esteem. During the reign of Ethered, his elder brother, by whom he was unjustly deprived of the patrimony left him by his father, he discovered neither any marks of resentment for the private injury he had sustained, nor of what prevailed so universally among the princes of that age, an ambition to possess the crown; but with uniform alacrity seconded all the public measures of the king; and, while yet at an early period of life, displayed uncommon valour and talents, in opposing the enemies of his country. When he afterwards succeeded to the throne, his magnanimity and firmness were put to a severe trial in the school of adversity. Though he had been victorious over the Danes in many conflicts, yet the swarms of those invaders multiplied so fast, and from every quarter pushed their depredations with such rapidity, that the English, throughout the greater part of the kingdom, became quite disheartened, and submitted to the conquerors. His ancient subjects, the Western Saxons, alone retained their fidelity, and supported the interest of their monarch: but these were incapable of resisting the torrent which broke in upon them, from the accumulated force of their enemies. After many fruitless efforts, and upon a sudden report of a new invasion by a

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powerful

powerful body of Danes, that spread universal consternation, the king found himself almost entirely abandoned; and, being able no longer to keep the field, was obliged to disband his remaining adherents, and to provide for his present safety; he was even under the necessity of concealing himself by various artifices, and in mean disguises. The distresses to which he was exposed, and the private adventures which he met with, in that situation, appear not unworthy of notice; as they relate to a person of such eminence; and as the fate of England depended upon his surmounting the difficulties in which he was involved. In the garb of a common soldier he remained for some time unknown, in the house of one of his own herdsmen: upon which occasion, historians have mentioned a little incident, which exhibits a ludicrous picture of royalty placed in awkward circumstances without being degraded by them. While the king was one day sitting by the fire-side, and trimming his bow and arrows, the woman of the house, who had no suspicion of the quality of her guest, happened to be toasting bread; and, having occasion to go about some other affairs, she found, at her return, that the cakes were burned; with which being greatly provoked, she heartily scolded his majesty, telling him, that though he neglected to turn her cakes, he was always very ready to eat them.

Meanwhile the royal demerits became a prey to the Danish forces; who being no longer restrained by the apprehension of an enemy, gave a loose to their cruelty and rapacity. Alfred, reduced in this manner, to the condition of an outlaw in his own dominions, and having collected a few faithful followers, wandered for some time from place to place, finding shelter from the woods and marshes,  
which

which covered a great part of the country, and which were of difficult access even to the natives themselves. But his principal retreat was in the middle of an extensive morass, formed by the rivers Thone and Parret in Somersetshire; which was almost entirely surrounded with water; and which afforded great plenty of fallow deer, and other wild animals fit for subsistence. In this place the king took up his residence, and erecting some fortifications, remained for near the space of a twelvemonth. Here he had leisure to reflect upon the uncertainty of human grandeur; to weigh the real value of all human enjoyments; and to revolve in his mind those benevolent and patriotic plans, by the execution of which he came afterwards to be revered by his countrymen, and has excited the admiration of mankind. From this retreat he made many secret excursions, in order to procure information or plunder, and to revive the drooping courage and spirits of his companions.

At length the earl of Devonshire, having suddenly attacked and routed a large party of the Danes, presented to Alfred a favourable opportunity of appearing once more in the open field, and of animating his subjects to hazard another attempt for the recovery of the kingdom. Amid all the difficulties and dangers to which this monarch was exposed, he appears to have uniformly discovered a mind cool and deliberate, resolute with caution, fruitful in expedients, and dexterous in executing such measures as the singular and desperate posture of his affairs made it adviseable to adopt. On this occasion he is said to have employed a stratagem, suited to the state of discipline in the armies of that age, and which recalls the memory of those military adventures related in the early periods of anti-

quity. In the disguise of a minstrel and fortune-teller, attended only by one companion, he visited the Danish camp; and supported the character with so much address, as to afford universal entertainment, and to pass through every quarter, not excepting even the general's tent, without incurring the least suspicion. Having thus procured every possible information, and having, by means of a previous intercourse with his nobles, suddenly collected a great body of his subjects, he found himself at the head of a powerful army, exulting in the recovery of their monarch, and eager to be revenged of their oppressors. With this force he fell unexpectedly upon the enemy; and entirely defeated them. His victory was so complete, that the Danes were incapable of any further opposition; and in a little time after were entirely subdued. Some part of them were driven out of the kingdom; the rest were under the necessity of submitting to such terms as he thought proper to impose.

The moderation and clemency of this prince, and the prudence which he displayed in the improvement of these advantages, were no less conspicuous, than the vigour and abilities by which they were obtained. The Danes who submitted to him were sent to reside in East Anglia, Northumberland, and some of the neighbouring parts of the kingdom, where many of their countrymen had long been settled; and they were admitted to the enjoyment of the same privileges with his other subjects. By the zealous interposition of Alfred, they were also happily persuaded to embrace the Christian religion; a circumstance necessary to remove their prejudices against the ancient inhabitants, and to unite those different tribes of people in one community.

Upon

Upon the restoration of peace, the first attention of the monarch was employed in providing a fleet, sufficient to oppose any new invasion of the Danish pirates; in erecting fortifications upon the coasts more immediately exposed to their depredations; in making regulations for assembling the inhabitants upon any sudden emergency; in rebuilding the towns that had been destroyed; and in repairing the waste and desolation which the country had suffered from a long course of rapine and violence.

To compile and publish a code of statutes, is, in a rude nation, a measure of the highest utility, for instructing an ignorant people in those rules by which they are to be governed; and accordingly we find that this has been the great object of almost all the distinguished princes of an early period. It appears that Alfred bestowed much labour and time upon a work of this nature; of which the greatest part is now lost. It is probable, that, from the various feudal institutions and customs, which had prevailed either in England or upon the neighbouring continent, he selected such as were accounted the most beneficial, and most adapted to the peculiar circumstances of his time and country; and that, having established these regulations by the authority of his great council, he endeavoured, in the most effectual manner, to produce a degree of uniformity in law and government, throughout the whole of the kingdom. We are not, however, to imagine, that all differences in the customs of different parts of the country were thus entirely abolished. On the contrary, we find that, in consequence of the new settlements in the Northern part of the kingdom, a multitude of Danish customs had been introduced; and that the people were now distinguished into three great branches, according to the varieties

varieties in the system of private law, established among the Western Saxons, the Mercians, and the Danes.

But the promulgation of good laws is, for the most part, and especially in a country remote from civilization, a matter of less difficulty and importance than the vigorous and impartial execution of them. When a regulation is made, the beneficial objects, which it is intended to promote, are commonly surveyed in that distant and dispassionate view which admits the full exertion of patriotic affections; but when it comes to be enforced by the punishment of transgressors, it then frequently assumes a different aspect; and the interest of the public is likely to be obscured and counteracted by the private connections, and by the partiality and prejudice of individuals: not to mention that the splendor and eclat, which accompany the temporary interpositions of the legislator, do not descend to the unremitting and laborious attention, to the painful and invidious task, of those inferior magistrates who render the law effectual. It was here that the genuine virtue of Alfred appeared most conspicuous. From the long course of depredation to which England had been exposed, that country was become a scene of the utmost license and disorder; exhibiting, on the one hand, a people fierce and barbarous in their manners, accustomed to live by robbery and violence; and on the other, a set of nobles, in reality the leaders of different pillaging parties, abusing that authority and jurisdiction with which they were invested, by protecting their adherents from punishment, and by oppressing those who had fallen under their displeasure. Yet such was the attention of this monarch to the inferior departments of government, so great was his vigilance in examining the conduct of judges and his rigorous in punishing

ing them for malversation in office, that, in a short time, these evils were in a great measure removed, and an equal and regular administration of justice was introduced. In one year of his reign no fewer than forty-four magistrates, it is said, were put to death, for misbehaviour in their judicial capacity; a proof that corruption and licentiousness had risen to an amazing pitch. There can be little doubt, that in the accounts transmitted by historians, the accuracy and regularity of the police, established by Alfred, has been greatly exaggerated; but even these exaggerations, the usual effects of wonder and admiration, may serve to convince us, that he made great improvements upon the former system. We are informed that, in order to try the success of his institutions, he caused golden bracelets to be hung up near the highway; and that no person, such was the terror of the magistrate, adventured to touch them.

By the establishment of good order and tranquillity, the people were encouraged to follow those peaceable occupations which had been totally interrupted by the preceding disorders. The king was indefatigable in his efforts to promote manufactures, and to excite the industry of his subjects; by employing artificers in great public works; by inviting foreigners to settle in the country; and by rewarding the inventors of new arts. He contributed, in a particular manner, to the extension of foreign commerce, by protecting it with his fleet, and by bestowing marks of his favour upon such as became eminent for their skill in navigation.

He was no less attentive to the encouragement of literature, not only by his patronage, but also by his example. His ardour, in this respect, was the more remarkable, as it surmounted

surmounted the disadvantages he lay under from the neglect of his early education; for, among the anecdotes which have come down to us concerning the private life of Alfred, it is related, that he was twelve years of age before he had been taught to read; and that he first felt a desire of being instructed, in this particular, from the recital of certain pieces of poetry, with which the queen his mother was much delighted. Prompted, however, by a strong inclination for literary pursuits, he soon became, not only a proficient in the Latin language, and in such branches of learning as were respected in that age, but even a writer of eminence, both in prose and in verse. As a poet, he seems to have employed himself chiefly in translating, or composing, *fables*, or *apologues*. These compositions are usually the first attempts, in a rude nation, to illustrate, by simple and familiar examples, the proverbs, or maxims for the conduct of life, which observation and experience have suggested, and which, as containing important information to an illiterate people, are frequently repeated, and appealed to, in ordinary conversation. The labours of this eminent statesman appear, in that particular, to have coincided with those of the first great teacher of morality among the Greeks. It is probable that those two celebrated personages were directed in the choice of their subject by a similarity of character; and it may perhaps be suspected, that both of them were more remarkable for their philosophy and public spirit, than for their poetry.

Historians have mentioned the bodily accomplishments of Alfred, as corresponding to the extraordinary endowments of his mind. He was distinguished by the strength and activity, as well as by the dignity and gracefulness of his

his person; and while his dexterity and address, in martial exercises, excited universal applause, he gained the hearts of his subjects by an affable and engaging deportment.

After all, though the history of this monarch may be accounted sufficiently authentic, to afford a solid conviction of his exalted merit; some allowance, no doubt, must be made for the colouring produced by that admiration which was due to his character, and which has been heightened by the remoteness of the period in which he lived. We need not be surprized, therefore, to meet with errors and prejudices, concerning his public transactions; and in particular, to find that he was supposed to be the author of several regulations, which he only revived, or brought to greater perfection than they had formerly attained. The great changes which he produced in the state of his country, by bringing it from anarchy and confusion into a degree of order and regularity, led his countrymen, in subsequent ages, to fix their attention upon him, as the person from whom they had derived the entire model of their constitution. He is thus held, by many historians, to have first divided the kingdom into tythings, hundreds, and shires, and to have introduced a peculiar system of policy connected with those divisions; though it seems now to be clearly proved, that these regulations existed in England before his time, and that they extended to other European kingdoms. The institution of *juries* has, in like manner, been ascribed to this monarch; though there is good reason to believe that it arose from the general situation of the Gothic nations; and that it had a very early establishment in all of them. Alfred, in a word, has become the English Lycurgus; and his interposition is the great engine which politicians have employed for explaining the

origin of such particulars, in the English government, as have excited uncommon attention, and are too remote, in their beginnings, to fall within the limits of authentic history.

For near eighty years after the death of that prince, England appears to have been successfully defended against every foreign invasion; though she experienced a variety of disturbances, occasioned by the domestic quarrels and insurrections of the Danes and other inhabitants of the country. During this period we may distinguish the reigns of Edward the elder, the son of Alfred, of Athelstan, and of Edgar, as remarkably vigorous; and as filled with exploits, which, if they make no very splendid figure in the general scale of historical events, were, however, of considerable consequence to the peace and internal tranquillity of the kingdom.

Those princes are said to have adopted a measure, which appears extremely singular, in the history of that early age. They are said to have kept in pay a regular body of troops, collected from their Danish subjects; whose military character, it seems, was superior to that of the other inhabitants. Though the bulk of the people were not unfit for war, and, by their ordinary employments, were not hindered from taking the field upon very short preparation; yet the numerous piratical invasions to which they were exposed, and by which they were held in continual warfare, suggested the same sort of military establishment that has been found convenient in all civilized nations. The Danish families were employed, in preference to the English, from the same policy, which, in later times, made the inhabitants of Switzerland be engaged in the service of many European princes. As those mercenaries, however, were

were quartered about the country, and were probably not much under the controul of the civil magistrate, they were guilty of many irregularities; and rendered themselves universally odious. They possessed all the power, and discovered, we may suppose, all the insolence of a standing army; unrestrained by the watchfulness of a regular government, or by the influence of civilized manners. Hence the appellation of a *lurdane*, or *lord-dane*, which was bestowed upon them, came to be used as a term of reproach; and signified an idler and oppressor. Their situation led them, at the same time, to seek distinction, by the superior elegance of their dress and behaviour; and we are told, that they were accustomed frequently to change their cloaths, to comb their hair once a day, and to bathe or wash themselves every Sunday. By these effeminate arts they became the favourites of the women; and were so successful in their gallantries, as to debauch the wives and daughters of many noble families\*.

In the reign of Ethelred, a weak and pusillanimous prince, England was again infested by more numerous swarms of the Northern pirates; and at length was invaded by a formidable army under Sweyn, the king of Denmark, and Olave the king of Norway. Ethelred, unable to resist these united forces, had recourse to the ineffectual and ruinous expedient of purchasing peace by the offer of a pecuniary composition; and when those princes had returned to their own country, he excited his English subjects, to gratify their resentment against the Danes, by taking advantage of their

\* "Habeant etiam ex consuetudine patrie unoquoque die comam pectere, sabbatis balneare, sepe etiam vestituram mutare, et formam corporis multis talibus frivolis adjuvare; unde et matronarum castitati infidebantur, et filias etiam nobilium concubinarum nomine detinebant." Chron. Joan. Wallingford.

security, and putting them to death in cold blood. The extent of this massacre, so disgraceful to the monarch, and to the nation, cannot easily be ascertained. The greater part of the historians consider it as extending to the whole of the Danish race, at that time to be found in England; but the improbability of this, together with the authority of one ancient author, makes it reasonable to suppose, with Mr. Hume, that the slaughter was, for the most part, limited to those mercenaries against whom the rage of the populace was more immediately directed.

To revenge an act of so much perfidy and cruelty, Sweyn, without loss of time, made another descent into Britain; and after destroying many of the towns, and desolating a great part of the country, seems to have meditated an entire conquest of the kingdom. He did not live to complete his designs; but these were prosecuted by his son Canute; who met with little opposition; and in a short time added the English monarchy to that of Denmark, which he possessed by inheritance. This prince, by his abilities, by the prudence and lenity of his administration, and by the extent of his dominions, was justly entitled to the appellation of *great*; which he has received from posterity. In England, after the first effects of the conquest were over, he endeavoured to procure the good-will of his subjects, by reducing the English and Danish inhabitants under the same laws, and by abolishing all distinctions between them. He published a collection of laws, which has been preserved. After this monarch, two of his sons reigned successively in England; but, as they died without issue, the crown was restored to a prince of the Saxon line, known by the name of Edward the confessor.

The

The conquest of England by the Danes appears to have been productive of no other political consequences, beside the interruption given to improvements, by the bloody and destructive wars with which it was attended. When Britain was deserted by the Romans, and fell under the Anglo-Saxon government, the country, which had made considerable progress in arts and civilization, was, of a sudden, reduced into a state of barbarism, and underwent a total revolution of its political system. By the Danish conquest, one set of barbarians was subjected to another, of kindred origin and manners; so that the sceptre was placed in different hands, without any alteration in the maxims by which it was swayed, or the authority by which it was maintained.

From the beginning to the end of the period, which is the immediate subject of this review, the circumstances of the kingdom were such, as contributed to render the government more and more aristocratical.

It has been already observed, that the landed estates, originally occupied by the Saxon conquerors of England, were of moderate extent; for which reason there came to be a great number of allodial or independent proprietors. This was what might be expected, from the very limited power and opulence of the several heads of families who settled in the country, and from their want of the knowledge and experience requisite for the management of extensive possessions. During the continuance of their settlement, however, and the consequent improvement of their circumstances, the industry and abilities, or the good fortune, of individuals, were attended with gradual accumulations of wealth, and with proportional differences in the distribution of landed property.

From

From the reign of Egbert, when England became an extensive kingdom, the sovereign was necessarily removed to a distance from a great part of his subjects; who, for that reason, were equally beyond the reach of his protection, and of his authority. For putting a stop to those predatory incursions, by which the inhabitants of different districts were frequently harassing and injuring one another, the forces employed by the crown could seldom be brought to act, either with sufficient quickness to relieve the sufferer, or with sufficient perseverance to chastise the offender. It was necessary, therefore, when the property of any person was invaded, or threatened with invasion, by a superior power, that the owner should not, in many cases, depend upon the interposition of the sovereign or public magistrate, but should endeavour to procure the immediate assistance of some of his neighbours. As the reciprocal acts of hostility, which were frequently committed, gave rise to hereditary feuds among particular families; so they occasioned, among other families in the same neighbourhood, a variety of combinations and alliances for mutual defence and security. When the parties, who thus formed a defensive alliance, had been exposed to the same difficulties, and expected to derive an equal benefit from their agreement, they were led to unite upon equal terms, and remained in a state of independence. Of the societies formed in this manner, we have many instances, both in England, and in the other countries of Europe\*.

But it happened more frequently that small proprietors, being exposed to continual oppression, and to every sort

\* They have been called *foedalia*, *fraternitates*. Dr. Hickeys, Diff. Epist. p. 21.

of

of injustice, from persons of greater opulence, were obliged to solicit the aid of one powerful neighbour, in order to shelter them from the attacks of another. In such a situation they could not pretend to form an alliance upon the footing of equality; but were commonly reduced to the necessity of purchasing protection by the offer of submission and services. As they were to obtain, from their protector, the same advantages which he bestowed upon his ancient military servants, it was reasonable that they should, in like manner, acknowledge his jurisdiction, and contribute to the advancement of his power and authority. Thus, in some cases, by a formal agreement, in others, perhaps, by a long and uniform submission to the feudal services, many renounced that allodial property which they were no longer able to maintain; and, from the prospect of living in greater security, allowed themselves to be degraded into the state of military retainers or vassals.

From a similarity of circumstances, these transactions were often repeated in different parts of the country; and were gradually extended over the whole kingdom. The more the demesnes of particular barons had been increased by such voluntary resignations, the remaining proprietors of small estates were the less able to retain their independence; and found it the more expedient to provide for their own safety by incorporating themselves in some great feudal dependency. The allodial proprietors were, in this manner, continually diminishing; the landed property of England was daily accumulated in fewer hands; and the districts possessed by particular barons, who profited by the reduction of their neighbours into a state of subordination, were proportionably enlarged.

By



By these changes, the nobility, it is evident, must have obtained more weight in the scale of government. While the landed estates of individuals were so small as barely to supply the necessaries of life, the owners were too inconsiderable to procure influence over others, and too numerous to prosecute an uniform plan for the advancement of their common interest. But in proportion as particular persons had acquired extensive possessions, they were enabled to maintain a train of dependants and followers, directed on all occasions by the will of their feudal superior, and inured, by long habits, to scruple at nothing, in order to gratify his ambition or to exalt his dignity. From the smallness of their number, these great proprietors might, at the same time, be combined with more facility, in opposing the exertions of the prerogative.

The sovereign, we may suppose, was not an idle spectator of these alterations in the condition of his subjects. As every opulent baron obliged his poorer neighbours to become his vassals, the king also exerted himself in the protection of such as resided near the royal demesnes; and acquired over them the rights of a feudal superior. But the accessions acquired in this manner, to the revenue of the crown, and to the number of crown vassals, were probably not sufficient to counterbalance the vast accumulation of landed property under the lords of particular districts. We find accordingly, that about the reign of Edward the confessor, a Godwin, earl of Wessex, a Leofric, duke of Mercia, a Siward, duke of Northumberland, with a few more barons, had become so powerful, as to be the objects of constant alarm and jealousy to the crown, and in a great measure masters of the government.

The

The authority of the Anglo-Saxon princes was, on the other hand, weakened, in many cases, and prevented from acquiring stability, by the defects of their title to the sovereignty.

The rules of succession to the crown appear, in all countries, to have been founded upon the same principles which govern the inheritance of private estates. It seems to have been thought reasonable, according to the primitive notions of mankind, that, upon the death of any person, his estate should belong to his nearest relations, who, by being members of the same family, appeared to have the most intimate connection with the family goods, of which they had formerly been a sort of joint possessors with the deceased. But in that state of the world, in which every family required a military leader to provide for their defence, the person invested with this office was by degrees permitted to assume the *management*, and at length to acquire the *property*, of that family-estate which was committed to his protection. Hence the right of *primogeniture* in succession; which, in opposition to the feelings of natural justice, has been introduced from considerations of expediency. The eldest of the sons, being commonly the first who acquired experience and reputation in war, was, upon the death of the parent, admitted to be the leader and heir of the family; and when a general practice in his favour had once been established from the ordinary course of things, it was maintained by the force of custom, even in singular cases, where he had not the same superiority. In the succession to a monarchy there occurred a double reason for introducing this right of primogeniture; as the monarch was not only the leader and representative of the nation, but also the heir of that private estate, which had been the original source, and was

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the principal support of his dignity. But in kingdoms of great extent, and which had made but small progress in the arts of government, the indivisible succession of the crown was, in reality, often maintained with greater difficulty than occurred in the transmission of private estates; because the several districts of an extensive monarchy, being at a great distance, and feebly united, were apt, upon the death of a monarch, to fall asunder, and to embrace the party of those different members of the royal family, who might be tempted to aim at the sovereignty.

The rules of succession to the crown of England appear, in the period now under examination, to have been gradually advancing towards a regular standard; but were far from having yet attained a perfect uniformity. Among the nineteen princes who reigned from the union of the Heptarchy to the Norman conquest, we meet with no fewer than eight, who, according to the notions of the present age, must be regarded as usurpers; and several of these obtained the crown by titles, which, though considered as in some degree irregular, had not, in that rude age, been entirely exploded.

Instead of the eldest son inheriting the estate of a family, it is common, in early ages, that the children should be altogether supplanted by the brothers and other collateral relations; who, by having arrived at greater maturity, and possessing superior powers, are enabled to put themselves at the head of their kindred. Thus in many of the hordes, or petty nations upon the coast of Guinea, the children are said to inherit nothing from their father but his arms; his other effects are carried off by the older relations of the family. In the succession of the ancient kings of Numidia, though a country far advanced beyond the state of primitive barbarism, the brother, as we are informed,

informed by Livy, was preferred to the children of the preceding monarch. A similar practice may be discovered in several parts of the Eastern world. It obtains at present in the Ladrone islands; as it formerly regulated the transmission of the crown in the kingdom of Siam, and in some dynasties of the Chinese empire. Of this preference of the brothers, or other relations, to the direct descendants, there are many traces in the early history of modern Europe; and among the Anglo-Saxon kings, even after the reign of Egbert, we meet with four instances of it; in the person of Alfred the Great, of Edred, and of Ethelred; each of whom succeeded to a brother; and of Edwy, who succeeded to an uncle, in prejudice to the children of the predecessor. To these may be added Edgar, surnamed *the Peaceable*, by whom Edwy his brother was dethroned.

According to the manners of a rude people, there is frequently little difference, with regard to the right of succession, between the children produced by a concubine and those who are born in marriage. It is the circumstance of living in the father's house, and having a sort of joint possession of the family estate, that is apprehended chiefly to bestow upon the children a title to the inheritance; and, in a country so destitute of refinement or delicacy, that the wife is indifferent about the fidelity of her husband, or is of so little consequence that her jealousy is not regarded, his bastards are likely to be often brought up under his own eye, and to receive a promiscuous maintenance with his legitimate offspring. This observation may be illustrated from the history of early nations, both ancient and modern, and in all quarters of the world. It seems worthy of remark, that, among the Israelites, in the time of their judges, the lawful children of Gilead had, apparently, no

other way of preventing Jephthah, their bastard brother, from succeeding to the father's estate, than by driving him out of the family.

The strictness of morals introduced by Christianity, contributed in Europe to diminish the privileges of bastard children. It does not however appear, that, even so late as the time of the Norman conquest, they were understood, in any European country, to be totally disqualified from inheriting estates. In England, not to mention the instances that might be collected among the kings of the Heptarchy, we find that Athelstan, the natural son of Edward, the elder, was permitted to mount the throne, in preference to the lawful children of his father.

The accession of Canute was merely the effect of conquest; though that prince endeavoured to support his claim by means of a stipulation, real or pretended, with the former king. Upon the restoration of the Saxon line, the nobles had acquired so much power as enabled them to dispose of the vacant throne. To their favour Edward the confessor, who usurped the right of the lineal heir, was principally indebted for the crown; and the advancement of Harold had confessedly no other foundation.

By these numerous deviations from the regular course of succession, the monarch was prevented from acquiring that accumulation of hereditary influence, which is the effect of an uninterrupted and long-continued lineal descent; at the same time that those princes who obtained the crown in an irregular manner were, upon that account, subjected to difficulties, from which they were obliged to extricate themselves by courting the nobility, and by making such concessions as tended to alter the balance of the constitution.

From

From a singular incident, in the reign of the first Edmund, and which occasioned the death of that prince, we may easily discover that the Anglo-Saxon kings depended, in a great measure, upon the arbitrary assistance of their followers, for maintaining the dignity and authority of the crown; and were far from being provided with proper resources for securing a decent respect and obedience to their commands. "As Edmund, one day, was solemnizing a festival in the county of Gloucester, he remarked, that Leolf, a notorious robber, whom he had sentenced to banishment, had yet the boldness to enter the hall where he dined, and to sit at table with his attendants. Enraged at this insolence, he ordered him to leave the room; but on his refusing to obey, the king, whose temper, naturally choleric, was inflamed by this additional insult, leaped on him himself, and seized him by the hair: but the ruffian, pushed to extremity, drew his dagger, and gave the king a wound, of which he immediately expired\*."

\* Hume's History of England.

## C H A P. X.

*Variations in the State of Tythings, Hundreds, and Shires.*

THE resignations of land, made by allodial proprietors in order to procure the patronage and protection of a feudal superior, were moulded in a particular manner, and received a peculiar direction, from the institutions formerly mentioned, of tythings, hundreds, and shires; as on the other hand, the state of these institutions underwent a great alteration from the progress of those resignations.

A tything was composed of a number of heads of families, who, possessing allodial property of small extent, and therefore having few dependants, found it convenient to live together in the same village or neighbourhood, for their mutual defence and security. The bulk of the free people, or allodial proprietors, appear to have been originally incorporated in the different tythings, throughout the kingdom; though it is probable, at the same time, that there were particular thanes, or military leaders, who, from their superior wealth and power, had no occasion to join in any tything; and who lived, in a state of greater independence and dignity, at the head of their own bondmen, or tenants and vassals. Beside the villages, therefore, which were composed of the freemen, and which had the denomination of tythings, there were others, composed of the

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the dependants of a feudal superior, placed under his immediate jurisdiction and authority\*.

The primitive borsholder, or tythingman, was elected by the freemen of the tything over which he presided; and at first was probably but little superior to them in opulence. By degrees, however, the rank which he enjoyed, together with the influence, and the perquisites, which he derived from thence, enabled him to increase his fortune, and to extend his authority over the different members of the community. Upon his decease, therefore, the person who inherited his estate, obtaining a great part of the weight and consideration of the predecessor, was naturally promoted to the same office; which after being continued for many generations in the same family, and bestowing upon the representative of it successive accumulations of property, was at last regarded as no longer elective, but as a permanent hereditary dignity. The borsholder came thus, in his own right, to demand military service from the members of the ancient tything; and to claim the privilege of being their judge both in civil and criminal matters. The tything, in short, was converted into a barony, and that voluntary combination of the inhabitants, intended for their mutual defence and security, was now lost in the more intimate connection between a superior and his vassals.

\* See the laws ascribed to Edward the Confessor, published by Lambard and Wilkins, L. 21. is translated as follows: " Archiepiscopi, episcopi, comites, barones, et omnes qui habuerint sacham et focam, thol, theam et infangthefe, etiam milites suos, et proprios seruites, scilicet dupiferos, pincernas, camerarios, pistores et cocos, sub suo sriborgo habeant. Et item isti suos armigeros, vel alios sibi seruites sub suo sriborgo. Quod si cui forsiferent et clamor vicinorum de eis assurgeret, ipsi tenerent eos reatitudini in curia sua: illi dico qui haberent sacham et focam, thol et theam, et infangthefe.

As the president of a tything advanced in the acquisition of this hereditary dignity, and found that his authority depended less upon the consent of his original constituents, he became less attentive, we may suppose, to the inferior duties of his office; and the police of the village, in matters of small moment, was at length committed to a deputy. The remains of this inferior officer seem to be still preserved, in the annual election of a person to preside in each of the towns or parishes of England; who in some cases retains the old appellation of headborough, or tythingman; but who, from the branches of business that have since devolved upon him, is more commonly called the *petty constable*.

Similar causes produced a change of the same sort in the condition of the *centenarius*. This magistrate, like the tythingman, was originally chosen by the freemen of the district over which he presided; but as the richest man of the district was most likely to carry the election, so the longer any individual had remained in the office, he became, from the many opportunities it afforded of increasing his riches, the more secure of holding it for the future; and for the same reason, the heir of his private fortune, to whom he communicated his family interest, had likewise the probability of obtaining the same dignity in preference to every other competitor. Thus the leader of the hundred was, through length of time, converted into a hereditary officer; and, from the superiority of his original office, was enabled to establish a permanent authority over the several tythingmen of his district. When these last had become the hereditary leaders of tythings, they were frequently reduced, therefore, into a state of feudal subordination to the hundreder. In other cases, the influence

fluence of this greater magistrate was exerted in bringing particular tythings under his immediate protection, and in checking and supplanting the tythingmen, who might otherwise have acquired a feudal authority in these little societies.

When the *centenarius* became a person of too much consequence to execute the inferior branches of business connected with his department, the deputy was appointed for that purpose; from whence the office of the *high-constable*, elected annually in those districts, appears to have been derived.

With respect to the alderman, or chief magistrate of a shire, it has been disputed whether he was originally nominated by the king, or elected by the freemen of the territory over which he presided. From what has been already observed, the latter of these opinions is much more probable than the former. Considering how little power was usually possessed by the sovereign in the infancy of government, not only among the Saxons, but in all the modern states of Europe; and considering that he had neither the nomination of the borough, nor of the *centenarius*; it is not likely, that he would assume the appointment of those who presided over the greater divisions of the kingdom.

It is universally admitted, that the Anglo-Saxon officers, who, in the early periods of the Heptarchy, received the appellation of *Heretochs*, were elected by the people whom they were appointed to command. These heretochs were the leaders of considerable bodies of the Saxons, who, upon the settlement of their followers, became the governors of provinces; and of consequence they were in reality the same sort of magistrates with those who, upon the more accurate division of the country into shires, were better

known by the name of aldermen or earls. It is therefore highly probable, that the first aldermen were appointed in the same manner with their predecessors the heretochs. By degrees, however, the chief magistrate of a shire was intrusted with the collection and management of several branches of the crown revenue within the bounds of his district; and for the execution of this part of his duty, he became, of course, accountable to the king. This afforded the sovereign a pretence for interfering in the appointment; and, from the effect which his interference could hardly fail to produce, appears to have given him a negative upon the election\*. How long the aldermen were appointed in this manner, it is not easy to discover: but from the same circumstances which had operated in the case of the tythingman, and of the hundreder; from the necessity of appointing the most opulent thane of a shire, who alone was able to command respect from the inhabitants; and from the accumulation of property, and of interest, arising from the possession of that high station; the office was frequently continued in the same families; and was, in the end, annexed to them as a permanent dignity. We accordingly find, that, in the latter part of the Anglo-Saxon line, the aldermen, or earls, as they were then more commonly called, had in general become hereditary. In France it appears that the same change in the state of the *counts* and *dukes* was, in like manner, completed before the accession of Hugh Capet; which corresponds to the English period of the Norman conquest.

\* In the reign of Alfred the earldoms were all held during the pleasure of the king. Affer. de gest. Alfrede. In the reign of Edward the Confessor they had a third part of all fines, forfeitures, and other profits of the shire, for their labour. Brady's Compleat Hist. of England.

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We may easily conceive that the hereditary governor of a shire, who had, in his own right, the privilege of assembling and commanding the forces, as well as of holding the chief tribunal for distributing justice, in that extensive territory, was possessed of great influence and authority; and that many allodial proprietors would find they had no better means of securing themselves from insult and depredation than by courting his protection. Even the leaders of hundreds, who had acquired a feudal superiority over their own districts, but who had been placed in a station subordinate to the earl, were sometimes induced, by motives of interest, to become his immediate vassals; and to promise the same service and submission to him, which they exacted from their own military retainers. In particular tythings, more immediately situated within the sphere of his influence, the powerful protection of the earl superseded that of their own tythingmen, and, by a natural consequence, rendered the inhabitants more desirous of yielding homage and fealty to that superior magistrate, than to their own proper officers. In such cases the authority of the smaller magistrates was lost and swallowed up in that of the greater.

The advancement of the earl gave occasion to the appointment of an inferior officer, the *sheriff*; upon whom was devolved the real business connected with the office. This officer was originally chosen by the free inhabitants, or allodial proprietors of the shire; though the extensive department committed to his care, and the great privileges with which he was invested, had the same tendency, as in the case of the chief governors, to vary the mode of his appointment, and, in the course of time, to bestow upon him an independent authority.

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It was in this manner that allodial was generally converted into feudal property, and that an enlarged system of military dependencies was at length established. The necessity of defence produced the primitive associations of tythings, hundreds, and shires, composed of allodial proprietors, with their respective bondmen or vassals. But, from the disorders of society, these combinations were too loose and feeble, to answer the purposes for which they were intended. To protect and rescue the individuals in each of these communities, it was requisite that their leader should be invested with greater authority than had originally been bestowed upon him; and that his associates or followers should become his permanent military servants. Tythings, hundreds, and even a considerable part of shires, were thus changed into fiefs; and the tythingman, the hundreder, and the earl, became the feudal superiors over such districts as found it expedient to court their protection. A subordination, too, was introduced among the leaders of those districts; and the tythingmen of a hundred became frequently the vassals of the hundreder; as many of the hundreders belonging to a shire became vassals of that greater baron, the earl.

As these changes were produced very slowly and gradually, it is not surprising that they should be overlooked by cotemporary annalists. The meetings of the tything, the hundred, and the shire, appear to have retained the same names, and to have transacted the same sort of business, long after the two former were entirely, and the last, in a great measure, converted into the courts of a barony. The alteration, in reality, consisted merely in a different shade of authority acquired by the leader or chief magistrate of those divisions.

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It seems worthy of notice, that this conversion of allodial associations into feudal dependencies, while it promoted the aristocracy, was calculated to improve the police of the country. When the tythingman, the hundreder, and the earl were exalted to the rank of hereditary barons, they were more capable than formerly of maintaining good order in their several districts; and, as every feudal superior was responsible to the public for the conduct of his vassals and retainers, he had an interest to exert his authority in preventing rapine and violence. Unhappily, indeed, they were often too powerful to submit to this part of their duty; and, instead of repairing the injuries done by their dependants, were frequently disposed to screen them from the punishment due to their offences.

C H A P.

## C H A P. XI.

*Changes produced in the Condition of the Vassals, and of the Peasants.*

THE members of every feudal dependency consisted of the military retainers or vassals, and of the peasants, or churles; both of whom, in the latter part of the Anglo-Saxon government, experienced a great alteration in their circumstances.

In that state of society which determined allodial proprietors to shelter themselves under the protection of a feudal superior, and by which the number of military retainers was gradually augmented, the privileges belonging to this order of men were naturally increased; and their condition was rendered more secure and comfortable. The original vassals of any person were the members of his own family, who, from natural affection, and from ancient habits, were strongly attached to his interest, and upon whom, from a reciprocal regard, as well as from the consideration of expediency, when they became too numerous to live in his own house, he voluntarily bestowed the possession of lands for their maintenance. As the superior had no reason to suspect that these men would ever be deficient in fidelity, or seek to withdraw their allegiance; so they entertained no apprehension that, while they were willing to fulfil their duty, they should ever be dispossessed of their lands. The intimate connexion between the parties,

parties, and the simplicity of their manners, made them place a mutual confidence in each other, and prevented their being apprehensive of any future disputes: so that neither the superior required any specification of the services to be performed, nor the vassal, any express stipulation, with respect to the duration or terms of his possession. Thus the original vassals, though, in fact, their land was commonly permitted to remain with them and their posterity, were properly no more than *tenants at will*, and therefore entirely dependent upon the superior.

But when persons originally independent, had, with a view to certain advantages, allowed themselves to fall into a feudal subordination, or had agreed to exalt an equal or a stranger to the rank of a superior, it could hardly be expected that these new vassals would be willing to hold their lands in so precarious a manner. Cautious of yielding any greater submission than their circumstances required, or suspicious of neglect or oppression from the person whom they had chosen for their protector, they naturally insisted, that the precise conditions of their tenure should be expressly ascertained; while the superior, distrustful the fidelity and attachment of men over whom he had no natural authority, and who submitted to him, perhaps, with reluctance, and from the mere pressure of temporary difficulties, was no less anxious to specify the nature of their service, and to secure the performance of it, by subjecting them, in case of negligence or disobedience, to severe penalties and forfeitures. From a variety of conjunctures, individuals might be laid under the necessity of submitting to harder conditions, upon some occasions than upon others; but, in general, when a feudal tenure was



was constituted by the consent of any allodial proprietor, it seems to have been expressly provided, that the fief should not only remain with the vassal during life, but should descend, either to his heirs male, or to such of his heirs as were specified in the grant.

By the establishment of those hereditary fiefs, the vassal, instead of being a precarious tenant, became, in effect; the proprietor of the feudal estate, and the interest of the superior was reduced to a *reversion* in default of the vassal's heirs, together with a right of levying certain perquisites or casual emoluments in particular cases. Of these casual emoluments or *incidents*, as they are called, which might still accrue to the superior from the estate of his vassal, after it was made transmissible to heirs, the feudal writers have commonly enumerated seven different sorts.

1. Though fiefs had been rendered hereditary, yet, as every person who enjoyed them was liable for the feudal services, it was necessary that an heir, before he obtained the investiture, should solemnly undertake the performance of them, and come under an oath of fidelity to the superior. Upon the death of any vassal, therefore, the superior laid hold of the lands, and detained them in his possession, until the heir should appear in order to renew the feudal engagement. This privilege gave rise to what is called the incident of *non-entry*.

2. Even when the feudal tenures were precarious, it was usual for the sons of the vassals to endeavour, by a present, to procure the favour of the superior, and to obtain the continuance of their ancestor's possession. When fiefs became hereditary, it still was found expedient to secure, by means of a bribe, what, though a matter of right, was

was not easily extorted by force; and the original arbitrary donation was converted into a regular duty, under the name of *relief*.

3. If the heir of a former vassal was incapable of performing the feudal service, he had no right to claim the possession of the fief. While he was under age, therefore, the lands were possessed by the superior; who, at the same time, from a regard to his own interest, if not from affection to the family of his old vassal, was induced to assume the guardianship and protection of the minor, his future military servant. Hence the complex burthen, and privilege, which went under the name of *wardship*.

4. During the disorders which prevailed under the feudal governments, it was of great consequence that the military vassals should not contract an alliance with the enemy of their liege lord; which might have a tendency to corrupt their fidelity. When fiefs therefore were secured upon a permanent footing, a provision was made against an event of this dangerous nature; and the vassals who married without the superior's consent, or who even refused to marry according to his desire, became liable to a pecuniary composition or penalty. Such was the incident of *marriage*; a perquisite suited to the barbarous manners of that age which occasioned its establishment.

5. Beside the ordinary revenue which the superior drew from his estate, he was accustomed, upon extraordinary emergencies, to apply to his vassals, and to request from them a contribution in order to relieve him from his immediate embarrassment. While they held their lands precariously, a request of this nature was equal to a command; since the superior might at pleasure seize upon the whole estate of his tenants. But when the vassals had obtained a

more permanent right, it became necessary to settle the particular occasions upon which those contributions were to be made, as well as the extent of the sum that might be demanded; and in this manner, *aids* or *benevolences* came to be enumerated among the duties payable to a superior. Three cases are mentioned, in which, over all the feudal kingdoms, these contributions might be exacted; to redeem the superior from captivity; to portion his eldest daughter, at her marriage; and to defray the expence of making his eldest son a knight.

6. Though a fief had been rendered hereditary; yet, upon the total failure of heirs, it necessarily returned to the superior. The vassal might also forfeit his right to the lands, by his neglect to perform the feudal service, or by any violation of his duty. This forfeiture, or termination of the fief, was called an *escheat*.

7. From the primitive state of the feudal tenures, the vassal had no title to alienate his fief, which he possessed as the wages merely of his military service. But when fiefs, by being transmissible to heirs, began to assume the appearance of property; when the general advancement of arts had rendered land more frequently an object of commerce; and when, upon the suppression of the former disorders, the military service of the vassal was rendered of less importance, it became customary, by the payment of a sum of money, to compound with the superior for the privilege of selling the feudal estate. This produced the perquisite of superiority called the *fine of alienation*.

These feudal incidents may be considered as the remains of that absolute property of the fief, which the superior had formerly enjoyed; but which, with reservation of such casual emoluments, was now conveyed to the vassal.

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After this new species of military retainers had become numerous, and had spread themselves over the country, it is natural to suppose that their privileges would, by the force of example, be communicated to the ancient vassals. The ancient feudal tenants, who from the more extended connections of the superior, had probably become less the objects of his peculiar attention, and were not always treated with those marks of distinction to which they supposed themselves entitled, beheld, with envy and jealousy, the stability and security enjoyed by his new vassals; and were solicitous to hold their lands under the same permanent tenure. A concession of this nature, by which the old and faithful followers of a chief were placed upon a footing of equality with strangers, could seldom be decently withheld from them; and in cases where he stood in immediate need of their assistance, was likely to be easily obtained. As these privileges were slowly and gradually introduced, and as they were often accelerated or retarded by the situation of particular baronies, not to mention a variety of accidental circumstances, it is impossible to mark the precise period at which their establishment was completed; though it is probable that, before the Norman conquest, they were extended to the greater part, if not the whole, of the ancient vassals.

That the duration of the military service, for each year, should be exactly determined, was equally necessary, to secure the interest of the vassal. In Britain, and probably in several kingdoms upon the continent, it was limited accordingly to forty days; a period that might appear fully sufficient for those desultory enterprizes which the superior had occasion to undertake. If ever he chose, after the expiration of this period, to retain his vassals in

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the field, he was obliged to bear the charges of their maintenance.

The effect of these changes in the state of the military tenures could not fail to be discernible in the administration and government of every feudal dependency. Though it still was, no doubt, the interest of the vassals to avoid all contention with the superior, and to merit his favour by their fidelity and alacrity in the discharge of their duty, yet they were not under the same necessity of paying an implicit obedience to his commands. To whatever inconveniences they might be subjected from the manner of levying the feudal *incidents*, yet, while they punctually performed their services, they could not, without gross injustice, be deprived of their possessions; and they had a right to follow their own inclination in the management of their private concerns. Sensible of this alteration in their circumstances, the superior was induced to be more cautious of disobliging them, to pay more deference to their opinions, to listen and give way to their remonstrances, and, in public measures of importance, to act with their advice and concurrence. Thus, while the influence and power of the great lords was gradually extended by the multiplication of their vassals, their authority over each particular vassal was necessarily reduced; and they were obliged to exercise it with greater moderation; as well as to endeavour, by the arts of popularity, and even, sometimes, by pecuniary rewards and advantages, to gain the effectual support of their followers.

The improvements made in agriculture, produced alterations, of no less importance, in the state of the peasants or *churles*. The peasants, as has been formerly observed, were originally bondmen or slaves. But as from the nature  
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of their employment, and from their living at such a distance as to be beyond the reach of the master's inspection, it was found expedient to excite their industry by bestowing upon them successive gratuities and privileges; many of them were enabled, at an early period, to acquire considerable property; and some of them were advanced to the condition of tenants, intrusted by the master with a discretionary management of their farms, for the payment of a yearly rent. In the natural course of things, these tenants were afterwards raised to a still better situation. When, in consequence of some degree of skill and experience in husbandry, they were about to undertake an expensive melioration of their farms, common prudence required that they should be secure of the possession, for such a period as might afford them a reasonable prospect of a return for their labour and expence. By offering an advanced rent to the master, they sometimes prevailed upon him to make an agreement of that nature; and to grant them a *lease* for a certain number of years. By raising the rent still higher, in consequence of greater affluence, the tenant, in some cases, obtained not only a right of holding the estate for life, but of transmitting it to heirs; and there appear to have been some occasions, though it is probable these were not very common, on which, by the payment of a full price, he was enabled to make an entire purchase of the lands.

Those churles who had acquired a landed estate transmissible to heirs, to be held for payment of a yearly rent, were denominated *foccage vassals*. From their employment and character, they were of an inferior rank to the military vassals; but they had the same permanent right to their estates. They were also liable to the same *incidents*.

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of *superiority*; excepting those of *wardship* and *marriage*; the former, because the superior was disposed to pay no attention to the education of such of his dependants as were employed merely in agriculture; the latter, because the alliances which they contracted were deemed of little consequence to him.

The churles who made a full purchase of a landed estate should have become allodial proprietors, and have acquired the rank and privileges of nobility; but were influenced, in those cases, by a regard to the ancient usage; and as the proprietor, who sold his lands, was unwilling entirely to resign his dignity, so the purchaser had not the presumption to deprive him of it. To retain a faint shadow of the ancient connection, the latter became bound, as an acknowledgment of the superiority, to pay to the former an elusory annual duty, if ever it should be demanded\*. We find that, by a statute in the reign of king Athelstan, a churle who had purchased an estate consisting of five hides of land, with certain appendages, usually possessed by gentlemen of that fortune, was declared to have a right to all the *privileges of a thane*; by which those of a *lesser thane*, or military vassal, were probably understood†.

From this law, which demonstrates that the encouragement of agriculture was become an object of public attention; it may be inferred, that though in some cases the *churles* were enabled to acquire landed property, they had not been understood, upon that account, to obtain of course the privileges of the military people; since these were not conferred upon them without a special interposition of the

\* This tenure has been frequently confounded with the ordinary soccage; but sometimes is distinguished by the name of *blanch*.

† *Judicia civitatis Lundeniæ*. Wilkins, Leg. Sax. p. 70.

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legislature; nor even by that statute, except upon such as had accumulated a very considerable estate. Such was the original inferiority of the peasants, and so strong were the habits connected with their primitive condition, that though they had been raised to independent circumstances, it was with some difficulty they were permitted to hold the rank of gentlemen, and procured the treatment suitable to men of that superior class.

The freedom acquired by a great proportion of the peasants, together with the advances in husbandry from which it proceeded, gave rise to an immediate improvement in arts and manufactures. The first artificers were villeins, or servants of the greater thanes; who happening to discover some ingenuity in the common mechanical arts, were employed by the master in those branches of manufacture, which he found requisite for his accommodation. The possession of their farms, according to the rude manner in which agriculture was then practised, did not hinder them from exercising this collateral employment. When these people began to be emancipated from their ancient bondage, they were at liberty to work, not only for their former master, but for every person who chose to employ them; and by working for hire, they drew a regular profit for their labour. A competition was thence introduced among different workmen, which contributed to promote their industry and skill; at the same time that the improvements which have been mentioned in the condition of the lower class of people, by increasing their opulence produced an increase of demand for the ordinary conveniences of life; and therefore afforded greater encouragement to the occupations by which those conveniences were supplied. Particular branches of manufacture, or of labour, coming in  
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this manner to be more in request, occasioned more constant employment to individuals; who, at length, found it their interest to abandon every other occupation, and to depend, for their livelihood, upon that single branch in which they had attained a peculiar proficiency.

A variety of trades and mechanical professions were thus introduced; and the artificers and labourers composed a separate order of men in the community. As these grew up and were multiplied, they became the chief part of the inhabitants in those villages where they resided; which were gradually enlarged into towns, of more or less extent according as their situation, or other circumstances, proved more favourable to manufactures.

It is unnecessary to observe, that the separation of trades and professions, among the different inhabitants, occasioned, of course, a degree of traffick or exchange of commodities. When the artisans, as well as the farmers, confined themselves to a single employment, they were able, by their own labour, to produce only one sort of commodity; and if they wanted any thing of a different sort, they had commonly no other method of procuring it, than by an exchange with the person who had produced it. This exchange was at first limited, we may suppose, to the inhabitants of the same town or village; but, according as different places began to excel in manufacturing goods of different kinds, was extended to neighbouring towns, or to the more distant parts of the country. Upon the opening of such intercourse between places at a distance, the inhabitants found it, in some cases, inconvenient to go themselves to purchase the goods which they wanted, and had occasion therefore to employ some of their neighbours for that purpose; from which there arose, by degrees, a common

mon *carrier*, upon whom this branch of business was frequently devolved. As this person acquired a little stock, he adventured sometimes, at his own risk, to buy commodities in one place, with a view of selling them in another; and his employment was at length improved into that of a pedlar or travelling merchant.

Although these tradesmen and mechanics were no longer in a servile condition, they had still much dependence upon the original master, or feudal superior, of that village or town in which they resided. He defended them from the attacks of the military people around them; to which, from the turbulence and disorder of the times, they were greatly exposed, and which, from their unwarlike dispositions, they were of themselves but ill qualified to resist. He also encouraged and promoted their trade; by permitting them to hold *fairs* and *markets*, or stated seasons of rendezvous, between the merchants and customers of different places; by supplying them with warehouses, and with measures and weights, for the sale of their goods; and by such other kinds of assistance as, from the rude state of the country, and in the infancy of commerce, their circumstances made them stand in need of. In return for these advantages, he levied from them such tolls and duties as they were able to bear; and of consequence augmented his revenue in proportion to the increase of their wealth.

According as the patron and protector of these manufacturing and trading towns was possessed of greater influence and power, their trade was likely to be the more prosperous and flourishing. Some of those towns, having sprung from the peasantry of the crown-demesnes, were under the immediate patronage of the sovereign; others, being

situated upon the estates of the greater thanes, were under the protection of those nobles. The former, it is evident, enjoyed a great superiority over the latter. The protection of no particular nobleman could reach beyond the limits of his own estate; but that of the sovereign extended, in some measure, over the whole of the kingdom: not to mention that the king, by residing occasionally in the towns of which he was the immediate protector, and which he was naturally desirous of encouraging, produced a resort of the nobility and gentry to those places; and, by the expensive living incident to a court, created an additional consumption of their commodities.

The extent of the trade of England, before the Norman conquest, cannot, at this distance of time, be ascertained with any degree of precision; but there is reason to believe that it was not very considerable. Of this we need require no farther evidence than the small size of the principal towns in the reign of William the conqueror\*. It appears however, that, for more than a century before that period, the commerce and manufactures of the country had been making advances which attracted the notice of the legislature. By a law of king Athelstan it is enacted, that a merchant who, upon his own account, had made three trading voyages to a foreign country, should acquire the privileges of a thane †. Such extensive trade, it was probably thought at that time, could be attempted only by a person of uncommon spirit, and in affluent circumstances; whose elevation, while it served as an incitement to com-

\* With regard to this point, see *Doomsday-book*—and *Dr. Brady on Boroughs*.

† *Et si mercator tamen sit, qui ter trans altum mare "per facultates proprias abeat, ille postea jure thani sit dignus."*—[*Judicia civitatis Lundeniæ*. *Wilkins, Leg. Sax. p. 71.*]

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mercial enterprise, might be regarded as no disparagement to the military people. In other statutes which have been preserved, of the same, and of subsequent princes, we meet with some of those fundamental regulations, which commonly have place in every country, upon the first efforts to introduce a regular commerce; such as the establishment of certain formalities in completing mercantile transactions\*; and the appointment of a mint in the principal towns †; together with that of a common standard of money, and of weights or measures ‡.

By the addition of artificers and tradesmen to the different orders formerly mentioned, the whole people of England came now to be distinguished into four great classes; which, from their differences in rank or employment, in characters and habits of living, were separated and kept at a distance from one another. Those who exercised the honourable profession of arms, whether in the station of *greater* or *lesser* thanes, of superiors or vassals, thought it inconsistent with their dignity to engage in any lucrative occupation; and disdained to contract alliances with farmers or manufacturers||. The two latter orders of men, though nearly of the same rank, were by their situation prevented from living together, and led to acquire very different manners, and ways of thinking. The solitary and robust employment of the farmer was not apt to form a similar

\* *Wilkins, Leg. Sax. p. 80, 81.*

† *Ibid. p. 59.*

‡ *Ibid. p. 78.*

|| After the Norman conquest, we find that the superior lord was prohibited by statute to marry his female ward to a *villain* or a *burgefs*. It is probable that the rank of the two last-mentioned orders of men had risen considerably, before this prohibition was thought necessary.

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style of behaviour and accomplishments to that which was produced by the sedentary town-life of the manufacturer; and in a country where improvements had not been carried so far as to create an intimate correspondence among all the members of society, these two sets of men were not likely to exchange their professions. The children of the farmers, as well as those of the tradesmen and mechanics, were commonly disposed to follow that way of life with which they had been early acquainted. They were even bred up, in most cases, to their father's employment, before they could well have an opportunity of comparing it with any other. These two orders of men were not only confined, in general, to their respective professions, but the mechanics, employed in the several branches of manufacture, often transmitted their occupations to their posterity; and continued them, for many generations, in the same families. The clergy, who formed a numerous and powerful body, were no less distinguished from the other three classes, by their peculiar education, by their separate views of interest, and by their professional character and manners. The celibacy, indeed, of the clergy, which, however, was introduced in England after the period that we are examining, prevented this order of men from being so entirely separated from the rest of the inhabitants, as might otherwise have been expected. When churchmen were prohibited from having posterity of their own, it was necessary that their profession should be supplied from the other ranks of the society.

From the natural course of things, it should seem, that in every country where religion has had so much influence as to introduce a great body of ecclesiastics, the people, upon the first advances made in agriculture, and in manu-  
factures,

factures, are usually distributed into the same number of classes or orders. This distribution is, accordingly, to be found, not only in all the European nations, formed upon the ruins of the Roman empire; but in other ages, and in very distant parts of the globe. The ancient inhabitants of Egypt are said to have been divided into the clergy, the military people, the husbandmen, and the artificers; and these four descriptions of men were, by a public regulation, or more probably by the influence of custom, derived from the early situation of the country, kept invariably distinct from one another. The establishment of the four great *castes*, in the country of Indostan, is precisely of the same nature. This division of the people, which goes back into the remotest antiquity, has been ascribed, by historians and political writers, to the positive institution of Brama, the early, and perhaps fabulous legislator of that country; but, in all probability, it arose from the natural separation of the principal professions or employments in the state; as it has been since retained by that excessive indolence, to which the inhabitants of those warm and fertile regions are addicted, and which has hitherto checked their improvements, by producing an aversion to every species of innovation.

## C H A P. XII.

*The Influence of these Changes upon the Jurisdiction and Authority of the feudal Lords.*

THE advancement of the Anglo-Saxon vassals and peasants to greater security and freedom, and the separation of the trading people from the class of husbandmen, could not fail to limit the authority of the superior, and more especially to affect the state of his jurisdiction. When his military retainers held their benefices precariously, and when the other members of his barony were either bondmen, or merely tenants at will, he found himself under no restraint, in deciding their differences, and in punishing their offences; but after the former had obtained hereditary fiefs, and a great proportion of the latter had been exalted to the rank of socage-vassals, he was obliged to relax his claim to their obedience, and to distribute justice among them with greater moderation and circumspection.

The retainers of every feudal superior were bound, not only to the performance of military or other services, but also to assist him in maintaining good order and tranquillity within his barony; and therefore, when any of them complained of injustice from another, or was accused of a crime, the baron found it expedient, instead of deciding by virtue of his own authority, to call a number of his other vassals, and to proceed with their advice and concurrence in trying the cause. This expedient was the most

most equitable for the person concerned in the trial, as well as the best calculated for giving weight to the decision. The assessors of the judges were the *paries curie*, men of the same rank with one another, and with the parties; they were chosen occasionally, and varied in each cause, to avoid burdening any individual more than his just proportion; and they were commonly selected from the neighbourhood of the place where the accusation or dispute had taken its rise, that, from their own private knowledge, they might be enabled to form a better judgment of the facts in question.

Thus the trial by an *inquest*, or *jury*, which had formerly taken place in the tribunals of the shire, and of the hundred, was introduced into those of a feudal barony. The causes, however, of this institution, in the former and in the latter, were somewhat different. A jury was found convenient, in the courts of the shire, and of the hundred, to supersede the attendance of all their members; and might be regarded as a sort of committee, in place of a full and regular meeting. In the courts of the baron, its interpositions became necessary, in place of the decisions formerly given by the judge himself, in order to supply his deficiency in authority over vassals whose fiefs had been secured to them by a permanent right. It is reasonable, at the same time, to suppose, that, when allodial proprietors had been changed into vassals, the custom of jury-trials in the courts of the former, would facilitate the introduction of a similar practice in the judicial establishments of the latter.

That this form of trial obtained universally in all the feudal governments, as well as in that of England, there can be no reason to doubt. In France, in Germany, and in



in other European countries, where we have any accounts of the constitution and procedure of the feudal courts, it appears that law-suits of every sort, concerning the free-men or vassals of a barony, were determined by the *pares curie*; and that the judge took little more upon him, than to regulate the method of proceeding, or to declare the *verdict* of the jury.

The number of jurymen was originally varied in each cause, according as the opulence and power of the parties, or the magnitude of the dispute, rendered it more or less difficult to enforce the decision. So little, after all, was the authority of the court, that, in many cases, the party aggrieved by the verdict assumed the privilege of challenging the jurymen to single combat\*. From the progress of regular government, and in consequence of the disposition among mankind to be governed by general rules, a certain number of jurymen became customary in ordinary causes; and at last was universally established. From accidental circumstances, of little importance, a different number has been established in different countries; as that of twelve in England, and fifteen in Scotland.

With respect to the time when trials by jury were first introduced into the court of every feudal barony, we are left in the same obscurity as concerning their previous introduction, among the allodial proprietors, in the courts of the hundred and of the county. But, considering the circumstances from which the superior was induced to adopt this mode of procedure, there is ground to believe that it arose upon the establishment of hereditary fiefs, and became gradually more universal, according as

\* Spirit of Laws.

the

the number of the feudal tenants, who had obtained a perpetual right to their possessions, was increased.

In this view, it seems probable that the practice of juries, in the baron-courts, was not very common in England till near the end of the Anglo-Saxon government. In the opinion of some antiquaries, the first vestige of a jury-trial, in the English history, is posterior to the Norman invasion; a mistake which appears to have arisen from the supposition, that before this period hereditary fiefs were unknown in England.

Though the fact seems now to be admitted, that jury trials were established in the baron courts of every feudal kingdom, yet the origin of that institution has been the subject of much doubt and controversy. Some authors have thought that jurymen were originally *compurgators*, called by a defendant, to swear that they believed him innocent of the facts with which he was charged. In the church courts, a person accused of a crime, was understood to be guilty, unless he could clear himself by what was called the *oath of purgation*; and in some cases, unless his own oath was confirmed by that of a number of other persons acquainted with his behaviour. The injustice of this general presumption of *guilt*, the very opposite of what should be entertained, in every court of justice, was the less observable, as the consequence of it was merely to draw upon the guilty person a spiritual admonition, or censure, for the good of his soul. From the influence of ecclesiastical procedure, the same rule, however, was afterwards adopted in the temporal courts; where it came to be much more oppressive.

But the province of *compurgators*, in those courts, and that of *jurymen*, were so totally different, as to make it

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scarcely

scarcely possible to conceive that the latter could arise out of the former. Compurgators were merely witnesses: jurymen were, in reality, judges. The former were called to confirm the oath of the party, by swearing, according to their belief, that he had told the truth: the latter were appointed to try, by witnesses, and by all other means of proof, whether he was innocent or guilty. Compurgators, for this reason, were called by the party himself: the jury, on the contrary, were named by the magistrate.

In consequence of the different departments, occupied by these two descriptions of men, it should seem that, in most of the feudal governments, they existed at one and the same time; and that juries were accustomed to ascertain the truth of facts, by the defendant's oath of purgation, together with that of his compurgators. We can have no doubt that this was formerly the practice; since it is, even at present, retained by the English, in what is called the *wager of law*.

There are two particulars in which we discover a resemblance between the procedure of compurgators and of jurymen; whence, in all probability, the opinion above mentioned has arisen. Both of them were obliged to swear that they would *tell the truth*; and both were subjected to confinement until they had given their declaration. But these regulations concerning jurymen afford no proof that they were ever considered in the light of compurgators. According to the simple idea of our forefathers, guilt or innocence was regarded as a mere matter of fact: and a man called occasionally from the common mass of the people, to give judgment in a law-suit, might lie under the suspicion of being exposed to improper influence; for which reason precautions were taken to prevent his

his having the least intercourse with the parties or their connexions.

As to the unanimity required in the English juries, a circumstance in which they agree with the ancient compurgators, it has not been universally established in the feudal governments. President Montesquieu, at the same time, accounts for it, from a point of honour observed by the *pares curie* in their judicial decisions, that they should agree with one another in pronouncing a verdict; because they were obliged to fight either of the parties who might give them the lie.

The same form of procedure which took place in the administration of justice, among the vassals of a barony, was gradually extended to the courts held in the trading towns. Notwithstanding the freedom acquired by the mercantile people, they still submitted to the jurisdiction of that person to whom they were indebted for protection; and were reduced by him under a system of government, similar to that which he established among his vassals. In as much as they held lands, for which they paid him a certain rent, they were in reality a species of feudal tenants.

The ancient jurisdiction of the greater thanes, or feudal superiors, came thus to be exercised in two different courts. The one, in which causes were determined with the assistance of a jury, took cognizance of the military and fockage vassals, together with the inhabitants of the trading towns, under the protection of the superior. The other, which proceeded without that formality, was held for the trial of such members of the barony as were still in a state of greater dependence. The former is that which, according to some authors, was properly called the *court-leet*;

*leet*; being the court of the *Liti*, or free people. The latter, in which the superior retained his ancient authority, received, by way of distinction, it is said, the general appellation of the *court baron* \*.

It is worthy of notice, that the king, considered as a feudal superior, was in the same circumstances with the greater thanes; and that, by the gradual multiplication of his vassals, his authority over them underwent a similar limitation. The same regulations, therefore, concerning the distribution of justice by the intervention of juries, with the same distinction in this respect between his vassals and bondmen, were introduced into the baron courts of the king, as into those of the nobility, or such of his subjects as retained their allodial property.

The improvements which I have mentioned, in the state of the feudal courts, could not fail to produce a more equal and impartial distribution of justice; and this circumstance, together with the general advancement of civil society, contributed to increase the business of those tribunals. From the greater diffusion of property among the people of inferior condition, law-suits became somewhat more numerous; and from their being frequently decided by men of the same rank with the parties, were likely to procure a fuller and more deliberate hearing. As the exercise of jurisdiction was thus rendered more tedious and burdensome, the great lords, as well as the king, who had been accustomed to preside in the trial both of civil and criminal causes, within their several baronies, were less

\* Bacon's discourse on the government of England, collected from the MS. notes of Mr. Selden, chap. 33. Also Minor.

"*Liti ac Litones idem ac Laffi et Liberti censentur.*" Muratori Ant. Med. Ævi. tom. i. dissert. 15.

disposed

disposed to give the necessary attendance; and, by appointing deputy judges, endeavoured to relieve themselves from a great part of the labour. The same circumstances which gave rise to these inferior officers, contributed afterwards to enlarge their powers; and from the negligence of their constituents, who seldom interfered in controuling their decisions, and at last intirely abandoned the employment of judging, they became the ordinary magistrates in the several demesnes or territories committed to their direction.

The transference of jurisdiction, from the primitive judges to their deputies, laid a foundation for one of the most important alterations in the system of judicial policy. The *executive* and *judiciary* powers, with which every feudal baron was originally invested, came thus to be separated from each other; and the exercise of the latter became the sole occupation of particular persons; who, upon that account, were likely to give greater application, as well as to acquire more experience and knowledge in the determination of law-suits. The judges of a barony, though nominated by the baron, had necessarily their own views of right and wrong; and having a character to support, might be supposed, in some cases, to conduct themselves without regard to the interest of their constituents. It happened likewise from the natural course of things, that, as the most opulent vassals were found the best qualified for maintaining the dignity of a judge, the same persons were frequently enabled to secure the office during life, and even sometimes to render it hereditary. In either case the judge became in a great measure independent of the feudal lord from whom his authority had been derived. It must be acknowledged, however, that long after the period

period which we are now examining, the king's judges continued under a precarious appointment.

A distinguished political author has pointed out the separation of the judicial power from the king's prerogative, as one of the great sources of the liberty enjoyed by the subjects of Britain. To those who speculate upon the conduct of human affairs, it is amusing to discover, that this important regulation was neither introduced from any foresight of its beneficial consequences, nor extorted from the monarch by any party that were jealous of his power; but was merely the suggestion of indolence; and was adopted by the king, in common with other feudal superiors, to relieve them from a degree of labour and attention which they did not chuse to bestow. It was, in reality, a consequence of the general progress of society, by which employments of every sort, both liberal and mechanical, have been distributed among different individuals, and have become the object of separate professions and trades.

As soon as the business of a judge became the sole employment of particular persons, it was necessary that they should obtain a maintenance in return for their labour. This was acquired without any difficulty, from the very exercise of their profession; as the superior by whom they were appointed, empowered them to exact a fee or perquisite from every party whose cause they had occasion to determine. These exactions, which came to be fixed, in every step of judicial procedure, according to the degree of trouble it was understood to produce, were not only sufficient for maintaining the judge, but afforded also an emolument to the superior, who demanded from his deputy a strict account of the fees he had levied. To prevent

vent any embezzlement in this respect, a clerk was appointed, to sit in court along with the judge, and to keep a record of judicial proceedings. Such was probably the first intention, not only in England, but in all the feudal countries, of recording the decisions of a judge; though the practice was afterwards made subservient to other purposes of the highest utility.

Of the fees, or perquisites, drawn by the judges under the appointment of the crown, the sovereign acquired a considerable proportion, which formed an additional branch of the public revenue.

From this method of maintaining judges, they had obviously an interest to encrease their perquisites by encouraging law-suits, and multiplying the forms of judicial procedure. Hence there occurred a new reason for the interposition of juries in the court of a barony; that they might prevent the unreasonable delay of justice. It may, at the same time, perhaps be admitted, that the interested activity and vigilance of the magistrate was, in that early and rude age, more beneficial in preventing disorder and violence, than it was hurtful, either by promoting litigiousness, or by introducing tedious and absurd formalities into the system of judicial discussion.

## C H A P. XIII.

*Of Ecclesiastical Courts.*

WHILE the nobles were gradually extending their power, and reducing that of the sovereign, the ecclesiastical order was advancing, with hasty strides, to the establishment of an authority independent of either. The barbarism and superstition that succeeded the downfall of the Roman empire, and the system of ecclesiastical government erected in the Western part of Europe, had a uniform tendency, as has been already observed, to increase the wealth and influence of the church. Were we to consider merely the former circumstance, we should expect that the usurpations of the clergy would be most rapid in those European countries, which were at the greatest distance from the incitements to cultivation, and in which the ignorance and simplicity of the inhabitants disposed them to follow more implicitly the direction of their spiritual guides. But the fact was otherwise. The kingdoms in the neighbourhood of the pope's residence, and of his temporal dominions, were nearer the center of that artful policy, which by taking advantage of conjunctures, exalted no less the power and privileges of the church than the dignity and authority of her leader. Thus the right of levying the *tythes*, that enormous imposition for the support of the clergy, and which marks the prodigious extent of ecclesiastical influence, was introduced in France, and over a great part of Italy, as early at least as the time of Charlemagne; which

which corresponds to that of Egbert among the Anglo-Saxons; and the same tax was afterwards extended, by degrees, to the other countries of Europe. It appears to have been finally established in England, during the reigns of Alfred and of Athelstan; patriotic princes, who, doubtless, found themselves under the necessity of giving way to the current of the times, by submitting to such an oppressive exaction.

The increasing opulence of the clergy, as it was an effect of the blind zeal, and the general debasement of the people, so it was accompanied by a corresponding perversion of religious opinions, and by an increase of superstitious observances. The real virtues of society, whose intrinsic value recommends them to our observance, and which frequently appear to cost us nothing, came to be little esteemed, in comparison of penances and mortifications; from which nature is disposed to shrink; and which are submitted to, for no other purpose, but that of appeasing the wrath of an offended deity. These last were accounted highly meritorious in persons of every description; but were thought more especially suitable to the profession and character of churchmen; upon whom it was incumbent to set an example to others. The monks, in particular, who, by their original institution, had no other means of distinction, were incited to procure admiration by the austerity of their lives, and by the severe and painful discipline which they underwent. As they advanced in reputation and popularity, they acquired more numerous and wealthy establishments; their influence in religious matters became proportionably extensive; and they not only rose to great consideration in the government of the church, but frequently, too, interfered in that of the state. From the

continent of Europe, the same practices, and ways of thinking, were communicated to Britain; where, about the middle of the tenth century, we find St. Dunstan, at the head of the regular clergy, possessed of such power and credit, as enabled him to controul the administration of government, and even to dispose of the crown.

Among the several branches of mortification imposed by the monastic rules, that of celibacy, or a total abstinence from the intercourse of the sexes, was deemed the most important; whether on account of the difficulty attending the observance of it, as it counteracts the most violent propensities of nature; or on account of that variation of temperature in the human frame, which makes the indulgence of those propensities, however irresistible at certain seasons, yet become, on other occasions, the object of aversion and disgust. This, therefore, became now the usual topic of declamation to the English monks; who, finding the secular clergy to be their great rivals in the public esteem, and being impatient of that superior authority which they possessed, inveighed against their married life, as inconsistent with the purity of a Christian pastor; representing their wives in the light of concubines or prostitutes, and their children as bastards. Though the doctrine inculcated by these fanatical zealots was not carried into execution until a subsequent period, it appears, even at this time, to have been approved and supported by the general voice of the people.

From the situation of the Christian clergy, and from the influence and authority which they enjoyed, they were led early to assume the cognizance of judicial business, and to form a number of tribunals for the exercise of their jurisdiction. Even before the time of Constantine, when they

they received no protection or countenance from the civil government, they were accustomed to enquire into the faith and manners of Christians; and, after repeated admonitions, to *excommunicate* those individuals who persisted in opinions, or practices, which the church had condemned. This jurisdiction was at first exercised by the clergyman, together with the most respectable among the laity, of each particular church; but when the zeal of the latter, from the greater extension of the gospel, had begun to slacken, they became weary of interfering in such matters; and as they gradually lost their privilege by disuse, the business remained entirely in the hands of the former. When a number of churches were afterwards united in one diocese, the clergy of that larger district, under the authority of the bishop, exercised a jurisdiction of a like nature over the whole of the inhabitants. In the meetings that were called, however, for this purpose, after the introduction of wealth had produced very different degrees of rank among churchmen, the parochial, or inferior clergy, were by degrees overlooked, or endeavoured to excuse themselves from attendance; and the care of maintaining ecclesiastical discipline, throughout the diocese, was appropriated to the bishop and clergy of his cathedral church. This diocesan court, which, from a perfect uniformity of circumstances, was formed upon the same plan in every diocese of the kingdom, was every where liable to the review of a similar court, in a still more extensive district, convened by the archbishop; and from the decrees of this last, at a period when the papal authority had arrived at its height, there lay an appeal to the Roman pontiff.

Together with this judicial authority, which was properly of a spiritual nature, the Christian clergy came also

to be invested with a temporal jurisdiction. After the Christian religion was taken under the protection of the Roman government, and after the fashion of making donations to the church, for pious uses, had become prevalent, the dignified clergy, both secular and regular, as has been formerly mentioned, were enabled to acquire great landed estates. These, upon the settlement of the Gothic nations in the Western part of Europe, were gradually reduced under the same feudal policy that obtained in the landed property of the lay-barons; and a great proportion of the lands of every bishop, or abbot, was commonly distributed among his villeins or vassals; over whom he exercised the jurisdiction and authority of a temporal lord and superior. The estate, or benefice, which from the piety of well-disposed persons, or from whatever cause, had been mortified to the church, and had come into the hands of some particular churchman, was afterwards, in like manner as happened to the other fiefs of the kingdom, increased by the voluntary submission of neighbouring small proprietors; who, in order to purchase his protection, resigned their allodial property, and became his vassals. As the dignified ecclesiastics were not only possessed of a degree of influence corresponding to the extent of their benefices, but were supported by the spiritual arm of the church, they were often better qualified than many of the nobles, to secure their dependants from oppression; and of consequence, the opportunities of augmenting their wealth, by an artful interposition in behalf of the inferior people, were proportionably more frequent.

In those circumstances, a bishop came to be invested with a civil as well as an ecclesiastical jurisdiction; the one extending to the people who lived upon his own estate; the other

other to all the inhabitants of his diocese. By virtue of the former, he punished the crimes, and determined the pecuniary differences of his tenants and vassals. In consequence of the latter, he enquired into the opinions and behaviour of such as were under his direction in religious matters; and censured them, either for heresy or for immorality.

It required no great penetration to discover, that this temporal jurisdiction of the bishop might be extended, under cover of the spiritual jurisdiction. Every crime; every transgression of a rule of justice; whether of a public or private nature, might be considered as a sin, or as an offence in the sight of God; and in that view, it might, consistently with the system of church-discipline, become an object of ecclesiastical censure. Whatever therefore could be the ground of an action before the civil magistrate, might be brought, at the same time, under the cognizance of the spiritual judge. The professed purpose of the latter was, indeed, very different from that of the former; as he pretended to act merely with a view of promoting the good of the party in a future world. But when the church had acquired great authority over the people, it was not difficult for the ecclesiastical judge to frame his sentences in such a manner as to affect also the interest of men in the present life. In making atonement for a sin, the offender might be ordained to indemnify the injured person, or even to submit to a public punishment.

This extension of ecclesiastical jurisdiction was made with greater or less rapidity, in different parts of Christendom, and with regard to persons or causes of different descriptions. It began with regard to the clergy themselves.

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To maintain the dignity and credit of the church, it was necessary that she should pay the utmost attention to the behaviour of her own members; and be careful to avoid scandal, by censuring their offences with impartiality and rigour. She found, at the same time, the least difficulty in compelling churchmen to obey her decrees; for, as soon as the Christian church had come to be established by law, the excommunication of a clergyman must have inferred a forfeiture of his benefice; since a person, who had been cast out of the society of Christians, could not consistently be permitted to hold any ecclesiastical dignity or employment. From the severe discipline, therefore, which the church exercised over her own members, it became customary to exhibit complaints against them before the ecclesiastical, rather than before the civil judge; and to prosecute them in the church court, either for private debts, or for public offences.

After this practice had become general, it was regarded by churchmen as a matter of privilege. The peculiar functions and character of a clergyman required a peculiar delicacy, it was pretended, in judging of his conduct, which could not with propriety fall under the cognizance of the civil magistrate, and of which the clergy themselves were the only competent judges. In the progress of church power, this exemption from the jurisdiction of temporal courts was gradually established throughout the greater part of Christendom. It was introduced in the diocese of Rome by a law of Alaric, which provided that the clergy of that district should only be prosecuted, in the first instance, before their own bishop; but from his decision an appeal was admitted to the civil magistrate. In the Eastern empire, the inferior clergy obtained a similar privilege,

privilege, in civil actions, by a law of the emperor Justinian; though, in criminal causes, not properly ecclesiastical, they might still be prosecuted either in the spiritual or temporal court. The higher orders of churchmen, however, together with nuns, were, by the regulation of this emperor, permitted, in all cases, to decline the jurisdiction of lay judges\*.

When the exemption of the clergy from the jurisdiction of the civil magistrate, which, with the exception of a few causes, became universal, in the Western part of Europe, had been completely established, the church was, in reality, independent of the state; since, whatever regulations were enacted by the legislature of any country, they might, with safety, be disregarded by churchmen, who could not be punished for the violation of any law, unless they thought proper to enforce it by their own courts †.

The power of the church, in the administration of justice to her own members, was followed by a similar jurisdiction over the laity, in those law-suits by which her own interest might, in any degree, be affected, or which appeared, however indirectly, to have an influence upon any ecclesiastical matter. But, in England, this encroachment upon the province of the civil magistrate was posterior to the Norman conquest: and therefore does not fall under our present consideration. During the government of the Anglo-Saxon princes, the clergy did not claim a separate cognizance in the temporal causes of the laity;

\* V. Nov. 83.—123.—79. Also Gianone, Hist. of Naples.

† There were certain great crimes, such as high treason, to which this exemption did not extend.

but



but they laid the foundation of such a claim, in a future period, by assuming a privilege of assisting the ordinary magistrates in the determination of such causes. The extent of a diocese being the same with that of a shire, the bishop sat along with the earl or sheriff, as a judge, in the county courts; and the rural dean, whose ecclesiastical district coincided with the hundred, appears, in like manner, to have been associated with the *centenarius*, in the determination of such differences as arose among the people of that division. It is not improbable that the union of the civil and ecclesiastical powers was carried still lower, and that the parson of a parish was accustomed to judge along with the tythingman, in the court of the decenary: this is what might be expected from the correspondence between the limits of a parish and a tything, and from the analogous practice in the superior courts; though the accounts transmitted by early historians are too vague and general to afford any positive evidence of the fact.

This arrangement of the Saxon tribunals was a natural consequence of the influence possessed by the spiritual and the temporal governors, in the territories over which they presided. It seems, at the same time, to have been esteemed a wise regulation; in as much as by uniting the opinion of these two officers, in the distribution of justice, it was likely that the decisions would be tempered in such a manner, as might correspond to the interest, and the views, of every set of men in the community. The experience and foresight of that age was too limited to discover the incon- veniency of confounding the plain and accurate rules of justice, with the intricate subtleties of casuistry, which naturally introduce themselves into the judgments of a spi- ritual

ritual director: not to mention the danger of committing a share of the judicial power, in those times of ignorance, to a set of men who, by their superior education, were likely to be an over-match for the civil magistrate, and who, by their situation, had acquired a separate interest, and were led to seek their own aggrandizement at the expence of the great body of the people.

## C H A P. XIV.

*Alterations in the State of the Wittenagemote.*

THE progressive changes in the state of property, and in the constitution and circumstances of the people, of which an account has been given, must have contributed, in many particulars, to alter the constitution and procedure of the Wittenagemote. As this national council was composed of all the allodial proprietors of land, whose estates, according to the primitive distribution of property, were generally of small extent, there can be no doubt that, upon the union of the different kingdoms of the Heptarchy, it formed a very numerous, and, in some degree, a tumultuary meeting. The measures which came under its deliberation were proposed, it should seem, by such of its members as were distinguished by their influence or abilities; and its determinations were signified, not by collecting exactly the number of suffrages, but by a promiscuous acclamation, in which the by-standers, it is not unlikely, were accustomed frequently to join with those who had the right of voting. This, in all probability, is what is meant by the early historians, when they speak of the *people* being present in the ancient Wittenagemote, and of their *assisting*, and *giving their consent*, in forming the resolutions of that assembly.

It cannot escape observation, that this early constitution of the national council, while it contained a mixture of democracy

democracy and aristocracy, was, in some respects, favourable also to the interests of the crown. In so numerous and disorderly an assembly, there was great room for address, in managing parties, and in conducting the subjects of public deliberation; so that the king, the chief executive officer, had many opportunities of promoting the success of a favourite plan, as well as of parrying, and removing out of sight, those measures which were disagreeable to him.

The frequent resignations of land which, during the progress of the Saxon government, were made by the small allodial proprietors, in order to shelter themselves under the protection of a feudal superior, necessarily withdrew those individuals from the Wittenagemote; and reduced them under the jurisdiction and authority of that particular thane whom they had chosen for their protector. As they became his military servants, they were bound, on every occasion, to espouse his quarrel, and to follow his banner. They were bound, at the same time, to attend his baron-court, and to assist in deciding causes, as well as in making regulations, with regard to his vassals. In consistency with that subordinate station, they could not be permitted to sit in the same council with their liege lord, to deliberate with him upon public affairs; but, on the contrary, were understood to be represented in the Wittenagemote by the person who had undertaken to protect them, and to whom they owed submission and obedience.

Thus, according as the vassals of the nobility, throughout the kingdom, were multiplied, the constituent members of the Wittenagemote became less numerous; and the right of sitting in that assembly was more and more limited, to a few

few opulent barons, who had acquired the property of extensive districts, and reduced the inhabitants under their dominion.

This change of circumstances was no less unfavourable to the king, on the one hand, than it was, on the other, to the great body of the people. For although the vassals of the crown were, by the gradual resignations of allodial property, increased in the same, or even in a greater proportion than those of particular noblemen, the sovereign was not thence enabled to preserve his former weight in the determination of public measures. The more the national council had been reduced to a small junto of nobles, it was the more difficult to impose upon them, or by any stratagem to divert them from prosecuting their own views of interest or ambition. By the accidental combination of different leaders, they sometimes collected a force which nothing could resist; and were in a condition, not only to defend their own privileges, but even to invade the prerogative. It was often vain for the sovereign, in such a situation, to appeal to the sword from the decisions of the Wittenagemote. Those haughty and ambitious subjects were generally prepared for such a determination; and, as they came into the assembly, supported by their vassals, armed and ready to take the field, they got frequently the start of his majesty. To give way, therefore, to their demands, and to wait for some future opportunity of recovering what had been yielded, was in many cases unavoidable.

In that early period of the Anglo-Saxon state, when the allodial proprietors were numerous, and when their estates were generally small, they were understood to be all of the same rank and condition. Although some persons might  
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be distinguished above others, by their abilities, or military reputation; the superiority derived from thence, being accidental and temporary, was not productive of any permanent authority or privileges. But when, from the causes which have been mentioned, a few great lords had become masters of an extensive landed property, their exaltation in power and dignity was a necessary consequence. Those individuals, on the contrary, who remained in the possession of small estates, though by any fortunate concurrence of events they had been enabled to retain their independence, were degraded in proportion to their poverty. They could maintain but few retainers to support their influence. Hardly in a condition to defend themselves, and afraid of every contest which might endanger their property, and their personal safety; they were deterred from claiming political consideration, and from interfering in public business. It was their interest to live upon good terms with their neighbours; and, by their peaceable and inoffensive behaviour, to shun every ground of jealousy and resentment. If they came into the Wittenagemote, their voice was but little heard; or if they ventured to differ from others, of greater opulence, it was likely to be treated with neglect, or with derision. They had but small encouragement, therefore, to attend the meetings of that assembly; where, at the same time that they incurred an expence not suited to their fortunes, they were subjected to continual mortification, and were incapable of procuring respect. In these circumstances, it is probable that the allodial proprietors, whose estates were inconsiderable, appeared but seldom in the Wittenagemote; and that, unless upon extraordinary occasions, when great unanimity was of the highest importance,

portance, their absence was either dispensed with, or in a great measure overlooked.

It was to be expected that this very unequal distribution of property, as it produced a real difference in the consideration and importance of individuals, would come at length to be accompanied with corresponding marks of distinction; and that so much wealth as enabled the possessor to live according to a certain standard of magnificence, might become the foundation of suitable dignity. Thus, in the latter part of the Anglo-Saxon government, such of the nobles as enjoyed an estate, extending to forty hides of land, were distinguished in rank and condition from those who possessed an inferior property. This appears from a passage in the register of Ely, in which mention is made of a person who, "though he was a *nobleman*, could not be numbered among the *proceres*, because his estate did not amount to forty hides of land\*."

From this passage, political writers have been led to advance two conjectures; to which it gives no countenance whatever. They consider the rank or privileges, attached to the possession of forty hides of land, as having existed from the original settlement of the Anglo-Saxons; although the writer of that passage speaks only, and that by the by, of what was established in the reign of Edward the Confessor. They also maintain, that persons whose estates were below forty hides of land, were entirely excluded from the right of sitting in the Wittenagemote. But the passage referred to makes no mention of the right of sitting in the

\* Habuit enim (speaking of the abbot of Ely) fratrem *Gudmundum* vocabulo, cui filiam prepotentis viri in matrimonium conjungi paraverat. Sed quoniam ille quadraginta *hidarum* terræ dominium minime obtineret, licet *nobilis* esset, inter *proceres* tunc numerari non potuit; cum puella repudiavit. *Historia Eliensis*, lib. ii. cap. 40.

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Wittenagemote, nor gives the least hint concerning it; but only points out the extent of property which entitled a person to be ranked among the *proceres*. There is no reason to believe, either from this, or from any other ancient author, that, even in the latter part of the Anglo-Saxon government, the proprietors of such great estates were the only members of the national assembly; though it is, no doubt, highly probable, that they would be more apt, than persons of a lower station, to give a punctual attendance upon its meetings.

The superior dignity, however, enjoyed, in the reign of Edward the Confessor, by such of the nobility as were possessed of a certain extent of property, is the more worthy of attention, as it became still more remarkable after the Norman conquest, and laid the foundation of that noted distinction between the *greater* and *smaller* barons, which was productive of important changes in the constitution.

As the Wittenagemote was diminished by the reduction of many allodial proprietors into a state of vassalage; it may be questioned whether it did not, on the other hand, receive a gradual supply of new members, by the advancement of the *churles*, who, in consequence of the law of king Athelstane, were, upon the acquisition of five hides of land, admitted to the privileges of a thane. Concerning this point the following observations will occur. 1st, That though many of the peasants appear, in the latter periods of the Anglo-Saxon government, to have become free, and even opulent, it is probable that they held their possessions upon the footing of vassalage, rather than of allodial property; in consequence of which, they could only be ranked, from the law above-mentioned, among the *lesser thanes*,

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who had no right of sitting in the Wittenagemote: 2dly, Supposing that any of these churles acquired allodial estates, and that they were strictly entitled to a voice in the Wittenagemote; yet, about the time when this privilege was bestowed, a much greater property than five hides of land, the quantity specified in the law of king Athelstane, was required for giving the proprietor any weight or consideration in that assembly, or for making his attendance upon it a desirable object. This was a privilege, therefore, which they would be more apt to decline from its inconveniencies, than to exercise, or to boast of, on account of its advantages.

It may also be a question, whether those merchants who performed three voyages into a foreign country, and who, by another law of the same prince, are said to have obtained the rights of a *thane*, were admitted into the Wittenagemote. But, as these mercantile adventurers were not required to possess any estate, real or personal, it is not reasonable to suppose that they could be allowed to participate, with the ancient nobility, in the deliberations of the supreme national council. It has already been observed, that by the privileges of a *thane*, bestowed as an encouragement to a certain degree of enterprise in trade, were probably understood those of a *lesser thane*, or vassal; who, though not a member of the Wittenagemote, was of a condition greatly superior to that of the original peasants and mechanics.

As it does not appear that individuals among the merchants had, independent of any landed estate, the privilege of sitting in the Wittenagemote; so there is no evidence that, collectively, the trading interest were, even in the latter part of the Anglo-Saxon history, entitled to send representatives,

representatives to that assembly. Of this we may be satisfied from the particulars, relative to the constitution of the national council, which have been formerly mentioned. The facts which were then adduced, in order to shew that in the Saxon Wittenagemote there were no representatives, either from towns, or from the small proprietors of land, appear conclusive with regard to the whole period of the English government before the Norman conquest. If the original constitution of that assembly admitted of no representatives from either of these two classes of men, it must be supposed, that the subsequent introduction of them, more especially if it had happened near the end of the Saxon period, when historical events are better ascertained, would have excited the attention of some historian or other, and have been thought worthy of transmission to future ages. But upon this point, of so much importance in the political system, and so unlikely to pass without notice, the later as well as the early Saxon historians are entirely silent.

The advancement of arts and manufactures, towards the end of the Saxon line, was, indeed, so considerable, as to have enlarged particular towns, and to have exempted the inhabitants from those precarious duties and services to which they had anciently been subjected. They were permitted to form *societies*, or *gilds*, for the benefit of their trade; which appear to have at length suggested the practice of incorporating the whole of a town, with particular privileges and regulations\*. By a series of progressive improvements, the trading people were thus gradually prepared and qualified for that political consideration which

\* *Madox firma burgi.*

they afterwards acquired by the establishment of representatives in the national council. But the acquisition of this important privilege was the work of a later period, when they rose to a higher pitch of opulence and independence.

The original meetings of the Wittenagemote in England, as well as those of the national council, in most of the kingdoms upon the neighbouring continent, appear, as was formerly observed, to have been held regularly at two seasons of the year; at the end of spring, for deliberating upon the military operations of the summer, and at the beginning of autumn, for dividing the fruit of those depredations. The same times of meeting were, for similar reasons, observed, in the courts belonging to the several shires and baronies of the kingdom. But as, in England, from her insular situation, military enterprises against a foreign enemy were less regular than upon the continent of Europe, those meetings fell soon into disuse; and as, on certain great festivals, the king was accustomed to appear, with great pomp and solemnity, among his nobles; it was found convenient, on those occasions, to call the Wittenagemote. Hence the meetings of that council came to be held uniformly at three different seasons; at Christmas, at Easter, and at Whitfuntide.

The increase of the national business, particularly with respect to the distribution of justice, a consequence of the gradual progress of authority in the public, made it necessary that the Wittenagemote should be held more frequently than in former times; and therefore, in any extraordinary exigence, which arose between the different festivals above mentioned, a particular meeting of that council was called by the king. Thus there came to be two sorts

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of Wittenagemote; the one held by custom; and at three stated periods; the other called occasionally, by a special summons from the king\*. Both were composed of the same persons, if they chose to attend; but commonly a much less regular attendance was given in the latter than in the former. At the occasional meetings of the great council, such of the nobility as lived at a distance were seldom at the trouble of appearing; and the business, of course, devolved upon those members who happened to be in the king's retinue, and who might be said to compose his privy-council.

For this reason, the occasional meetings of the Wittenagemote usually confined themselves to matters of less importance than were discussed in the old customary meetings. The chief employment of the former was the hearing of appeals from inferior courts: but legislation, and other weighty transactions, were generally reserved to the latter.

If, however, it was found necessary, in the interval between the three great festivals, to deliberate upon public business of importance, the king issued an extraordinary summons to his nobles; in which he expressly required their attendance, and specified the cause of their meeting †.

It may here be proper to remark, that the smaller occasional meetings of the Wittenagemote appear to have suggested the idea of the *aula regis*; a separate court, which, after the Norman conquest, was formed out of parliament for the sole purpose of deciding law-suits.

\* The former were called *courts de mare*, being founded upon immemorial custom.

† Gurdon's History of the high court of Parliament.

As the occurrences which demanded the immediate interposition of the Wittenagemote could not be foreseen, the king was led to determine the particular cases in which the deliberation of that assembly was requisite; and in the exercise of this prerogative, he was originally under no restraint. The powers exercised by the crown seem, at first, to have been all discretionary; and to have remained without limitation, until experience had shewn the danger of their being abused.

We shall afterwards have occasion to observe, that, under the princes of the Norman and Plantagenet race, the ancient and regular meetings of the national council were more and more disregarded, and at length entirely dissolved; in consequence of which the whole parliamentary business came to be transacted in extraordinary meetings, which were called at the pleasure of the sovereign. The attempts to limit this important branch of the royal prerogative will be the subject of future discussion.

*Conclusion of the Saxon Period.*

Such appear to be the outlines of the English government under the administration of the Anglo-Saxon princes. To the subjects of Britain, who consider the nature of their present constitution, and compare it with that of most of the nations upon the neighbouring continent, it seems natural to indulge a prepossession, that circumstances peculiarly fortunate must have concurred in laying the foundation of so excellent a fabric. It seems natural to imagine, that the government of the Anglo-Saxons must have contained a proportion of liberty, as much greater than

than that of the neighbouring nations, as our constitution is at present more free than the other European governments.

When we examine, at the same time, the state of our country, in that remote age; the uniform jurisdiction and authority possessed by every allodial proprietor; the division of the country into various districts, subordinate one to another; the perfect correspondence between the civil and ecclesiastical divisions; the similarity in the powers exercised by the meetings of the tything, the hundred, and the shire, in their respective territories, and those of the Wittenagemote over the whole kingdom; the analogy between the office of the tythingman, the hundred, and the earl, in their inferior departments, and that of the sovereign in his more exalted station: when, I say, we examine these, and other particulars relating to the Anglo-Saxon government, in which we may discover so much order and regularity, such a variety of regulations, nicely adjusted to one another, and calculated for the most beneficial purposes; it is natural to suppose, that the whole has originated in much contrivance and foresight; and is the result of deep laid schemes of policy.

In both of these conclusions, however, we should undoubtedly be mistaken. When we look round and examine the state of the other European kingdoms about the same period; and when we observe, in each of them, the close and minute resemblance of its political system to that of England, how little soever the apparent intercourse of the inhabitants; we feel ourselves under the necessity of abandoning our former supposition, and of acknowledging that the regulations established in all of these countries proceeded from no artificial or complicated plans of legislation; but

but were such as occurred successively to the people, for the supply of their immediate wants, and the removal of incidental inconveniencies; in a word, that the feudal constitution was, every where, a kind of natural growth, produced by the peculiar situation and circumstances of the society.

Neither was the Anglo-Saxon government calculated, in any peculiar manner, to secure the liberty and the natural rights of mankind; though, in the long period during which it subsisted, it underwent considerable variations. The sovereign, indeed, was at no time invested with absolute power. The supreme authority in the state was originally possessed by a numerous body of landed proprietors; but the rest of the community were either slaves, or tenants at the will of their master. The number of those who enjoyed a share in the government was afterwards greatly diminished; at the same time that, upon the advancement of the aristocracy, the lower part of the inhabitants became somewhat more free and independent. The restriction of political power in men of a superior class was thus compensated by some little extension of privileges in the great body of the people.

## B O O K II.

OF THE ENGLISH GOVERNMENT FROM THE REIGN OF WILLIAM THE CONQUEROR, TO THE ACCESSION OF THE HOUSE OF STEWART.

THE political history of this extensive period may be subdivided into three parts; the first extending from the Norman conquest to the end of the reign of Henry the third; the second, from the beginning of the reign of Edward the first, to the accession of Henry the seventh; and the third, comprehending the reigns of the Tudor family. In each of these parts we shall meet with progressive changes in the English constitution, which appear to demand a separate examination, and which, being analogous to such as were introduced, about the same time, in the other European governments, may be regarded as the natural growth and development of the original system, produced by the peculiar circumstances of modern Europe.



## C H A P. I.

*The Norman conquest.—Progress of the feudal System.—View of the several Reigns before that of Edward I.—The great Charter, and Charter of the Forest.*

WILLIAM the conqueror ascended the throne of England, partly by force of arms, and partly by the voluntary submission of the people. The great landed estates, acquired by a few individuals, towards the end of the Saxon government, had exalted particular nobles to such power and splendor, as rendered them, in some degree, rivals to the sovereign; and even encouraged them, upon any favourable emergency, to aspire to the crown. Among these, under the feeble reign of Edward the confessor, we may distinguish Godwin earl of Wessex, who had become formidable to the monarch; and, after the death of that earl, his son Harold, who, at the same time that his possessions were not less extensive than those of his father, being endowed with superior abilities, and much more amiable dispositions, appears to have attained a degree of influence and authority which no English subject had ever enjoyed. He became, of course, an object of jealousy to Edward; who, in the decline of life, and having no children, was anxious to exclude this nobleman from the throne, by securing the succession to one of his own kindred. Edward himself was properly an usurper, having seized the crown to the prejudice of his elder brother's son,

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the undoubted lineal heir. This prince being now dead, the right of inheritance devolved upon his son Edgar Atheling, whose tender age, and slender abilities, appeared to disqualify him, in such a critical conjuncture, for wielding the sceptre over a fierce and turbulent people. In those disorderly times, the line of hereditary succession, though not intirely disregarded, was frequently broken from particular accidents: persons incapable of defending the sovereignty, were commonly deemed unworthy to obtain it; and the recommendation, or *will*, of the reigning prince was always held to be a strong circumstance in favour of any future competitor for the succession.

Edward the confessor had resided four and twenty years in the court of Richard the Second, duke of Normandy, his maternal uncle; by whom, in the short reign of his brother Edmund Ironside, and during the usurpation of the Danish monarchs, he was generously educated and protected. By remaining, for so long a period, in a foreign country, where he was careffed, and treated with every mark of distinction, the English prince was led to form an attachment to the people, whose progress in arts, government, and manners, surpassed that of his own countrymen; and he ever retained a grateful remembrance of the hospitality and kindness which he had experienced in the family of his kinsman. When he mounted the throne of England, a communication was opened between the two countries; and an intimate connexion subsisted between the respective sovereigns. Multitudes of Normans resorted to the English court, in expectation of preferment; many individuals of that country obtained landed possessions in England; and many were promoted to offices of great dignity, both in church and state. These foreigners, who stood so

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high in the favour of the sovereign, were imitated by the English in their dress, their amusements, their manners, and customs. They imported also the French language; which had for some time been adopted by the Normans; and which, being regarded as a more improved and elegant dialect than the Saxon, became fashionable in England, and was even employed, it is said, in the writings and pleadings of lawyers.

The duchy of Normandy having descended to William, the natural son of Robert, and nephew of Richard II. the affections, as well as the policy of Edward, made him cast his eyes upon that prince, his nearest relation by the mother, and the most able and accomplished warrior of his time, as the most proper person to succeed him in the throne. His illegitimate birth was, in that age, an objection of little moment; since it had not prevented him from inheriting the dukedom of Normandy; and since a similar stain is observable in the line of our Saxon kings. Some historians have asserted, that the English monarch actually made a *will*, by which he bequeathed his crown to the duke of Normandy; and that this deed was even ratified by the states of the kingdom. But whether such a transaction was really executed, appears extremely doubtful. It is certain, however, that Edward had publickly declared his intentions to this purpose; that William, in consequence of such declaration, had openly avowed his pretensions to the crown of England; and that Harold himself, being upon a visit to the Norman court, and having received a promise of the duke's daughter in marriage, had taken a solemn oath to support his title. An artifice which was put in practice, with relation to that oath, in a contract between two of the most conspicuous personages of the age, is worthy of attention,

attention, as it exhibits a ludicrous picture of the superstition to which the minds of men were then universally subjected. William secretly conveyed under the altar upon which Harold was to swear, the bones of some of the most revered martyrs; and after the oath was taken, shewed the relics to the affrighted nobleman; who discovered, with equal concern and indignation, that he was ensnared into a much stronger obligation than he had intended; and that his future breach of promise would be productive of more fatal consequences than he had been aware of.

By what species of casuistry Harold afterwards endeavoured to satisfy his conscience with respect to the violation of this oath, which had, indeed, been in some degree extorted from him, we have no information; but, in fact, he neglected no opportunity of increasing his popularity, and of strengthening his connexions among the nobility; so that, upon the death of Edward, he found himself, before his rival could take any measures for preventing him, in a condition to obtain possession of the throne, and to bear down every appearance of opposition. The duke of Normandy was not of a temper to brook this disappointment, and tamely to relinquish his pretensions. He collected a great army, composed not only of such forces as could be levied in his own dominions, but of all those desperate adventurers whom the prospect of plunder, and of military reputation, allured to the standard of so celebrated a leader. The battle of Hastings, in which Harold and his principal adherents were slain, put an end to the struggle, and left the victorious general without a competitor. This decisive action was followed by a speedy submission to his authority; and the chief of the nobility and clergy, together with Edgar Atheling himself, having made him an offer of

the vacant throne, he was crowned at Westminster Abbey with the usual solemnities. It is worthy of notice, that, on this occasion, he took the same oath which had formerly been administered to the Saxon kings, "that he would maintain the ancient fundamental laws of the kingdom;" to which there was added a particular clause, suggested by the peculiarity of the present circumstances, "that he would distribute justice impartially between his English and his Norman subjects."

The crown of England having thus been transmitted to a foreign family, William, according to the barbarous Latin of those times, received the title of *conquestor*; which has, without much propriety, been translated the *conqueror*. It imported merely an *acquirer*, in contradistinction to a person who inherits by lineal descent, corresponding to the sense in which, by the present law language of Scotland, *conquest* is opposed to *heritage*\*.

Whether the accession of this monarch is to be considered in the light of a real conquest by force of arms, unsupported by any other circumstance, would be a frivolous question, were it not for the serious and important consequences which have, by some authors, been connected with that supposition. It is maintained, that if William entirely conquered the kingdom, he could be under no restraint in modelling the government; that he, accordingly, overturned altogether the ancient constitution; and in place of that moderate system which had grown up under the Saxon princes, introduced an absolute monarchy.

\* "*Conquestus* id quod à parentibus non acceptum, sed labore pretio vel parsimonia comparatum possidemus—Hinc Guliel. I. *conquestor* dicitur que Angleam conquirit, i. e. acquirit, PURCHASED, non quod subegit." Spelm. Glossar. v. Conquestus. See also Skene, de verbor. sign.

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The supposition itself is no less remote from truth, than the conclusion drawn from it is erroneous. It was the party of Harold only that was vanquished by the arms of the Normans; and had it not been for the usurpation of that nobleman, William would probably have met with no opposition to his claim. After the defeat of Harold, there was, beside the duke of Normandy, no other candidate able to hold the reins of government. Even supposing William to have completely conquered the whole of the English, his conquest, surely, was not extended over those Norman barons, the associates and companions of his enterprise, to whom he was chiefly indebted for his success. When those powerful chieftains obtained possessions, in England, proportioned to their several merits, and became grandees of the kingdom, it is not likely that they would willingly relinquish the independence which they had enjoyed in their own country, or that they would regard the assistance they had given to their duke, in raising him to be a great king, as a good reason for enslaving them\*.

But, however this be, nothing is more clear in point of fact, than that William was far from wishing to hold himself up to the people of England in the light of a conque-

\* The duchy of Normandy was at that period governed like most of the other feudal countries of Europe; and the duke, at the same time that he was a feudatory of the king of France, enjoyed a very moderate authority over his Norman vassals. In particular, he could neither make laws, nor impose taxes, without the consent of the barons, or principal land-holders of the duchy. This appears from the Latin customs of Normandy, printed at the end of the old French edition of the *Customier de Normandy*; in the preface to which it is said; "Quoniam leges et instituta que Normanorum principes, non sine magna provisionis industria prelatorum, comitum, et baronum, nec non et ceterorum virorum prudentum consilio, et assensu, ad salutem humani foederis statuerunt." [Tyrrel's Bibliotheca Politica, dial. 10. Also many instances of Norman great councils, collected by Brady.]

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ror. Like every wise prince, who has employed irregular and violent measures for obtaining the sovereignty, he endeavoured as much as possible to cover every appearance of usurpation; and was willing to exercise his power in the manner most likely to secure the continuance of it. He was active in restraining his Norman followers from committing depredations on the English, and in preventing disputes between the individuals of those different nations. The partisans of Harold, who had distinguished themselves by supporting his cause in the field, were, doubtless, deprived of their possessions; but the rest of the English, who submitted to the authority of the monarch, were treated with marks of his favour and confidence. Many of those who had been in arms against him, were overlooked or forgiven; and the people in general received assurances of his protection. London, and the other cities of the kingdom, were confirmed in their immunities and privileges. Even Edgar Atheling himself, the lineal heir of the crown, was permitted to live in safety, and to retain the estate and honours which had formerly been conferred upon him. Justice was every where administered, not only with great impartiality, but by tempering clemency with severity; and, the public tranquillity being thus, in a short time, perfectly restored, the government under the new sovereign proceeded, without interruption, in its former channel\*.

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\* Several historians, who write near that period, consider William's advancement to the English throne as the effect of a formal election. William of Poitou, this king's chaplain, gives the following account of it: "Die ordinationi decreto locutus ad Anglos concedenti sermone Eboraci Archiepiscopus, sapiens, bonus, eloquens, an consentirent eum sibi dominum coronari inquisivit; protestati sunt hilarem consensum"

But though the constitution was far from being converted into an absolute monarchy, by virtue of an immediate conquest, a considerable change was, about this time, introduced, both in the state of landed property, and in the authority of the sovereign. For this change, the country, during the latter part of the Anglo-Saxon government, had been gradually ripened and prepared. When, by the frequent conversion of allodial into feudal estates, the small proprietors of land were at length reduced into the condition of military servants, those great lords, who remained at the head of extensive districts, were brought into a more direct opposition and rivalry to one another. Their estates, by gradual enlargement, were become contiguous; and those intermediate possessors, whom they had formerly been employed in subduing, were now distributed upon either side, and ready to assist their respective superiors in their mutual depredations. Those hereditary feuds, which had been scattered over a multitude of individuals, were now concentrated in a few great leaders; who felt a stronger incitement to the exercise of reciprocal hostilities, as well as the capacity of prosecuting them with greater vigour and perseverance, according as their power, toge-

"sensum universi minime hæsitantes, ac si coelitus unâ mente datâ, unâque voce, Anglorum, quam facillime Normanni consenserunt fermocinato apud eos, ac sententiam præcunctatorium Constantini Præsule, sic electum consecravit Archiepiscopus," &c.

Ordericus Vitalis, who lived in the reign of William Rufus, speaks of the same event as follows: "Dum Aldredus Præsul alloqueretur Anglos, et Godofredus Constantiniensis Normannos, an concederent Gulielmum regnare super se, et universi consensum hilarem protestarentur unâ voce non unius linguæ locutione."

Gul. Gemeticensis, in his history of the dukes of Normandy, agrees with the two authors above quoted: "Ab omnibus," says he, "tum Normannorum, quam Anglorum proceribus rex est electus," &c. Tyrrel's Bibliotheca Polit. dial. 10.

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ther with their pride and their ambition, had been augmented. The public magistrate was often unwilling to interfere in reconciling their differences; and was even pleased to see their force wasted and broken by their mutual ravages. The greater nobles were thus permitted to injure and oppress one another at their own discretion; and, being exposed to such difficulties and distresses as had formerly been sustained by the proprietors of small estates, were obliged to extricate themselves by similar expedients. They endeavoured to provide against the dangers which threatened them, from the invasion of some of their neighbours, by forming an alliance with others; or, if this resource had proved ineffectual, by courting the favour and soliciting the protection of the king. Nothing less than the power of the crown was capable, in many cases, of delivering them from their embarrassment; and, in order to procure that relief which their situation required, it was necessary that they should promise, upon their part, a return of good offices. If they were anxious to enjoy that security which he bestowed upon his immediate retainers, they could not decently withhold from him the same homage and fealty, or refuse to perform the same services. They found, in a word, that it was expedient for them to resign their allodial property, and to hold their estates by a feudal tenure as vassals of the crown.

The political theatre, at that time, exhibited a frequent repetition of the same parts by different actors. Those opulent individuals, who had formerly been in a condition to oppress their neighbours, and force them into a state of dependence upon the sovereign, were, by a different combination of rival powers, or by an alteration of circumstances, rendered, on other occasions, incapable of maintaining their

their own independence; and being, in their turn, induced to supplicate the interposition of the crown in their favour, were obliged to purchase it by the same terms of submission. As these resignations of land were in the highest degree advantageous to the sovereign, we can have no doubt, that the influence of the court would be uniformly exerted, and that every possible artifice would be employed, in promoting them. The great nobles were thus rendered subordinate to the crown, in the same manner as the inferior free people had become subordinate to the nobility; the whole kingdom was united in one extensive barony, of which the king became the superior, and in some measure the ultimate proprietor; and the feudal system, as it is called, of which the foundations had been laid several centuries before, was at length entirely completed.

From the state of England, about the accession of the Norman race of kings, a change of this nature was likely to have happened; though it was, undoubtedly, promoted and accelerated by the peculiar circumstances of William the Conqueror. From the great abilities of that prince, as well as from the manner in which he ascended the throne, he became possessed of uncommon personal influence; and, by his uniting the duchy of Normandy to the crown of England, the royal demesnes, and the public revenue, were greatly extended. But above all, the numerous forfeitures, incurred by the partisans of Harold, and by such as were incited to acts of rebellion, during the course of William's reign, enabled the sovereign to acquire a prodigious landed territory in England; part of which he retained in the possession of the crown; and the rest he bestowed upon his favourites, under condition of their performing the feudal services.

It must not be overlooked, that this feudal policy was extended to the greater ecclesiastical benefices, as well as to the estates of the laity. The bishops and abbots became immediate vassals of the crown; and, though not bound to the king for personal service in war, were obliged to supply him with a number of military tenants proportioned to the extent of their possessions. Notwithstanding the great influence of the clergy, supported by the Roman pontiff, who strongly remonstrated against this innovation, yet, as ecclesiastical benefices were enjoyed only for life, those churchmen who expected preferment from the crown were, without much difficulty, prevailed upon to accept of a benefice, under such general conditions as now began to be imposed upon all the great proprietors of land.

The change, which was thus effected in the state of the great nobles, was far from being peculiar to England. It was extended, nearly about the same time, over all the kingdoms in the Western part of Europe; and in most of them, was the result of no conquest, or violent effort of the sovereign; but appears to have proceeded from the natural course of the feudal governments.

In France the great barons appear to have become the immediate vassals of the crown, in the time of Hugh Capet; whose reign began about eighty years before the Norman conquest; and who obtained the regal dignity, without any appearance of disorder or violence, by the free election of the national assembly. The feudal institutions having been completed in that kingdom, of which Normandy constituted one of the principal baronies; it is likely that William, when he came into England with a train of Norman vassals, found it the more easy to establish that system, because

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cause his followers had already been acquainted with it in their own country.

In the German empire many powerful barons became vassals of the emperor, as early as the reign of Otho the Great; who had likewise been advanced to the sovereignty, not by force of arms, but by the voice of the diet. From particular causes, however, the feudal subordination of the nobility was not rendered so universal in Germany as in other European countries\*.

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\* Concerning the time when the feudal system was introduced into England, authors of great note have entertained very different opinions. Lord Coke, the judges of Ireland who gave their decision upon the case of defective titles, Mr. Selden, the author of the *Merroit des Justices*, and many others, suppose that it was established under the Anglo-Saxon government. Lord Hale, Mr. Somner, Cambden, Dugdale, Mathew Paris, Bracton, maintain that it was unknown before the Norman conquest.—Sir Henry Spelman, in his Glossary, seems to hold this last opinion; but in his posthumous treatise he explains his meaning to be only that fiefs did not become hereditary, so as to yield feudal incidents, before the reign of William the Conqueror. The opinion which I have delivered above seems to account for these opposite conjectures. It seems impossible to deny that there were fiefs among the Anglo-Saxons: on the other hand, it appears equally clear that there were many allodial estates principally in the hands of the great nobility. Nothing therefore remained for William, towards completing the feudal system, but the reduction of these last into a state of vassalage.

We find accordingly, that, in the twentieth year of his reign, this monarch, having finished a survey of all the lands in the kingdom (except those of Northumberland, Cumberland, and Westmoreland) summoned all the great men and land-holders, to do homage, and swear fealty to him. The expression used in the Saxon Chronicle, in mentioning this fact, is *Proceres, et omnes prædia tenentes, se illi subdederunt, ejusque facti sunt vassalli*. Having become vassals of the crown, at that time, it may be inferred they were not in that condition formerly. It is further probable, that the twenty years which had elapsed, since the accession of William, were occupied in bringing about this great revolution; for if the great men had been crown vassals during the Saxon government, it was the interest of this prince not to delay their renewal of

By this alteration in the state of landed property, the power of the crown was undoubtedly increased, but it was not increased in so great a proportion as at the first view was perhaps imagined. When the allodial estates of the great lords were converted into fiefs, they were invariably secured to the vassal and his heirs. The power and influence of those opulent proprietors were therefore but little impaired by this change of their circumstances. By their tenures they were subject to the jurisdiction of the king's courts, as well as bound to serve him in war; and they were liable for various *incidents*, by which his revenue was considerably augmented; but they were not in other respects dependent upon his will; and, while they fulfilled the duties which their condition required, they could not, with any colour of justice, be deprived of their possessions. Neither was the sovereign capable, at all times, of enforcing the performance of the feudal obligations; but from the power of his great vassals, or the exigence of his own situation, he found it necessary, in many cases, to connive at their omissions, and even to overlook their offences.

The reign of William the First was filled with disquietude and uneasiness, both to the monarch, and to the nation. About six months after the battle of Hastings, he found the kingdom in such a state of apparent tranquillity, that he ventured to make a visit to Normandy; in order, as it should seem, to receive the congratulations of his ancient

the feudal engagement, by their swearing fealty to him as soon as he came to the throne.

From domesday-book, which is now happily laid open to the inspection of all the world, this fact is made still more certain, as innumerable instances occur of landholders, who are said to have held their lands *allodially*, in the reign of Edward, the preceding king.

subjects.

subjects. He probably intended to survey his late elevation from the most interesting point of view, by placing himself in the situation in which he had planned his undertaking, and by thence comparing his former anxious anticipations with his present agreeable reflections. William is, on this occasion, accused by some authors of having formed a resolution to seize the property of all his English subjects, and to reduce them into the most abject slavery. He is even supposed to have gone so soon into Normandy, for the purpose of giving them an opportunity to commit acts of rebellion, by which a pretence might be afforded for the severities which he had purposed to execute\*. But, as this has been advanced without any proof, so it appears in itself highly improbable. It is altogether inconsistent with the prudence and sound policy ascribed to this monarch, not to mention the feelings of generosity or justice, of which he does not seem to have been wholly destitute, that he should, in the beginning of his reign, have determined to crush and destroy the English nobility, merely for the sake of gratifying his Norman barons; since, by doing so, he must have expected to draw upon himself the hatred and resentment of the whole kingdom, and to incur the evident hazard of losing that crown which he had been at so much trouble and expence in acquiring. Although William was, doubtless, under the necessity of bestowing ample rewards upon many of his countrymen, it was not his interest that they should be enriched, or exalted beyond measure. Neither was he of a character to be guided by favourites, or to sacrifice his authority to the weakness of private affection. When he found himself seated upon the English throne,

\* Hume's Hist. of England.

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it is natural to suppose that he would look upon the duchy of Normandy as a distant province, or as a mere dependency of the crown of England; and that he would be more interested in the prosperity of the latter country than of the former, as being more immediately connected with his own dignity and reputation. Upon his return from Normandy, William, accordingly, exerted himself in putting a stop to those quarrels which, in his absence, had broke out between his English and his Norman subjects, and in giving redress to the former, for those injuries which they had sustained from the latter. In particular, he endeavoured, every where, to restore the English to those possessions from which they had been expelled, through the partiality, or want of authority in those persons with whom he had left the administration of government.

Several circumstances contributed to render this monarch unpopular, and have subjected his conduct to greater clamour and censure than it appears to have merited.

I. The jealousy with which the English beheld the Normans, whom they looked upon as intruders, and who became the ruling party, gave rise to numberless disputes, and produced a rooted animosity between them. The partiality which, in such cases, might frequently be discovered, and perhaps was oftener suspected, in the sovereign, or in those to whom he committed the inferior branches of executive power, inflamed the passions of men who conceived themselves loaded with injuries, and excited them to frequent insurrections. By the punishment, which fell unavoidably upon the delinquents, and which could not fail to be regarded by their countrymen as rigorous, new discontents were occasioned, and fresh commotions were produced.

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To the aversion which the English conceived against William, as a Norman, and as the friend and protector of Normans, they joined a strong prejudice against those foreign customs which he and his followers had imported. Devoted, like every rude nation, to their ancient usages, they were disgusted with those innovations which they could not prevent; and felt the utmost reluctance to adopt the peculiar manners and policy of a people by whom they were oppressed. The clamours propagated against particular laws of William the Conqueror, which were considered as the most oppressive, may serve to demonstrate, that his subjects had more disposition to complain than there was any reason to justify. It appears that the origin and nature of some of these laws have been grossly misunderstood and misrepresented. The regulation, for instance, that lights should be extinguished in every house by eight in the evening; for the execution of which, intimation was given to the public by the ringing of a bell, thence known by the name of the curfew, has been regarded as the most violent exertion of tyranny; and the most incontestable evidence, not only that William was determined entirely to break and subdue the spirit of the English, but that he was held in continual terror of their secret conspiracies. It is now generally understood and admitted, that this was a rule of police established in the greater part of the feudal nations; as by the extreme sobriety which it enforced, it was peculiarly adapted to the circumstances of a simple people. Another law, the source of much complaint, and deemed an intolerable grievance, was, that when a Norman was robbed or slain, the hundred, within whose territory the crime had been committed, should be responsible, and subject to a pecuniary punishment.



ment. This regulation, which, in all probability had become necessary, from the multitude of Normans that were daily affaffinated, was originally of Saxon institution, and was only accommodated in this reign to the exigence of the times.

2. The extension of the prerogative, by reducing the allodial proprietors of land into a state of vassalage under the crown, was likewise, we may suppose, the ground of dissatisfaction and murmuring to those great barons, who found themselves deprived of their ancient independence, and were exposed to much vexation from those various *incidents*, the fruit of the feudal tenures, that were now claimed by the sovereign. The discontent arising from this cause, and the desire of recovering that condition which they had held under the Anglo-Saxon princes, was not limited to the English nobility; but was readily communicated to those Norman chiefs who had obtained estates in England, and were naturally animated with the ambition of supporting the privileges of their own order in opposition to the claims of the sovereign. One of the most formidable insurrections, during the reign of William the First, appears to have been excited and conducted by some of the principal Norman barons; and to have proceeded from the impatience of those individuals under that recent authority which the crown pretended to exercise.

3. Another circumstance which contributed, no less than either of those which have been mentioned, to render William unpopular, was the resentment of the clergy, whom he greatly offended by his exactions from them, and by his opposition to the progress of ecclesiastical authority. As the clergy possessed great influence over the people, so they were the only historians of those times; and in estimating the

the character of any particular prince, they seem to have had no other criterion but the liberality and favour which he displayed to the church. According to his dispositions in this respect, they appear to have extolled or depreciated his virtues, to have aggravated or extenuated his vices, and to have given a favourable or malignant turn to the whole of his behaviour. From these impure fountains the stream of ancient history contracted a pollution, which has adhered to it even in the course of later ages, and by which it is prevented from reflecting a true picture of the past occurrences.

After all, it cannot be controverted, that this monarch was of a severe and inflexible temper; and that he punished with rigour every attempt to subvert or to disturb his government. That he was rapacious of money, as the great instrument for supporting his authority, must likewise, perhaps, be admitted. Among other exactions, he revived a tax, no less hateful than singular, known to the English by the name of *Dane-gelt*, which had been abolished by Edward the Confessor. It appears to have arisen from an extraordinary contribution, which the Anglo-Saxon kings were under the necessity of levying, in order to oppose the inroads of the Danes, or to make a composition with those invaders. According to the maxims of prudence, common to the princes of that age, William was not content with providing a revenue sufficient to defray his annual expence; but accumulated a large treasure for the supply of any sudden or extraordinary demand. That he exterminated, however, the whole English nobility, or considerable proprietors of land, or that he stripped them of their possessions, as has been asserted by Dr. Brady and by some later writers, from the authority of some declamatory and vague expressions

sions in one or two ancient annals, there seems no good reason to believe\*.

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\* This point has been the subject of much disquisition and controversy. See Petit's Rights of the Commons asserted—Atwood's Janus Anglorum ab Antiquo—Cook's Argumentum Antinormanicum—Tyrrell's History—and Bibliotheca Politica, dial. 10. On the other side of the question, Dr. Brady's History, and his various political treatises.

From an inspection of Doomsday-book, it cannot be denied that William the First, before the end of his reign, had made prodigious changes in the landed property of England, and that very large estates were conferred upon his Norman barons, who had the principal share of his confidence.—But, on the other hand, it seems equally clear, that a great part of the landed property remained in the hands of the ancient possessors. Whatever burdens were imposed upon the church, it is not alledged that the clergy, or that any religious societies, which had been established under the Anglo-Saxon government, were deprived of their property. These ecclesiastical estates were of great extent, and the tenants, or knights, who held of the church were numerous and powerful. Of 60,215 knights' fees, computed to have been in England not long after the conquest, no fewer than 20,015 are said to have belonged to churchmen. It must be owned, however, that when vacancies occurred in church livings, they were most commonly bestowed upon Normans.

With respect to the laity, there are great numbers mentioned in Doomsday-book, as having held estates in the reign of Edward the Confessor. This is so palpable, that even Dr. Brady himself, in his answer to the Argumentum Antinormanicum, seems to abandon his assertion, that the English were deprived of their possessions, and contents himself with maintaining, that the nature of their property was changed, by their being reduced into a subordinate state of vassalage.

But even here the fact seems to be misrepresented, and in the list of crown vassals recorded in Doomsday, we may discover great proprietors, who held lands in England before the conquest: such as, *Radulfus de Mortimer*—*Hugo de Perth*—and even in this number we may reckon the *Earl of Moreton*, who, though a Norman, had, along with many others, obtained English possessions in the reign of Edward the Confessor. Among those crown vassals, it seems difficult, in many cases, to distinguish the names of the Norman from those of the Anglo-Saxon families; but there are many which appear to have been appropriated to the latter. Such as, *Oswald*, *Eldred*, *Albert*, *Grimbald*, *Edgar*, *Edmund*, *Alured*.

It is said indeed, by William of Malmesbury and Henry of Huntington, that, about the

When, at the same time, the situation of William, and the difficulties which he was obliged to encounter, are properly considered, it must on the one hand be acknowledged, that the rigours imputed to him were, for the most part, excited by great provocation; as, on the other, it may be doubted, whether they were not in some degree necessary for reducing the country into a state of tranquillity; and whether a sovereign, endowed with greater mildness of disposition, would not have probably forfeited the crown, as well as involved the kingdom in greater calamities than those which it actually suffered.

William Rufus, the second son of the Conqueror, succeeded to the throne, in preference to Robert his elder brother, from the recommendation of his father; from the influence of Lanfranc, the archbishop of Canterbury; and from his being, at his father's death, in England to support his claim, while his brother was at a distance. His reign exhibits the same aspect of public affairs with that of his father; the internal discord of the nobles; their frequent insurrections against the sovereign; with his correspondent efforts to keep them in subjection. As by the succession of this prince, the duchy of Normandy, which was bequeathed to Robert by his father, was detached from the crown of England, many of the Norman barons, fore-

the end of William's reign, no Englishman was either a *bishop*, abbot, or earl, in England.

We may add, that, supposing the whole of the English to have been extirpated by William the Conqueror, it would not thence follow that his government became absolute. For what motive could have induced his Norman barons, now become English nobles, and possessed of immense estates, which were secured to them in perpetuity, to acquiesce in any violent extension of the prerogative, to which neither the nobility of Normandy nor of England had been accustomed?

feeling the inconvenience that might arise from a division of their property under different sovereigns, endeavoured to prevent his establishment, and raised a rebellion in favour of Robert. But the same circumstance, which rendered the advancement of William so disagreeable to the Normans, made this event equally desirable to the English, who dreaded the continuance of a connexion, from which, in the late reign, they had experienced so much uneasiness and hard treatment. By their assistance, the Norman rebels were soon defeated; the estates of the greater part of them were confiscated; and the authority of the king was completely established: a proof that, in the reign of the Conqueror, the English nobility or considerable land-holders were far from being extirpated; and that their power was not nearly so much impaired as has been pretended\*.

Not long after, the king passed over into Normandy, with an army, in order to retaliate the late disturbances which had been promoted from that quarter; but before hostilities had been pushed to any considerable length, a reconciliation, between the two brothers, was effected, by the interposition of the principal nobility in both countries; and a treaty was concluded, by which, among other articles, it was

\* The expression used on this occasion by William of Malmesbury, is, "Rex videns Normannos pene in una rubic conspiratos, Anglos probos et fortes viros, qui adhuc residui erant, invitatoriis scriptis arcessit; quibus super injuriis suis queremoniam faciens, bonasque leges, et tributorum levamen, liberaeque venationes pollicens, fidelitati suae obligavit." Ordericus Vitalis says, "Lanfrancum archiepiscopum, cum suffraganeis praesulibus, et comites Anglosque naturales, convocavit; et conatus adversariorum, et velle suum expugnandi eos, indicavit."

Dr. Brady, whose system led him to maintain that none of the native English retained considerable property in the end of the reign of William the Conqueror, labours to prove, that, by the *Angli Naturales*, and the *Angli qui adhuc erant residui*, Normans, or Frenchmen, who had settled in England, are to be understood, in opposition to such as lived in Normandy, or were but recently come from that country.

agreed,

agreed, that, upon the death of either, without issue, the survivor should inherit his dominions. Twelve of the most powerful barons on each side became bound, by a solemn oath, to guaranty this treaty: a circumstance which, as Mr. Hume observes, is sufficient to shew the great authority and independence of the nobles at that period. Nothing can afford fuller conviction, that neither this king nor his predecessor, though they undoubtedly extended their prerogative, had been able to destroy the ancient aristocracy, and to establish an absolute despotism.

The re-union of Normandy with the dominions of the English monarch was, however, more speedily accomplished, in consequence of an event, by which, at the same time, all Europe was thrown into agitation. I mean, *crusades*; which were begun in this reign, towards the end of the eleventh century, and continued for about two hundred years. The causes which produced those expeditions; the general superstition of the age, by which Christians were inspired with a degree of phrensy to deliver the holy sepulchre, and the holy land, from the hands of infidels; and the ambitious designs of the Pope, supported by the whole Western church, to extend the dominion of Christianity over both the religion and the empire of Mahomed; these circumstances inflamed most of the princes of Europe with an eager desire of signalizing themselves in a war, from which they had the prospect, not only of the highest reputation and glory in this world, but of much more transcendent rewards in the next. Such motives were peculiarly calculated to work upon the gallant, thoughtless, disinterested character of Robert, the duke of Normandy; who, in the same proportion as he was deficient in political capacity,

capacity, seems to have excelled in military accomplishments, and to have been possessed with all those religious sentiments, and those romantic notions of military honour, which were fashionable in that age. Embarking, therefore, in the first crusade, and being under the necessity of raising money to equip him for that extraordinary enterprise, he was prevailed upon to mortgage, to his brother the king of England, the duchy of Normandy, for the paltry sum of ten thousand marks. William Rufus took no part in that war; and seems to have beheld it with perfect indifference. He was upon bad terms with the clergy, whose resentment he incurred by the contributions which he levied from them; and he has, partly, we may suppose, for that reason, been branded even with irreligion and profaneness. His covetous disposition allowed him to entertain no scruple in taking advantage of his brother's necessities; and, being immediately put in possession of Normandy, his authority, by this extension of territory, and by the distant occupation thus given to Robert, was more firmly established.

This monarch, after a reign of thirteen years, having been killed accidentally, by an arrow aimed at a wild beast, was succeeded by his younger brother, Henry; who immediately seized upon the treasure of the late king, and obtained possession of the throne. The duke of Normandy was at this time in Syria, where he had gained great reputation by his valour. It was to be expected, that, as soon as he should be informed of these transactions, he would take vigorous measures for supporting his title to the crown of England. Few of the English princes have appeared at their accession to be surrounded with greater dangers and difficulties

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difficulties than Henry the First; but his capacity enabled him to encounter them with firmness, and to extricate himself with dexterity.

During many of the reigns that succeeded the Norman conquest, we find that the demands of the nobility, in their disputes with the sovereign, and the complaints of such as were discontented with the government, were pretty uniformly confined to one topic, "the restoration of the laws of Edward the Confessor." But what particular object they had in view, when they demanded the restoration of those laws, it is difficult to ascertain. That they did not mean any collection of statutes, enacted or published by the last of the Saxon princes, is now universally admitted; and it seems to be the prevailing opinion, that their demand related to the system of common law established in England before the Norman conquest. From what has been observed concerning the advancement of the feudal system in the reign of William the First, it appears evident, that the nobility had in view the recovery of the allodial property, and the independence, which they had formerly enjoyed. They saw with regret, we may easily suppose, the late diminution of their dignity and influence; and submitted with reluctance to the military service, and to the other duties incumbent on them as vassals of the crown. The feudal incidents, which were levied by the crown-officers, and of which the extent was not ascertained with accuracy, were, in particular, the source of much vexation, and gave occasion to many complaints. Of these complaints the success was generally proportioned to the difficulties in which the sovereign was involved, and the necessity he was under of purchasing popularity by a redress of grievances.

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As Henry the First was exposed to all the odium attending an open and palpable usurpation; and was threatened with an immediate invasion from the duke of Normandy, the acknowledged heir of the crown; he endeavoured to secure the attachment of his barons by yielding to their demands; and, in the beginning of his reign, he granted them a public charter of their liberties; by which the encroachments of prerogative made in the reign of his father, and of his brother, were limited and restrained. When we examine this charter, the first of those that were procured from the English monarchs after the Norman conquest, we find that, besides containing a clause with respect to the privileges of the church, it relates principally to the incidents of the feudal tenures.

One of the most oppressive of these was *wardship*; by which the king became the guardian of his vassals, in their minority, and obtained the possession of their estates during that period. It is probable that this important privilege had not, in the case of crown-vassals, been yet fully established; since the guardianship of them is, in the charter of Henry the First, relinquished by the king, and committed to the nearest relations\*.

The *relief*, or composition, paid by the heir of a vassal, in order to procure a renewal of the investiture, was not given up by the sovereign; but the extent of this duty appears to have been settled, with a view of preventing oppression or dispute in particular cases†.

The incident of *marriage*, by which, in after times, the superior was entitled to a composition, for allowing his

\* The charter of Henry I. published by Blackstone.

† Ibid.

vassals

vassals the liberty of marrying, seems, by this charter, to have extended no farther than the privilege of hindering them from forming, by intermarriages, an alliance with his enemies\*.

Upon the whole, the parties appear to have intended, in this famous transaction, to compound their differences. The feudal superiority of the crown is permitted to remain; while the nobles are, on the other hand, relieved from some of the chief inconveniences which had resulted from it; and, after the regulations particularly specified, the charter contains a general clause, in which the king promises to observe the laws of Edward the Confessor, with such amendments as William the First, with the advice of his barons, had introduced. Copies of this deed were sent to all the counties of England; and deposited in the principal monasteries, in order to preserve the memory of an agreement, by which the prerogative of the crown, and the rights of the people, in several important articles, were ascertained and defined.

The popularity which Henry acquired by these prudent concessions, enabled him to defeat the ill-concerted enterprise of the duke of Normandy; who, becoming the dupe of his brother's policy, was persuaded to resign his present claim to the crown, in consequence of an agreement similar to that which had formerly been made with William Rufus, that, upon the death of either of the two princes without issue, the survivor should inherit his dominions. Not contented with the quiet possession of England, Henry soon after invaded Normandy; gained a complete victory over Robert, and reduced the whole country into subjection.

\* The charter of Henry I. published by Blackstone.

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The duke himself, being taken prisoner, was carried over to England, and detained in custody during the remainder of his life, which was eight and twenty years. It is added by some authors, that he lived most part of this time in utter blindness; having, on account of an attempt to make his escape, been condemned to lose his eye-sight. The character of these two brothers appears to exhibit a striking contrast, in the virtues of generosity and private affection, as well as in activity and talents for public affairs; and the unfortunate duke of Normandy was no less distinguished by his superiority in the former, than by his inferiority, or rather total deficiency, in the latter.

During a reign of thirty-five years, Henry conducted the administration of government, with constant moderation, and with uninterrupted prosperity. He was attentive to the grievances of his people, vigilant in the distribution of justice, and careful to levy no exactions without consent of the national council. From the progress of ecclesiastical usurpation, he was involved in disputes with the church; but in the course of these he conducted himself with such address, as not only to avoid the resentment, but, in the issue, to become even the favourite of the clergy. His character has, of consequence, been highly celebrated: at the same time, when regarded only in a public view, it seems to merit all the praises with which it has been transmitted to posterity.

Henry left no legitimate sons; and only one daughter, Matilda; who had been first married to the emperor, and afterwards to the earl of Anjou, by whom she had children. Setting aside the consideration that her father was an usurper, she had, according to the rules of succession in that period, by which females were beginning to inherit

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landed estates, the best title to the crown; but a great part of the nobility were in the interest of Stephen, a younger son of the count of Blois, and grandson, by a daughter, of William the Conqueror. This nobleman, who had long resided in England, and was distinguished by his popular manners, had procured many partizans; and was probably thought the fitter person to wield the sceptre\*. After obtaining possession of the sovereignty, he immediately called a parliament at Oxford, in which he granted a charter, confirming all the privileges contained in that of his predecessor; and in the presence of the assembly he took an oath to maintain them; upon which the bishops and peers recognized his authority, and swore fealty to him†. The policy of this monarch was not equal to his bravery. During the long contest in which he was engaged with Matilda, and her eldest son, Henry, he was generally unfortunate; and, in the end, was obliged to yield the reversion of the crown to the latter.

Henry the Second, who succeeded, in right of his mother, but who irregularly mounted the throne in her life-time, had excited sanguine expectations of a prosperous and brilliant reign. To the early display of great activity and abilities, he joined the possession of more extensive dominions than had belonged to any English monarch. Upon the continent he was master of Normandy, Britany, Anjou, Guienne, and other territories, amounting to more than a third of the whole French monarchy. He was, at the same time, a descendant, though not the lineal heir, of the Anglo-Saxon monarchs; his grandmother, the wife of

\* Daniel's Hist.

† Ibid. Blackstone, History of the Great Charter.

Henry the First, being the niece of Edgar Atheling; a circumstance which contributed not a little to conciliate the affection of the English. Notwithstanding these advantages, his administration, though full of vigour, was clouded with misfortunes. Having conceived the design of repressing the incroachments of the church, and wishing to execute this in the smoothest and most effectual manner, he promoted to the see of Canterbury his principal favourite, Thomas a Becket, by whose assistance he expected that the direction of his own clergy would be infallibly secured. This prelate, however, happened to possess a degree of ambition, not inferior to that of his master; and no sooner found himself at the head of the English church, than he resolved to dedicate his whole life to the support of ecclesiastical privileges, and of the papal authority.

The particulars of that controversy, which terminated so unfortunately, and so disgracefully, to the king, are known to all the world. The greatest monarch in Europe, reduced to the necessity of walking three miles barefooted, to the tomb of *Saint Becket*; prostrating himself before that shrine, and lying all night upon the cold pavement of the cathedral, in prayer, and with demonstrations of the deepest penitence, for having offended a man from whom he had received the highest provocation; and, after all, submitting to be scourged by the prior and monks of the neighbouring convent; besides yielding up implicitly all those points which had been the original cause of the contest: such an unusual and humiliating spectacle cannot fail to excite singular emotions; and it is believed that few readers can peruse this part of our history without visible marks of indignation.

That

That ecclesiastical tyranny is more extensively mischievous than civil, is indisputable; and that the former should therefore raise greater indignation than the latter, is reasonable. There may be ground for suspecting, however, that our feelings, in the present instance, proceed from a natural bias or prejudice, more than from any such rational or liberal views. The ambition of St. Becket, though accompanied with superior steadiness and intrepidity; and though it may be considered as a purer principle of action, by pursuing the aggrandisement of his own order more than of himself; yet is less calculated to dazzle the imagination, and to seize our admiration, than that of a Cæsar or an Alexander, who makes his own will the law of his conduct, and who scruples not to tread upon the necks of his people.

Beside the feudal incidents formerly mentioned, which were a sort of rights reserved by the superior, upon his granting fiefs in perpetuity, there was another pecuniary payment, which grew up in course of time, from the regular duty of military service. As, in many cases, the performance of this duty became inconvenient for the vassal, he was led to offer a sum of money in place of his personal attendance in the field; and such a composition was generally acceptable to the sovereign; who, by means of it, was enabled to hire a soldier more perfectly subject to his direction. The sum payable by the vassal in place of military services, the extent of which was at first determined by an agreement with the king in each case, was denominated a *scutage*. In England, the practice of levying scutages became very general in the time of Henry the Second; when the connexions of the sovereign with France gave rise to more expensive enterprizes than had formerly

formerly been customary; and consequently induced the crown-vassals more frequently to decline their personal attendance.

In this reign the conquest of Ireland, as it is called, was begun and completed. As that island had never been conquered, or even invaded, by the Romans, it retained, with its independence, a total ignorance of those arts, and of that civilization, which every where accompanied the Roman yoke. It seems, on the other hand, to have escaped, in a great measure, the fury of the Saxons, Danes, and other Northern invaders; who never penetrated into that country, but only committed occasional depredations upon the coasts, where they formed some small settlements, and built several towns. Thus, while the greatest part of Europe was, for several centuries, thrown into convulsions by the repeated irruptions of the German or Scythian nations, Ireland was, by reason of its situation, exposed to little disturbance or commotion from any foreign enemy; and the inhabitants were seldom engaged in any military enterprises, but such as arose from their own private quarrels and depredations. It is therefore highly probable, that, for some time after that country was first inhabited, and while the several families or petty tribes, to whom by its fertility it afforded an easy subsistence, were not much crowded together, they enjoyed more tranquillity than the other barbarians of Europe, and, of consequence, were less counteracted and restrained in those exertions of generosity and friendship, to which, among people who live in small societies, and are strangers to industry, and to the concomitant habits of avarice, there are peculiar incitements. That they might, upon this account, acquire a considerable share of that refinement which is attainable in the pastoral ages, it

it is natural to suppose; and that they actually did so, the specimens of Celtic poetry, lately published, which have been claimed respectively by the Irish and by the inhabitants of the West Highlands of Scotland, both of whom may, in this case, be considered as one people, appear incontrovertible evidence. The authenticity of these publications has, indeed, been called in question; but it would require an equal degree of scepticism to doubt, that the groundwork of them is genuine, as it would of credulity to believe that they are the original production of any modern publisher.

According as Ireland became gradually more populous, a greater number of families came to be united in particular principalities; the leaders of which being actuated by larger views of ambition, found more frequent pretences for quarrelling with each other; and their subjects or followers, being thus involved in more numerous acts of hostility, or in such as were productive of greater violence and outrage, the manners of the people in general were, of course, rendered more ferocious. The whole island came at length to be reduced into four or five extensive districts, under so many different sovereigns; one of which frequently claimed a sort of authority or pre-eminence over all the rest.

After the English monarchy had come to be connected with the continent of Europe, and to interfere in its transactions, it was natural for the king of England to entertain the ambition of adding to his dominions a country so commodiously situated as Ireland, and which appeared to be so little in a capacity of making resistance. Henry the Second is accordingly said to have taken some steps for executing a project of this nature, when application was made to him  
for



for protection, by Dermot the king of Leinster, who had been driven out of his dominions. In virtue of a bare permission from the king of England, two needy adventurers, Fitzstephen and Fitzgerald, and afterwards, Richard surnamed Strongbow, likewise a man of desperate fortune; to whom the two former acted in a kind of subordination; landed with a few followers in Leinster, defeated any force that was brought in opposition to them, besieged and took several towns, and formed a settlement in the province. Upon receiving information of their progress, Henry, inflamed, as it should seem, with jealousy of their success, hastened immediately to take possession of the territory which they had subdued; and coming over to Ireland, received the submission of several chiefs or princes of the country, who, dreading the effects of his power, were anxious to avoid any contest with him.

Neither Henry himself, nor his successors for several centuries, appear to have derived any substantial benefit from this acquisition. Their authority was confined to that narrow district inhabited by the English; and even *there* was more nominal than real; for the English inhabitants, harassed by continual inroads from their neighbours, and receiving a very uncertain and casual support from England, were, on many occasions, tempted to throw off their allegiance, and were seduced to imitate the barbarous manners and practices of the natives.

Henry, in the latter part of his life, was rendered unhappy by domestic misfortunes. A conspiracy was formed against him, by his queen and sons, which became the source of repeated insurrections, accompanied with several very formidable invasions from the neighbouring powers.

Though

Though the king was successful in repressing these disorders, and in defeating all his enemies; yet the obstinacy with which his children persisted in their unnatural attempts, appears to have impressed his mind with deep sentiments of melancholy and dejection. From the difficulties, at the same time, with which he was surrounded, he found it highly expedient to court the good-will of his subjects, not only by a careful attention to the police of the kingdom, and by an equal distribution of justice, but by granting a new charter in the same terms with that of Henry the First\*.

Richard the First, who succeeded his father, was entirely ingrossed by the love of military glory; and the short period, during which he held the reins of government, was, for the most part, employed, either in preparations for a magnificent crusade, the fashionable achievement of that age, or in oppressive exactions, to relieve him from the burdens which he had incurred by that unfortunate enterprise.

The character of John, his brother and successor, is universally known, as a compound of cowardice, tyranny, sloth, and imprudence. This infatuated king was involved in three great struggles, from which it would have required the abilities of his father, or of his great grandfather, to extricate himself with honour; but which, under his management, could hardly fail to terminate in ruin and disgrace.

It is observed by Mr. Hume, with his usual acuteness, that the extensive territories which the kings of England, at this period, possessed in France, were the source of

\* Blackstone, History of the Great Charter.

much less real than apparent strength; and that, from their situation, they were filled with the seeds of revolt and disobedience. In the ordinary state of the feudal tenants, the vassals of the nobility were much more attached to their immediate superior, by whom they were most commonly protected, and with whom they maintained an intimate correspondence, than with the sovereign, who lived at a distance from them, and with whom they had little connexion. The power of the king, therefore, depended, for the most part, upon the extent of his own demesnes; and in every quarrel with his nobles, it was to be expected that all their vassals would take party against him. But in the dominions which the king of England held in France, these circumstances were completely reversed; and his immediate vassals, by their situation, were less capable, on any emergency, of receiving protection from him, than from the French monarch, their paramount superior: not to mention, that they regarded the king of England as a foreign prince, whose interest was commonly very different, and sometimes diametrically opposite to that of their native country. Their affections therefore were gradually alienated from their immediate superior; and transferred to their sovereign; who, it was natural to suppose, might, some time or other, availing himself of his advantageous situation, be enabled to wrest those dominions from his rival. This accordingly happened in the beginning of the present reign: as John was advanced to the throne in preference to Arthur, the son of his elder brother, and consequently the lineal heir; and as he had incurred great odium in a war with that prince, whom he defeated, and was afterwards believed to have murdered; Philip Augustus, at that time king of France, seized the opportunity of interfering

in a dispute, which afforded so fair a prospect of acquiring popularity, as well as of promoting his interest. Having called a national council, he procured a declaration, that the king of England, by his behaviour, had forfeited Normandy, and the other territories which he held in France; and in the greater part of those territories, this decree, from the concurrence of the inhabitants, co-operating with the power of the French crown, was easily carried into execution.

This disaster was followed by a contest with the Roman pontiff, concerning the right of electing the archbishop of Canterbury; in which John was, if possible, still more unsuccessful. In order to remove the papal excommunication which had been inflicted upon him, he was laid under the necessity, not only of abandoning the points in dispute, but of surrendering his kingdom to the pope, and submitting to hold it as a feudatory of the church of Rome.

The contempt which this abject submission of their sovereign could not fail to excite in the breast of his subjects, together with the indignation raised by various acts of tyranny and oppression of which he was guilty, produced at length a combination of his barons, who demanded a redress of grievances, and the restoration of their ancient laws. As this appeared the most favourable conjuncture which had occurred, since the Norman conquest, for limiting the encroachments of prerogative; the nobility and principal gentry were desirous of improving it to the utmost; and their measures were planned and conducted with equal moderation and firmness. The king attempted, by every artifice in his power, to frustrate their designs. He endeavoured by menaces to intimidate them; and, by delusive promises, to lull them asleep, in order to gain time

for breaking their confederacy. When all other expedients proved ineffectual, he made application to the pope as his liege-lord; and called upon his holiness to protect the rights of his vassal. The barons were neither to be deluded nor terrified from the prosecution of their purpose. Finding that their petitions were disregarded, they rose up in arms, and proceeded to actual hostilities. The number of their adherents was daily increased; and the king, who retired before them, was deserted by almost all his followers; till at last there were only seven lords who remained in his retinue. All further opposition, therefore, became impracticable. At Runnemede, a large meadow between Windfor and Staines; a place which has been rendered immortal in the page of the historian and in the song of the poet; was held that famous conference, when the barons presented, in writing, the articles of agreement upon which they insisted; and the king gave an explicit consent to their demands\*. The articles were then reduced into the form of a charter; to which the king

\* ———— "Hail Runny mead!  
 "Illustrious field! like Marathon renowned!  
 "Or Salamis, where freedom on the hofts  
 "Of Persia, from her radiant sword shook fear  
 "And dire discomfiture! Even now I tread  
 "Where Albion's ancient barons won the pledge  
 "Of independence. ————  
 "O gallant chiefs! whether ye ride the winds,  
 "Bound on some high commission to confound  
 "The pride of guilty kings; or, to alarm  
 "Their coward spirits, through the realms of night  
 "Hurl the tremendous comet, or in bowers  
 "Of blooming paradise enjoy repose;  
 "I ween the memory of your patriot-zeal  
 "Exalts your glory, and sublimates your joys."

affixed

CHAP. I. PROGRESS OF FEUDAL SYSTEM, &c. 285  
 affixed his great seal; and which, though it was of the same nature with the charters obtained from the preceding monarchs, yet, as it was obtained with difficulties which created more attention, and as it is extended to a greater variety of particulars, has been called, by way of distinction, *the great charter of our liberties*.

As the feudal superiority of the crown, over the nobles, together with the various casual emoluments, or *incidents*, arising from that superiority, had now been established, with little or no interruption, ever since the reign of William the Conqueror; it would probably have been a vain project to attempt the abolition of it. The chief aim of the nobility, therefore, in the present charter, was to prevent the sovereign from harrassing and oppressing them by the undue exercise of those powers, the effects of their feudal subordination, with which he was understood to be fully invested. The incidents of wardship, relief, and marriage, notwithstanding the provisions in the charter of Henry the First, had continued the subject of much controversy; for the removal of which, the nature and extent of those feudal perquisites were more particularly defined and explained. With regard to the practice of levying *aids* and *scutages*, it was provided that the former should not be demanded, unless in the three cases established by the feudal customs, to redeem the sovereign from captivity, to portion his eldest daughter, or to make his eldest son a knight; and that the latter should not be imposed in any case without the authority of parliament\*.

The jurisdiction exercised by the king, as a feudal supe-

\* Blackstone's edition of king John's Magna Charta, § 2, 3, 4, 6, 12, &c.

rior,

rior, was another source of oppression, for which a remedy was thought requisite; and several regulations were introduced, in order to facilitate the distribution of justice, to prevent the negligence, as well as to restrain the corruption, of judges: In particular, it was declared, that no count or baron should be fined unless by the *judgment of his peers*, and according to the quality of the offence\*.

While the barons were thus labouring to secure themselves against the usurpations of the prerogative, they could not decently refuse a similar security to their own vassals; and it was no less the interest of the king to insist upon limiting the arbitrary power of the nobles, than it was their interest to insist upon limiting that of the crown. The privileges inserted in this great transaction were, upon this account, rendered more extensive, and communicated to persons of a lower rank, than might otherwise have been expected. Thus it was provided that justice should not be *sold*, nor unreasonably *delayed, to any person* †. That no freeman should be imprisoned, nor his goods be distrained, unless by the *judgment of his peers*, or by the law of the land ‡; and that even a villain should not, by any fine, be deprived of his carts and implements of husbandry §.

It is worthy of notice, however, that though this great charter was procured by the power and influence of the nobility and dignified clergy, who, it is natural to suppose, would be chiefly attentive to their own privileges; the interest of another class of people, much inferior in rank, was not entirely overlooked: I mean the inhabitants of the

\* Blackstone's edition of king John's Magna Charta, § 21.

† Ibid. § 40. ‡ Ibid. § 39. § Ibid. § 20.

trading

trading towns. It was declared, that no aid should be imposed upon the city of London, unless with consent of the national council; and that the liberties and immunities of this, and of all the other cities and boroughs of the kingdom, should be maintained\*. To the same class we may refer a regulation concerning the uniformity of weights and measures, and the security given to foreign merchants, for carrying on their trade without molestation. The insertion of such clauses must be considered as a proof that the mercantile people were beginning to have some attention paid to them; while the shortness of these articles, and the vague manner in which they are conceived, afford an evidence equally satisfactory, that this order of men had not yet risen to great importance.

In order to diffuse the knowledge of the charter over the kingdom, and to ensure the execution of it, a number of originals was made, and one of these was lodged in every county, or at least in every diocese; twenty-five barons were chosen, as guardians of the public liberties, and invested with power suitable to the discharge of so important a trust; and the nobles farther required, that, in the mean time, the city of London should remain in their hands, and that the Tower should be put in their possession. The king consented to these measures; though nothing could be farther from his intentions, than to fulfil the conditions of the charter. No sooner had he obtained a bull from the pope annulling that deed, and prohibiting both the king and his subjects from paying any regard to it, than, having secretly procured a powerful supply of

\* Blackstone's edition of king John's Magna Charta, § 13.

foreign

foreign troops, he took the field, and began without mercy to kill and destroy, and to carry devastation throughout the estates of all those who had any share in the confederacy. The barons, trusting to the promises of the king, had rashly disbanded their followers; and being in no condition to oppose the royal army, were driven to the desperate measure of applying to Lewis, the son of the French monarch, and making him an offer of the crown. The death of John, in a short time after, happened opportunely to quiet these disorders, by transmitting the sovereignty to his son Henry the Third, who was then only nine years of age.

Under the prudent administration of the earl of Pembroke, the regent, the young king, in the first year of his reign, granted a new charter of liberties; at the same time that the confederated barons were promised a perpetual oblivion for the past, in case they should now return to their allegiance.

It is observable, that a copy of this deed, with some variations, was also transmitted to Ireland, for the benefit of the English inhabitants of that island; who, it was justly thought, had an equal right to all the privileges enjoyed by their fellow-subjects in Britain.

The following year, when peace was concluded with Lewis, and the public tranquillity was restored, this charter was renewed, with additions and improvements; and, as the charter of king John contained one or two clauses relating to the forest laws, these were now extended, and made the subject of a separate instrument, called the *Charter of the Forest*. The two deeds, into which the original great charter came thus to be divided, were again renewed, with

with some variations, and confirmed, in the ninth year of Henry Third, when the king was, by a papal bull, declared of age, and began to hold the reins of government.

The charter of the forest, how insignificant soever the subject of it may be thought in the present age, was then accounted a matter of the highest importance. The Gothic nations, who settled in the Roman empire, were, all of them, immoderately addicted to the diversion of hunting; insomuch that this may be regarded as a peculiarity in their manners, by which they are distinguished from every other people ancient or modern\*. It arose, in all probability, from their having acquired very extensive landed estates, a great part of which they were not able to cultivate; and from their continuing, for many centuries, in that rude and military state, which disposed them to bodily exercise; while it produced such a contempt of industry, and profound ignorance of the arts, as were the sources of much leisure and idleness. The free people, or gentry, commonly allotted to hunting the most part of the time in which they were not engaged in war; and the vassals of every chieftain, or feudal superior, were usually his companions in the former occupation as well as in the latter. Every independent proprietor, however, endeavoured to maintain the exclusive privilege of killing game upon his own grounds; and, having set apart, for the purpose of this amusement, a large portion of uncultivated land, under the name of a *forest*, he denounced severe penalties against his vassals, as well as against every other person, who should hunt upon it without his consent. The sovereign,

\* Muratori, *Antiq. Med. Ev.* tom. ii. diss. 23.—The Romans generally employed their slaves in hunting. *Ibid.*

in each kingdom, enjoyed the same privilege, in this respect, with the other allodial proprietors; though it appears to have been originally confined within the limits of his own demesnes. The completion of the feudal system, however, by reducing the great lords to be the vassals of the crown, rendered the sovereign the ultimate proprietor of all the lands in the kingdom; and the privilege of hunting, being thus considered as a branch of the royal prerogative, was not understood, without a special grant in their charter, to be communicated to his vassals. Upon the same principle that the king was alone entitled to kill game within his dominions, he assumed the exclusive privilege of erecting lands into a forest; by which they were appropriated to the diversion of hunting: at the same time, for preserving the game in the royal forests, a peculiar set of regulations came to be established; and particular officers and courts of justice were appointed, for executing such regulations, and for trying offences committed against them.

The diversion of hunting became still more fashionable, and was carried to a greater height, in England, than in the countries upon the continent of Europe. The insular situation of Britain enabled the inhabitants in a great measure to extirpate the fiercer and more hurtful species of wild animals; so as to leave no other but those which, placing their whole safety in flight, directed the attention of the people to the pleasure merely of the chase. Hunting, therefore, in Britain, came to consist in a long and intricate pursuit, admitting the display of much art and skill; while, upon the continent, it was often a sort of combat with wild animals, requiring only a momentary exertion of strength and courage, or at most, of military dexterity. As the inhabitants of this island were, besides,

less

less engaged in distant wars than the other European nations, they had, upon that account, more leisure to employ themselves in rural sports. It has farther been alledged, that Britain was anciently famous for its breed of flow-hounds, a species of dogs peculiarly fitted for the improvement of the chase; but whether this ought to be regarded as one cause of the national propensity to this diversion, or rather as the effect of it, there may be some reason to doubt. It is more probable that the English were led early to cultivate the breed of flow-hounds, because they were much addicted to that mode of hunting which required those animals, than that this kind of dogs, from something unaccountable in the nature of our soil and climate, were the original and peculiar growth of our country\*.

We may remark, by the way, that the English manner of hunting, and their fondness for that sport, has been the cause of another peculiarity, their passion for horse-racing. When hunting came to consist entirely in a pursuit, there was a necessity that the company should, for the most part, be on horseback; and when different sportsmen were engaged in the same chase, they had frequently occasion to vie with one another in the swiftness of their horses; which naturally produced a more formal trial, by running in a stated course; while the improvement of this latter diversion excited the people to cultivate that breed of race-horses which is now reckoned peculiar to the country.

\* That England was anciently famous for its breed of flow-hounds, appears from Strabo, c. 4. The French, under the kings of the Merovingian race, were accustomed to procure hunting dogs from England. Velly's Hist. vol. i.

During the whole period of the Anglo-Saxon government, the great lords, who possessed allodial estates, appear to have enjoyed the privilege of hunting upon their own ground, independent of the sovereign\*. But, in consequence of that feudal superiority over the nobles, which was acquired by the crown upon the accession of William the First, it became a maxim, that the killing of game was a branch of the royal prerogative, and that no subject had any right, either to possess a forest, or even to hunt upon his own estate, unless by virtue of a charter from the crown.

In this part of the prerogative, William the Conqueror, and his immediate successor, are said to have committed great abuses. As those princes were excessively addicted to the amusement of hunting, they laid waste very extensive territories, in different parts of England, in order to convert them into forests; having, for that purpose, demolished many houses, and even villages, and expelled the inhabitants. New and savage penalties were inflicted upon such as encroached upon the king's game, or committed any trespass in his forests; and the laws upon this subject were executed in a manner the most rigorous and oppressive.

It may, indeed, be suspected that these abuses have been somewhat exaggerated. The extension of the prerogative, with respect to the privilege of hunting, must

\* By a law of Canute the Great, whose authority was more extensive than that of his predecessors, the right of the nobles to protect the game upon their own grounds seems to be laid under restrictions. The words are, "Volo ut omnis liber homo, pro libito suo, habeat venerem, sive viridem, in planis suis super terras suas, sine chacea tamen, et devitent omnes meam, ubicunque eam habere voluerit."

have

have been highly offensive to the nobles; and could hardly fail to excite loud complaints, together with some degree of misrepresentation, against the proceedings of the crown. The erection of great forests, even though these had been confined within the demesnes of the king, was likely of itself to occasion much popular clamour; as in our own times, the change of a large estate from tillage to pasturage, by which many tenants are deprived of their livelihood, is frequently the source of much odium and resentment. There is reason, however, to believe, that these exertions encroached, in some cases, upon the private property of individuals, and were, therefore, no less unjust than they were unpopular.

The charter of the forest contained a variety of salutary regulations, for mitigating the severity of the laws upon that subject, for the rectification of the former abuses, and for preventing the future encroachments of the sovereign. In the proceedings against those who trespassed upon a forest, a greater degree of regularity was introduced; and capital punishments were, in all cases, abolished. The invasions of private property, by erecting a royal forest, except upon the demesnes of the crown, were prohibited; and it was ordained that all the lands, belonging to particular persons, which, from the reign of Henry the Second, had been included within the boundaries of a forest, should be *disafforested*, and restored to the owner\*.

The long reign of Henry the Third, from the feeble character of that monarch, and from the injudicious, the inconstant, and the arbitrary measures which he pursued, according to the different favourites by whose counsel he

\* See the Charter published by Blackstone.

happened

happened to be governed, was filled with insurrections and disorders; and in the latter part of it, the rebellion conducted by the daring ambition and great abilities of Simon Montfort, the earl of Leicester, had reduced the sovereign to the most desperate situation, and threatened to deprive him of his crown; when his enemies were unexpectedly and completely defeated, by the intrepidity, steadiness, and good fortune, of his son Edward. During the course of these commotions, Henry, in order to appease his barons, granted, more than once, a renewal of the great charter, and the charter of the forest. He also swore, in the most solemn manner, to preserve them inviolable; an oath to which, after he was relieved from the present embarrassment, he appears to have shewn little regard.

We may here take notice, though it falls beyond the period which we are now considering, that another solemn confirmation of these charters was afterwards obtained, in the vigorous and successful reign of Edward the First.

1. When we take a view of these great transactions, and endeavour to estimate the degree of attention which they merit, their number, their similarity, and the long intervals of time at which they were procured, are circumstances which cannot be overlooked. Had one charter only been granted by the sovereign, on a singular occasion, it might well be supposed to have arisen from a concurrence of accidents, and from partial views. Instead of expressing the opinions entertained by the king and his people, concerning the rights of either, it might, in that case, have been the effect of a mere casual advantage, which the one party had gained over the other; and, so far from displaying the ordinary state of the government at that period, it might have

have exhibited the triumph and injustice of a temporary usurpation. But those important stipulations, not to mention the confirmations of them in a later period, were begun and repeated under the reigns of six different monarchs, comprehending a course of about two hundred years; they were made with princes of extremely different characters, and in very opposite situations; and though, by the insertion of different articles, those deeds were gradually expanded, and accommodated to the circumstances of the times, yet their main object continued invariably the same; to limit those abuses of prerogative, which, from the nature of the monarchy, were most likely to be committed. Taking those charters, therefore, in connexion with one another, they seem to declare, in a clear and unequivocal manner, the general and permanent sense of the nation, with respect to the rights of the crown; and they ascertain, by express and positive agreement between the king and his subjects, those terms of submission to the chief magistrate, which, in most other governments, are no otherwise explained than by long usage, and which have therefore remained in a state of uncertainty and fluctuation.

2. It seems to be a common opinion, that, by these charters, the crown was deprived of many of those powers which had been assumed by William the Conqueror, or by his son William Rufus, and the constitution was brought nearer to that equal balance, which it had maintained under the direction of the Saxon princes. In particular, by the charter of king John (for the preceding charters have been frequently overlooked) it has always been supposed that the bounds of the prerogative were greatly limited. But upon examination it will be found, that this opinion is contrary to



to the real state of the fact. During the whole period which we are now considering; that is, from the Norman conquest to the time of Edward the First; while the barons were exerting themselves, with so much vigour, and with so much apparent success, in restraining the powers of the crown, those powers were, notwithstanding, continually advancing; and the repeated concessions, made by the sovereign, had no farther effect than to prevent his authority from encreasing so rapidly as it might otherwise have done. For a proof of this we can appeal to no better authority than that of the charters themselves; from which, if examined according to their dates, it will appear, that the nobility were daily becoming more moderate in their claims; and that they submitted, in reality, to a gradual extension of the prerogative; though, by more numerous regulations, they endeavoured to avoid the wanton abuses of it. Thus, by the great charter of Henry the Third, the powers of the crown are less limited than by the charter of king John; and by this last the crown-vassals abandoned some important privileges with which they were invested by the charter of Henry the First.

In the charter of Henry the First, *the incident of wardship*, the severest and most oppressive of all the feudal incidents, is relinquished by the sovereign; and, according to the same charter, the *incident of marriage* extended no farther than to prevent the vassals of the crown from marrying any woman with whose family the superior was at variance. But, in the reign of king John, the incident of wardship had taken such root, that the crown vassals no longer thought of disputing the continuance of it; and that of marriage had been so much enlarged, as to imply a right in the superior to prohibit his vassals from marrying with-

out

out his consent, and even to require that they should marry any woman whom he presented to them. In the charter of this monarch, therefore, the former incident is understood to be completely established, and some regulations are made to prevent abuses in making it effectual. With regard to the latter, it is provided that the heirs of a vassal shall be married without *disparagement*, that is, they shall not be required to contract unsuitable alliances; and, to secure them from imposition or undue influence, in a matter of this kind, it is farther stipulated, that before they contract any marriage their nearest relations shall be informed of it.

The charter of king John may, on the other hand, be compared with that of Henry the Third, in relation to *aids* and *scutages*, a sort of indirect taxes, from which a considerable part of the crown-revenue was derived. By the charter of John, the exclusive power of imposing those duties is committed to parliament; but that of Henry the Third is entirely silent upon this point; and leaves the monarch under no restraint in imposing such burdens by virtue of his own prerogative. It is true, that the former limitation upon this part of the prerogative was afterwards renewed in the reign of Edward the First\*.

What I have observed, concerning the variations in the series of great charters, does not seem applicable to the laws of the forest. The violations of private property, committed in this respect by William the First, and his successors, were too notorious to be seriously defended; and therefore, notwithstanding the general progress of monarchy, it was thought necessary to remove these abuses, and to guard against them for the future.

\* 34 Edw. I. stat. 4. cap. i.—Also 25 Edw. I. 2, 5, 6.

3. Whoever enquires into the circumstances in which these great charters were procured, and into the general state of the country at that time, will easily see that the parties concerned in them were not actuated by the most liberal principles; and that it was not so much their intention to secure the liberties of the people at large, as to establish the privileges of a few individuals. A great tyrant on the one side, and a set of petty tyrants on the other, seem to have divided the kingdom; and the great body of the people, disregarded and oppressed on all hands, were beholden for any privileges bestowed upon them, to the jealousy of their masters; who, by limiting the authority of each other over their dependants, produced a reciprocal diminution of their power. But though the freedom of the common people was not intended in these charters, it was eventually secured to them; for when the peasantry, and other persons of low rank, were afterwards enabled, by their industry, and by the progress of arts, to emerge from their inferior and servile condition, and to acquire opulence, they were gradually admitted to the exercise of the same privileges which had been claimed by men of independent fortunes; and found themselves entitled, of course, to the benefit of that free government which was already established. The limitations of arbitrary power, which had been calculated chiefly to promote the interest of the nobles, were thus, by a change of circumstances, rendered equally advantageous to the whole community as if they had originally proceeded from the most exalted spirit of patriotism.

When the commons, in a later period, were disposed to make farther exertions, for securing their natural rights, and for extending the blessings of civil liberty, they found

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it a singular advantage to have an ancient written record, which had received the sanction of past ages, and to which they could appeal for ascertaining the boundaries of the prerogative. This gave weight and authority to their measures; afforded a clue to direct them in the mazes of political speculation; and encouraged them to proceed with boldness in completing a plan, the utility of which had already been put to the test of experience. The regulations, indeed, of this old canon, agreeable to the simplicity of the times, were often too vague and general to answer the purposes of regular government; but, as their aim and tendency were sufficiently apparent, it was not difficult, by a proper commentary, to bestow upon them such expansion and accommodation as might render them applicable to the circumstances of an opulent and polished nation.

## C H A P. II.

*In what Manner the Changes produced in the Reign of William the Conqueror, affected the State of the national Council.*

THE changes in the state of landed property, arising from the completion of the feudal system, in the reign of William the First, were necessarily attended with correspondent alterations in the constitution and powers of the national council. The Saxon Wittenagemote was composed of the allodial proprietors of land; the only set of men possessed of that independence which could create a right of interfering in the administration of public affairs. The number of these, as I formerly observed, having been originally very great, was gradually diminished, according as individuals were induced, from prudential considerations, to resign their allodial property, and to hold their estates of some feudal superior. But in the reign of William the Conqueror, when the most powerful of the nobility, those who alone had hitherto retained their allodial property, became at last the immediate vassals of the crown, the ancient Wittenagemote was of course annihilated; since there no longer existed any person of the rank and character which had been deemed essential to the members of that assembly.

As, during the government of the Anglo-Saxon princes, every feudal superior had a court, composed of his vassals, by whose assistance he decided the law-suits and regulated the police of his barony; so the king, considered in the same

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 same capacity, had likewise a private baron-court, constituted in the same manner, and invested with similar powers. In that period, however, the former of these courts, being held by allodial proprietors, acknowledging no farther subjection to the king than as chief magistrate of the community, were totally independent of the latter. But in the reign of William the Conqueror, when the whole of the nobility became vassals of the crown, they were incorporated in the king's baron-court, and the jurisdiction which they exercised in their own demesne was rendered subordinate to that of the king as their paramount superior. The several districts, which had formerly been divided into so many independent lordships, were now united in one great barony, under the sovereign; and his baron-court assumed, of consequence, a jurisdiction and authority over the whole kingdom. Thus, upon the extinction of the Wittenagemote, there came to be substituted, in place of it, another court or meeting, similar to the former, and calculated for the same purposes, though constituted in a manner somewhat different. To this meeting, as the Norman or French language was now prevalent at the English court, and even employed in public deeds and legal proceedings, the name of *parliament* was given; as the meeting itself corresponded, not only to the assembly known by the same appellation in France, but to the national council of all those European countries in which the feudal system had attained the same degree of advancement\*.

\* It has been alledged, that the name of parliament was bestowed upon the English national council even in the reign of Edward the Confessor, at which time the French language began to be fashionable in England. Discourse on the English government, published by Nathaniel Bacon.

The English parliament, though its members appeared under a different description, comprehended in reality the same class of people who had been members of the ancient Wittenagemote. It was composed of all the immediate vassals of the crown; including the dignified clergy, and the nobility, whether of English or of French extraction. The wealth of these persons, from the successive accumulations of property before, and in the reign of William the Conqueror, must have been prodigious. From the survey in doomsday-book it appears, that, about the end of William's reign, the immediate vassals of the crown were in all about six hundred: so inconsiderable was the number of baronies, whether in the hands of laymen or ecclesiastics, into which the whole territory of England, exclusive of Wales, and the three Northern counties, and exclusive of the royal demesnes, had been distributed\*.

Notwith-

\* The separate baronies in the different counties, including the lands in the crown demesne, amount in all to 1462. But as the same persons were often possessed of estates in many different counties, it is a matter of some labour to distinguish the exact number of separate proprietors. For example, the king himself held lands in every county except Shropshire.—Comes Moritonienſis possessed baronies in 20 counties.—Comes Eufſtachiſ, in 11.—Comes Rogerius, in 13.—Willelmus de Warenna, in 12.—Edwardus Sarisberienſis, in 9.—Willelmus filius Anſculfi, in 11.—Hunfridus Comerarius, in 9.—Comes Alanus, in 11.—Comes Hugo, in 21.—Ernulfus de Heſding, in 10.—Radulphus de Mortemer, in 13.—Epiſcopus Cantuarrenſis, in 8.—Epiſcopus Baiocenſis, in 17.—Epiſcopus Wentonienſis, in 11.—Abbatea Weſtmonaſterii, in 14.—Epiſcopus Lincolcenſis, in 9.

After a pretty accurate scrutiny, it is believed the separate crown-vassals, recorded in doomsday-book, are not above 605, though they may possibly be one or two below that number. Of these, the ecclesiastical vassals, including the different sorts of religious societies, amount to about 140. It is to be observed, however, that some of these appear to have belonged to Normandy, though they possessed lands in England.

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Notwithstanding the vassalage into which the barons had been reduced, their influence was but little impaired; and, though changed in outward appearance, they continued to maintain that authority which great landed estates will always procure. By the nature of their tenures, their property was not rendered more precarious than formerly; but merely subjected to certain burdens or exactions in favour of the king. As vassals of the crown, their dependence upon it was even slighter than that of the inferior hereditary vassals upon their immediate superior; and from their number, their distance, and their vast opulence, the king was less able to retain them in subjection. Standing frequently in need of their support and assistance, he found it highly expedient to avoid their displeasure; to consult them in matters of a public nature, and to proceed with their approbation. In their new capacity, therefore, they still assumed the privilege of controuling the abuses of administration; and in directing the great machine of government, their power was little inferior to that which had formerly been possessed by the Wittenagemote\*.

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It is evident that the power and influence of the crown-vassals, in the reign of William the Conqueror, must have been great in proportion to the smallness of their number, and the vast extent of their property.

\* That parliaments were frequently held by William the Conqueror, and by his son William Rufus, as well as by the succeeding monarchs, is indisputable. In the fourth year of William the Conqueror, the laws of Edward the Confessor were confirmed by a great national council. [R. Hoveden. Annal. Also Selden. Spicilegium in Eadmerum.] It is doubtful whether this was the same parliament which confirmed the collection of Edward the Confessor's laws, preserved by Ingulphus, the abbot of Croyland, and secretary to William the First. Selden, *ibid.*—Another parliament was held in 1070, for terminating a dispute between the archbishop of York and the bishop of Worcester—*Coram rege et dorobunice archiepiscop. Lanfranco, et episcopis, abbatibus, comitibus,*

The power of declaring peace and war was from this time, indeed, regarded as a branch of the royal prerogative. It was a principle inseparably connected with the feudal polity, that the vassals of the king, as well as those of every subordinate baron, should be liable for military service to their liege lord, and should be ready to attend him in the field whenever he chose to call upon them. To determine the particular quarrels in which he should engage, and the military enterprises which he should undertake, was his province, not theirs; and, provided their attendance was not more burdensome than their duty required, it was understood to be a matter of indifference to them, against what enemy they should happen to be employed. The discretionary power, which came thus to be assumed by the king, as the great feudal superior of the kingdom, was, at the same time, supported by the consideration of its expediency. During the numerous invasions customary in the feudal times, it was necessary, upon any sudden emergency, that the leader of a barony should take his measures upon the spot; and that, without consulting his vassals, he should

*comitibus, et primatibus, totius Angliæ.* Dr. Brady's Tracts.—Another parliament is mentioned in 1084, for changing the canons of Durham into Monks—*Presentibus omnibus episcopis et baronibus meis.* Ibid.—See also, in the same author, the instances of national councils convened by William Rufus.

The whole territory of England not having been united as the feudal barony of the king, till near the end of the Conqueror's reign, his parliament or baron-court could not, before this period, be properly invested with an authority over the whole kingdom. It is probable, however, that this circumstance was overlooked; and that, as a great part of the nobility, soon after the conquest, were become vassals of the crown, they were called, in that capacity, to the national council; while others, who still retained their allodial property, might be willing perhaps, without regarding the difference of their situation, to join in the deliberations of that assembly.

proceed

proceed to repel the enemy by force of arms. To call a council, in such a case, would be to lose the critical moment; to waste, in deliberation, the proper season for action; and, for the sake of a punctilio, to involve the whole community in utter destruction.

This may be accounted the chief difference between the Anglo-Saxon and the Anglo-Norman government. In the former, the power of making peace and war was invariably possessed by the Wittenagemote; and was regarded as inseparable from the allodial condition of its members. In the latter, it was transferred to the sovereign: and this branch of the feudal system, which was accommodated, perhaps, to the depredations and internal commotions prevalent in that rude period, has remained in after ages, when, from a total change of manners, the circumstances, by which it was recommended, have no longer any existence.

The legislative power was viewed in a different light. New regulations generally took their origin from a complaint of grievances, made to the sovereign, the great executor of the law, and accompanied with a request, that, in the future administration of government, they might be redressed. The privilege of preferring such petitions, or at least that of demanding a positive answer to them from the sovereign, was anciently appropriated to the Wittenagemote; and, upon the dissolution of that assembly, was devolved upon the Anglo-Norman parliament. In every subordinate barony into which the kingdom was divided, the vassals exercised a similar privilege with respect to the administration of their own superior. A public statute was, according to this practice, a sort of pacton or agreement between the king and his vassals; by which, at their desire,

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he promised to observe a certain rule of conduct; and in which, therefore, the consent of both was clearly implied. No such rule was ever thought of without the previous request of parliament, nor was it ever effectual to bind the parties, unless the sovereign acceded to the proposal.

The supreme distribution of justice was likewise a matter of such consequence as to require the interposition of the crown-vassals; and therefore constituted another privilege of the Anglo-Norman parliament. How this branch of business came, in ordinary cases, to be devolved upon an inferior court, with reservation of an ultimate controlling power in the parliament, will be the subject of a separate enquiry.

Taxation is properly a branch of the legislative power; since every rule that is made, with respect to the payment of taxes, is a law which directs and limits the future administration of government. This branch of legislation is in itself of greater importance, and it is more likely to be abused, than any other; because every member in the community has an interest to avoid all public burdens, and to roll them over upon his neighbours; while the chief executive officer, or whoever has the management and disposal of the revenue, is interested to squeeze as much as he can from the people. We may easily suppose, therefore, that as the vassals of the crown, after the Norman conquest, assumed the ordinary exercise of the legislative power, they would not be disposed to relinquish that peculiar branch of it, which consisted in the imposition of taxes; and there is, accordingly, no reason to doubt, that, as far as it could exist in that period, it was immediately transferred, from the Wittenagemote of the Saxons to the Anglo-Norman parliament.

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But in that age, there was little occasion for exercising this power; few taxes being then, directly at least and avowedly, imposed upon the nation. The chief support of the crown was derived from a revenue independent of the people; and when additional supplies became requisite, they were obtained, either by means of a private bargain, for a valuable consideration; or under the mask of a gift or voluntary contribution.

At a period when mercenary armies were unknown, and when the administration of justice, instead of being a burden upon the crown, was the source of emolument, the royal demesnes, which, after the accession of William the First, became prodigiously extensive, together with the profits of amerciaments and fines, and the common feudal rents and incidents arising from the estates of crown-vassals, were fully sufficient to maintain the dignity of the sovereign, and to defray the ordinary expence of government. This ancient revenue, however, was gradually improved, according to the increasing charges of government, by the addition of *scutages*, *hydages*, and *talliares*.

The first, of which an account was formerly given, were pecuniary compositions paid by the crown-vassals, in place of their military service; and, being settled, in each case, by a stipulation between the parties, had no resemblance to what is properly called a tax. It was always in the power of the vassal to insist upon such terms, with respect to this composition, as he judged expedient, or to avoid the payment of it altogether, by performing the service for which he was originally bound. The sum paid was a voluntary commutation; and therefore it must be understood that he who paid it thought himself a gainer by the bargain.

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Hydages

Hydages were due by the foccage-vassals of the crown; who, beside their constant yearly rent to their superior, were bound to supply him with carriages, and to perform various kinds of work. As these were, by their nature, somewhat indefinite, they came to be frequently exacted by the crown-officers in an oppressive manner; and, when the vassal rose to a degree of wealth and independence, he was willing to exchange them for a pecuniary payment, which might, at the same time, yield more profit to the crown. Of this payment the extent was originally fixed, like that of the scutage, by an agreement in each case between the parties.

Tallages were paid, in like manner, by the inhabitants of towns in the king's demesne. As the king protected his boroughs, and bestowed upon them various privileges, with respect to their manufactures, so he levied from them such tolls and duties as they were able to bear. According as those communities became opulent and flourishing, their duties were multiplied, and rendered more troublesome and vexatious; from which it was at length found convenient that they should be converted into a regular pecuniary assessment\*.

The trade of the country, however inconsiderable, became also the means of procuring some revenue to the sovereign. Persons engaged in this employment, standing in need of the protection of government, and being also frequently destitute of conveniences for transporting and vending their goods, were not only protected, but even

\* The name of tallage is frequently extended to every pecuniary contribution levied by the superior from his vassals.

sometimes

sometimes provided with warehouses, and with measures and weights, by the king; who, in return, demanded from them, either a part of their commodity, or some other payment suited to the nature of the benefit which they had received. A similar payment was demanded by the king upon the passage of goods from one port of the kingdom to another. To the duties which came thus to be established by long usage, was given the appellation of *customs*. Having arisen from the demands of one party, and the acquiescence of the other, they were in reality founded upon a sort of stipulation or mutual agreement.

When all these branches of revenue proved insufficient, the king, upon any extraordinary exigence, applied for an *aid*, or general contribution, from his vassals. We find that aids are enumerated among the feudal incidents; but, exclusive of the three cases formerly mentioned, whatever was contributed in this manner, appears to have been regarded in the light of a free gift; and, according to this view, came afterwards to be denominated a *benevolence*.

Though none of those duties, which were levied by the express or implied consent of parties, could with propriety be considered as taxes, they became in reality the source of much oppression and injustice. It was dangerous to refuse the sovereign, even when he demanded a thing to which he had no right. It was difficult to make an equal bargain with a person so greatly superior in power and influence. By adhering strictly to their privileges, and by incurring the resentment of the king, the people subjected to those impositions might be utterly ruined; and were, on every occasion,

occasion, likely to lose much more than the value of what was demanded from them. When the abuses, however, of which the crown was guilty in relation to these exactions, had risen to a certain height, they became the subject of general complaint, and attracted the notice of the legislature. Scutages, payable by the military vassals of the crown, came to be fixed by parliament, of which those vassals were members. After the socage tenants and the burghesses had acquired a degree of opulence, the same rule was extended to the hidages, and talliages, levied from those two orders of men. The aids, demanded promiscuously from all the different sorts of crown vassals, came to be regulated by the same authority\*. The customs, originally of little importance, were, by the gradual extension of trade, and the increasing demands of the crown, brought likewise into public view, and acquired such magnitude as to occasion the interposition of parliament. By a statute in the reign of Edward the First, it is provided that those duties shall not be levied without the "common assent of the realm †."

With respect to the manner of convening the national council, it was not immediately varied by the Norman conquest. The parliament, from the accession of William the First, was held, like the Wittenagemote in the Saxon times, either according to ancient usage, at the three stated festivals of Christmas, Easter, and Whitsuntide, or, upon par-

\* With regard to aids, and scutages, this provision is made in the charter of king John, § 12. The statutes 25 Edward I. c. 5, 6, and 34 Edw. I. contain the same regulation with respect to aids and talliages.

† 25 Edw. I. c. 7.

ticular exigencies, by virtue of a summons from the king. By degrees, however, the occasional meetings extended the subjects of their deliberation; while, on the other hand, the regular customary assemblies were frequently prevented by the disorderly state of the country. In the war between the empress Matilda and king Stephen, they met with great interruptions, and from the beginning of the convulsions in the reign of king John, were entirely discontinued. The power of calling parliaments, and consequently of putting a negative upon its meetings, was thus in all cases devolved upon the sovereign\*.

From these particulars, it is evident, that the English monarchs, after the Norman conquest, were far from possessing an absolute authority; and that the constitution, notwithstanding the recent exaltation of the crown, still retained a considerable proportion of the preceding aristocracy. As the national council, composed of the nobility or great proprietors of land, was invested with the legislative power, including that of imposing taxes, and with the power of distributing justice in the last resort, it enjoyed, of course, the right of controuling and directing the sovereign in the most important parts of administration.

From the state of the revenue, indeed, in that period, the executive power was under less restraint from the legislature than it has become in later ages. As the king had seldom occasion to solicit a supply from parliament, he was the less liable to be questioned about the disposal of his income. The people, who gave nothing to the public magistrate for defraying the expence of government, had but

\* Gardon's History of Parliament.



little incitement or pretence either to find fault with his oeconomy, or to require a strict account of his management. He managed the revenue of the kingdom, as other individuals were accustomed to manage their own estates; and the idea of a public officer, or magistrate, was apt to be sunk in that of an ordinary proprietor, to whom the crown, and the revenues connected with it, have been transmitted like a private inheritance.

It must at the same time be admitted, that abuses in the exercise of the executive power were then extremely frequent, and were often suffered to pass without animadversion or notice. The legislature had too little experience, to provide regulations for preventing the numerous instances of malversation in office that were likely to occur; judicial establishments had not yet attained such perfection as might enable them with quickness to punish the several violations of justice; nor had long usage established those equitable maxims of government, which are the common effects of polished manners, and which often supply the place of positive institutions. The conduct of the sovereign, therefore, and even that of inferior officers, in the ordinary course of administration, was in a great measure discretionary; and was no otherwise restrained, than by the fear of exciting general clamour and disturbance. But individuals might sustain much oppression before their complaints were likely to excite attention, and might be disposed, from prudential considerations, to submit to many injuries and inconveniences, rather than contend against the whole force of the crown. In this disorderly state of society, persons who preferred any request to the king, or who had even any claim of right, in which his interest was concerned,

concerned, were commonly induced to secure his favour by a present, or, if you will, by a bribe. A numerous list of those presents, which were made to the sovereign, in order to procure what was barely justice, has been collected by different authors, with a view of demonstrating the despotical nature of the Anglo-Norman government. But these instances tend only to prove the frequency of abuses, from the want of a regular polity, extending to all the departments of administration. They shew that the government was rude and imperfect, and therefore in many cases arbitrary; not that it was an absolute monarchy: that the national council was negligent and unskilful in restraining disorders; not that it was destitute of authority to limit the prerogative. This is what happens in the infancy of every political system, whatever be the peculiar plan upon which it is formed. The strong find themselves often at liberty to oppress the weak; persons of inferior station are therefore obliged to shelter themselves under the wings of a superior; and are glad to obtain, by solicitation or bribery, the quiet exercise of those rights which they are unable to maintain by any other means.

What puts this observation in a clear light is, that the abuses of the executive power, which were so frequent in the early periods of the English constitution, have since been removed by the gradual improvement of arts, and the correspondent progress of manners, without any considerable change in the distribution of the great powers of government. The outlines of the English constitution are not very different, at this day, from what they were in the reign of William the Conqueror; but the powers which were then universally acknowledged, have been since more

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minutely applied to the detail of administration; and the variations that have occurred in the modes of living, and in the condition of individuals, have been gradually accommodated to the spirit of the old institutions. The experience of the nation has led them to fill up the picture, of which a rude sketch was delineated in that early period.

C H A P.

C H A P. III.

*Of the ordinary Courts of Justice after the Norman Conquest.*

THE distribution of justice, in the last resort, was not the most brilliant or conspicuous, though it was, undoubtedly, one of the most useful departments belonging to the national council. During the latter part of the Anglo-Saxon government, this branch of business, as has been already observed, was commonly devolved upon occasional meetings of the Wittenagemote; which being called for discussing matters of inferior concern, were seldom attended by any other members than such as happened, at the time, to be retained about the king's person. But, after the Norman conquest, the changes which have been mentioned in the state of the country, contributed to produce farther alterations in the judicial establishments; and particularly, to divest more entirely the public assembly of the ordinary cognizance of law-suits. By the completion of the feudal system in France, the administration of justice in that country attained a degree of regularity which was formerly unknown; and upon the accession of William the First, to the English throne, the improvements in this branch of policy, which had been extended to Normandy, at that time a part of the French dominions, were gradually introduced into Britain. As the several districts of the kingdom, which had formerly been distracted by the feuds of their independent leaders, came

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now to be united under the feudal superiority of the crown, the decision of private quarrels by the sword was more effectually restrained; while the vigor and influence, possessed by the two first princes of the Norman race, cooperated with the natural progress of society in bringing the differences among all the inhabitants under the determination of the magistrate. From the consequent multiplication of appeals to parliament, the members of that assembly became daily less disposed to execute this part of their duty; at the same time that, from the increasing authority of the crown, their attendance was rendered proportionably less necessary. The number of crown-vassals, convened on such occasions, was therefore gradually diminished; the absence of others was more and more overlooked; and at length there was formed, out of parliament, a regular tribunal, for the sole purpose of deciding law-suits, and composed of an arbitrary number of those persons who sat in the greater assembly. The great officers of the crown, being always upon the spot, whenever a meeting of this kind was called, became its ordinary constituent members; and to these were added by the king particular persons, who, from their knowledge of law, or experience in business, were thought qualified to assist in the inferior departments of office\*.

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\* Account of this tribunal in Madox's History of Exchequer. The great officers of the king's court are made by this author to be seven in number. 1. The chief justicier. 2. The constable. 3. The marshal. 4. The seneschall or dapifer. 5. The chamberlain. 6. The chancellor. 7. The treasurer. Of these the chief justicier was originally the seneschal or high-steward. But when the primitive high-steward, who had been the chief officer of the family, came to be possessed of great ministerial powers over the whole kingdom, a deputy was appointed to manage the affairs of the household, who acquiring high rank and authority, received the appellation

This court, from the place in which it was commonly held, received the appellation of the *aula regis*. In its constitution and origin, it corresponded exactly with the *cour de roy*, which, after the accession of Hugh Capet, was gradually formed out of the ancient parliament of France; and with the *aulic council*, which, after the time of Otho the Great, arose, in like manner, out of the diet of the German empire. In Scotland we meet with a court of the same nature; and there is reason to believe that, in every European kingdom of considerable extent, the progress of the feudal system gave rise to a similar institution. In all these countries, as well as in England, it appears probable, that this tribunal was detached from the national council by connivance rather than by any positive appointment; from a disposition in the people to consult their own ease and convenience, more than from any design upon the part of the crown to limit their privileges; in short, from no pre-conceived plan of altering the constitution, but from a natural and obvious accommodation to the circumstances

tion of seneschall, or *steward of the household*, as the other was called the *steward of the kingdom*. The subordinate appointment of a steward of the household, or *comes palatii*, is also to be found in France, Germany, and other feudal countries.

The office of constable, or chief groom, had come in England, as well as upon the continent, to be divided into two branches, that of the constable and marshal; or of the groom and the smith, or farrier.

The seneschal and dapifer ought, in all probability, to have been distinguished; as in France, and of course in Normandy, the offices of steward, and butler, or cup-bearer, had been long separated.

The treasurer is supposed to have been originally the deputy of the high-steward.—But in later times was more probably that of the chamberlain, who came to have the principal charge of the revenue.

See an account of the rank and employment of these officers, in that branch of the king's court which had the management of the revenue, in the *Dialogus de Scaccario*, published by Madox, from the *black* and the *red books of Exchequer*.

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of the community; and from an immediate prospect of advantage, by facilitating the distribution of justice. As this tribunal, therefore, has been formed in a slow and gradual manner, it seems difficult, in any of the countries above-mentioned, to ascertain the precise date of its formation. In England, the institution of the *aula regis* is commonly ascribed to William the Conqueror; but this must be understood, it should seem, with relation to the first appearance of that court, as distinct from the greater meeting of parliament, and not with respect to the subsequent variations and improvements which preceded its complete establishment.

This court was held by the English monarchs, not only in their most usual place of residence, but wherever they happened to be, when there was found occasion for its interposition. It had the same extent of jurisdiction with parliament, out of which it had grown; and therefore obtained the cognizance of all ordinary law-suits, whether civil, criminal, or fiscal.

The king himself presided in the *aula regis*, whenever he thought proper to sit there as a judge; but the ordinary president of this court was the lord high steward, the principal officer of the crown; who, in rank and authority, had risen to be the second person in the kingdom; and upon whom the king, when absent from parliament, had likewise devolved the right of presiding in that assembly\*.

For some time after this tribunal had been separated from the meetings of parliament, it still consisted of all the

\* When the members of this court transacted civil and criminal pleas, they sat in the hall of the king; when they acted as a court of revenue, they sat in the Exchequer. Dial. de Scaccario. Baron Gilbert's Hist. of Chancery.

great

great officers of the crown; but according as, by the gradual extension of its authority, it had occasion to sit more frequently, the attendance even of the greater part of these members was rendered more useless, as well as inconvenient; and therefore became the less regular. The king, at the same time, acquiring higher notions of his own dignity, or finding himself more engaged in the other departments of government, ceased also to exercise the ordinary functions of a judge; so that the high steward became in a manner the sole magistrate of the *aula regis*; and, from this most conspicuous branch of power annexed to his office, was denominated the *grand justiciary*\*.

While the judicial authority of parliament was thus delegated to another court, the king exercised the chief parts of the executive power, by the assistance of a *privy-council*, composed of such barons as enjoyed his particular favour and confidence. Some institution of this nature had probably existed, at least occasionally, during the reigns of the later Saxon princes; but, after the Norman conquest, when the prerogative was considerably exalted, the privy-council,

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\* That the grand justiciary of England was originally the high steward appears indisputable. 1. That the high steward, or *maine of the palace*, in France, was anciently the officer of the crown who acquired the highest dignity and authority over the kingdom, is universally admitted. 2. In Normandy a similar officer, appointed by the duke, appears to have been chief justiciar throughout the duchy. See *Customier du Normandie*. 3. From the black and red books of Exchequer, there is distinct evidence that Robert earl of Leicester, who, in the reign of Henry the Second, was the high steward, had also the office of *grand justiciary*. *Non solum ad scaccarium verum per universum regnum PRESIDENTIS dignitatem obtinuit*. The author of this account was a cotemporary, who says he saw the great officer whom he speaks of. 4. That the high steward had by his office the right of presiding over the king's privy counsellors, and over all the officers and ministers of justice in the kingdom, appears also from an old manuscript, intitled, *Quis sit Seneschallus Anglia, et quid ejus officium*, quoted by Sir

Robert

of consequence, rose in dignity, and its interpositions became proportionably more extensive. The members of this meeting, it is probable, were nearly the same persons who, from their employment about the king's person, had usually been called to sit in the *aula regis*, after it came to be separated from the greater meeting of parliament; and even when the king and his privy-counsellors had devolved the ordinary business of that court upon a single magistrate, they still retained the cognizance of such extraordinary causes, both civil and criminal, as more immediately excited their attention. Of the causes which came, in this manner, to be determined by the king and his privy-council, and were at length, by custom, appropriated to that court, there were three different sorts.

1. When a crime was committed, for the punishment of which the common law had made no proper provision, it was thought expedient, that the criminal should not be permitted to escape from justice; but that he should be called before this extraordinary tribunal, and punished according to the nature of his offence. From the meetings

Robert Cotton and other antiquaries, whose researches upon this subject are preserved in Hearne's Collection.—See the facts collected by these authors—also Spelm. Gloss. v. *Justiciarius Capitalis*.

It is true, that among the English historians and antiquaries there is some confusion in the accounts given of the persons who held the office of high steward and of justiciary. This seems to have arisen partly from the difficulty of distinguishing the old high steward from his original deputy the steward of the household; and partly from the occasional appointments made by the sovereign of persons to preside in particular trials, who have been mistaken for permanent justiciaries. This last seems to be the great source of error in Madox.

5. That the high steward was anciently the president over the king's judges, and even of the high court of parliament, is further confirmed by the privilege of that officer, when created, in later times, to preside in the house of lords.

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of the privy-council to determine, in such uncommon and singular cases, there was formed, in after times, a regular jurisdiction, known by the name of the *star-chamber* \*.

From the nature of things, it was to be expected, that this jurisdiction would soon degenerate into tyranny and oppression. The procedure of the court, as it related to matters in which no rule had been established, was, of course, discretionary and fluctuating: at the same time that the causes which might come before it, under pretence of not being properly regulated by common law, were capable of being multiplied without end: not to mention, that, as the members of this court were created and removed at pleasure by the king, so the decisions, whenever he chose to interfere, depended entirely upon his will. These objections, however, to the jurisdiction of the star-chamber, which appear so well-founded, and which, in a future period, occasioned the abolition of that court, were not likely to be suggested upon its first establishment, when its interpositions, we may suppose, were few, and limited to cases of great necessity, and when the simplicity of the age was more disposed to regard the immediate benefit arising from any measure, than to consider the distant consequences of which, as a matter of precedent, it might possibly be productive.

2. In usual questions the rules of common law, which had been gradually established by judges in order to avoid

\* Concerning the origin of the name of star-chamber, and the original nature of that court, see Sir Thomas Smith de Repub. Angl.—Lamb. Arch.—Blackstone's Comment.—The nature of the jurisdiction anciently possessed by the star-chamber may be conceived from the sort of offences concerning which that court is directed to enquire, by the statutes 3 Henry VII. c. 1. and 21 Henry VIII. c. 20. See Coke's Inst.

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reflections,

reflections, and to prevent inconsistency of conduct, were sometimes found so extremely defective as to lay the court under the disagreeable necessity, either of refusing justice to individuals, or of pronouncing an improper decision. The king and his privy-council, upon the same principle which led them to interfere in extraordinary crimes, were induced to hear the complaints of persons who had suffered injustice from the rude and imperfect system of jurisprudence adopted by the grand justiciary; and to afford them relief by a decision according to conscience or natural equity. The interpositions derived from this source, becoming numerous, and being often attended with some difficulty, were put more immediately under the direction of the chancellor; who, as the king's secretary, was usually a man of some literature; and who, having become the clerk, or keeper of the records of the *aula regis*, was particularly conversant in matters of law, and qualified to decide in such nice and intricate cases. In what manner the decisions of this officer, who acted at first with the assistance of a committee of privy-counsellors, gave rise to the jurisdiction of the *court of chancery*, will fall more properly to be considered hereafter.

3. When the Christian clergy had acquired an extensive authority and jurisdiction in the Western part of Europe, we find that, whatever censure they may deserve for the interested policy which they practised in other respects, they had the singular merit of endeavouring every where to repress the disorder and injustice arising from the anarchy of the feudal times. The weak and defenceless, who met with insult and oppression from every other quarter, found protection from the church; and the causes of widows and orphans, and of all persons in circumstances of

distress,

distress\*, which had been banished from the barbarous tribunal of the lay-judges, procured a welcome reception in the spiritual court; where they were commonly examined with candour, and determined with impartiality.

In imitation, as it should seem, of this ecclesiastical interposition, the king of England took under his immediate protection the causes of such as, by reason of their poverty, were unable to bear the expence of an ordinary law-suit; and, since no other court in the country could give the proper redress, he encouraged those persons to bring a petition or supplication to the privy-council; which decided their claims in a summary manner, and without the forms observed in the ordinary tribunals. Hence particular persons, being entrusted with this branch of business, composed at length a *court of requests*, as it was called; which, for a long time, had no warrant of ordinary jurisdiction; but which, as the complaints that came before it could not be accurately defined, assumed at length so great powers as to render it unpopular, and, in the reign of Charles the First, to occasion its abolition †.

The influence of that humanity, displayed by the church, was not confined to England; but appears to have produced a similar interposition in the government of other European countries. In France it was anciently the custom to present petitions or complaints to the king at the gate of his palace; and, for the purpose of receiving and examining these, the king was early led to appoint certain persons belonging to his household. If any petition was of too great consequence to be answered immediately by these commission-

\* *Personæ miserabilis.*

† Sir Tho. Smith de Repub. Anglor.—Blackstone's Comment.

ers, they were directed to make a report of it to the king, and to require the attendance of the parties, in order that the cause might be heard and determined. The persons appointed for the determination of such causes, who seem to have been members of the king's privy-council, were called *maîtres des requestes de l'hôtel du roy*. Their number was increased to six, of which the one half were ecclesiastics; and they seem at length to have been formed into a separate court, under the name of the *chamber of requests*\*.

The institution of the *aula regis*, or court of the grand justiciary, was a natural, and a very great improvement in the system of judicial policy. The great national council could not be very frequently convened, and its decisions, therefore, especially in matters of private property, were not easily procured. But the smaller tribunal of the *aula regis* was easily kept in readiness, to determine every controversy whether civil or criminal. As the king, amid the disorders of the feudal government, was under the necessity of making frequent journies over the kingdom, in order to maintain his authority, and to suppress or prevent insurrections, he was enabled to receive, in every quarter, the complaints of his people, and found no difficulty in calling this court to give such redress as the occasion might require. Justice was made, in this manner, to pervade the country; reparation of injuries was rendered more certain, while the expence of litigation was diminished; and, by punishing crimes in the neighbourhood of those places where they had been committed, the axe and the halter became an immediate and powerful antidote to the poison of bad example.

\* Recherches de la France. D'Étienne Pasquier.

From

From the decisions of this tribunal, there always lay an appeal to the high court of parliament. This was a consequence of the manner in which the *aula regis* was formed; by the mere diffuse of attendance in the greater part of the members of parliament; who thence were understood to have delegated the ordinary judicial power to such of their number as continued in the exercise of it. But as this delegation was intended merely to save trouble to the members of parliament; it was not conceived to exclude a full meeting of that council from reviewing, in extraordinary cases, the procedure of the committee upon whom this ordinary jurisdiction had been devolved. Though parliament might wish to be disengaged from the labour attending the decision of law-suits, it was probably not willing to resign the authority connected with that employment; and, while it acquiesced in the substitution of a court for exercising the whole parliamentary jurisdiction in the first instance, it still reserved the power, which might be exerted on singular occasions, of superintending the proceedings of that court, and of controuling its decisions.

The *aula regis*, being a sort of deputation from the national council, or king's baron-court, had, on the other hand, a power of reviewing the sentences of the several tribunals erected in different parts of the kingdom; and became an intermediate court between them and the high court of parliament. There was the same reason for committing to the court of the grand justiciary, the province of hearing and discussing appeals from inferior tribunals; as for devolving upon it an original jurisdiction in parliamentary actions. The full establishment of this tribunal, however, together with the changes in the state of property

erty after the Norman conquest, contributed to limit the authority of these inferior courts, and to render their interposition of little importance.

When the great lords of a county had become vassals of the crown, they claimed the privilege of bringing their law-suits, in the first instance, before the baron-court of the sovereign, their immediate superior. To the same court were brought immediately, appeals from the sentences pronounced by these barons in the causes of their own tenants and vassals. The sheriff, now converted into a crown vassal, beside the jurisdiction over his own feudal barony, appears to have still retained the power of deciding controversies between the inferior vassals or tenants belonging to different baronies within his county.

The authority possessed by the *aula regis*, which was daily extended, from the increasing power of the crown, enabled that court even to make continual encroachments upon the subordinate jurisdiction of the sheriff and of the different barons. It could be of little advantage to the inhabitants, that their law-suits were brought in the first instance before the court of the baron or of the sheriff, since the decision of those judges might with the utmost facility be reviewed by the court of the grand justiciary; and, as this great tribunal appeared occasionally in all parts of the kingdom, and distributed justice with superior efficacy and splendor, men were frequently disposed to pass over the inferior courts, and took encouragement to bring their disputes immediately before the court of appeal. Thus, by the gradual operation of the same circumstances, the judicatories of each barony, and county, dwindled into a state of insignificance; their jurisdiction was at length restricted to matters of small value; and the greater part of

causes,

causes, civil and criminal, as well as fiscal, were appropriated to the ordinary baron-court of the sovereign.

Mr. Hume imagines, that none of the other feudal governments in Europe had such institutions as the county-courts; and seems at the same time to be of opinion, that as these courts, by requiring the frequent attendance of the barons, contributed to remind them of their dependence upon the king, they must have had remarkable effects in reducing those great personages under the authority of the chief magistrate.

But the county-courts were so far from being peculiar to England, that they appear, in the early periods of the feudal system, to have existed throughout all the Western parts of Europe. In France, and in several other countries upon the continent, those courts began sooner to lose their authority than in England; because the sovereign had sooner acquired a feudal superiority over the great lords; by which they were reduced under the immediate jurisdiction of the king's baron-court, and withdrawn from that of the chief officer of a county. In Scotland, on the other hand, where the influence of the crown over the nobles advanced more slowly than in England, the county-courts were enabled much longer to preserve their primitive jurisdiction; so that a considerable share of it has been transmitted to the present time, and become a permanent branch of the judicial polity.

It seems difficult, therefore, to suppose that the long continuance of the courts of the sheriff in England had any tendency to increase or maintain the authority of the king over the barons. The decay of those judicial establishments appears, on the contrary, to have been a necessary consequence of a correspondent exaltation of the crown; and

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and we shall find that, in every country, they remained longer in power and splendor, according as particular circumstances contributed to thwart the ambitious views of the monarch, and to prevent the extension of his prerogative.

In the dominions belonging to France the judicial power of the *cour de roy* advanced very quickly from the reign of Hugh Capet, by the difuse of the county courts, and by receiving appeals from the courts of the barons. These appeals, agreeable to the general custom of the feudal governments, contained at first a complaint that injustice had been committed by the inferior judge; who, therefore, was obliged to appear as a party, before the superior tribunal. But according as the practice of appealing became more frequent, the petitions of appeal were admitted upon flighter grounds; the charge of wilful injustice against the inferior courts was more and more overlooked; the magistrates, who had presided in these courts, were no longer sufficiently interested to appear for the justification of their conduct; and the controversy was examined in the court of review, for the sole purpose of determining the propriety or impropriety of the former decision.

It is true, that, from the disorders which prevailed in France, under the later princes of the Carlovingian race, one or two of the great lords had acquired such independence, as, for some time after the reign of Hugh Capet, prevented the king from reviewing their sentences; but this is mentioned by all the historians as a remarkable singularity. It also merits attention, that the French monarchs, about this period, were not content with the power of receiving appeals from the several courts of their barons. An expedient was devised of sending royal bailiffs into  
different

different parts of the kingdom, with a commission to take cognizance of all those causes in which the sovereign was interested, and in reality for the purpose of abridging and limiting the subordinate jurisdiction of the neighbouring feudal superiors. By an edict of Philip Augustus, in the year 1190, those bailiffs were appointed in all the principal towns of the kingdom\*.

\* Hainault's Abridgment of Hist. of France.

## C H A P. IV.

*Progress of ecclesiastical jurisdiction and Authority.*

THE hierarchy of the Western church grew up and extended itself over the kingdoms of Europe, independent of the boundaries which had been set to the dominion of secular princes, and of the revolutions which took place in the state of any civil government. The Roman pontiff, having found the means of uniting under his protection the clergy of each particular kingdom, was equally interested in promoting their influence, as they were in maintaining the authority of their spiritual leader. By taking advantage, therefore, of the various and successive contentions among opposite and rival powers, he was enabled to extort concessions from those whom he had supported, to levy impositions, and to exalt the dignity and prerogatives of the holy see.

The Norman conquest, in England, was followed by a complete separation of the ecclesiastical from the temporal courts. By a regulation of William the Conqueror, the bishop was no longer permitted to sit as a judge in the court of the county; nor the archdeacon in that of the hundred\*. This alteration had undoubtedly a tendency to promote that exclusive jurisdiction which the clergy were desirous of establishing; and to build up that

\* William the Conqueror's charter, with advice of the national council. Spelman.

system

system of church power which the wisdom of after ages found it so necessary, and at the same time so difficult, to pull down. Under the dominion of the Anglo-Saxon princes, while the spiritual judges were associated with the civil magistrate, many causes of an ecclesiastical nature were brought under the cognizance of the temporal courts; and though, from the superior knowledge and address of churchmen, the decisions given by those tribunals might be apt, in some cases, to favour of a clerical spirit, there was little danger; from this arrangement, that the church would become totally independent of the state. But from the moment that the clergy were excluded from a voice in the courts of the hundred and of the county, ecclesiastical controversies were appropriated, in all cases, to the judicatories of the church; and the ambition of churchmen immediately excited them to extend their own peculiar jurisdiction, by invading that of the civil magistrate.

The encroachments made by the spiritual, upon the province of the temporal courts, were of a similar nature in England, and in all the other countries belonging to the Western church. The pretence for these encroachments was, the privilege of the clergy to inflict censure upon every irregularity, which could be considered as a *sin*, or an offence in the sight of God. Under this description every act of injustice, every violation of the laws of the land, was manifestly included; but the offences which in this view attracted more particularly the attention of churchmen were such, it may easily be conceived, as had an immediate connexion with their own interest, or with those religious observances from which their own dignity and importance were in some measure derived.

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One of the first interpositions of the church, in a matter of civil jurisdiction, appears to have been made with relation to *tythes*, and other ecclesiastical revenues. Even after the rights of the clergy, in this particular, had received the sanction of public authority, they were not likely to meet with a vigorous and hearty support from the civil magistrate; and it was therefore considered by the church, as a matter of general concern, to render them effectual in the spiritual court.

The performance of testamentary bequests was viewed in a similar light. As in the exercise of their profession, the clergy were frequently employed about dying persons, and had almost the exclusive possession of all the literature of that ignorant age, they were usually consulted upon the making of testaments, and became the common witnesses to those deeds. It would be doing them injustice to say, that they neglected to avail themselves of that situation, for increasing the revenue of the respective corporations to which they belonged. With so great diligence and success did they perform this part of their duty, that few persons adventured to take a near prospect of a future state, without making considerable donations for *pious uses*; and the effect of inculcating the same doctrine was at length rendered so universal, that, in many countries of Europe, a great proportion of every personal estate was, without any testament, and in virtue of a tacit or presumed will of the proprietor, transferred, by the ordinary course of succession, to the church. Thus the clergy were not only the best qualified for explaining the will of the testator, but had besides a peculiar interest in the execution of it; and therefore by their activity and vigilance, joined to the  
indifference.

indifference and remissness of the civil tribunals, they found it not difficult, in questions of this nature, to acquire an exclusive jurisdiction.

From the same principle which recommended penances and mortifications as highly meritorious, the ministers of religion thought it incumbent upon them to censure and discourage all excesses in sensual pleasure; and in a particular manner to restrain every irregularity with respect to the intercourse of the sexes. The contract of marriage was therefore brought under their immediate inspection; and, as it came to be celebrated by a clergyman, and to be accompanied with religious forms and solemnities, was regarded as a species of sacrament. Upon this account, every breach of the duties of marriage, every question with relation to its validity, or concerning the terms and conditions which were held compatible with that institution, became an object of ecclesiastical cognizance.

This branch of jurisdiction afforded, by degrees, a pecuniary revenue, which the clergy did not fail to improve. By the Roman law, which was at first adopted in ecclesiastical courts, marriage was prohibited between collateral relations in the second degree; that is, between brothers and sisters. This prohibition, comprehending those persons who usually were brought up in the same family, and who, unless their union had been entirely prevented, might be frequently exposed to the hazard of seduction, is founded upon manifest considerations of expediency. But no sooner was the church possessed of sufficient authority in this point, than, becoming dissatisfied with such a reasonable and salutary regulation, she thought proper to introduce a stricter discipline; and proceeded, by degrees, to prohibit the union of more distant relations; in so much that  
marriage.

marriage between persons in the fourteenth degree, according to the Roman computation, was at length declared illegal\*. Not contented with preventing the intercourse of natural relations, the superstition of the age recommended, and the interested policy of the church ordained, a restraint of the same nature, in consequence of the spiritual connexion arising from baptism; between the person baptized and his godfathers and godmothers, as well as the clergyman by whom that sacrament was administered; and the marriage of those persons together with their relations, as far as the fourteenth degree, was likewise forbidden. The number of people, thus prohibited from intermarrying, came to be so immense, that persons at liberty to form that union, at a time when relations were not, as at present, scattered over the world by the influence of commerce, could seldom be found; at least among persons of rank, in the same quarter of a country, and hardly ever in the same circle of acquaintance †.

These regulations were intended merely for the purpose of levying contributions from the people; for, though marriages contracted within the forbidden degrees were null

\* The fourteenth degree, according to the computation of the civilians, is equal to the seventh degree among the canonists; comprehending persons removed by seven generations from the common stock. To change the Roman method of counting kindred, was the first contrivance of the clergy in the dark ages, for extending the laws of ancient Rome with respect to the relations prohibited from contracting marriage.

† Blackstone in his Comment. vol. ii. calculates the number of relations which may, at an average, exist in different degrees of consanguinity; by which it appears, that every person may have at least 16,000, in the 14th degree, according to the Roman computation, not to mention such as are a step or two nearer, who may be living at the same time; and of *spiritual relations*, in consequence of baptism, he may have three or four times as many more.

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and void, the church assumed a power of dispensing with the law; and to such as were able to pay for it, with exception of parents and children, and some other very near relations, a dispensation, in most cases, was readily granted.

By this jurisdiction with relation to testaments, and with relation to the validity of marriage, the church decided the most important questions concerning the transmission of property. She possessed the sole power of determining the legitimacy of children, upon which depended their capacity of inheritance; at the same time that she gave authority to the nomination of every person who succeeded to an estate by the *will* of the proprietor.

Amid the disorders which prevailed in Europe for many centuries after the downfall of the Roman empire, and by which the inhabitants were sunk in profound ignorance and barbarism, the clergy exerted themselves in restraining the perfidy and injustice of the times; and, by the influence of religious motives, endeavoured, as far as possible, to induce mankind to the observance of good faith in their various transactions. For this purpose they introduced a general practice, that contracts of every sort should be confirmed by the sanction of an oath; by which means the violation of a contract, being considered as the breach of a religious duty, fell under the cognizance of the church. From the strictness observed in the decisions of the spiritual court, the private party, at the same time, found it more advisable to bring his complaint before this tribunal than that of the civil magistrate. The extent of jurisdiction, acquired in this manner, may easily be conceived.

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Lastly. To the church courts were appropriated, as I formerly had occasion to observe, the causes of widows and orphans, and of all persons in circumstances of distress. Causes of this description were too apt to be neglected by those military barons invested with civil jurisdiction, who paid but little attention to the claims of any person from whose future services they could derive no benefit, or from whose resentment they had nothing to fear.

It must be remembered, to the honour of the clergy of those times, that they were the friends of order and regular government; that, if they laboured to rear a system of ecclesiastical despotism, their authority was generally employed in maintaining the rules of justice; and that they discovered a uniform inclination to protect the weak and defenceless, against that violence and oppression which was too much countenanced by such of the laity as were possessed of opulence and power. From this circumstance, the extensions of ecclesiastical jurisdiction were highly acceptable to the people; and, notwithstanding the pernicious consequences which they ultimately tended to produce, were, in the mean time, of great advantage to the lower ranks of men, if not of general benefit to the community.

Having thus occasion to determine a multitude of causes, both of an ecclesiastical nature, and such as fell within the province of the civil magistrate, the church courts advanced in the knowledge and experience of judicial business. As, by their literature, the clergy could not fail to be acquainted with the ancient Roman law, they were led, in many cases, to adopt the rules of that equitable system: Their own decisions were collected, in order to serve as precedents in  
future

future questions; and from these, together with the opinions of learned fathers in the church, the decrees of councils, and the regulations of popes, was at length formed that body of canon-law, which obtained universal reputation in the Western part of Europe.

It would have been to little purpose, however, for the church to assume a jurisdiction, had she not been able to render herself independent in the exercise of it. But the same vigour and dexterity, by which the clergy established their power in any European kingdom, were exerted in order to withdraw their subjection from the sovereign, and to render them subordinate only to the Roman pontiff. In England this was, in some measure, effected so early as the reign of William the Conqueror, by the expedient of appointing papal legates, or commissioners, to hear and determine ecclesiastical causes. As those appointments might be renewed at pleasure, they soon opened the way for a direct appeal from the English church-courts to that of Rome; which was first attempted in the reign of William Rufus, and finally accomplished in that of king Stephen\*.

The entire exemption of churchmen, or *clerks*, from secular jurisdiction, which had been early introduced into some other European countries, and which appears to be a natural consequence of the advancement of ecclesiastical power, was, in England, made effectual about the time of Henry the Second. The effects of this exemption, which have, in some measure, been retained in later ages, are universally known by what is called the *benefit of clergy*. As the church-courts never inflicted a capital, or corporal punishment, those offenders, who could be subjected to no

\* Burne's Ecclesiastical Law.

other jurisdiction, were of course exempted from such punishment, unless in some few cases, where the church might refuse her interposition, or was pleased to deliver over the criminal to the secular arm. After the reformation, this privilege of clerks, which, by the progress of literature, came to be within the reach of almost all the inhabitants, was looked upon as a convenient method for moderating the rigorous punishments of the common law; and therefore, with various modifications by statute, was then incorporated in the legal system.

In the reign of Henry the First, the monastic rule of celibacy, after long and violent struggles, was at length imposed upon the secular clergy of England; and received the sanction of ecclesiastical authority\*. By this regulation, churchmen, being freed from the cares of a family, and from the burden of making a provision for posterity, were detached, in a great measure, from the rest of the community, and, by motives of interest and ambition, were more uniformly and firmly united in that ecclesiastical corporation of which they were members. Though it may be true, therefore, that this absurd system of mortification was introduced from perverted notions of refinement, and by the universal influence of superstition, there can be no doubt that it was afterwards promoted and extended from the interested policy of churchmen, and more especially from that of their spiritual sovereign.

But the great circumstance which contributed to establish the independent power of the church, was the privilege of bestowing ecclesiastical preferments.

Upon the first establishment of ecclesiastical benefices, by the donation of dying persons, and the consequent rise

\* Lyttelton's Hist. of Henry II.

of ecclesiastical dignities, the inferior clergy of each diocese were chosen by the bishop and chapter, and the bishop himself, by the dean and chapter, of the cathedral church. After the modern European kingdoms had been erected upon the ruins of the ancient Roman empire, the sovereign, in each of those kingdoms, was tempted to interfere in ecclesiastical elections, and, by his influence over those who had the power of nomination, acquired at length the privilege of bestowing the higher church livings. But when the authority of the bishop of Rome had risen to a great height in the Western church, he left no measure unattempted, in order to wrest out of the hands of princes an instrument of so much importance as the nomination of the superior clergy. The dispute concerning this point, which lasted for more than a century and a half, is one of the most remarkable events in the history of modern Europe. It was begun by the famous Gregory the Seventh; a man who, by his abilities, his intrepidity, and his unbounded ambition, was qualified to draw the utmost advantage from the situation in which he was placed. This pontiff not only rejected with disdain the prerogative which the German emperors had for some time exercised, of confirming the election of the popes; but prohibited them from interfering in the election of all bishops and abbots; and proceeded so far as to issue decrees, by which he excluded the laity, of every rank or condition, from the collation to ecclesiastical benefices. Henry the Fourth, who at this time wore the imperial diadem, defended his rights with vigour; and, as many princes were, by various motives, induced to support the interest of the church, the contending parties had recourse to arms. During the progress of the quarrel, all Italy and Germany were thrown into convulsions;

vulsions; millions of people were destroyed upon the one side and the other; and it is computed that no less than sixty battles were fought, in the reign of this emperor; together with eighteen more in that of his son and successor, Henry the Fifth; who, at length, was persuaded to conclude a peace with the court of Rome, by granting an express renunciation of all his pretensions\*.

The contest, with respect to the right of investitures, was not confined to Italy and Germany, but extended itself over the other countries of Europe; in which the church, for the most part, was equally successful. In France, the decrees of the pope were made effectual with less rapidity; but without violence, and even without much disturbance. In England, the right of the laity to confer ecclesiastical benefices, was first disputed in the reign of Henry the First, when Anselm, the archbishop of Canterbury, refused to consecrate the bishops nominated by the king. The controversy was continued under several of the succeeding princes; but no blood was spilt in the quarrel, farther than by the assassination of Becket, or than what might arise from the scourging of Henry the Second. In this kind of warfare, the church was properly in her own element; and managed her weapons with her usual dexterity. When king John had been weakened by an unsuccessful war, and had incurred the contempt and resentment of his subjects, the pope laid hold of that opportunity to invade his prerogative; and, by thundering out against him the different orders and degrees of ecclesiastical censure, at the same time that he had the address to employ the secular arm of France to support his authority, he at length obliged the

\* Father Paul's History of Benefices.

infatuated.

infatuated English monarch, not only to relinquish all claim to the right of investitures, but even to resign his kingdom to the church, and to hold it for the future as a feudatory of the holy see.

It could hardly be expected that the pope would engage in such long and violent struggles for the sake merely of the clergy over whom he presided, and that when he had, at last, gained a complete victory, he would not endeavour to improve it to his own advantage. No sooner was the nomination of bishops and abbots placed in the clergy of each cathedral church or monastery, than his holiness began to interfere in elections, by recommending particular persons to vacant benefices. Considering the influence and authority which he possessed over all the members of the church, and the exertions which he had made in procuring the right of election to the clergy, such a recommendation could not, with decency, be overlooked; and, in most cases, could scarcely fail of success. The frequency, however, of these recommendations disposed the electors to anticipate them on particular occasions, by filling up the vacancy with the utmost expedition. Foreseeing the death of some particular incumbent, the pope endeavoured sometimes to prevent a precipitate supply of the vacancy, by requesting that it should be delayed for some time. Such recommendations and requests, having come at length to be frequently disregarded, were afterwards accompanied with commands; and commissioners were sent to put them in execution, as well as to punish the clergy, in case of their disobedience. To all these expedients was added, at length, a more effectual interposition for preventing every disappointment. With regard to the mode of electing bishops and abbots, and the qualifications of the person to be elected,

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elected, a set of regulations was made, so numerous and intricate, that the strict observance of them became impossible; while it was declared, that, upon the least failure in any point, the election should be void, and the nomination should devolve to the apostolic see. By these artifices the bishop of Rome acquired, in reality, the power of appointing all the dignified clergy, together with all that influence and revenue which could be obtained, either directly or indirectly, from the disposal of every important ecclesiastical preferment.

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CHAP. V. VIEW OF THE KINGLY POWER, &c. 343

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*General View of the kingly Power, from the Reign of Edward I. to that of Henry VII.*

THE period of the English monarchy, from Edward the First to the accession of the house of Tudor, corresponds, with great exactness, to that of the French, from Philip the Fair to Lewis the Eleventh. About the beginning of these periods, the government, in each of those countries, assumed a degree of regularity unknown in former ages; and it afterwards continued, by similar steps, advancing towards maturity. The power of the king, and that of the nobles, formed, at this time, the only balance in the constitution; which came, in the natural course of things, to lean more and more to the side of the former. The nobility were too much divided among themselves, to be capable of prosecuting any regular plan for the aggrandisement of their own order. Their opulence, which, if collected in one great current, might have borne down every obstacle before it, was deprived of its efficacy by being broken into many separate channels, and spent in various and contrary directions. In order to make an effectual opposition to the crown, it was requisite that the greater barons should be firmly united in defence of their privileges; but such a union was not easily procured, and, for any length of time, could hardly ever be maintained. Distracted by mutual animosity, and actuated by private jealousies, or by opposite views of interest, these  
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refless, but short-sighted chiefs, were, without much difficulty, persuaded to abandon any joint measures; and excited to employ their force in weakening and destroying one another. What they gained, therefore, upon some occasions, by a sudden and violent effort, was afterwards thrown away, from the want of perseverance or management; and the effect of a temporary combination was more than compensated by their usual tendency to disunion and dissension. But the crown was not capable of being divided against itself. Its property, being under the disposal of a single person, was always directed, however injudiciously, to the same end; and made subservient to one political purpose; that of extending the royal prerogative. The revenue of the crown, therefore, created a degree of influence, which was continually extending itself, and which, by its uniform operation, afforded continual opportunities for increasing that revenue. While the aristocracy was thus remaining stationary, or left in a fluctuating state, according to the impulse of casual circumstances, the monarchy, by receiving regular supplies from every quarter, was gradually rising to a greater height, and overflowing its ancient boundaries.

It must, however, be admitted, that the period of English history, now under consideration, is distinguished by many powerful efforts of the nobility to support their privileges; and that the crown did not rise to the summit of dignity and splendor which it attained in the possession of the Tudor family, without surmounting a variety of obstacles, and without being frequently checked and retarded by unfavourable occurrences.

There is even good reason to believe, that, in England, the regal authority was more limited, about the time of Edward

Edward the First, than it was in France, during the reign of Philip the Fair. Though the English crown was considerably exalted upon the accession of William the Conqueror, yet, under the succeeding reigns, its progress was apparently more slow and gradual. The barons, by taking advantage of particular conjunctures, and, in some cases, by proceeding to such extremities as threatened an immediate revolution, obtained from the sovereign the most important concessions; and, in little more than a century and a half, no fewer than six great charters were granted, some of them repeatedly, by six different princes. By these charters the power of the crown does not, indeed, seem to have been contracted within a narrower compass than immediately after the Norman conquest; but it was undoubtedly restrained in its advancement, and prevented from rising to that height which it would otherwise have attained. In France, on the other hand, the extension of the royal prerogative appears, from the time of Hugh Capet, to have scarcely met with any opposition. No formidable combination of the nobles, to withstand the incroachments of the kingly power! No series of charters, as in England, relinquishing the supposed usurpations of the crown, and confirming the privileges of the aristocracy! The only deed of this nature, which we meet with in the French history, was near half a century posterior to the reign of Philip the Fair; and was extorted from king John, in consequence of the difficulties under which he laboured from the invasion of his kingdom by the English monarch\*.

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\* "The opportunity of the states general, assembled in the year 1355," says the count de Boulainvilliers, "is favourable to my design; since, upon their remonstrances,

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To what causes may we ascribe this different spirit of the French from that of the English nobility? From what circumstances were the former disposed to look with so much tranquillity and indifference upon the exaltation of the crown, as never, but upon one occasion, to exert themselves in repressing it; while the latter discovered such a constant jealousy of the sovereign, and made so many and such vigorous attempts to restrain the progress of his authority? The importance of this question is obvious; for the efforts then made to resist the usurpations of the crown, may be regarded as the groundwork of those more precise limitations of the prerogative, which have been introduced in a later period.

1. There occurs one remarkable difference between the situation of the French and the English kings; that in France, the crown was, without interruption, transmitted directly from father to son, during a period of more than three hundred years; that is, from the time of Hugh Capet to that of Philip the Long; including a series of eleven different reigns: whereas in England, during the same period, we meet with no less than five deviations from the lineal course of succession; and about one half of the reigning princes, who, however their title might be recognized by parliament, or their pretensions might

“ king John gave a declaration which irrevocably established the right of those assemblies, and which, upon that account, might justly be compared to the *great charter* granted to the *English* by a prince of the same name; were it not unfortunately too true, that it has been buried in oblivion for above two hundred years past, even so far that there is no public instrument of it remaining, except one copy preserved in the king's library; from whence I took that of which I shall give you an extract in the course of this letter.” [Boulainv. account of the ancient parliaments of France.] See a full account given by this noble author, of that famous *French charter*, which in reality has a great resemblance to the *English charter* above mentioned.

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be supported by the prevailing party, were, according to the common notions of that age, considered in the light of usurpers. In France, therefore, the crown passed, with perfect tranquillity, from one sovereign to another; and each of those princes, when he mounted the throne, having no competitor to obstruct his immediate possession, no flaw in his title to weaken or disturb the general prepossession in his favour, succeeded, of consequence, to all that hereditary influence which had been accumulated by his predecessors. To render the succession still more quiet and secure, Hugh Capet introduced the precaution, which had been in some measure suggested by the Roman emperors, of crowning his heir in his own life-time; and the same practice was uniformly observed by six of the succeeding monarchs; that is, till the reign of Philip Augustus, when, from the superior stability of the throne, any ceremony of this kind was become superfluous.

In England, on the contrary, the succession of those princes, whose title was ill founded or disputable, gave always occasion to dissatisfaction and complaint, if not to direct opposition, and open resistance; and, as the nobles were invited to lay hold of these opportunities for maintaining or extending their privileges, the king was obliged to compound for the possession of the sovereignty, by submitting to limitations in the exercise of it. The personal authority of William the Conqueror, produced a submission to William Rufus, though in preference to his elder brother Robert, a man of a popular character; but Henry the First, and Stephen, may be said to have purchased the crown, by the respective great charters which they granted to their vassals. With respect to Henry the Second, it must be acknowledged, that, though he was a foreigner, and

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though he had in some measure fought his way to the throne, yet in the end his accession was agreeable to the whole nation. But after having suffered a variety of disappointments, and having been exposed to much uneasiness from the unnatural behaviour of his own children, he appears to have confirmed the two preceding charters, from a disposition to guard against any future accident, by securing the good-will of his people. The usurpation of John, accompanied with the murder of the lawful heir, had excited against that prince an indignation and resentment, which his future conduct, instead of removing, tended only to confirm; and the concessions which he made to his subjects, were plainly extorted from him by the accumulation of distress and embarrassment under which he laboured. Henry the Third, though there were no objections to his title, inherited, while he was yet a minor, a civil war from his father; and afterwards, by his imbecillity and imprudence, was involved in calamities, from which nothing less than the good fortune, and the great abilities, of his son Edward the First could have extricated him. The charters granted by the former of those two princes were evidently the fruit of these difficulties\*.

2. Another circumstance which, in that early period, produced a peculiar exaltation of the monarchy in France, was the forfeiture of Normandy by the king of England, and the reduction of that extensive country into an immediate fief of the French crown. This forfeiture, though the particular time when it happened might be accidental, was to be expected, as I formerly took notice, from the situation of that country, with respect to the king of Eng-

\* It appears, that one of the charters granted by Henry III. was subscribed by his son prince Edward. Blackstone, History of the Great Charters.

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land, the immediate superior, and to the king of France, the lord paramount. The effect of so great an accession of revenue and influence to the French crown was visible; and Philip Augustus, in whose reign it happened, became evidently possessed of much greater authority than his predecessors.

No acquisition of equal importance was made to the crown of England at this early period; for the settlement which was effected in Ireland, by Henry the Second, and which historians have been pleased to dignify with the splendid appellation of a conquest, was productive neither of wealth nor of authority to the English monarch; nor does it appear, for several centuries, to have yielded any advantage whatever.

3. The insular situation of Britain may be considered as a general cause of the slower advancement of the royal prerogative in England, than is to be found in the greater part of the modern kingdoms upon the continent of Europe. As, in the infancy of government, the kingly office arose from the necessity of having a general to command the united forces of the state, it was to be expected, that the oftener any sovereign had occasion to act in this capacity, his authority and dignity would sooner arrive at maturity. During the time of a military enterprise, when the national forces, the great body of the people, were placed under the immediate direction of the king, they acquired habits of submitting to his orders; their admiration was excited by his eminent station or distinguished prowess; and they were taught by experience to look up to him as the principal source of honours and preferment. In times of peace, on the contrary, when the members of different baronies, or tribes, had retired to their several places

places of abode, they were, in a great measure, withdrawn from the influence of the king; and were accustomed to no other jurisdiction, or authority, but that of the baron or chief by whom they were protected. Even after the feudal governments had attained some degree of regularity, and when the sovereign had acquired numerous branches of civil power, it still was in the field that his pre-eminence attracted superior attention, and that he had the best means of procuring popularity.

It seems reasonable to conclude, therefore, that, upon the continent of Europe, where every sovereign found his dominions surrounded by bordering nations, whom he was frequently tempted to invade, and against whom he was obliged to be constantly upon his guard, the most ample scope was afforded him for displaying those talents, and for availing himself of those situations, which were best calculated for extending his authority. In England, on the other hand; a country in which there were fewer inducements to undertake a national war, and in which the military operations of the sovereign were chiefly employed in quelling the disturbances excited by his rebellious barons, or in repelling the inroads of the Scots, which were not of much more importance than the insurrection of particular barons; he had fewer opportunities of exciting a national spirit in his favour; and consequently found it more difficult to reduce the nobility into a state of dependence.

The prosperous reign of Edward the First, had undoubtedly a considerable effect in confirming and exalting the prerogative. This prince was equally distinguished by his policy in the cabinet, and by his activity, courage, and conduct, in the field; at the same time that he does not appear, by any scrupulous regard to the principles of honour

nour or justice, to have been, on any occasion, prevented from directing those talents to the pursuit of his own grandeur or emolument. By the conquest of Wales he not only gained an enlargement of dominion, but freed himself from the vexatious depredations of a troublesome neighbour. Had he lived somewhat longer, it is more than probable that he would also have completed the entire conquest of Scotland; in which case, there is good ground to believe, that the reduction of the Northern and Southern parts of the island into one monarchy, would have been productive of such advantages, to both countries, as might in some measure have atoned for the perfidy and injustice by which it was accomplished.

The reign of Edward the Second was no less adverse to the influence of the crown, than that of his father had been favourable to it. By the total deficiency of that prince, in vigour and military capacity, he soon lost all the acquisitions which his father had made in Scotland; and saw the independence of that kingdom completely re-established. For the internal administration of government he was equally disqualified. The nobility of that age were, with difficulty, reconciled to the dignity and pre-eminence of the sovereign; but they could not endure that any person of inferior condition should, by the favour of the monarch, be exalted over them, and be invested with the exercise of the prerogative. The extreme facility of Edward subjected him, however, to the constant dominion of favourites, in supporting whom he excited the indignation of the nobles; and the queen, whose affections had been seduced by Mortimer, and who seems to have thought herself better entitled than any other person to govern her husband, having joined the malcontents, the king was formally

mally deposed by a meeting of parliament; was kept for some time in confinement; and at length barbarously murdered. The fate of this unhappy prince cannot fail to move compassion, as it proceeded from the weakness of his understanding, and even from the gentleness of his disposition, more than from ambition, or any passion for arbitrary power: while it afforded a salutary lesson to his successors, by exhibiting a striking example of the authority of parliament to controul, and even to punish, the sovereign.

The same power of the nobles, which had deposed Edward the Second, advanced to the throne his son Edward the Third, while yet a minor. The early indications of genius, and of a martial disposition, discovered by this prince, dispelled very quickly the gloom which had for some time hung over the nation; and gave a total change to the aspect of public affairs. He soon freed himself from the direction of the queen his mother; and put to death her favourite Mortimer, with little ceremony, and without much regard to the forms of justice. His first military enterprize was directed to the recovery of what his father had lost in Scotland; in which, from the weak and disorderly state of that country, he met with little obstruction; but he was prevented from the execution of this plan, by another object, which was thought of much greater importance, and which, during the remainder of his reign, ingrossed his whole attention. This was, his pretension, in right of his mother, to the crown of France; a claim which, though founded neither in justice nor expediency, was yet sufficiently plausible to palliate that love of extensive dominion, with which not only princes, but even the people, in all ages and countries, have been almost constantly intoxicated. The conduct of Edward, in asserting this claim, was probably

bably such as every monarch of spirit, in that age, must have held, and in so doing was sure of meeting with the general approbation of his subjects. As the undertaking, therefore, was crowned with unexpected and amazing success, it is no wonder that the splendid victories obtained by this king, and by his son the Black Prince, who acted so conspicuous a part in those scenes, procured them the admiration as well as the affections of the whole English nation. While these two princes flattered the national vanity, by the prospect of conquering so great a kingdom as France, they displayed all the talents and virtues which, in those times, were supposed to enter into the composition of the most complete military character. Even at this day, when we contemplate the gallantry of the Black Prince, and the humanity and generosity with which he treated the king of France, his prisoner, we must acknowledge that they are surpassed by nothing either in ancient or modern story. Without detracting from the merit of this distinguished personage, we are led at the same time to conceive an exalted idea of the institutions and manners of *chivalry*, which, in so rude a state of society, were capable, among people of the better sort, of promoting so much delicacy of sentiment, and of encouraging any individual to form such a perfect model of propriety and refinement.

In the course of his long war against France, the king obtained, more and more, an ascendant over those nobles who followed his banner, and were smitten by an universal enthusiasm to distinguish themselves in that illustrious field of national glory. His administration at home was equally prudent and vigorous, and calculated to restrain injustice, as well as to command respect. Though not disposed to relinquish any part of his prerogative, he appears to have

had a real regard for the ancient constitution; and though he acquired greater authority than was possessed by the former kings of England, he confirmed, on many occasions, the great charters of his predecessors. He was under the necessity of making large and frequent demands of money from his subjects; but, as he endeavoured, in most cases, to procure it by the concurrence of parliament, and as the nation entered heartily into the views which gave occasion to so much expence, the supplies which he required were commonly furnished without any complaint. His numerous applications to the national assembly contributed, besides, to ascertain its powers and privileges, as well as to establish and reduce into order the forms and method of its procedure.

It merits attention, that, notwithstanding the alacrity with which the English nation supported the claim of their sovereign to the crown of France, the parliament seem to have been alarmed at the idea of their falling under the government established in that country; and, to remove this apprehension, a statute was made, in which the king expressly declares, that the realm and people of England "shall not, in any time to come, be put in subjection nor in obedience of us, nor of our heirs nor successors, as kings of France, nor be subject nor obedient, but shall be free and quit of all manner of subjection and obedience as aforesaid, as they were wont to be in the time of our progenitors, kings of England, for ever\*." From this precaution, it may be inferred, that the parliament understood the French monarchy, at this time, to be more absolute than the English; and were afraid that their monarch, if

\* 14 Edw. III.

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he came to the possession of that kingdom, might be led to exercise over them a power inconsistent with the constitution of England.

The reign of Richard the Second is, in many respects, a repetition of the same disgusting and melancholy scenes, which that of his great grandfather, Edward the Second, had exhibited. In each of them we behold a young prince ascending the throne with great advantages; regarded by the nation with a partiality and affection derived from paternal connections; incurring the general contempt and indignation, by his folly and misconduct; governed, through the whole course of his administration, by favourites; dethroned at length by parliament, imprisoned, and brought to a tragical end. But the occurrences, in the time of Richard, were accompanied with circumstances which, in a review of the English government, are more particularly worthy of observation.

This reign affords a memorable example of the interference of parliament for the removal of the king's ministers. To the address which was presented for this purpose, Richard is said to have answered, that, *at the desire of parliament, he would not remove the meanest scullion of his kitchen.* Having occasion for a subsidy, however, which could not otherwise be obtained, he was obliged to comply with their demand: the earl of Suffolk, the chancellor, was not only removed from his office, but impeached, and found guilty of misdemeanours; an inquiry was ordered into the disposal of the public revenue; and a commission was granted by parliament, to fourteen persons, for the space of a twelvemonth, to concur with the king in the administration of government.

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To these regulations Richard submitted no longer than till he thought himself in a condition to oppose them; and it soon became evident, that he had formed a resolution of extending his prerogative beyond its ancient limits. For this purpose he consulted with the principal judges and lawyers of the kingdom; from whom he found no difficulty in procuring an unanimous opinion agreeable to his wishes. Whatever may be the virtue of individuals, it is not to be expected that a body of men, sprung very frequently from a low origin; bred up in the habits of a gainful profession; whose views must be continually directed towards preferment, and the emoluments of office; soldiers of fortune, and whose fortune depends chiefly upon the favour of the crown; will be disposed to stand forth in critical times, and expose themselves to much hazard in maintaining the rights of the people.

This design was frustrated by the vigour and activity of the nobles, who levied a great army, and defeated that of the crown. The king's ministers made their escape; but in their absence were impeached, and their estates confiscated. Two persons of note, one of whom was the famous Trefilian, chief justice of the king's bench, who happened to be caught, were tried and executed. The rest of the judges, who had concurred in the opinions above-mentioned, were banished to Ireland.

The behaviour of the king, in this situation, was abject and mean, in proportion to his former haughtiness. At an interview with the nobles, he is said to have answered their reproaches with a flood of tears. But Richard was possessed of a high degree of obstinacy; a quality which is frequently connected with inferiority of understanding: whether

whether it be that the same stupidity, which leads men into error, puts them out of the reach of conviction by reasoning; or that, in proportion as they are incapable of examining objects on every side, they are commonly self-conceited and opinionative.

The parliament being then composed of two houses, as will be mentioned more fully hereafter, it was perceived, by the advisers of this infatuated prince, that the easiest method of carrying his views into execution, was by dividing that assembly, and in particular, by procuring a majority in the house of commons. We accordingly find, that, by adhering invariably to the same plan; by directing the nomination of sheriffs, and of the principal magistrates of boroughs; and by employing the interest and address of all those different officers in the election and return of representatives, this object was, in a few years, entirely accomplished. The king now ventured to avow his pretensions to absolute power; and in a meeting of parliament, in the year 1397, the opinions of the judges, which had been formerly condemned, were approved of and ratified; the chief heads of the aristocracy were put to death, or banished; the duke of Gloucester, the king's uncle, was privately murdered; and, to supersede the necessity of calling the national assembly for the future, a committee was appointed, consisting of twelve peers, and six commoners, upon whom the authority of both houses was devolved.

This expedient of the crown, to pack the house of commons, is the first of the kind that occurs in our history; and it must be considered as forming a remarkable æra in the British constitution. It shows, in the first place, the limited nature of our ancient government; since, notwithstanding the late advances of the regal authority, the king,

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in order to carry his measures, was obliged to employ such indirect means for procuring the concurrence of parliament.

It proves also, that political consideration was not, at this period, confined to the greater nobility; but that men of small property, and of inferior condition, the representatives of counties and boroughs, were possessed of so much interest as enabled them, by throwing their weight into the scale of the sovereign, to bestow upon him an entire ascendant over the national council.

From the consequences which followed this undue influence, acquired by the king over the house of commons, we may plainly perceive that a spirit of liberty, or, if you will, of opposition to the tyranny of the crown, was even then diffused, in some measure, over the nation. Finding that he was now master of the resolutions of parliament, Richard supposed the dispute was at an end; was therefore lulled in perfect security; and abandoned himself to the dictates of his own arbitrary will. But the people saw, with concern, that they had been betrayed by their own representatives; their indignation and resentment were excited, and they became ripe for a general insurrection. The leaders of the malcontents cast their eyes upon the duke of Hereford, the oldest son of the duke of Lancaster; who, by the injustice of the king, had been sent into exile, and afterwards excluded from the inheritance of his father's large possessions. This nobleman, the most distinguished by his rank and accomplishments, was invited to put himself at the head of the conspiracy, for the purpose of redressing his own private injuries, no less than of delivering the nation from tyranny and oppression. Richard, mean while, went over to Ireland, in order to quell the disturbances

disturbances of that country; and thus gave to his enemies the opportunity which they wanted of executing their designs. The general sentiments of the people were made abundantly evident by the events which followed. The duke of Hereford landed at Ravenspur, in Yorkshire, with no more than eighty attendants; but in a short time found himself at the head of an army amounting to sixty thousand. The duke of York, on the other hand, who had been left regent of the kingdom, assembled a body of troops to the number of forty thousand; but these, from disaffection, were unwilling to fight; and being therefore disbanded, they immediately joined the enemy. Another army having been transported by the king from Ireland, were infected with the same spirit; and the greater part of them deserted the royal standard.

Richard, abandoned by the whole nation, was forced to subscribe an instrument of *resignation*, in which he acknowledged himself unworthy to govern the kingdom. An accusation for misbehaviour, consisting of no less than thirty-five articles, was preferred against him to parliament, and universally approved of: after which, this prince was solemnly deposed by the suffrages of both houses; and the crown was conferred on the duke of Hereford.

It is remarkable, according to the observation of an eminent writer, " that these extremities fell upon Richard the Second, at a time when every thing seemed to contribute to his support, in the exercise of that arbitrary power which he had assumed. Those whom he had most reason to fear, were removed, either by violent death or banishment; and others were secured in his interest by places, or favours at court. The great offices of the

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“ crown, and the magistracy of the whole kingdom, were  
 “ put into such hands as were fit for his designs; besides  
 “ which, he had a parliament entirely at his devotion; but  
 “ all these advantageous circumstances served only to prove,  
 “ that a prince can have no real security against the just  
 “ resentments of an injured and exasperated nation; for, in  
 “ such governments as that of England, all endeavours  
 “ used by the king to make himself absolute, are but so  
 “ many steps towards his own downfall\*.”

The right of Henry the Fourth to the crown of England was derived from the authority of parliament, confirmed by the voice of the whole kingdom. No transaction of the kind was ever completed with greater unanimity. But although, in that age, the people gave way to their natural feelings in dethroning an arbitrary and tyrannical prince, they were probably little accustomed to reason upon those philosophical principles, by which, in cases of extreme necessity, the right of doing so may be vindicated. Even so late as the revolution, in the year 1688, when the necessity and propriety of the settlement, which then took place, was universally understood, the parliament were unwilling to avow, in express terms, that power which they were determined to exercise; they had recourse to childish evasions, and fictitious suppositions; and the absurd pretext of an *abdication* was employed to cover the real deposition of the sovereign. It is not surprising, therefore, that, in the days of Richard the Second, the speculative opinions of men, concerning points of this nature, were loose and fluctuating. Henry appears to have been sensible of this; and founds his claim to the throne upon three different

\* Remarks upon the History of England by H. Oldcastle.

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circumstances; upon the mal-administration of Richard; upon the right of conquest; and upon a popular, though probably a groundless tradition, that, by his mother, he was descended from Henry the Third, by an elder brother of Edward the First, who, on account of his personal deformity, had been excluded from the succession to the crown. These particulars, however, are jumbled together, in a manner calculated to avoid a minute investigation. “ In the name of Father, Son, and Holy Ghost,” says he, “ I Henry of Lancaster challenge this rewme of Yng-  
 “ lande, and the crown, with all membres and appurte-  
 “ nances; als I that am descendit by right line of the blode,  
 “ coming fro the gude king Henry therde, and throge that  
 “ right that God of his grace hath sent me, with helpe of  
 “ kyn, and of my friends, to recover it; the which rewme  
 “ was in poynt to be oudone by defaut of governance, and  
 “ ondoying of the gude lawes.”

As no credit seems due to this connection with Henry the Third; so it must be admitted, that, supposing it necessary to set aside Richard the Second, for *default of governance*, Henry the Fourth was not, according to the established rules of succession, the next heir of the crown. He was the grandson of Edward the Third, by the duke of Lancaster, third son of that monarch. But the duke of Clarence, Edward's second son, had left a daughter, who was married into the house of Mortimer, and whose grandson, the earl of Marche, now a boy of seven years of age, was the representative of that family.

In examining this point, however, it ought to be remembered, that by the rules of succession established among rude and warlike nations, what is called the right of *repr-*

*sentation* is unknown, and the nearer descendants of a family are frequently preferred to the more distant; as also, that, upon similar principles, female relations are usually excluded by the males. According to the early laws of almost all Europe, the title of Henry the Fourth to the crown was therefore preferable, from both of these considerations, to that of the earl of Marche. A contrary custom, indeed, in consequence of more improved manners, had undoubtedly been gaining ground, before this competition became an object of attention; but we must not suppose that it had yet become so universal, or had acquired such a degree of stability, as the peaceful situation, and the scientific views of a polished age, have since bestowed upon it.

But whatever might be the opinions of parliament, or of the people, upon this point, the preference of Henry to any other competitor was, at this time, a matter of the highest expediency, if not of absolute necessity. To dethrone a prince, who had for years been establishing a system of absolute power, and who had given proofs of his violent and sanguinary disposition, was a measure no less dangerous than it was difficult; and the successful execution of it could only be expected under a leader of great popularity, weight, and abilities. Henry appears to have been the only person in the kingdom qualified for conducting such an enterprise, and likely to secure the public tranquillity under the new establishment. To depose Richard, and at the same time to commit the reins of government to a person who, in that extraordinary exigence, was manifestly incapable of holding them, would have been to attempt the abolition of despotism by substituting

substituting anarchy in its place; and wantonly to introduce a revolution, at the hazard of much bloodshed and injustice, but with no reasonable prospect that it could be productive of any lasting advantages.

Henry the Fourth enjoyed, however, but little tranquillity in the possession of that sovereign power which was thus conferred upon him. The great lords, who had taken a distinguished part in placing him on the throne, and who probably over-rated their services, became dissatisfied with that share of the royal favour and confidence which he thought proper to bestow upon them; and were disposed to believe they might easily pull down that fabric which they themselves had erected. The persevering activity, the deliberate valour, and sound policy, displayed by this monarch, through the whole of his conduct, enabled him to crush those frequent conspiracies which were formed against him; although it must be admitted, that his uncommon talents, which were uniformly exerted for this purpose, during a reign of thirteen years, were hardly sufficient to recover the prerogative from the shock which it had received by the deposition of his predecessor.

The splendid character of Henry the Fifth; his courage and magnanimity; his clemency, moderation, and humanity; his engaging appearance and deportment; his affability, address, and popular manners; together with his renewal of the claim to the kingdom of France, and his invasion of that country, accompanied with most astonishing success; these circumstances revived the flattering and delusive prospects entertained by the English in the days of Edward the Third; and, by seizing the national enthousiasm,

flaſm, reſtated the crown in that authority and dignity which it had formerly maintained.

But the death of that monarch produced a ſad reverſe in the ſtate of the kingdom. By the long minority of Henry the Sixth, and his total incapacity, after he came to be of age; by the diſaſters which beſel the Engliſh in proſecuting the war with France; and by their entire expulſion from that country, without the leaſt hope of recovering it; the people were filled with diſcontent; were inſpired with contempt of their ſovereign; and of courſe were diſpoſed to liſten to any objections againſt the title by which his family had obtained the crown. In the preceding reign thoſe objections were held to be of ſo little moment, that Henry the Fifth diſcovered no jealousy or apprehenſion of the earl of Marche, the lineal heir of Richard; and there even ſubſiſted between them an intercourſe of mutual confidence and friendſhip; a circumſtance which reflects great honour both upon the king and upon that nobleman. As the right of the governing family had been confirmed by a poſſeſſion of three ſucceſſive reigns, it would not, in all probability have now been called in queſtion, had not the weakneſs and miſfortunes of the preſent adminiſtration deſtroyed all reſpect to the government, and excited uncommon diſſatisfaction.

Upon the death of the earl of Marche without heirs male, the duke of York, in right of his mother, was now become the repreſentative of that family; and from the extenſive property poſſeſſed by this nobleman, together with his powerful connections, in conſequence of various alliances among the principal nobility, he found himſelf in a condition to aſſert that claim to the crown, which had been

been over-ruled by the prevailing aſcendant of the houſe of Lancaſter. It is needleſs to enter into particulars of the famous contention between thoſe two branches of the royal family; which was continued through the reigns of Henry the Sixth, of Edward the Fourth, and of Richard the Third; and which, during a period of about five-and-thirty years, filled the kingdom with diſorder and with blood. That this long-continued civil war, in which different princes were alternately ſet up and dethroned by the different factions, and in which all public authority was trampled under foot, was extremely unfavourable to the prerogative, will readily be admitted. It cannot however eſcape obſervation, that, in the courſe of this violent contention, the nobles were not, as in ſome former diſputes, leagued together in oppoſition to the king; but, by eſpouſing the intereſt of different candidates, were led to employ their whole force againſt one another. Though the crown, therefore, was undoubtedly weakened, the nobility did not receive proportional ſtrength; and the tendency of this melancholy ſituation was not ſo much to increaſe the ariſtocracy, as to exhaust and impoveriſh the nation, and to deſtroy the effect of all ſubordination and government.

When we conſider, in general, the ſtate of the Engliſh conſtitution, from the acceſſion of Edward the Firſt, to that of Henry the Seventh, we muſt find ſome difficulty to aſcertain the alterations produced in the extent of the regal authority. That the powers of the monarch were, upon the whole, making advances during this period, it ſhould ſeem unreaſonable to doubt; but this progreſs appears to have been ſlow, and frequently interrupted. If, in the vigorous and ſucceſſful reigns of Edward the Firſt,

of Edward the Third, and of Henry the Fifth, the sceptre was remarkably exalted, it was at least equally depressed by the feeble and unfortunate administration of Edward the Second, of Richard the Second, and of Henry the Sixth. By what circumstances the prerogative acquired additional strength, under the princes of the Tudor family, we shall afterwards have occasion to examine.

## C H A P. VI.

*History of the Parliament in the same Period.*

**A**MONG the important subjects of inquiry, which distinguish the period of English history, from the accession of Edward the First to that of Henry the Seventh, our first attention is naturally directed to the changes which affected the legislative power; by the introduction of representatives into parliament; by the division of that assembly into two houses, attended with the appropriation of peculiar powers to each of them; and lastly, by the subsequent regulations, with respect to the right of electing members of the national council. These particulars appear to be of such magnitude, as to deserve a separate examination.

*SECT. I. The Introduction of the Representatives of Counties and Boroughs into Parliament.*

THE parliament of England, from the time of William the Conqueror, was composed, as I formerly took notice, of all the immediate vassals of the crown, the only part of the inhabitants that, according to the feudal constitution, could be admitted into the legislative assembly. As the English nobility had accumulated extensive landed property, towards the latter part of the Anglo-Saxon govern-  
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ment; as yet larger territories were acquired by many of those Norman barons who settled in England at the time of the conquest; and as the conversion of allodial into feudal estates, under the crown, occasioned no diminution in the possessions of individuals; the original members of parliament must have been, for the most part, men of great power, and in very opulent circumstances. Of this we can have no doubt, when it is considered that, in the reign of William the First, the vassals of the crown, as I formerly had occasion to observe, did not amount to more than six hundred, and that, exclusive of the royal demesne, the whole land of the kingdom, in property or superiority, was divided among so small a number of persons. To these opulent barons, attendance in parliament was a duty which they were seldom unwilling to perform; as it gave them an opportunity of asserting their privileges, of courting preferment, or of displaying their influence and magnificence. But in a long course of time, the members of that assembly were subjected to great revolutions; their property was frequently dismembered, and split into smaller divisions; their number was thus greatly increased; while the consideration and rank of individuals were proportionably impaired; and many of those who had appeared in eminent stations were reduced to poverty and obscurity. These changes proceeded from the concurrence chiefly of three different causes.

1. During that continual jealousy between the king and the nobles, and that unremitting struggle for power, which arose from the nature of the English constitution, it was the constant aim of the crown, from a consciousness of inferiority in force, to employ every artifice or stratagem for undermining the influence of the aristocracy. But no measure

could be more effectual for this purpose, than to divide and dismember the overgrown estates of the nobles; for the same wealth, it is evident, which became formidable in the hands of one man, would be of no significance when scattered among twenty. As the frequent insurrections and disorders, which prevailed in the country, were productive of numberless forfeitures, they afforded the king opportunities of seizing the property of those barons who had become obnoxious to him, and of either annexing it to the crown or disposing of it at pleasure. In this manner a considerable part of the land in the kingdom, during the course of a century or two, passed through the hands of the sovereign, and, being distributed in such parcels as coincided with his views of policy, gave rise to a multiplicity of petty proprietors, from whose exertions he had no reason to fear much opposition to the progress of his authority.

2. Another circumstance, which contributed still more effectually, though perhaps more slowly and gradually, to diminish the estates of the crown-vassals, was the advancement of arts and manufactures.

The irruption of the Gothic nations into the Roman empire; the struggles which took place during their conquest of the different provinces; the subsequent invasions carried on by new swarms of the same people, against the states erected by their predecessors; the violent convulsions which, in a great part of Europe, were thus continued through the course of many centuries, could not fail to destroy all industry, and to extinguish the mechanical as well as the liberal professions. The rude and barbarous manners of the conquerors were, at the same time, communicated to those countries which fell under their dominion;

nion; and, the fruits of their former culture and civilization being gradually lost, the inhabitants were at length sunk in universal ignorance and barbarism.

When these disorders had risen to a certain pitch, the countries which had so long poured out their inhabitants, to disturb the peace of Europe, put a stop to their depredations. The Northern hive, it has been said, was then exhausted. Those countries, however, were in reality so far from being drained of inhabitants, that they had increased in population. But they had become a little more civilized; and, consequently, had less inclination to roam in quest of distant settlements, or to procure subsistence by the plunder of nations who were now in a better condition to withstand them.

The greater tranquillity which was thenceforward enjoyed in the states that had been formed upon the ruins of the Roman empire, gave the people more leisure and encouragement to introduce regulations for securing property, for preventing mutual injuries, and for promoting their internal prosperity. That original disposition to better their circumstances, implanted by nature in mankind, excited them to prosecute those different employments which procure the comforts of life, and gave rise to various and successive improvements. This progress was more or less accelerated, in different countries, according as their situation was more-favourable to navigation and commerce; the first attention of every people being usually turned to the arts most essential to subsistence, and, in proportion to the advancement of these, being followed by such as are subservient to conveniency, or to luxury and amusement. The eleventh and twelfth centuries have been marked by historians as presenting, in modern times, the first dawn of knowledge

knowledge and literature to the Western part of Europe; and from this period we begin to trace the rude footsteps of manufactures, in Italy, in France, and in the Netherlands.

The communication of the Normans with England, in the reign of Edward the Confessor, which began in 1041, and still more from that of William the Conqueror, contributed to spread, in this island, the improvements which had made a quicker progress upon the continent: the common arts of life were now more and more cultivated; tradesmen and mercantile people were gradually multiplied; foreign artificers, who had made proficiency in various branches of manufacture, came and settled in England; and particular towns, upon the coasts of the sea, or of navigable rivers, or which happened to be otherwise advantageously situated, began to extend their commerce.

This alteration in the circumstances of society, which became more and more conspicuous through the reigns of the several princes of the Norman and Plantagenet race, was productive, as we may easily suppose, of a correspondent variation of manners. The proprietors of land, for whose benefit the new improvements were chiefly intended, endeavoured to render their situation more comfortable, by purchasing those conveniencies which were now introduced; their ancient plainness and simplicity, with respect to the accommodations of life, were more and more deserted; a mode of living more expensive, and somewhat more elegant, began to take place; and even men of smaller fortunes were tempted, in this, as well as in most other particulars, to follow the example of their superiors. By an increase of their annual expence, without any addition to their annual revenue, many individuals, therefore, were laid under

difficulties; found it necessary to contract debts; and, being subjected to incumbrances, were at last obliged to dismember and alienate their estates.

To this general cause of alienation, we may add the epidemical madness of the crusades, by which many persons were induced to sell or mortgage their possessions, that they might put themselves in a condition for bearing a part in those unprosperous and expensive expeditions.

It may accordingly be remarked, that as, about this time, the commerce of land was rendered more frequent, it was gradually freed from those legal restraints to which it had anciently been subjected. According to the simplicity of manners which had prevailed among the rude inhabitants of Europe, and which had kept estates invariably in the same families, no person was understood to have a right of squandering his fortune to the prejudice of his nearest relations\*. The establishment of the feudal system produced an additional bar to alienation, from the circumstance that every vassal, being a military servant, and having obtained his land as a consideration for services to be performed, could not transfer the property without the consent of his master. In England, upon the dawnings of improvement after the Norman conquest, persons who had acquired an estate by purchase, were permitted to dispose of it at pleasure; and in towns, the inhabitants of which became familiar with commerce, the same privilege was probably soon extended to every tenement, however acquired. When the disposition to alienate became somewhat more general over the country, the con-

\* Vide L. L. Aelfred, c. 37.

veyance,

veyance, even of estates descending by inheritance, was executed, in a manner consistent with feudal principles, by *subinfeudation*; the purchaser became the vassal of the person who sold the lands, and who still continued liable to the chief lord for all the feudal obligations. But in the reign of Edward the First a statute was made, by which an unbounded liberty was given to the alienation of landed property; and when any person sold an estate, the superior was bound to receive the purchaser as his immediate vassal\*.

3. By the course of legal succession, the property of the crown vassals, or members of parliament, was also frequently broken and dismembered. The right of primogeniture, indeed, which, among the feudal nations, was introduced in order to shelter the individuals of every family under the protection of their own chief or leader, prevented, so far as it went, the division of estates by inheritance. But primogeniture had no place in female succession. Besides, the improvements of society, by enlarging the ideas of mankind, with relation to property, contributed to extend and to multiply *devises*, by which even landed possessions were bequeathed at pleasure; and, according to the situation or caprice of the owner, were liable to be split and distributed among different persons.

When the alienation of estates, together with those divisions of landed property which arose from female succession, or from devise, had proceeded so far as to threaten the destruction of great families, the nobility took the alarm, and had recourse to the artifice of entails for preserving

\* The famous statute *quia emptores*, passed in the 18th of Edward I. This law was farther extended, or at least received a more liberal interpretation, in the reign of Edward III.

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their opulence and dignity. In the reign of Edward the First, they are said to have extorted from the king a remarkable statute, by which the privilege of entailing was greatly extended; from which it may be inferred that there had appeared, about this time, a strong disposition to alienate and dismember estates; since, in order to check the progress of the evil, this extraordinary remedy was thought requisite\*.

These changes in the state of landed property had necessarily an extensive influence upon the government, and more especially upon the interest and political views of those persons who composed the national council. Many of the crown-vassals were now, from the smallness of their fortune, unable to bear the expence of a regular attendance in parliament: at the same time that they were discouraged from appearing in that assembly; where, instead of gratifying their ambition, they were more likely to meet with situations to mortify their vanity, by exposing the insignificance into which they had fallen. They were no longer in a condition to view the extensions of the royal prerogative with an eye of jealous apprehension; but had commonly more cause of complaint against the great barons, who lived in their neighbourhood, and by whom they were frequently oppressed, than against the sovereign, whose power, being more distant, and operating in a higher sphere, gave them less disturbance.

But while, from these considerations, the small barons were disposed, in many cases, to withdraw themselves from

\* This was the statute of Westminster *de donis conditionalibus*, 13 Edward I. c. 1. By which it was provided, that an estate left to a person, and *the heirs of his body*, should in all cases go to the issue, if there was any; if not, should revert to the donor.

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the meetings of parliament, the king had commonly an interest in requiring their punctual attendance; because he found it no difficult matter to attach them to his party, and by their assistance was enabled to counterbalance the weight of the aristocracy. On every occasion, therefore, where any measure of public importance was to be agitated, the king was usually solicitous that many of the poorer members of parliament should be present; and a great part of these, on the other hand, were continually excusing themselves from so burdensome a service. The longer the causes which I have mentioned had continued to operate, in dividing and dismembering landed estates, the number of crown-vassals, desirous of procuring an exemption from this duty, became so much the greater.

Comparing the condition of the different landholders of the kingdom, towards the latter part of the Anglo-Saxon government, and for some time after the Norman conquest, we may observe a similar distinction among them, proceeding from opposite causes. In the former period, when people of small fortune were unable to subsist without the protection of their superiors, the property of many allodial proprietors was gradually accumulated in the hands of a few, and those who possessed a landed territory of a certain extent, acquiring suitable consideration and rank, were distinguished by the title of *proceres*, or chief nobility. Under the first Norman princes, when the dependence of the lower ranks had produced its full effect in the completion of the feudal system, the owners of small estates were almost entirely annihilated; and in the condition of those opulent barons, among whom the kingdom came to be divided, no difference was probably acknowledged. But when the re-  
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val of arts, and the progress of the people towards independence, had begun to dismember estates, and to multiply the vassals of the crown; the disproportion between the property of individuals became, once more, conspicuous; and the former distinction between the *great* and *small* barons excited the attention of the legislature.

The prior accumulation, and the subsequent dissipation, of wealth, had in this respect a similar effect. In amassing great fortunes some of the barons were necessarily more successful than others, which rendered estates extremely unequal. In that state of society which tempted men to spend, or promoted the division of their estates, some proprietors proceeded likewise in this career with greater rapidity, by which the same inequality was produced.

In the great charter of king John it is ordained, that the archbishops, bishops, earls, and *greater barons*, shall be summoned to the meetings of parliament, by particular letters from the king; and that all other persons, holding immediately of the crown, shall receive a general citation from the king's bailiffs or sheriffs. But, although the more opulent vassals of the crown are thus clearly exalted above those of inferior wealth, and dignified with particular marks of respect, it is difficult to ascertain the extent of property by which those two orders of men were separated from each other. That the statute has a reference to some known boundary between them, can hardly be doubted; but whether, in order to obtain the rank and title of a *great baron*, an estate amounting to forty hides of land was requisite, agreeable to the distinction of the *chief nobility* in the reign of Edward the Confessor; or whether the qualification in point of property had been varied according

ing to the alteration of times and circumstances; no account can be given.

The effect of a regulation for summoning the small barons to parliament, by a general citation only, was to place them in greater obscurity, and to encourage their desertion, by giving them reason to hope that it would pass without observation. In such a situation, however, where a complete and regular attendance was not to be expected, and where each individual was endeavouring to excuse himself, and to throw as much as possible of the burden upon his neighbours, an agreement would naturally be suggested to the inhabitants of particular districts, that they should relieve and succeed each other by turns, in the performance of this duty; and thus contribute to their mutual ease and advantage, by sharing among them an inconvenience which they could not entirely avoid. Of these joint measures, it was an obvious improvement, that, instead of a vague and uncertain rotation, particular persons, who appeared the best qualified for the task, and were most willing to undertake it, should be regularly elected, and sent, at the common expence, to represent their constituents in parliament. Nor can it be doubted that the king would be highly pleased with such an expedient; by which he secured a proportion of the small barons in the ordinary meetings of the national council, and which did not hinder him from convening a greater number on extraordinary occasions.

In this manner the knights of shires appear to have been first introduced into parliament. The date of this remarkable event cannot be fixed with precision; but it was undoubtedly as early as the reign of Henry the

Third\*. The division of counties produced a separate association among the crown vassals, in each of those districts, for electing their own representatives. The number of these appears to have been originally precarious, and probably was varied in different emergencies. On different occasions we meet with four knights called from each county; but they were gradually reduced to two, the smallest number capable of consulting together for the interest of their constituents †.

The same changes in the state of the nation, which contributed principally to the rise of the knights of shires, introduced likewise the burgeses into parliament.

By the advancement of agriculture, the peasants, in many parts of Europe, had been gradually emancipated from slavery, and been exalted successively to the condition of farmers, of tenants for life, and of hereditary proprietors. In consequence of the freedom attained by this inferior class of men, a great proportion of them had engaged in mechanical employments; and, being collected in towns, where the arts were most conveniently cultivated, had, in

\* The records of parliament, for several reigns after the Norman conquest, are in a great measure lost, having probably, during the barons wars, been destroyed alternately by each prevailing party, who found them unfavourable to their interest. [Prynne's preface to Cotton's Abridg. of Records in the Tower.] This circumstance accounts for the great obscurity in which, after all the labour of antiquaries, the origin of so great a change in the constitution of that assembly still remains. The first introduction of representatives of counties may, with some probability, be traced as far back as the reign of king John. See Carte's Hist. Reign of Edw. I.

† In the eleventh year of Edward I. four knights were summoned for each county. [Brady's Hist. of England.] In the reign of John, there had been a writ issued to the sheriff of Oxfordshire, to return four knights for that county. Carte, in the reign of Edward I.

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many cases, become manufacturers and merchants. The situation of these manufacturing and trading people enabled them, after the disorders which prevailed in Europe had in some measure subsided, to make a rapid progress in improving their circumstances, and in acquiring various immunities and privileges. By mutual emulation, and by the influence of example, the inhabitants of the same town were excited to greater industry, and to the continued exertion of their talents; at the same time that they were in a capacity of uniting readily for mutual defence, and in supporting their common interest. Being originally the tenants or dependants, either of the king or of some particular nobleman, upon whose demesne they resided, the superior exacted from them, not only a rent for the lands which they possessed, but various tolls and duties for the goods which they exchanged with their neighbours. These exactions, which had been at first precarious, were gradually ascertained and fixed, either by long custom, or by express regulations. But, as many artifices had, no doubt, been frequently practised, in order to elude the payment of those duties, and as, on the other hand, the persons employed in levying them were often guilty of oppression; the inhabitants of particular towns, upon their increasing in wealth, were induced to make a bargain with the superior, by which they undertook to pay a certain yearly rent, in the room of all his occasional demands: and these pecuniary compositions, being found expedient for both parties, were gradually extended to a longer period, and at last rendered perpetual.

An agreement of this kind appears to have suggested the first idea of a *borough*, considered as a *corporation*. Some of the principal inhabitants of the town undertook

to pay the superior's yearly rent; in consideration of which, they were permitted to levy the old duties, and became responsible for the funds committed to their care. As managers for the community, therefore, they were bound to fulfil its obligations to the superior; and, by a natural extension of the same principle, it came to be understood that they might be prosecuted for all its debts; as, on the other hand, they obtained, of course, a right of prosecuting all its debtors. The society was thus viewed in the light of a body politick, or fictitious person, capable of legal deeds, and executing every sort of transaction by means of certain trustees or guardians.

This alteration in the state of towns was accompanied with many other improvements. They were now generally in a condition to dispense with the protection of their superior; and took upon themselves the burden of keeping a guard, to defend them against a foreign enemy, and to secure their internal tranquillity. Upon this account, beside the appointment of their own administrators, they obtained the privilege of electing magistrates, for distributing justice among them. They became, in a word, a species of *soccage tenants*, with this remarkable peculiarity in their favour, that by remaining in the state of a corporation from one generation to another, they were not liable to the *incidents* belonging to a superior, upon the transmission of lands to the heirs of a vassal.

The precise period of the first incorporation of boroughs, in the different kingdoms of Europe, is not easily determined; because the privileges arising from the payment of a fixed rent to the superior, in the room of his casual emoluments, and the consequences which resulted from placing the revenue of a town under permanent ad-

ministrators,

ministrators, were slowly and gradually unfolded and brought into the view of the public. In the eleventh and twelfth centuries, we may trace the progress, if not the first formation, of those communities, in Italy and in Germany, which corresponds with the advancement of trade and manufactures in those countries\*. The towns in France are said by Father Daniel to have been first incorporated in the reign of Lewis the Gros; but it appears that they had then acquired considerable privileges, were intrusted with their own government, and the inhabitants were formed into a militia for the service of the crown †.

In the reign of Henry the First of England, the cotemporary of Lewis the Gros, the inhabitants of London had begun to farm their tolls and duties, and obtained a royal charter for that purpose ‡. Their example was followed by the other trading towns, and from this time forward the existence of English boroughs becomes more and more conspicuous.

When the towns, under the immediate protection of the king, had been incorporated, and, of course, exalted into the rank of crown-vassals, it was agreeable to the general system of the feudal policy, that they should have a voice in the national council; and, more especially, when extraordinary aids, beside their constant yearly rent, were de-

\* With respect to the rise of the cities of Italy, see Muratori *Antiq. Ital. Med. Ævi*, tom. iv. The advancement of the German free cities appears to have been rather posterior to that of the Italian; their chief privileges having been acquired under the princes of the Swabian family. They attained their highest pitch of grandeur in consequence of the famous Hanseatic confederacy, which began in the year 1241. See *Abrégé de l'histoire et du droit public d'Allemagne*, par. M. Puffel.

† M. Puffel's *History of the reign of Lewis VII.*

‡ Hume's *History of England*.

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manded from them, as well as from the other tenants *in capite*, that they should have an opportunity of refusing or consenting to these demands. Their attendance in that assembly was, at the same time, of advantage to the sovereign, and even more so than that of the small barons; for the trading people, of all the inferior part of the nation, were the most liable to be insulted and oppressed by the nobles, and were of consequence proportionably attached to the monarch, who had found his account in protecting and supporting them.

It was impossible, however, that all the members of every royal borough should assemble in order to deliberate upon the business of the nation; and in this, as well as in the separate concerns of each respective community, it was natural for them to commit the administration to particular commissioners or representatives. In England, accordingly, it appears, that, after the boroughs had been incorporated, and had been raised, by their trade, to a degree of consideration and independence, they began to send representatives into parliament. The records of parliament, as has been before remarked, during several reigns after the Norman conquest, have not been preserved; so that it is no less uncertain at what precise time the burghesses, than at what time the knights of shires, made their first appearance in that assembly; but as those two events proceeded from the same cause, the advancement of commerce and manufactures, it is probable that they were nearly coeval\*.

\* Sir Henry Spelman declares, that, from the most careful examination, he could find no traces of the representatives of boroughs in parliament, before the latter part of the reign of Henry III. *Glossar. v. Parliamentum.*

In the great charter of king John, it is expressly ordained, that aids shall not be imposed upon the boroughs without the consent of parliament; from which it may be inferred, that those communities had then acquired the rank of socage tenants, and that matters were at least ripened and prepared for their introduction into the councils of the nation. The first instance, upon record, of the burghesses attending in parliament, occurs in the forty-ninth year of the reign of Henry the Third; when they are said to have been called by the famous earl of Leicester, in order to support his ambitious views: but this is not mentioned by any historian as a late innovation; neither is it probable that this nobleman, at the very time when he was endeavouring to screen himself from the resentment of the nation, would have ventured to open a new source of discontent, by making a sudden and violent change in the constitution. It is likely that some of the burghesses had been present in former parliaments; as we find that they afterwards were, upon two different occasions, in the early part of the reign of Edward the First: but the number of them was not fixed; nor were they accustomed to give a regular attendance.

The policy of Edward the First led him to take hold of the circumstances, which have been mentioned, for promoting the interest of the crown. In the twenty-third year of his reign, directions were given to summon regularly the knights of the shires, together with the burghesses; of which, after the example of the former, two were generally sent by each borough; and from that period, both these classes of representatives continued to be constant members of the legislature.

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The same circumstances, according as they existed more or less completely, in the other countries of Europe, were productive of similar changes in the constitution of their national councils.

In Scotland, a country whose government and laws bore a great analogy to those of England, not only from the common circumstances which operated upon all the feudal nations, but also from that vicinity which produced an intercourse and imitation between the two countries, the parliament, as far back as we can trace the records of Scottish history, appears to have been composed of the greater thanes, or independent proprietors of land. The representatives of boroughs are supposed by historians to have been first introduced into its meetings during the reign of Robert Bruce; which corresponds to that of Edward the Second; but satisfactory evidence has lately been produced, that this event must have happened at an earlier period\*. From the slow progress, however, of trade in Scotland, the number of burghers in her national council was for a long time inconsiderable; and their appearance was limited to a few extraordinary cases.

The representatives of counties became constituent members of the Scottish parliament by the authority of a statute, which, being still preserved, affords great light with respect to the origin of this establishment both in Scotland and in England. By that statute it is provided, that the smaller vassals of the crown should be excused from personal attendance in parliament, upon condition of their sending representatives, and maintaining them at the common expence. This regulation was intro-

\* See Dr. Stuart's acute researches into the ancient government of Scotland.

duced

duced by James the First; who, as he had resided for many years in England, and was a prince of learning and discernment, had probably been induced to copy this branch of policy from the institutions of a people, among whom the monarchy had made greater advances than in his own country. But the Scottish barons, whose poverty had given occasion to this regulation, laid hold of the dispensation which it bestowed upon them, without fulfilling the conditions which it required; and it was not until the reign of James the Sixth, that their obligation to send representatives into parliament was regularly enforced\*.

In France, the representatives of boroughs, according to the most probable account, were first introduced into the national assembly in the reign of Philip the Fair; by whom they are said to have been called for the purpose chiefly of consenting to taxes †. It is remarkable, however, that in the French *convention of estates*, no set of men, corresponding to the knights of shires in England, was ever admitted. The improvement of arts, in France as well as in England, contributed not only to raise the trading people,

\* In the reign of James the First, we meet with two statutes upon this subject. By act 1425, c. 52. it is required, that all the *freeholders* shall give personal attendance in parliament, and not by a *procurator*; unless they can prove a lawful cause of their absence. Afterwards, by a statute 1427, c. 102. it is enacted, "that the small barons and free tenants need not come to parliaments, provided that, at the head court of every sheriffdom, two or more wise men be chosen, according to the extent of the shire, who shall have power to hear, treat, and finally to determine all causes laid before parliament; and to chuse a *speaker*, who shall *propone* all and sundry needs and causes pertaining to the commons in parliament."

From these two acts of parliament, it is evident the king had first endeavoured to enforce the attendance of all the small barons; and, upon finding this impracticable, had resorted to the expedient of introducing representatives.

† This happened about the year 1300. See Paquier *Recherches de la France*.

but also to dismember the estates of many proprietors of land; but the king does not seem to have availed himself of that situation for obliging the small barons to send representatives into the national council. The greater authority possessed, about this period, by the French monarch, was probably the cause of his not resorting to the same shifts, that were practised in England, to counterbalance the power of the aristocracy. That a sovereign should court the lower part of his subjects, and raise them to consideration, with a view of deriving support from them, is none of the most agreeable expedients; and nothing, we may suppose, but some very urgent necessity could make him think of submitting to it.

The circumstance now mentioned, created a most essential difference between the national council in France and in England; the latter, comprehending the representatives of counties as well as of boroughs, and consequently a large proportion of the people; whereas the former admitted no other representatives but those of boroughs, the number of which, in either country, was for a long time inconsiderable.

The free cities of Germany had, in the thirteenth century, acquired such opulence as enabled them to form that famous Hanseatic league, which not only secured their independence, but rendered them formidable to all the military powers in their neighbourhood. From these circumstances they rose to political power, and obtained a seat in the Diet of the empire. But in Germany, the representatives of the small barons were not admitted into that assembly, from an opposite reason, it should seem, to that which prevented their admission into the French convention of estates. At the time when the rise of commerce had led the

the way to such a regulation, the nobility, and the free states of the empire, had so firmly established their independence, and the emperors had so far declined in authority, that it was vain to expect, by any artifice or exertion, to stop the progress of the aristocracy. The great exaltation of the German states had indeed produced a wide difference, in the power and dignity of the different nobles; and those of inferior rank, instead of maintaining an equal voice with their superiors, were at length associated in different classes; each of which, having only a single vote in the diet, were in fact reduced to a worse condition than if they had acted by representatives.

In Flanders, in the several principalities which afterwards composed the Spanish monarchy, and, in general, in all the feudal governments of Europe, we may observe, that whenever the towns became free and opulent, and where they continued members of a larger community, they obtained a seat in the legislative assembly. But with respect to the representatives of the small barons, or inferior nobles, their introduction into the legislature is to be regarded as a more singular regulation, which, depending upon a nice balance between the crown and the nobility, has been adopted in some countries, and in others neglected, according as it happened to suit the interest and policy of the sovereign, or the peculiar circumstances of the people\*.

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\* The boroughs are said to have been introduced into the *cortes* of the different petty kingdoms of Spain, about the same time as in the other nations of Europe. In each of those kingdoms the *cortes* came to be composed of the nobility, of the dignified ecclesiastics, and the representatives of the cities. But in none of them do we find that the representatives of the small proprietors of land were admitted into those

In Italy, a country which had been broken into small principalities, under princes possessed of little power, or residing at such a distance as to have little capacity of exerting it over the inhabitants, the principal towns, whose prosperity in trade, if we except the territories belonging to the Moors in Spain, was prior to that of the other parts of Europe, became separate and independent states; and fell under such modes of republican government as were agreeable to the situation of their respective societies.

From a connected view of the different countries of Europe, during the period now under examination, it seems hardly possible to entertain a doubt, that the representatives in the English parliament were introduced in the manner, and from the causes, which have been specified. It appears, at the same time, surprising, and may perhaps be considered as an objection to the account which has been given, that there is a profound silence, among all cotemporary writers, concerning this important event. The historians of that age, it is true, were neither philosophers nor politicians; they were narrow-minded and bigotted ecclesiastics, who saw nothing of importance in the history of England, but what was immediately connected with those religious institutions to which they were devoted. But still it may be said, that if the commons were unknown in the early assemblies of the nation, the introduction of that order of men into parliament, would have been such a novelty, as could hardly fail to strike the imagination, and to be mentioned in some of the writings of those times.

assemblies; though, in the kingdom of Arragon, it appears that the nobility were distinguished into those of the first, and those of the second rank. See Dr. Robertson's History of Charles V.

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It is necessary, however, to remark, that this alteration was produced in a gradual manner, and without any appearance of innovation. When the knights of shires began to attend the meetings of parliament, they were no other than barons formerly entitled to that privilege. Their being sent at the common expence of the small barons belonging to a district, was a circumstance that would excite little attention; as it probably arose from the private contribution of the parties concerned, not from any public regulation. The burgeses, in like manner, were not admitted into parliament all at once, or by any general law of the kingdom; but when particular towns, by their incorporation, and by the privileges bestowed upon them, had acquired the rank of crown-vassals, their obtaining a share in the legislature, by means of representatives named for that purpose, was a natural consequence of their advancement. This privilege, so far from being regarded as new or uncommon, had regularly been acquired by such of the churles, or peasantry, as were exalted to the condition of foccage-tenants; and was in reality a consequence of vassalage, interwoven in the system of that feudal government, with which the people of that age were familiarly acquainted. Neither was it likely that the appearance, from time to time, of a few of these inferior persons, along with the greater lords of parliament, would have an apparent tendency to vary the deliberations of that assembly; and the practice had, in all probability, been long continued, and greatly extended, before the effects of it were of such magnitude as to attract the notice of the public.

SECT.

SECT. II. *The division of Parliament into two Houses, and the peculiar Privileges acquired by each House.*

THE members of the great council, in all the feudal governments of Europe, were divided originally into two classes or orders; the one composed of ecclesiastical, the other of lay barons. These two sets of men, from their circumstances and way of life, having a different interest, and being actuated by different views of policy, entertained a mutual jealousy, and were frequently disposed to combat and thwart the designs of each other. In the conduct of national business, they usually held separate conferences among themselves; and when they afterwards came to a joint meeting, were accustomed, instead of voting promiscuously, to deliver, upon the part of each, the result of their previous deliberations. As each of those bodies was possessed of independent authority, it would have been dangerous to venture upon any measure of importance, in opposition to the inclination or judgment of either; and therefore, in all public transactions which they had occasion to determine, the concurrence of both was held indispensable. Hence, by long custom, they became two separate *estates*, having each a negative upon the resolutions of the legislature.

When the burgeses were admitted into the national assembly, they were, by their situation and character, still more distinguished from the ecclesiastical and lay barons, than these last from each other. They acted, not in their own name, but in the name of those communities, by whom they had been appointed, and to whom they were

were accountable: at the same time that the chief object in requiring their attendance, was to give their consent to such peculiar aids, or taxes, as were demanded from their constituents. It was necessary, therefore, that they should consult among themselves, in matters relating to their peculiar interest; and, as the department allotted them was unconnected with that of all the other members, they naturally obtained a separate voice in the assembly. We may easily conceive, that when this method of procedure had been established in the imposition of taxes, it was afterwards, upon the subsequent rise of the burgeses, extended to every branch of parliamentary business, in which they claimed the privilege of interfering. Thus, in all the feudal kingdoms which had made advances in commerce, the great council came to be composed of three estates: each of whom, in the determination of public measures, enjoyed a separate negative.

Whether these different classes of men should be convened in the same, or in different places, depended, in all probability, upon accident, and in particular on the number of their members, which, at the times of their meeting, might render it more or less difficult to procure them accommodation. In England, the prelates, and the nobility, were accustomed, in ordinary cases, to meet in the same place; although it is likely that each of them, in order to settle their plan of operations, had previous consultations among themselves. When the deputies from counties and boroughs were first called into parliament, they proceeded upon the same plan, and were included in the same meeting with the ancient members. It is probable, that the boroughs, then in a condition to use this privilege, were not numerous. To a parliament held in the eleventh of Edward



Edward the First, we find that no more than twenty towns were required to send representatives; of which two were summoned from each town\*. But upon the regular establishment of the deputies from counties and boroughs, in the twenty-third year of that reign, the number of the latter was greatly increased. The returning boroughs, from each of which two representatives were generally required, are said to have then amounted to about an hundred and twenty; besides those belonging to Wales, of which there are supposed to have been about twelve†.

From the number of the burgessees at this time, from the influence and weight which they had acquired, and from their peculiar character and circumstances, as representing the commercial interest, they now found it convenient, it should seem, to have a different place of meeting from

\* The trading towns, who sent representatives to this parliament, were, London, York, Carlisle, Scarborough, Nottingham, Grimesby, Lincoln, Northampton, Lynne, Yarmouth, Colchester, Norwich, Chester, Shrewsbury, Worcester, Hereford, Bristol, Canterbury, Winchester, and Exeter. See Carte's Hist.

† Some of these boroughs, however, were omitted in the summons to future parliaments. Mr. Browne Willis, from a diligent inspection of such materials as he could find, to afford any information upon this point, is of opinion, that from about the middle of Edward the Third's reign, to the beginning of that of Edward the Sixth, the parliament consisted of a pretty uniform number of boroughs: that, about this last period, it consisted of 126, and at no former time amounted to 130. See Notitia Parliamentaria.

Mr. Hume asserts, that the sheriff of each county had anciently a discretionary power of omitting particular boroughs in his returns, and was not deprived of this power till the reign of Richard II. [Hist. 4to, vol. ii. p. 287.] In proof of this assertion, he refers to 5 Richard II. c. 4. But that statute proves the direct contrary. It declares, "That if any sheriff leaves out of his returns any cities or boroughs which be bound, and of old time were wont to come to the parliament, *he shall be punished in the manner as was accustomed to be done in the said case in times past.*" Statutes at Large.

the

the other members of parliament, and began to form a separate body, which was called the house of commons.

The knights of shires continued, for some time after, to sit in what now became the house of peers. Although the small barons were, in general, excused from personal attendance, yet, as crown-vassals, they had still a title to vote in parliament; and such of them as attended, even in consequence of an election, were at first considered in the same light with the greater nobility. By appearing frequently, however, in the capacity of mere representatives, not only elected, but having their charges borne by their constituents, their privilege of attending in their own right was gradually lost and forgotten. In consequence of the progressive alienation and division of landed property, their personal influence was continually sinking, while that of the mercantile people was rising in the same proportion; and, as these two classes were thus brought nearer to a level, the landed gentry were often indiscriminately chosen to represent either the one or the other. In such a situation, it became at length an obvious improvement, that the deputies of the counties and boroughs, as by the circumstance of their being representatives, and responsible to those who had appointed them, they were led into a similarity of procedure, should meet in the same house, and carry on their deliberations in common. It is conjectured by Carte the historian, that this change was not effected before the latter part of the reign of Edward the Third; but with respect to the precise time when it happened, there seems to be no evidence whatever.

The coalition of these two orders of deputies may perhaps be regarded as the great cause of the authority acquired by the English house of commons. The members

of that house were by this measure exalted to higher consideration and respect, from the increase of their numbers, as well as from the augmentation of their property. They now represented the mercantile people and the landed gentry; who, exclusive of those who remained in a state of fervitude, composed the great body of the people, and who possessed a great proportion of the national wealth. Of those two classes of the free inhabitants, the landed gentry, for a long time, enjoyed the first rank; and the deputies of boroughs were therefore frequently chosen among the neighbouring gentlemen, who, by reason of their independence, were more capable than their own burgessees of protecting their constituents. By joining together and confounding these different orders of representatives, the importance of either was in some degree communicated to both; at the same time that the people, under so many leaders, became attentive to their common privileges, and were taught to unite in defending them. Had all the constituents been to appear in the national council, they would have been a disorderly multitude, without aim or direction: by choosing deputies to manage their parliamentary interest, they became an army, reduced into regular subordination, and conducted by intelligent officers.

We accordingly find, that, even so early as the reign of Richard the Second, the commons, when they had been induced to take party with the crown, were able to defeat the designs of the nobility, and to raise the sovereign from the lowest extremity to the height of absolute power. The sudden revolution, produced at that time by the national representatives, was a prelude to those greater exertions, which at a subsequent period they displayed in a better cause.

In

In the principal kingdoms upon the continent of Europe, the *third estate* was differently constituted. It comprehended, as I formerly observed, no other deputies but those of the trading towns; a set of men, who, in comparison even of the small barons, or inferior gentry, were long obscure and insignificant. In supporting their privileges, the boroughs were not aided by the joint efforts of the counties; and the family interest of the representative was not superadded to the weight of his personal wealth.

In some of those kingdoms, therefore, as in France and in Spain, the monarch was enabled to break the aristocracy, and to annihilate the national council, before the *third estate*, in consequence of the advancement of commerce, was in a condition to establish its authority: In others, as in the German empire, the great nobles, before the deputies of towns had acquired much influence in the *diet*, reduced the power both of that assembly and of the emperor to a mere shadow.

After the members of parliament had been accustomed to meet regularly in two separate places, the three estates were gradually melted down and lost, in the division of the two houses. The ecclesiastical and lay barons, who sat in the upper house, were led, most frequently, into a promiscuous deliberation; and did not think it worth while to demand a separate voice, except in determining any nice or important question, by which the interest of either was particularly affected. But as government came to be more established upon a regular plan, those extraordinary questions occurred less frequently; at the same time that the progress of knowledge, and of the arts, diminished the influence of the clergy, and rendered them less willing to hazard a direct and avowed contest with the nobles. The

custom of deliberating promiscuously, was thus more and more confirmed, and the exertions of a separate negative, being considered as indications of obstinacy or a factious disposition, were marked with disapprobation and censure, and at length entirely exploded. It appears that, in the time of Richard the Second, this innovation was not entirely completed.

The two houses, on the other hand, having occasion always to deliberate apart, acquired an independent authority, and were naturally regarded as distinct branches of the legislature. The resolutions of each house constituted a separate voice, the concurrence of which was necessary in all the determinations of parliament.

After the formation of the two houses of parliament, in the manner just mentioned, each of them came to be possessed of certain peculiar privileges; which, although probably the objects of little attention in the beginning, have since risen to great political importance.

1. The house of commons, from the nature of its original establishment, obtained the sole power of bringing in money-bills. This was not, at first, regarded as a privilege; but was introduced merely for the sake of dispatch. The primitive house of commons was composed of burghesses only, empowered to grant the king a supply, by one general agreement, in place of the separate bargains, which had formerly been made with each borough. In conducting this business, each borough seems to have directed its representatives with respect to the rate of assessment to which they should consent; and by collecting these particular directions, the sum total to be granted by the whole trading interests was easily ascertained. In a matter so simple as that of determining the extent of the contribution

contribution which, on any particular occasion, they were willing to make, the constituents found no difficulty either in preparing their deputies, by expressing a previous opinion upon the subject, or by sending them clear and pointed instructions, in case, from any new exigence, after the meeting of parliament, an unexpected demand was made by the sovereign.

According to this constitution of parliament, the imposition of taxes produced no intercourse between the two houses; but each house consented to the exactions laid upon that order of men with which it was connected. This method of procedure was continued so long as the house of commons consisted only of burghesses; but when the deputies from counties came to sit and deliberate along with them, a variation was necessary. The deputies of the counties having, by this change, assumed entirely the character of representatives, came naturally to be limited, in the same manner as the burghesses, by the instructions of their constituents\*. But these two orders of men, who now formed the cumulative body of the commons, were connected with different parts of the nation; and, while the burghesses were interested in the taxes laid upon the boroughs, the county-members had an equal concern in such as were paid by the landed gentry. In their promiscuous deliberations, therefore, upon the subject of taxation, it was found convenient, that each of them should not confine their views to that part of the community which they represented, but should agree in the duties to be paid in common by the whole of their constituents; and, as the

\* In a parliament held in the year 1339, that is, about the middle of the reign of Edward the Third, we find the knights of shires pleading that they durst not grant a tax without the consent of their constituents. Carte.

taxes paid by landed gentry or small barons were of the same nature with those which were laid upon the great barons or peers, this naturally suggested the idea of a general assessment upon the nation at large, to be imposed by the concurrence of both houses of parliament. Hence the introduction of *tenths*, *fifteenths*, and *subsidies*; the two former of which were taxes upon personal property; the last, upon estates real and personal. In the imposition of such taxes, both houses of parliament were equally concerned; and the concurrence of both was therefore held requisite.

The house of commons, however, if the precise sum to be granted by them had not been previously specified, were accustomed, in cases of this nature, to consult their constituents, and to regulate their conduct by the instructions which they received.

They could have no debate, therefore, on any occasion, upon the subject of taxation; as their province extended no farther than merely to declare the determination of their constituents. Upon this account, it was to no purpose that any particular tax should first become the subject of deliberation among the peers, and afterwards be submitted to the consideration of the commons; since, after the fullest and most laborious discussion of the question by the former, no other point could be considered by the latter, but whether the intended supply was agreeable to their instructions. The most expedient course, in order to save time and useless disputation, was evidently, that the commons should begin with stating the exact sum which they had been empowered to grant; and that the tax proposed by them should afterwards be examined and canvassed in the house of peers, whose conduct, in this as well as in other particulars, was not subject to any direction or controul.

From

From the same circumstance which introduced the practice, that every proposal for a tax should originate in the house of commons, it became customary that every such proposal or bill, when presented to the house of peers, should receive their simple assent, or negative, without variation or amendment. It could answer no purpose, to return the bill, with amendments, to the house of commons; because the members of that house had no power of deliberating upon such matters, and, having once declared the opinion of their constituents, could not venture to deviate from it in any subsequent stage of the business.

It is probable, at the same time, that this mode of conducting the business of taxation was promoted by the king; who, finding the people of inferior condition most ready to acquiesce in his demands, was willing that, by taking the lead in the imposition of taxes, they might incite the nobility to follow their example, and make them ashamed of declining a burden which they were much more able to bear.

Such appears to have been the origin of this important privilege, which is now justly regarded by Englishmen as one of the greatest pillars of their free constitution. Like many other parts of the British government, it arose from views of immediate convenience; and its distant consequences were neither foreseen nor intended: but, after it had received the sanction of immemorial custom, it was preserved inviolable, without any consideration of the circumstances from which it had taken its rise. As the commons interfered by degrees in legislation, and in various other branches of business, their interpositions became too extensive and complicated, to permit that they should

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be regulated by the opinion of constituents living at a distance. In consequence of more liberal views, it came also to be considered as the duty of each representative, to promote the good of the nation at large, even in opposition to the interest of that particular community which he represented. The instructions, therefore, of constituents were laid aside, or regarded as producing no obligation, upon any set of deputies, to depart from the dictates of their own conscience. The expediency of this important privilege, with which the house of commons came thus accidentally to be invested, will fall more properly to be examined hereafter.

2. Upon the establishment of the two houses of parliament, the supreme judiciary power was, on the other hand, appropriated to the house of peers. The jurisdiction belonging to the Saxon Wittenagemote was exercised promiscuously by all the members of that assembly; and in the Norman parliaments, both before and after the formation of the *aula regis*, the same rule was observed. It seems, however, to be a principle of natural law, that when a magistrate of any sort is invested with jurisdiction, he is bound to a personal discharge of the duties of his office, and has no power to commit the exercise of them to a delegate. The public, by whom he is appointed, has a right to the fruit of that capacity or diligence, upon account of which he was selected to the office; and as, in the decision of law-suits, no security can be given that different individuals will act precisely in the same manner, the appointment of a delegate for the discharge of this employment, would be to impose upon the public a different rate or measure of service from that which was due. Upon this principle, the members of the house of commons, having only

only a delegated power, were excluded from the exercise of that jurisdiction with which the members of parliament, in general, had been anciently invested. Their disqualification, at the same time, was rendered still more apparent, by their acting in consequence of instructions from their constituents. The counties and boroughs might be in a condition, from their general information, to instruct their deputies concerning the taxes to be imposed, or even concerning any law to be enacted; but were altogether incapable of directing them how to proceed in the determination of law-suits. The decision given in any cause must depend upon a complex view of the proofs and arguments produced in court; and therefore no person who is absent, especially in cases where the chief part of the business is transacted  *viva voce*, can form any proper judgment concerning it. Upon this account, the only members of parliament, qualified to act as judges, came to be those who sat in their own right, who had the liberty to form their opinions upon the spot, and, by an immediate investigation of the circumstances, were capable of deciding from the impression made upon their own minds.

From the same cause, therefore, which bestowed upon the commons the right of suggesting taxes, the house of peers became the ultimate tribunal of the nation, and obtained the power of determining, in the last resort, both civil and criminal actions. Thus, while one of these branches of the legislature enjoyed an immediate access to the purses of the people for the public service, the other was intrusted with the guardianship of their lives and fortunes. What was acquired by the commons, in one department, was fully compensated by what fell to the share of the peers in another; so that the constitution remained upon its ancient

basis, and was kept in equilibrio by an equal distribution of privileges.

It may farther deserve to be remarked, that, by the exclusion of the commons from the judicial power, the supreme tribunal of the nation came to be composed of a moderate number of persons; a circumstance highly conducive to the uniformity of their decisions, as well as to the expedition and regularity of their procedure.

When law-suits, before the Norman parliament, had become frequent, it was found inconvenient to determine them in a full meeting, and they were brought, in the first instance, before the *aula regis*. But even as a court of review, the parliament, after the deputies of boroughs and counties were obliged to give constant attendance, was perhaps too numerous; while, by the division of its members into two houses, they were prevented, at least according to their usual forms, from co-operating with one another in the distribution of justice. The same regulation, therefore, which was introduced from the peculiar situation of the lords and of the commons, was afterwards recommended, no doubt, and supported by general considerations of utility.

3. The supreme judiciary power being limited to the house of peers, the right of *impeachment* was of course devolved upon the commons.

When persons intrusted with great offices under the crown, or enjoying any share in the public administration, were guilty of malversation in office, or of what are called high misdemeanors, it was frequently thought necessary, that they should be tried before the highest court in the nation, whose weight alone was adequate to the task of bringing such powerful offenders to justice. In the earlier periods:

periods of the English government, the national council was accustomed to enquire into the conduct of the different executive officers, and to punish them for their offences. The king himself was not exempted from such inquiry and punishment, more than persons of inferior rank. On such great occasions, the prosecution, instead of being committed, as in ordinary crimes, to the management of an individual, was usually conducted by the assembly, who acted both in the capacity of accusers and judges. This was, doubtless, a practice ill calculated for securing a fair trial to the delinquent; but it was no more than what happened in criminal trials before the ordinary courts of justice, where the king was both judge and prosecutor.

Upon the establishment of the two houses of parliament, it became a natural and obvious improvement, that, as the power of trying those offences was restricted to the house of peers, the privilege of conducting the accusation should belong to the commons; that branch of the legislative assembly, which had no share in the judicial department, though it was no less concerned than the other to prevent the abuses of administration. In this manner the two characters of a judge and a prosecutor, which, in the ordinary courts, had been placed in different hands by the custom of appointing deputies to officiate in the name of the crown, came likewise to be separated in the trial of those extraordinary crimes, where, from the danger of arbitrary measures, an amendment of the ancient method of proceeding was most especially requisite.

4. Beside the foregoing privileges, which, from the influence of peculiar circumstances, were acquired by the different branches of parliament, either house was led to assume the power of ascertaining the persons of whom

it was composed, a jurisdiction and authority over them, and the cognizance of the several rights and immunities belonging to their own order. Hence it came to be established, that the house of commons should determine questions concerning the election of its own members; and that every bill affecting the rights of the peerage should take its origin in the house of peers. The privileges, arising from this principle, which have been acquired by the house of commons, were afterwards greatly multiplied, and variously subdivided, in consequence of the attention given to the forms of procedure, and to the rules and maxims necessary for securing its independence.

SECT. III. *Concerning the Manner of electing the national Representatives, and the Forms of Procedure in Parliament.*

THE establishment of a house of commons, consisting entirely of representatives, required a set of regulations for the election of its members. From the different situation of the counties and boroughs, the deputies of those two classes of men came to be chosen in a very different manner.

I. Upon the first incorporation of a borough, the nomination of particular persons, for distributing justice, for managing the funds, and for executing the other business of the community, would seem naturally to belong to all its members, who have a common concern in those branches of administration. In those towns, accordingly, where commerce had introduced a degree of wealth and independence among the bulk of the inhabitants, such a popular plan of government appears to have been generally adopted.

But

But in many of the boroughs, whose trade was more in its infancy, the people of inferior rank were still too poor, and in too servile a condition, to claim the privilege of electing their own administrators; and by their neglecting to intermeddle in public business, the care of every thing relating to the community was devolved upon particular citizens, distinguished by their opulence. When the boroughs were afterwards permitted to have a voice in parliament, the differences in their condition occasioned the same, or even a greater diversity in the mode of choosing their representatives; and, in a long course of time, many other varieties were added, from the operation of accidental circumstances. In some towns, therefore, the representatives were chosen by a considerable part, in others, by a very small proportion, of the inhabitants; in many, by a few individuals, and these, in particular cases, directed, perhaps, or influenced, by a single person.

Two sorts of inequality were thus produced in the representation of the mercantile and manufacturing interest: the one from the very different magnitude of the boroughs, who sent, for the most part, an equal number of representatives: the other, from the very different number of voters, by whom, in each borough, those representatives were chosen. But this inequality, whatever bad consequences may have flowed from it in a later period, was originally an object of little attention; and excited no jealousy or complaint. The primitive burgesses were sent into parliament for the purpose chiefly of making a bargain with the crown, concerning the taxes to be imposed upon their own constituents; and the representatives of each borough had merely the power of consenting to the sum paid by that community which they represented, without interfering in what

what was paid by any other. It was of no consequence, therefore, to any one borough, that another, of inferior size or opulence, should have as many representatives in the national assembly; since those representatives, as far as taxes were concerned, could only protect their own corporation, but were incapable of injuring or hurting their neighbours. So far were the boroughs from entertaining a jealousy of one another upon this account, that some of them found it more eligible to acquiesce in whatever aids the king thought proper to demand, than to be at the expence of supporting their deputies in parliament; and were willing to renounce the privilege, in order to be free of the burden attending it. Many instances of this occur in the English history, from the reign of Edward the First. Mr. Browne Willis has produced a large list of boroughs, which had early sent representatives into parliament, but which lost that privilege by disuse; and there is no doubt that several towns, which had been incorporated, and which obtained the denomination of boroughs, exerted themselves from the beginning, and successfully, in avoiding any parliamentary representation.

Neither was it originally of much importance to any parliamentary borough, in what manner its deputies were chosen; for these, being instructed by the corporation, with respect to the precise amount of the supply to be granted, were only the messengers, who declared the will of their constituents; and as they were not entrusted with discretionary powers, their behaviour occasioned no apprehension or anxiety. The honour of being the representative of a borough was, in those times, little coveted; and the privilege of voting in his election was yet less. The rank which the burgeses held in parliament was too low to  
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become the object of much interest or solicitation; and those who voted for a burges, were so far from gaining any thing by it, that they had scarcely an opportunity of obliging their friends.

2. The knights of the shires were at first elected, in each county, by a meeting composed of the small barons, or vassals of the crown. Of this, from the nature of the thing, it seems hardly possible to doubt. The small barons had been originally members of parliament, but were excused from personal attendance, upon condition of their sending representatives. Who could have a right to choose those representatives, but the persons whom they represented, the persons by whom they were sent; and who bore the charges of their attendance?

But although the vassals of the crown only had, in the beginning, a right to interfere in the appointment of the knights of shires; the *rear-vassals*, or such as held their lands of a subject-superior, were afterwards admitted to a share in the election. This, although an important change in the constitution of parliament, has passed, like many others, without any notice of cotemporary historians. Of the circumstances from which it proceeded, a probable conjecture seems to be the utmost that can be attained.

The small barons, or vassals, who, exclusive of the nobility, held their lands of the crown, and those who held of a subject-superior, were separate orders of men, who originally, by their situation, were removed to a great distance from each other. As members of the community, they appeared to be distinguished most remarkably in two respects. The vassals of the crown sat in parliament: those of a subject-superior were members of his baron-court. The former were liable for aids, and for the other feudal incidents,



incidents, to the king: the latter were bound, for similar duties, to their inferior liege lord.

But these distinctions, arising from the feudal policy, continued no longer than while that system remained in its vigour. After the reign of Edward the First, the small barons, having ceased to attend in parliament, otherwise than by representatives, were at length understood, unless when particularly called by the king, to have no more a seat in that assembly than the vassals of a subject-superior.

With respect to the feudal incidents, great alterations, in the course of time, were also produced. The demesnes of the crown, together with the extraordinary aids, and other incidents, drawn from the crown-vassals, were the only original funds for supporting the expence of government. But when the charges of the public, in consequence of the gradual advancement of society, had from time to time been encreased, these funds became at length insufficient; new supplies were demanded by the king; and, after stretching as far as possible the ancient duties of the crown-vassals, it was found necessary to levy an assessment upon all the proprietors of land, without considering whether they held immediately of the king, or of a subject. The greater part of the public burdens came thus to be imposed upon the nation at large; and the casual emoluments, which the crown derived from its immediate vassals, became, in proportion, of little importance.

In this situation, there was no longer any essential difference between the small proprietors of land, who held immediately of the crown, and those who held of a subject. Neither of them had any right, in their own persons, to sit in the house of commons. Both of them, according to the

the later notions of property, had the same full power over the respective estates which they possessed; and the estates of both were equally subject to the taxes imposed upon the counties. Both of them, therefore, were equally beholden to the knights of the shires, by whose consent those taxes were imposed, and who had it in their power to secure either the one or the other from oppression. As those two classes of men thus reaped an equal benefit from the service of the knights of shires, it became reasonable that they should contribute jointly to the expence with which that service was attended; and if they joined in maintaining the county-representatives, it was no less equitable, that they should have a voice in their election. If they submitted to the burden, they could not decently be excluded from the privilege.

By this relaxation of the feudal system, the foundation of the house of commons was enlarged; and its establishment was rendered more extensively useful. The knights of the shires became properly the representatives, not of one class, but of the whole gentry of every rank and description. All the independent property in the kingdom was, according to this constitution, represented in parliament: the lords appeared in behalf of their own possessions; the inferior landed interest fell under the care of the county-members; and the burghesses were entrusted with the protection of that wealth which was employed in trade.

Such, in all probability, were the circumstances, from which the rear-vassals obtained a share in the election of county-members; but at what time this change was produced is very uncertain. Mr. Hume has concluded, that it took place in consequence of an act of parliament in the reign of Henry the Fourth. But when we examine that

statute, it does not appear to have introduced any such regulation: on the contrary, it supposes that proprietors of land, not holding directly of the crown, had been formerly entitled to vote for the county-members; and makes a general provision for securing the freedom of their election, as well as for preventing undue returns by the sheriff\*.

A late respectable historian, notwithstanding all the light which has been thrown upon the subject in the present age, declares it still to be his opinion, not only that the knights of counties were coeval with the existence of the English parliament; but that, from the beginning, they were chosen, as at present, in a joint meeting of the rear-vassals, and those who held immediately of the crown †. The former part of this opinion has been already examined. With regard to the latter, it is totally inconsistent with the original plan of the feudal government. But what puts the matter beyond all possibility of doubt, is, that in Scotland, whose constitution, from a similarity of circumstances, as well as from imitation, is extremely analogous to that of England, but who, from the slow progress of arts, has retained a number of her primitive regulations; in Scotland, the original practice has been invariably continued; and, from the first introduction of county-representatives to the present day, no person who does not hold his lands immediately of the crown, whatever be the extent of his property, has ever been permitted to vote in a county election ‡.

\* 7 Henry IV. c. 15. See a farther provision to the same purpose, 11 Henry IV. c. 1.

† See Lord Lyttelton's History of Henry II.

‡ Holding of the prince of Wales, is in Scotland viewed in the same light with holding of the king.

When

When a number of the crown-vassals had been excused from personal attendance in parliament, on account of the smallness of their fortunes, it might have been expected that some rule would be established, concerning the precise extent of property which gave a title to this concession; and that an exact line of partition would thus be formed between the small barons, or *gentry*, and the great barons, or nobility. It appears, however, that no such regulation was ever made. The liberty of absence enjoyed by particular members of parliament, seems to have depended, at first, upon the mere will of the sovereign, who never thought of restraining himself with regard to the terms upon which he granted this indulgence. To procure this liberty was the aim of by far the greater part of the crown-vassals; as to prevent the unreasonable extension of it, was the great object of the king; and the exemption was, by custom, established in favour of individuals, before any precautions had been suggested for ascertaining its boundaries\*.

The want of a general rule to define the limits, in point of property, between the *small* and the *great* barons, appears to have produced an irregularity in this part of the constitution. Those crown-vassals whose attendance in parliament had been dispensed with, continued ever after to be excluded from that assembly, and their posterity re-

\* It seems at one time to have been intended by Edward I. that personal attendance in parliament should be required from every landed proprietor, whose yearly rent was above 20l. This was the rule prescribed to the sheriffs of counties, in summoning the crown-vassals to an assembly held in the eleventh of that king's reign. This was also the extent of property in Scotland, which distinguished the *great* barons, or those who were "*constrained* to come to the parliament or general council." Parl. 1457, c. 75.

mained in the same situation, however great the fortune which they might happen to acquire. On the other hand, those opulent barons who continued, in their own right, to sit in parliament, after the time of Edward the First, retained for the future their seat in the house of peers, notwithstanding all the vicissitudes of their fortune, and whatever might be the degree of poverty to which they were afterwards reduced. Property, the natural source of influence and authority, was, in this manner, detached from political power; while indigence, the parent of servility and dependence, was often invested with privileges which he was not qualified to exercise. The former inconvenience might, in particular cases, be removed by the interposition of the sovereign; who could, at pleasure, create any commoner a member of the house of peers: but the latter admitted of no remedy; since a peer, who had squandered his estate, could not, unless he committed a crime, be deprived of his rank; and since by that rank he was excluded from the usual means of repairing his fortune\*.

As there was no regulation concerning the *greatest* extent of property, from which a baron might be excused from attending in parliament, so there was originally none with respect to the *least* which entitled him to vote for a county-member. All the crown-vassals whatever, whose personal attendance was dispensed with, had of course a title to choose representatives, and were bound by their joint contribution to defray the expence of maintaining

\* There occurs, in the reign of Edward IV. an act of parliament, declaring, in the case of George Nevil, duke of Bedford, that his title of honour, as a duke, was void and extinguished, in respect of his poverty, by which he was incapable of supporting his dignity.

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them\*. But when landed property had undergone so much division, that the possessions of many individuals were become extremely insignificant; more especially after the rear-vassals had been joined with those who held immediately of the crown, in voting for the county-members; the poorer sort of proprietors endeavoured to excuse themselves from contributing to the support of national representatives; and, upon being relieved from that burden, had no longer a pretence for interfering in their election.

By an act of parliament, in the reign of Henry the Sixth, it is provided, that the knights of shires shall be chosen by persons residing within the same county, and possessed of lands or tenements, of which the yearly rent, free from all charges, amounts to forty shillings†. By another statute, in the same reign, it is declared, that the voter shall have this estate within the county where the election is made‡. Mr. Hume is of opinion, that forty shillings, at that time, making allowance for the alteration in the weight of the coin, and in the price of commodities, was equivalent to near twenty pounds of our present money.

According as parliament had occasion to determine a greater variety of questions, and attained more experience in discussing the business which came before it, the forms of parliamentary procedure became an object of greater attention; and received, as we may easily imagine, a variety

\* With respect to the contribution laid upon the counties for maintaining the members, see Madox *Firma-burgi*. It was at first levied by the king's writ; and afterwards by act of parliament, from the time of Richard II. See 12 Rich. II. c. 12.

† 8 Henry VI. c. 7.

‡ 10 Henry VI. c. 2.

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of improvements. The appointment of a president, in order to prevent confusion in delivering opinions, to declare the result of a debate, and even, in some measure, to direct the method of handling any question, was a step so necessary in a numerous meeting, that we meet with it as far back as there are any records of the English national council. The lord high steward, as I formerly took notice, was anciently the person who, in absence of the king, presided in that assembly; and when that officer no longer existed, the chancellor, who then rose to the chief consideration in the king's household, was commonly entrusted with this department. After the division of parliament into two houses, this officer continued in most cases to preside in the house of peers; but in that of the commons, whose deliberations were totally separate, another president became necessary.

From the primitive situation of the commons, who, in all cases, were instructed how to act, they had no opportunity of debating upon any subject; but they required a person to intimate their determinations to the king; and for this purpose they, at first, elected a *speaker*. The farther the business of that house was extended, the more they ventured to form resolutions without the advice of their constituents; the power and privileges of their speaker were enlarged in proportion; and he at length obtained the province of an ordinary president. The first election of this officer, which is upon record, occurs in the first parliament of Richard the Second. From the influence and dignity acquired, in that reign, by the commons, their speaker was exalted to an eminent station; and the persons who enjoyed the office became so conspicuous, as to attract the attention of the public.

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One of the principal branches of business which fell under the consideration of parliament was legislation. The first method of conducting a measure of this kind was by a petition from parliament addressed to the king, setting forth some particular grievance or inconvenience, and requesting that it should be removed. To the king belonged the direction both of the executive and judicial powers; and, agreeably to the spirit of a rude age, he was originally under no restraint in the exercise of his prerogative, farther than what might arise from his apprehension of incurring the public displeasure. By a statute it was proposed to limit the former discretionary power of the king, and, out of respect to his dignity, any proposal to this effect was made in the form of a request, that he would consent to the intended regulation. As every new law was, in fact, an innovation of the ancient establishment, it required the agreement of all parties concerned; that is, of the national assembly, including virtually the whole people, and of the king, whose power was to undergo a limitation. When the petition, therefore, had passed the two houses, and had obtained the consent of the king, it became an act of the legislature.

The petitions which had thus been granted, during the course of a parliament, were afterwards digested into the form of a statute; and, as the execution of this task required a degree of legal knowledge, it was devolved upon the principal judges of the kingdom. From the observation, it is said, that mistakes and abuses were committed in a matter of such importance, it was provided, in the reign of Henry the Fifth, that the statutes should be drawn up by the judges before the end of each parliament; and, in the reign of Henry the Sixth, the present mode of presenting bills

bills to parliament, already digested in the form of a statute, was first understood\*.

For some time after the introduction of the commons into parliament, no notice was taken of them in the character of legislators. The burgeses who composed the first house of commons, were not regarded as the advisers of the crown; and if on any occasion they obtained a redress of grievances, it was merely from this consideration, that the supply expected from the boroughs could not otherwise be procured. In the beginning of the reign of Edward the Third, the commons are mentioned in the character of petitioners; and the statutes are said, in the preamble, to have been ordained "at the request of the commonalty of the realm, by their petition made before the king and his council in the parliament, by the assent of the prelates, earls, barons, and other great men assembled at the said parliament." The union of the knights of shires, in the same house with the burgeses, contributed quickly to bestow a deliberative voice upon the aggregate body of the commons; and in the reign of Richard the Second, we find them interfering in public regulations of the highest importance †. In digesting the statutes, however, the old stile was continued, until the reign of Edward the Fourth; when laws are said to be established *by the advice and consent of the lords, at the request of the commons, and by the authority of the same parliament* ‡.

From the primitive method of conducting bills for a new law, in the form of a petition to the king, was derived the custom that they should take their origin from parlia-

\* See Blackstone's Commentaries.

† See Gurdon's History of Parliament.

‡ See the Preamble to those Statutes.

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ment, and that the king should give no opinion concerning them, till they had been approved of in that assembly. As the king had no inclination to limit his own discretionary powers, it was never supposed that a bill for that purpose would be suggested by the crown. All that could be expected from the sovereign, in a matter of this nature, was, that he would be graciously pleased to comply with the desires of his people, communicated to him by the national council; and when a bill had come to be agitated in parliament, it was not yet considered as the request of the nation, and could not, therefore, be regularly presented to the king, for the royal assent, before the two houses had given their authority for that measure.

Such was the original foundation of a maxim, which is now regarded as one of the main pillars of the British constitution; that the king's negative upon bills shall not be interposed, until they have undergone the final discussion of the two houses of parliament; and, as a consequence of this, that he shall not take notice of any bill depending in parliament, until it shall be communicated to him in the usual and parliamentary manner. The effect of this maxim, in supporting the democratical part of the government, is now universally admitted; but that it was dictated by a regard to the interest of the people, or from the view of encreasing their weight in the exertions of the legislature, there is no reason to believe. It is probable, on the contrary, that the form of procedure above mentioned was thought advantageous, or at least respectful, to the sovereign; as it prevented his being troubled with solicitations to limit his power, until there was an immediate necessity for it. But, in reality, this method of conducting the deliberations of the legislature, was not

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the fruit of any pre-conceived system of policy, nor the result of any claim of right, either upon the part of the king, or of parliament; it arose merely from the nature of the business under consideration, which was most conveniently brought to an issue in that manner; and, as this gave rise to a practice, which was observed with some degree of uniformity, so, in the revolution of ages, the ancient usage, whose utility became daily more observable, was invested with complete legal authority.

It merits attention, however, that what has been observed, concerning the method of ordinary legislation, is not applicable to the imposition of taxes. As the effect of a statute was to ascertain and determine the behaviour of the king, and consequently implied a privilege gained by the people; that of taxation was to bestow some emolument upon the crown, and to lay a correspondent burden upon the nation. An opposite course, therefore, was followed in those two branches of government. The people were understood to be the prime movers in the former; the king, in the latter. The proposal for a new law proceeded upon a petition from parliament to the crown. The proposal for a new tax proceeded upon a request or solicitation of the crown to parliament. Each of these parties having something to bestow which the other wanted, they both became coy and reserved in their turn, and, by their address and perseverance, were enabled to extort reciprocal advantages. When the king was in want of money, he offered his consent to beneficial regulations, upon condition that certain taxes were imposed. When parliament were about to grant supplies to the crown, they took advantage of its necessities, and, as a preliminary article, stipulated the redress of grievances.

Upon

Upon this principle, that taxes are granted by parliament, at the desire of the king, is founded a rule, at present, "that the house of commons shall receive no petition for any sum of money relating to the public service, but what is recommended from the crown." And when a money bill is offered to that house, it is necessary, that the chancellor of the exchequer, or some other officer of the crown, should declare, "that his majesty, having been informed of the contents of the said bill, recommends the same to the consideration of the house\*." After this preliminary step, a bill for the imposition of taxes is conducted in the same course, and passes through similar stages, with every other matter which comes under the determination of the legislature.

\* See Hatfield's Proceedings in the House of Commons.

## C H A P. VII.

*Alterations in the State of the ordinary Courts of Justice.*

THE reign of Edward the First is no less distinguished by institutions of great importance relating to the distribution of justice, than by those which have been mentioned with regard to the legislative authority; and in both these particulars we may trace back to this period, the introduction of that regular system which we at present enjoy. The chief of those institutions respecting the exercise of the judicial power, and some of the most remarkable consequences with which they were attended, we shall proceed to examine.

SECT. I. *Establishment of the Courts of Common Law, at Westminster.*

THE *aula regis*, which, after the Norman conquest, had risen by degrees out of the high court of parliament, was productive of great advantages, by facilitating the distribution of justice. A full meeting of parliament could not be obtained, unless upon singular occasions; but this tribunal, consisting of a small number of judges, and these commonly attending the king's person, could easily be held upon any emergency, and was ready to take cognizance of every complaint.

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Although the institution of the *aula regis*, however, was, at the time of its introduction, accommodated to the infant state of improvements in the country; yet, in a subsequent period, when those improvements were advanced to greater maturity, and when the authority of government was better established, its interpositions became not only defective, but liable to many inconveniences. For some time after the Norman conquest, the investigation of law-suits, although requiring a degree of attention unknown to the preceding ages, was not so tedious as to prevent their being commonly decided in the neighbourhood of the place in which they had been commenced. But when the advancement of law and government had farther multiplied the legal disputes among the members of society, as well as the forms of judicial procedure, such a quick dispatch of the business was no longer practicable; and, as the court had no fixed residence, but followed the king, wherever the political state of the kingdom required his presence, it was frequently necessary that causes should be decided in a part of the country very remote from that in which they had arisen. The circumstances of this ambulatory court, became thus inconsistent with the leisure and deliberation requisite for judges in forming their decisions; and still more incompatible with the interest of parties, who, in many cases, were obliged to attend the court from place to place, and sometimes, before they could obtain a final sentence, to travel over a great part of the kingdom. This attendance was rendered more expensive and burdensome, from the gradual advancement of law, as a science; which tended to promote the employment of lawyers, as well as other retainers of judicial controversy; and which, by contributing to encourage the fullest and most

most ample discussion of every plea, laid parties frequently under the necessity of calling a number of witnesses in support of their several averments.

It was to be expected, therefore, that, according to the general improvements of the country, the attention of government would be directed to the removal of these inconveniences; by rendering the *aula regis* a stationary court, or at least by appointing, that it should hold regular meetings at particular places.

While the natural progress of improvement in the kingdom appeared to require this alteration in the state of the principal tribunal, the increase of judicial business had likewise a tendency to distinguish different branches of jurisdiction, and to place them in the hands of different judges. The prosecutions carried on against atrocious offenders, to satisfy public justice, and to prevent the future commission of crimes, came to be viewed in a different light from private controversies concerning property, and the various rights and obligations which occur among individuals. Law-suits of the former sort, or *criminal actions*, are usually much less numerous than those of the latter, which have received the appellation of *civil actions*. The trial of a crime is apt to be terminated in a more expeditious manner, than a civil process. Those heinous offences, which are supposed to require a prosecution at the instance of the public, excite, for the most part, a general indignation in the minds of men, who are therefore disposed to call for a speedy vengeance upon the criminal. In many of those offences, besides, it is necessary, that, before a prosecution is commenced, the person suspected of the crime should be arrested and imprisoned, in order that, if guilty, he may be prevented from escaping a trial; and the hardships, to which

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he is thus unavoidably subjected, together with the difficulty of securing his person, afford additional reasons, from expediency, as well as from justice, for bringing the action against him to a speedy conclusion. To all these peculiar circumstances, we may add, that the laws of a country, respecting the punishment of crimes, are usually plain and simple; so that, in prosecutions of this nature, the judge can seldom have any farther difficulty, than what arises from the investigation of the fact.

Law-suits about private property are in a different situation. A cool spectator feels himself but little interested in such disputes; and it seems reasonable that the parties should be left, in a great measure, to their own discretion, in bringing the business to an issue. As in such differences there is no reason to suspect that either party will endeavour to escape from justice, no imprisonment of either is necessary. The laws, too, relating to the civil rights of mankind, are apt to become so numerous and intricate, as may occasion great hesitation and embarrassment in applying them to particular cases. These peculiarities, by multiplying the pleadings of parties, as well as the delays of court, and by introducing peculiar forms of procedure, have contributed to distinguish a civil from a criminal action.

To these two species of law-suits may be subjoined a third, arising from disputes between the king and the people, in matters of revenue. Such law-suits are calculated to interest the public, at least the crown, like a criminal trial; at the same time that they are strictly of a mere pecuniary nature. Though the public revenue of a state is really the property of the community, yet, in a monarchical government, the sovereign, who has the immediate disposal of that revenue, and who reaps more benefit from it than

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any other individual, is likely to consider it as his own patrimony, and to become particularly attentive to the support and encouragement of those judges by whom it is made effectual.

Thus, in every kingdom which is advancing in improvement, the same division of labour which takes place in the arts becomes also convenient in the conduct of law-suits; and, upon the same principle which gives rise to separate trades and professions, the province of distributing justice will be divided, and appropriated to a number of distinct judicatories.

These two objects, the fixing the residence of the *aula regis* to a particular place, and the division of the powers with which it was invested, had not been entirely overlooked by the English, before the time of Edward the First. From what has been already observed, it is evident, that an ambulatory court is less qualified for discussing a civil than a criminal action. From the multitude of civil, in comparison of criminal causes, such an unsettled tribunal is attended with more inconvenience to the judge; from the greater length of time required in their discussion, it is more burdensome to the parties.

We accordingly find, that, by a clause in the great charter of king John, an improvement was made with respect to the exercise of civil jurisdiction; a court of *common pleas* was detached from the ancient *aula regis*, and was appointed, for the future, to have a permanent residence\*. The making this an article in that great transaction between the king and his nobles, is a proof that a regulation of this nature was thought of the utmost importance; and that the

\* "Communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo."

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want of it, in former times, had been a ground of general complaint. The new court of common pleas, which was thus erected, and held by separate judges, appears to have been deemed inferior in rank to the criminal court, held by the grand justiciary, and in which the king continued sometimes to sit in person. For this reason, the latter court was permitted, in certain cases, to review the decisions of the former\*.

Even at an earlier period, the *aula regis*, when acting as a court of revenue, had been so far distinguished as to have a separate *president*; that officer who had the charge of the public treasury †.

At last, in the reign of Edward the First, these changes were completed: the court of the grand justiciary was entirely abolished; and three permanent courts were established at Westminster; a court of king's bench, to have the cognizance of crimes; a court of common pleas, to determine civil causes; and a court of exchequer, to decide in matters of revenue. As the jurisdiction committed to these three tribunals was totally different, they had, each of them, a separate place of meeting, a different president, and were composed of different judges.

There is ground to suppose, that the jealousy, entertained by the king, of that great officer who presided in the *aula regis*, co-operated with the natural course of things in abolishing this court, and in producing the institutions which came in its place. The office of the grand justiciary was originally an appendage of that of the lord high steward; who, in all the feudal kingdoms, was the chief officer

\* See Blackstone's Commentaries, Book III.

† Baron Gilbert's History of the High Court of Chancery. Dialogus de Schaccario.

of the king's household, and the person next in power and dignity to the sovereign. As an employment of such high importance was naturally claimed by one of the greatest of the nobility, so his remaining in the possession of it could not fail to augment his opulence and authority. It was the same officer in France, who, at an early period, found himself in a condition to dethrone the Merovingian race of kings, and to establish the crown in his own family. We need not wonder, therefore, that Edward, a prince of equal policy and activity, and who had been successful in extending the regal authority, should be desirous, at the same time that he improved the judicial establishments, of putting an end to the existence of a minister, of whose designs he might be apprehensive, and whom he found it difficult to retain in subjection. The chief justice, who presided in the new criminal court, was considered merely in the light of a judge, without any share of public administration.

In this, as well as in other branches of government, the history of modern Europe exhibits a remarkable uniformity; accompanied, however, with certain varieties, the effect of accidental circumstances. The *cour de roy* in France, which, like the English *aula regis*, had grown out of the national council, and which was likewise an ambulatory court, was at length productive of similar inconveniences to those felt in England; and it was thought proper to remove them, by giving a permanent residence to this tribunal. By an ordinance, in the reign of Philip the Fair, a branch of the *cour de roy* was fixed at Paris, and another at Thouloufe\*; to both of which the name of parliaments was given. Other courts of the same nature were after-

\* In the year 1302.

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wards added in different districts, or had arisen in provinces which came to be reduced under the French monarchy; so that the whole kingdom, instead of being placed, like England, under one set of great tribunals, remaining in the capital, was divided into a number of separate territories, in each of which there was a particular court, invested with a supreme and independent jurisdiction. The multiplication of law-suits in any of those courts occasioned a subdivision of its members into different *chambers*, among which the different sorts of judicial business were distributed.

The *aulic council* in Germany, as I formerly observed, was, in like manner, an ambulatory court, which had arisen from the diet of the empire; but, from the slower improvements of that country, or perhaps from the decline of the imperial dignity, it was much later than in France, before any attempts were made to correct this inconvenient mode of distributing justice. In the year 1495, and the reign of the emperor Maximilian, was formed the *imperial chamber*, a new and stationary court, with similar powers to those of the aulic council. But, as this latter tribunal was not abolished, the German empire has come to be provided with two distinct judicatures, the one ambulatory, the other with a fixed residence; which have, in the greater part of causes, a concurrent jurisdiction.

In Scotland, the *aula regis*, both in its original constitution, and in its powers, was perfectly similar to the court of the same name in England; and, from similar motives of conveniency, it was afterwards broken into the different courts, of the session, the exchequer, and the justiciary; corresponding to the distinction of civil, fiscal, and criminal causes; and these tribunals came, at length, to have a regular establishment in the capital.

In considering the policy of the judicial institutions, in modern Europe, those of England and France, the two most powerful nations, appear to merit particular notice.

In France, the establishment of a number of parliaments, or supreme tribunals, in different districts throughout the kingdom, has the manifest advantage of diminishing the expence of litigation, by bringing the distribution of justice near the residence of the different inhabitants: an advantage which is farther improved, by the appointment of subordinate courts, held by the *lieutenant civil* and *criminal*, within the district of every superior judicatory.

The independence of these great tribunals has, on the other hand, a tendency to produce inconsistent and jarring decisions. The districts belonging to the different parliaments may, so far as the interpretation of law, and the opinion of the judges, are concerned, be considered as in the state of separate kingdoms; having, in the ordinary operation of government, no means for securing uniformity of conduct. This, no doubt, is one great cause of the diversity of laws and customs, which, notwithstanding the general influence of civilized manners, is to be found at present in different parts of the French monarchy.

To remove this inconvenience, an extraordinary measure is, in some cases, adopted. The king, who is the fountain of justice, nominates, at pleasure, any number of persons, to receive an appeal from the decision of any particular parliament; and in this way, the members of one parliament are sometimes appointed to review the sentence of another. But this is a partial remedy, which cannot be effectual to prevent all discordance in the judgment of those different courts. In a few instances of gross absurdity, or flagrant injustice, the interposition of the sovereign may

may be procured; but it is impossible that he should give attention to the ordinary course of decisions, through the whole extent of his dominions, and restrain the numberless varieties and inconsistencies which are introduced into the common law of the country.

The judicial establishments of England are totally free from this inconveniency. As the principal courts have a jurisdiction over the whole kingdom, the principles of law, in every department, being determined by the same set of judges, are reduced to an uniform standard. As these courts have, besides, a fixed residence in the neighbourhood of each other, it was easy for them to communicate their opinions; and hence, in order to secure the propriety of their decisions, it became customary, in matters of great difficulty, depending before any one court, to refer the decision to a meeting composed of the judges of all the three courts. With the same view, it was provided, by a statute in the reign of Edward the Third, that the decisions of the court of exchequer may be reviewed by a court consisting of the judges of the king's bench and common pleas, with the assistance of certain officers of the crown; and by another statute, in the reign of Elizabeth, that certain proceedings of the king's bench may be reviewed in a joint meeting of the justices of the common pleas and the barons of the exchequer.

The system of English jurisprudence has become what might be expected from this general plan of the English tribunals. There seems to be no country in the world where the lawyers and judges are so strongly impressed with a notion of the advantages derived from uniformity and stability in the rules of law. That a certain rule should be established, and invariably maintained, is justly esteemed of  
more

more consequence, than that the rule itself should be the most perfect imaginable. Almost any regulation whatever is preferable to fluctuation and uncertainty. To such an extreme, it should seem, has this principle been carried in England, as to have produced a maxim, that when any point has once been decided in a judicial controversy, or has even been settled by the opinion of any lawyer of good authority, it shall be regarded as not liable, on any future occasion, to be altered or disputed.

But the English tribunals, according to the plan above mentioned, were calculated to render litigation expensive and troublesome, by giving to the capital a monopoly in the distribution of justice. The inferior judicatories, those of the baron in his own demesne, and of the sheriff in each county, had, upon the advancement of the *aula regis*, been so far reduced as to retain only the cognizance of petty crimes, and the determination of civil actions below the value of forty shillings. These, therefore, could be of little service in settling disputes, and restraining injustice, throughout the kingdom; and, as no intermediate courts were provided, the most part of law-suits, both in civil and criminal matters, and whether of small or of great importance, could only be decided by the courts of Westminster-hall. In a country so extensive as England, a great proportion of the inhabitants were thus removed to a great distance from the seat of justice, and laid under many disadvantages in making their rights effectual.

To supply this deficiency in the ordinary establishment, the king appointed certain extraordinary judges, as auxiliaries to those of the capital, for the purpose of circulating the administration of justice through every corner of the kingdom.

Although

Although the distant residence of individuals from the seat of justice is, in all cases, inconvenient, it is more so in criminal than in civil actions. It seldom happens that a crime can be proved in any other manner than by parole evidence; for a criminal does not usually act with so little caution as to afford a written document of his guilt; neither is it competent to demand his oath concerning the truth of the facts with which he is charged. But of all the methods of proof, that which requires the attendance of witnesses, more especially when they must be conveyed from distant parts of a country, is necessarily the most expensive and burdensome. In the view of public utility, it is likewise expedient, that every criminal trial should be conducted, and that the punishment of the offender should be inflicted, as much as possible, in the neighbourhood of the place where the crime has been committed. The chief object in the punishment of crimes is to preserve the peace and good order of society, by deterring others from following the example of the criminal; and this is most effectually obtained, when the same persons who have beheld the violation of the law, are also spectators of the terror, mortification, and misery, with which that violation is attended.

From these considerations, when the king's bench came to be fixed at Westminster, the sovereign was induced to grant special commissions, for trying particular crimes, in such parts of the country as were found most convenient; and this practice was gradually modelled into a regular appointment of certain commissioners, empowered, at stated seasons, to perform circuits over the kingdom, and to hold courts in particular towns, for the trial of all sorts of crimes. These judges of the circuit, however, never obtained an ordinary

ordinary jurisdiction; but continued, on every occasion, to derive their authority from two special commissions; that of *oyer and terminer*, by which they were appointed to hear and determine all treasons, felonies, and misdemeanors, within certain districts; and that of *gaol delivery*, by which they were directed to try every prisoner confined in the gaols of the several towns falling under their inspection. Thus, by the addition of an ambulatory court, in supplement of another which has a fixed residence, precautions are taken to prevent the various and opposite inconveniences incident to the distribution of criminal justice; and, as far as human institutions are capable of attaining perfection, the most complete establishment seems to be made for the trial and punishment of crimes.

The appointment of the circuit judges, in order to facilitate criminal trials, naturally suggested the idea, that the same commissioners might assist the courts at Westminster in another department, and be made subservient to the more expeditious decision of civil causes. With this view the commission of *assise*, and that of *nihi prius*, was granted to these judges. By the former they were empowered to take the verdict of a jury in the trial of landed disputes. The latter was intended to shorten the procedure in ordinary civil actions, by directing the judges in the circuits to investigate all such matters of fact, as were then under dispute before any court of Westminster-hall\*.

What is commonly an article of the greatest magnitude, even in a civil process, the proof of the different averments made by the parties, came thus to be discussed within

\* See Blackstone's Commentaries. Hawkins's Pleas of the Crown.

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the county, and frequently in the very neighbourhood of the place where the dispute had arisen; while the mere matter of law was left to the consideration of the great court at a distance; a court, from its permanent situation, as well as from its authority and dignity, the best qualified for deciding points of such difficulty and importance.

To these regulations, of such manifest utility, there was added a further provision, for maintaining the general tranquillity: when quarrels arose among individuals, when outrage and violence were committed, and these were likely to be followed by riots and insurrections, it was in vain to expect, that, by application to the ordinary courts of justice, a timely interposition could be procured for suppressing such disorders. It was expedient, therefore, that men of rank and character, living in the different parts of the country, and who might, of consequence, be at hand upon any emergency, should be invested with sufficient authority to seize disorderly persons, to put them under confinement, and, in general, to prevent violations of the public peace.

We find accordingly, that, by the ancient law of England, *conservators of the peace*, with powers of that nature, were, in the different counties, elected by the freeholders; and the same powers were also annexed to many of the higher offices of government. It appears that those magistrates had originally no cognizance of crimes, but merely an authority to secure offenders, in order to their trial before the ordinary tribunals. We may easily conceive, however, that such an employment would lead to a species of jurisdiction. When a person has been guilty of a breach of the peace, his conduct, although deserving animadversion, may often be unworthy of the trouble and expence which would

attend a trial before the ordinary courts; and if, in such a case, the magistrate, who has taken the offender into custody, and who must, in some measure, have already examined the case, should proceed of himself to inflict a moderate punishment, the expediency of such a measure would afford its justification, or at least would induce the public to connive at so small an extension of authority.

In the reign of Edward the Third, the appointment of those magistrates, as might be expected from the rising state of the prerogative, was transferred to the crown; at the same time that they were invested with a power of trying all offences excepting those which inferred a capital punishment\*. From this period they acquired the appellation of *justices of the peace*. By subsequent regulations they came to be entrusted with various branches of civil jurisdiction; by which they were enabled, in many questions of importance, to supersede the interposition of the superior tribunals.

Although, in Scotland, the principal courts of law were established in the capital, upon the same plan as in England, the inhabitants were not subjected to the same inconvenience by their distance from the place where justice was administered. To say nothing of the narrowness of the country, compared with England, the Scottish nobles maintained their authority much longer than the English; and the courts of the baron, and of the sheriff, were therefore enabled to preserve a great part of their original jurisdiction. As these tribunals had the power of determining both civil and criminal actions, in their several districts, there

\* By 18 and by 34 Edward III. the Justices of peace are empowered to determine felonies and trespasses; but in practice their jurisdiction is restricted to such felonies as are within the benefit of the clergy. See Hawkins.

was

was no necessity for bringing such matters, in the first instance, before the superior courts in the capital; and upon this account, although the judges of the court of justiciary were empowered to make circuits over the country, as in England, there was no occasion for bestowing upon them any civil jurisdiction, corresponding to what arises from the English commission of *nisi prius*.

The appointment of justices of the peace, to supply what is defective in the jurisdiction of the ordinary courts for suppressing riot and disorder, was introduced into Scotland at a later period, but in a similar manner, and upon the same footing, as in England.

#### SECT. II. Of the Petty Jury—and the Grand Jury.

FROM the progressive alterations, which have been mentioned, in the English courts of justice, it is natural to conclude, that the judges were continually advancing in experience and knowledge, and that the forms of judicial procedure were daily attaining higher degrees of perfection. Of all the institutions relative to the management of judicial business, which may be considered as the effect of that improvement, those of the *petty jury*, and the *grand jury*, are most deservedly the boast of English jurisprudence; and as, in the period which we are now examining, both of them appear to have arrived at their complete establishment, a review of the circumstances from which they proceeded, and of the steps by which they were introduced, may not be improper.

I. I had formerly occasion to observe, that, under the government of the Anglo-Saxon princes, the chief magis-

trate of a county, or of a hundred, found it unnecessary, in the determination of law-suits, to call a full meeting of the courts over which they presided; and, for the greater dispatch of the business, as well as for the ease and convenience of the people, were accustomed to select a certain number of the freemen, or allodial proprietors, in each particular cause, to assist in giving a decision. Hence the first idea of the *petty jury* was probably suggested.

In a subsequent period, a similar practice was adopted in the courts of a barony. When the vassals of a superior had acquired hereditary fiefs, they were no longer under the necessity of submitting to his arbitrary will; and in regulating their conduct, as well as in distributing justice among them, he found it expedient to act with their advice and concurrence. To have assembled the whole of his vassals, for the determination of every law-suit, would have been too great a hardship upon them; but a moderate number were convened, in order to satisfy the parties, and to give weight and authority to the sentence.

The calling, occasionally, a number of the vassals, in each case, to assist the superior, was a more natural expedient, than the appointment of certain permanent assessors. It was attended with no trouble or expence; for every vassal was bound not only to fight for the superior, but also to perform such other services as might be requisite, in order to support his authority and dignity. According to the simple notions of that age, these persons were sufficiently qualified to determine the points referred to their decision; more especially as they might receive advice and direction from the magistrate. In some respects they were held even preferable to every other sort of judges; being men of the same rank and condition with the parties; and, from their situation,

situation, having frequently access to know the state of the controversy, as well as the circumstances of the facts in question.

The introduction of juries in the courts of a barony, arose from the establishment of hereditary fiefs; for, so long as vassals held their land precariously, or even were not secure of transmitting it to their posterity, they had too much dependence upon their superior, to dispute his authority, either in settling their differences or punishing their offences. We may easily suppose, therefore, that, under the Anglo-Saxon government, this mode of procedure was not very common; because the custom of securing landed estates to the heirs of a vassal was then far from being general. It is from the reign of William the Conqueror, that we may date the remarkable extension of jury-trials; proceeding partly from the imitation of Norman or French customs; but still more from the completion of the feudal system, and the consequent multiplication of hereditary fiefs.

It merits attention, that this institution had been hitherto limited to the hundred and county courts, and to those of a feudal barony, but never had taken place in the judiciary proceedings of the national council. The causes which came under the cognizance of the Wittenagemote were not so numerous, as to create much trouble to its members, or to suggest the measure of devolving that branch of business upon any sort of Committee, or partial meeting, in place of the full assembly.

Upon the establishment of the Anglo-Norman parliament, its ordinary judicial business was, in a short time, committed to the *aula regis*; a court which at first consisted of several members, but was afterwards held by a single magistrate.

magistrate, the deputy judge of the sovereign. This tribunal was properly the ordinary baron-court of the king; and, being in the same circumstances with the baron-courts of the nobility, it was under the same necessity of trying causes by the intervention of a jury. As the vassals of the crown were usually more independent of the king, than the rear-vassals were of their immediate superior; it is not likely, that, while justice was administered by the *pares curia* to the latter, the former would submit to the decisions of a single magistrate, named at pleasure by the sovereign. We find, accordingly, that, by a general law in the reign of Henry the Second, either party in a law-suit was allowed to decline the customary mode of trial by single combat, and to demand that his cause should be determined by an *assize* or *jury* of twelve persons. From this time forward, there can be no doubt that jury-trials were admitted in all the courts of ordinary jurisdiction. They are expressly recognized and established by the great charters of king John, and of Henry the Third\*.

When the office of the grand justiciary was abolished, in the reign of Edward the First, and when the powers of the *aula regis* were distributed to the king's bench, the common pleas, and the exchequer, it was natural for these courts to follow the same forms of procedure which had been observed by that high tribunal to which they were substituted. The former practice of determining law-suits by a jury, was doubtless viewed, at the same time, in the light of a privilege, which the nation would not have been willing to resign. The number of judges, in each of the courts of Westminster-hall, was much inferior to that of

\* Magna Charta reg. Johan. c. 21. M. C. reg. Hen. III. c. 32.

the

the ordinary assize; and, as they were not men of the same rank with the parties, it was not likely that the same degree of confidence would be reposed in them. To have transferred the powers of an institution so popular as that of juries, to a set of courts constituted in this manner, would, notwithstanding the late advances of prerogative, have been a dangerous measure. What is called the petty jury was therefore introduced into these tribunals, as well as into their auxiliary courts employed to distribute justice in the circuits; and was thus rendered essentially necessary in determining causes of every sort, whether civil, criminal, or fiscal.

In the high court of parliament, however, this method of trial was never admitted; being neither found requisite for the convenience of the members, nor conducive to the interest of parties. It was not requisite for the convenience of the members; because the trials which came before parliament were few, and speedily brought to an issue. It was not conducive to the interest of parties; because they were better secured from partiality and oppression, by a judgment of the whole house, consisting of all the crown vassals, than they could expect to be from a decision given by a limited number of those vassals, arbitrarily appointed by the president.

It has been questioned, whether an institution, similar to that of the petty jury in England, had place in any of the nations of antiquity. Among the Greeks and Romans, as far back as we can trace the history of their judicial establishments, it does not appear that the inhabitants of certain districts were ever invested with jurisdiction, or that a part of their number were, in each trial, selected by the ordinary magistrate to assist him in giving a decision. The ordinary



ordinary courts of Greece and Rome were composed of a chief magistrate, and of certain assessors; but these last were permanent officers, appointed, as it should seem, from year to year, or for the same period with the magistrate himself.

The Roman *judex pedanius*, indeed, was nominated for each trial; but he was originally no more than a commissioner for taking a proof of the facts in question; and, although he was afterwards empowered, in many cases, to determine the law, as well as the fact, the intention of his appointment was not to give weight and authority to the decision, but merely to relieve the magistrate and his assessors from a part of their labour.

Among the Gothic nations of modern Europe, the custom of deciding law-suits by a jury seems to have prevailed universally; first in the allodial courts of the *county*, or of the *hundred*, and afterwards in the baron-courts of every feudal superior. The same custom, however, does not appear, in any European kingdom except England, to have been extended to those great courts, which, upon the advancement of civilized manners, arose out of the national council, and were invested with the principal branches of ordinary jurisdiction.

The *cour de roy*, in France, was not, like the court of the grand justiciary in England, reduced under the direction of a single magistrate; but consisted of an indefinite number of the same persons who sat in the national assembly. The parliament of Paris, formed out of the *cour de roy*, was likewise composed of as many of the nobles as chose to attend; with the addition of a body of lawyers, who, it was understood, were to direct the forms of procedure, and to take

take upon them the drudgery of the business\*. The parliament of Thoulouse, which was authorized at the same time, and the other parliaments which were afterwards formed in particular districts, conducted themselves upon the same principles with the parliament of Paris; and, as all of them were composed of a numerous council of judges, the intervention of a jury, to prevent erroneous judgments, or even to secure the parties from oppression, was the less necessary.

This observation is applicable to the principal courts of the German empire. The aulic council was composed of an indefinite number of the same persons who had a right to sit in the diet. The imperial chamber was a numerous council of judges. In both of these tribunals, therefore, the assistance of a jury was probably thought unnecessary.

In Scotland, the court of the grand justiciary came to be established upon the same plan as in England; and admitted, in like manner, the form of jury-trials. But upon the division of the powers of that court into different branches, the civil tribunal, then introduced, was a committee of parliament; that is, a committee of those crown-vassals of whom juries had been composed. By one or two variations of that model, was formed the present court of session, which was made to consist of fifteen ordinary judges, the usual number of jurymen in Scotland; with a view, it should seem, to supersede the use of jury-trials: and, as this mode of judicial procedure was laid aside in the

\* Soon after the establishment of the parliament of Paris, the king dispensed with the attendance of the dignified clergy. The ordinary lay barons afterwards absented themselves, without any express dispensation; and there remained only the princes of the blood, and peers, who retained the privilege of attending that court on solemn occasions.

principal civil tribunal, the example appears to have been quickly followed in the inferior civil courts of the kingdom. In the court of justiciary, however, which consisted of a smaller number of judges, and consequently in the inferior criminal courts, the ancient practice of jury-trials was continued.

Beside the circumstance now mentioned, relating to the constitution of the principal courts of justice in several European kingdoms, the influence of the ancient Roman law, as delivered in the compilations of the emperor Justinian, was another more general cause, which contributed to the disuse of juries through the greater part of Europe. Upon the revival of letters in Europe, that improved system of jurisprudence was recommended and propagated by the clergy; was taught, under their direction, in almost all the universities; and its decisions and forms of procedure were considered by the civil magistrate as models for imitation. The Gothic institution of juries, which had been unknown to the Romans, was therefore brought more and more into discredit; and, that the whole cognizance of a law-suit should be committed to judges, who, by being set apart for that purpose, and by devoting themselves to this employment, might become peculiarly qualified for the exercise of it, was regarded as an improvement in the state of judicial policy.

In England, where, from circumstances that will be mentioned hereafter, the Roman system was less incorporated with the common law than in other countries, the custom of jury-trials has, accordingly, been most religiously maintained. But even in England, this custom has been totally excluded from ecclesiastical tribunals, from those of the two universities, and from all other courts in which, from particular

ticular causes, the maxims and principles of the civil law have been adopted.

Scotland was, in some degree, under the influence of opposite systems; and seems, upon that account, to have held a middle course. Like the nations upon the continent, she was led into a close imitation of the Roman decisions and forms of procedure; while, by her vicinity to England, she was induced to borrow many regulations and customs from that more cultivated and powerful country. Thus the Scottish tribunals imitated the English, by retaining a jury-trial in criminal prosecutions; but followed the practice of the Romans, by neglecting that institution in the greater part of civil actions. In the former, it was natural to entertain a greater suspicion of the court than in the latter; because, in a criminal trial, the king, who nominates the judges, and to whom they must look for preferment, is always a party; whereas in a civil action, or controversy between private individuals, the crown has no interest; and there is commonly no circumstance to influence the magistrate upon either side, or lay him under a temptation to gross partiality.

It is not likely that the institution of juries would, in any country, be very acceptable to the sovereign; since it limited the power of those judges whom he appointed, and of whom he had, in some measure, the direction. We may easily imagine, therefore, that, according as, among any people, the prerogative was exalted or depressed, its influence would be exerted, more or less effectually, in discouraging this mode of trial; and hence we may discover an additional reason for the continuance of juries in England. As the English were successful in reducing the power of the monarch within moderate bounds, and acqui-

red proportionably higher notions of liberty; they became, of course, the more attached to that method of distributing justice, by which the disposal of their lives and fortunes was committed to their fellow citizens, rather than to officers in the nomination of the crown. They became not only the more passionately fond of this privilege, which had been handed down to them from their ancestors, but at the same time the more capable of maintaining it. There is no reason, indeed, to believe that this circumstance alone would have been sufficient to retain, in England, the practice of jury-trials; for other European states have had also the good fortune to restrain the prerogative, and to establish a popular government. But this circumstance undoubtedly co-operated, with the other causes formerly mentioned, in rendering the people of England more tenacious of that ancient appendage of the feudal policy, and more jealous of every attempt, from whatever pretences, either to limit the power of juries, or to exclude them from the decision of particular causes.

2. In order to secure the regular distribution of justice, it is not enough that courts are properly constituted, and that judges are attentive to the determination of law-suits. The magistrate must also be informed of those cases which require his interposition; and measures must be taken for bringing them under his examination. A distinction, however, in this respect, may be observed between that branch of judicial business which relates to civil, and that which relates to criminal causes. In a controversy between private individuals, each party is likely to prove sufficiently attentive to his own interest; and may therefore be left to vindicate his own rights as he shall think fit. But when a crime is committed, which requires a punishment for the sake

fake of a public example, there is danger that the interest of the community will be neglected; that no information of the fact will be given to the judge; and that no person will take upon him the trouble, the odium, and the expence, of bringing an accusation. It is here that some regulation is necessary, to prevent the disorders that might be apprehended, from permitting criminals to pass with impunity.

Among the Romans, not only the person injured, but any one of the people, was allowed to prosecute a public offence. As the crime was understood to affect the whole community, any one of its members, being in some degree a sufferer, was entitled, upon that account, to come forward and claim redress.

It requires but little sagacity to discover, that this mode of prosecution was liable to great abuses. It was likely, on the one hand, to produce negligence in prosecuting crimes; and, on the other, to encourage unjust and groundless prosecutions. Few people were found so public-spirited, as to undertake the disagreeable task of convicting criminals, from the view of promoting the interest of society; while many were tempted to become public accusers, from secret motives of resentment or malice, or even for the purpose of obtaining a pecuniary composition from the person whom they had found an opportunity to prosecute. To prevent this latter enormity, severe penalties were inflicted upon such as brought an unjust accusation of a public offence. In particular, it was enacted, that he who failed in proving his accusation, should suffer the same punishment to which, if he had been successful, the defendant would have been subjected: a regulation which, if strictly enforced, must have put an end to every capital prosecution:

For

For who is there that will hazard his own life, upon the uncertainty of prevailing in any criminal trial?

In the modern feudal nations, the judge himself was originally the public prosecutor. Every feudal lord, whether a sovereign prince or a subject, was excited to punish offences within his demesne; not only from the desire of repressing disorders, but also from that of procuring fines and amerciaments. As representing the community, of which he was the leader and executive officer, he first brought an accusation against those whom he suspected of crimes: as the chief magistrate, he afterwards examined the proof, and gave judgment in the cause.

The mischief attending this practice must have soon become notorious. It can hardly be supposed that the same person would acquit himself with propriety in the two-fold character of an accuser and a judge. Even in the course of a speculative debate, men usually acquire a prejudice in favour of those tenets which they are endeavouring to support; and find it extremely difficult to preserve a degree of candour in judging of such as are advanced upon the opposite side. What shall we say then of a person who is engaged in preparing a public accusation; who sets out with a strong suspicion, that the defendant is guilty; who converses with informers, likely to employ every artifice to strengthen that opinion; and who, to pass over his pecuniary interest, involved in the issue of the cause, has exerted himself in collecting and arranging all the facts and arguments in confirmation of his hypothesis? how is it possible to avoid that blind zeal and prepossession, that eagerness to convict the defendant, acquired in the capacity of a prosecutor; and to behave with that impartiality, coolness,

coolness, and moderation, which are essentially requisite in the distribution of justice?

To prevent this dreadful enormity, and at the same time to secure a proper attention to the public interest, the prosecution of crimes was, in all the feudal countries, reduced into a separate employment, by the appointment of a procurator or factor to act in the name of the sovereign. Hence the attorney-general in England, and the king's advocate in Scotland, were appointed to manage the judicial business of the crown, before the principal tribunals; and a similar institution, from the same views of expediency, was even extended to inferior courts.

But, previous to the prosecution of offences, there must be information of their existence; and frequently, too, the immediate interposition of the magistrate is necessary, to apprehend and imprison the offender. In a rude nation, however, especially if it is of considerable extent, many crimes are likely to be hid from the public eye, and to escape the examination of any court. It appears, accordingly, that, in modern Europe, this branch of police had early become an object of general attention. To make inquiry concerning the commission of public offences, and to transmit an account of them to the criminal court, was one great purpose of the appointment of *coroners*; a set of officers who had place not only in England and Scotland, but in the greater part, if not in all, of the feudal kingdoms upon the continent.

The office of the coroners, in England, is of so great antiquity, that the commencement of it is entirely lost in obscurity. It seems to have been an immemorial custom of the Anglo-Saxons, that several persons of distinction should be

be named by the freeholders in each county, with power to secure and imprison criminals of all sorts, to the end that they might be brought to a trial. From this employment, these officers, as in after times the justices of the peace, found the means of assuming a criminal jurisdiction, which, from small beginnings, became gradually more and more extensive. Another branch of business, devolved upon the coroner, and which may be regarded as an appendage or consequence of the former, was that of ascertaining and determining the value of the fines, amerciaments, and forfeitures, or of any other emoluments, which accrued to the sovereign, either from the condemnation of public offenders, or from the right of the crown to all the goods, of which no other proprietor could be found.

When the coroner had occasion to enquire into the truth of any fact, either with a view to determine those matters which fell under his own jurisdiction, or in order to transmit an account of it to some other criminal court, he proceeded, in the same manner that was customary in the courts of the hundred, and of the county, by the assistance of an *inquest* or jury; and the number of jurymen, who, in those cases, were called from the neighbouring townships, was not less than was employed in other judicial investigations.

After the Norman conquest, when the *aula regis* drew to itself the cognizance of the greater part of crimes, it became the duty of the coroner to certify to that court his inquisition concerning those offences which fell under its jurisdiction; and upon this information, the most authentic that could well be procured, a trial before the grand justiciary was commenced. Upon the establishment of the king's

king's bench, and of the commissions of oyer and terminer and gaol delivery, the like certification, and for the same purpose, was made by the coroner to those tribunals.

But in proportion to the advancement of the prerogative, the authority of the coroner, an officer elected by the county, was diminished; his jurisdiction was daily subjected to greater limitations; and his reports became gradually more narrow and defective: whether it be that, by having a fellow-feeling with the inhabitants, he endeavoured to screen them from justice, or that, from the rust and relaxation to which every old institution is liable, his operations became tardy and inaccurate; certain it is, that he came to overlook the greater part of the offences which require the interposition of the magistrate, and his inquisition was at length confined to a few of those enormous crimes, which excite universal indignation and resentment.

To supply the deficiency of the coroner's inquest, the sheriff, who had come, in a great measure, under the appointment of the crown, was directed, upon the meeting of judges in the circuits, or of the other criminal courts, to call a jury, in order to procure information concerning the crimes committed in particular districts. Hence the origin of what is called the *grand jury*, by whose inquisition the judges were authorized to proceed in the trial of public offenders.

It is probable, that when the grand jury were first called, they made an inquiry at large concerning every fact which ought to become the subject of a criminal trial, and of their own proper motion delated the persons whom they found to deserve an accusation; but, by degrees, when the agent for the crown had been led to suspect any particular person, he was accustomed to lay before them the immediate question, how far that suspicion was well founded?

Hence the two methods of finding the fact; by *presentment* and by *indictment*.

It seems evident, from what has been observed, that the original purpose of the inquisition by the coroner, and of a *presentment* by the grand jury, was to prevent offenders from being overlooked, and from escaping a trial. When the custom of preferring *indictments* to the grand jury was introduced, the intention of that measure was, probably, to avoid the trouble and expence of a fruitless prosecution. But, whatever was originally intended by this practice, the necessity of procuring the previous approbation of a jury, by one or other of the forms above mentioned, was productive of the highest advantage to the people, that of securing them from groundless or frivolous accusations. If a person is known to have committed a crime, or lies under a strong suspicion of guilt, the voice of the whole neighbourhood will probably call aloud for justice, and demand an immediate trial of the offender. But if, on the contrary, an innocent man is attacked, if he is threatened with a prosecution, from apparently malicious motives, or for the purpose of serving a political job, it is most likely that his fellow citizens will view this proceeding with indignation; that they will consider his misfortune as, in some measure, their own; and that, from a principle of humanity and justice, as well as from a regard to their own interest, they will be excited to stand forth as the protectors of innocence.

This is a new instance, perhaps more conspicuous than any that we have had occasion to observe in the history of the English government, of a regulation whose consequences were not foreseen at the time when it was introduced. The great benefit arising to society from the interposition of the grand

grand jury is not only totally different, but even diametrically opposite to that which was originally intended by it. The original purpose of that institution was to assist the crown in the discovery of crimes, and by that means to encrease the number of prosecutions. But when an accurate police had been established in the country, there was little danger that any crime of importance would be concealed from the public; and it became the chief end of the grand jury to guard against the abuses of the discretionary power with which the officers of the crown are invested; that of prosecuting public offences.

The employment of the coroner in Scotland, was the same as in England; and he appears to have used the same forms in the exercise of his jurisdiction. With the assistance of a jury, he enquired into the commission of crimes; and either punished them by his own authority, or transmitted information concerning them to the competent court. The negligence of this officer seems, in that country, to have likewise produced the interposition of the sheriff, or chief magistrate of particular districts, by calling a jury for the same purpose. By a statute in the reign of Alexander the Second, it is enacted, that no prosecution, at the instance of the crown, shall proceed against any person, unless by an accusation, upon the inquisition of a jury, consisting of the chief magistrate of the place and three respectable persons in the neighbourhood. This rule continued till near the end of the sixteenth century; when, in consequence of the establishment of the court of session, and from other causes, the investigation of judicial matters, by a jury, came to be much more limited than it had formerly been. By an act of the Scottish parliament, in 1587, certain commissioners, instead of the inquest formerly called,

were appointed in the several counties, for enquiring into public offences; and indictments, framed upon the report of these commissioners, were put into a list, which got the name of the *porteous roll*\*.

The same statute empowered the king's advocate to prosecute crimes of his own proper motion †; and, as he was the person employed to raise indictments, upon the information transmitted by the commissioners, he naturally assumed the privilege of determining whether the facts laid before him ought to be the ground of a prosecution or not. Thus in Scotland the ancient grand jury was abolished; and criminal actions, at the instance of the public, came, in all cases, to be directed at the discretion of a crown officer.

The attorney-general, in England, and the master of the crown-office, have acquired, in like manner, a power of prosecuting by *information*, without any previous authority of a grand jury; but this mode of prosecution is confined to misdemeanours tending to disturb the government, or the peace and good order of society, and is never extended to crimes of a capital nature.

How far the nations upon the continent were possessed of a similar provision, to secure the people from unjust and groundless prosecutions, it is not easy to determine. That in the greater part of them the coroner's inquest was employed for bringing to light those disorders which required the interposition of a criminal court, there is no room to doubt. But when, from the circumstances which have already been pointed out, the method of trial by the petty jury had fallen into disuse, it is not likely that a previous inquest would still be employed to judge of the necessity

\* See Act of Parliament, 1587. ch. 82.

† Ch. 77.

OR

or expediency of commencing a criminal accusation. From the rapid advancement of the prerogative in these nations, the sovereign was freed from any restraint in this branch of administration, and an unbounded liberty of trying public offences was committed to the officers of the crown. To whatever causes it may be ascribed, the English grand jury is now the only institution of the kind that remains in Europe; and perhaps, as it is modelled at present, there cannot be found, in the annals of the world, a regulation so well calculated for preventing abuses in that part of the executive power which relates to the prosecution of crimes.

SECT. III. *Circumstances which prevented the Civil Law from being so much incorporated in the System of English Jurisprudence, as in that of other European Countries.*

TO those who survey the common law of England, in its progress towards maturity, there is one peculiarity which must appear extremely remarkable; the little assistance it has borrowed from the ancient Roman jurisprudence; that system of equity, which has been so highly esteemed, and which, in the other countries of Europe, has excited such universal imitation. Why the English have deviated, in this particular, from the practice of all the neighbouring nations, and have disdained to draw supplies from those plentiful sources of legal knowledge, by which many systems of modern law have been so amply enriched, it seems a matter of curiosity to enquire: at the same time that, by examining the causes of a proceeding so singular, and apparently so unreasonable, we shall, perhaps, be enabled to discover

discover the advantages or disadvantages which have resulted from it; and likewise to form an opinion, how far expediency may, in the present state of things, recommend the same, or a different line of conduct.

The Gothic nations who subdued the provinces of the Roman empire, and settled in the countries which they had over-run, were by degrees incorporated with the ancient inhabitants; and from the communication and mixture of these two races of men, there was formed a composition of laws, manners, and customs, as well as of language; in which, upon different occasions, and from a variety of circumstances, the proportions contributed by the one people, or by the other, were accidentally more prevalent. Although the ancient inhabitants were, every where, the vanquished party, they possessed that superiority which knowledge and civilization have usually bestowed over ignorance and barbarism; and hence we find a multitude of Roman institutions inserted in the codes of law, which, at an early period, were published by many kings or leaders of those barbarous nations.

Soon after the settlement of those barbarians, or rather before it was completed, they embraced Christianity, and fell under the direction of the Christian clergy; who, having been firmly established in the Roman empire, were enabled to preserve their footing in those new states that were formed. These ecclesiastics were attached to the Roman law, in opposition to the barbarous customs of the new settlers; both as it was the system with which they were acquainted, and as it was calculated to maintain that peace and tranquillity, which their profession and manner of life disposed them to promote.

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The doctrines of Christianity, unlike the fables which constituted the mythology of the Greeks and Romans, contained philosophical truths, which the teachers of that religion were under the necessity of knowing, and by the knowledge and propagation of which they supported their credit among the people. Those teachers, therefore, became conversant in several branches of literature; and, as their theological system afforded them great scope for speculation and reasoning, and consequently for difference of opinion; they soon arranged themselves in different sects; disputed eagerly with one another; and, in proportion to their zeal in making proselytes, acquired a degree of acuteness and skill in defending their several tenets.

The learning and abilities which came, in this manner, to be possessed by the clergy, together with the general ignorance and superstition of the people, bestowed upon the former an influence and authority over the latter, and produced, as I formerly took notice, an extensive jurisdiction, both in ecclesiastical and secular matters. It is sufficient here to observe, that, in the exercise of this jurisdiction, ecclesiastical judges were guided, as far as the difference of circumstances would permit, by the rules and principles of the Roman jurisprudence; which had been transmitted from the ancient inhabitants of the provinces, and were delivered in the collections made by different Roman emperors, by Theodosius the younger, by Justinian, and by many of his successors. The Roman system became, in a great measure, the law of the church; and was therefore propagated by her, with the same zeal, and from the same views and motives, by which she was actuated in supporting and extending her influence and authority. The disorders which, for some centuries, were continued, by



by the successive invasions of new barbarous tribes, retarded, no doubt, the progress of every regular establishment. But when Europe began to recover from these convulsions, and when the restoration of public tranquillity was followed, as there was reason to expect, by the revival of letters, the efforts of the clergy, to extend the credit and authority of the Roman law, became highly conspicuous and successful. Innumerable schools were founded in cathedrals and monasteries, many of which, under the patronage of the church, obtaining large endowments; and being invested with jurisdiction and various privileges, became what are now called universities. Both the *canon law*, which was the rule of decision in ecclesiastical courts, and the *civil law*, properly so called, the original fund from which a great part of the former had been gathered, were taught in these different seminaries, and thus rendered familiar, not only to those who had views of entering into holy orders, but to all who received the benefit of a liberal education.

About the end of the eleventh century, Ivo de Chartres published a collection of canon-law, much more complete than any that had been formerly made; though it was much inferior to the subsequent compilation of Gratian, a Benedictine monk, known by the title of the *Decretum*.

In the year 1137, the Pisans, at the taking of the town of Amalphi, found a copy of Justinian's Pandects; and to this accident, the rapid cultivation of the civil law, from that period, has been commonly ascribed. But we may be allowed to entertain some doubt, whether an event of that magnitude could have proceeded from a circumstance apparently so frivolous.

There

There is no reason to believe that this book had been entirely lost in the Western part of Europe, although, for a long time, it had been less in request than other compilations upon the same subject. Ivo de Chartres, in the preceding century, quotes the laws of the Pandects; and Irnerius, professor of law at Bologna, as early as the year 1128, prelected upon some part at least of Justinian's compositions.

Even supposing the Pandects to have been lost, there were many other writings upon the Roman law still remaining, from which the knowledge of it might, in some degree, have been preserved; the Institutes, the Codex; and the Novellæ of Justinian; the Theodosian code; and the compilations, published after the time of Justinian, by different emperors of Constantinople.

Neither is it likely that, if men had possessed no previous disposition to that study, it would have been inspired by finding an old book upon the subject. Few people will be at the pains to peruse a long book, upon any abstract science, unless they already feel a strong inclination to acquire the knowledge contained in it. But, in the twelfth century, when, from different circumstances, a spirit of improvement began to diffuse itself in Italy and France, it is probable that men of learning were excited to the discovery of ancient books upon every subject; and, as the civil law became then a principal object of attention, the Pandects, containing the fullest collection of legal opinions and decisions, was considered as the most instructive work of the kind, and copies of it were greedily sought for. As Amalphi was, at this time, the chief trading state of Italy, an Amalphitan merchant, observing the demand for books of

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that nature, is said to have brought from Constantinople this copy of the Pandects, which was found by the Pisans. Some authors mention another copy of the same book, that had been discovered in the year 1128, at Ravenna\*.

However this be, the Roman law was, upon the revival of letters in Europe, universally held up, and admired, as the great system, from an imitation of which the laws of each particular country might receive the highest improvement. This the modern lawyers were, by their education, accustomed to consider as the standard of reason and equity; and, wherever their own municipal customs were defective, they had recourse to it, in order to supply what was wanting, or to correct what was amiss. Even such of the modern writers as endeavoured to delineate the principles of natural justice, independent of all positive institutions, made use of the Roman system, almost exclusively of every other, in order to illustrate their doctrines.

Although the Roman law was, in this manner, generally incorporated in that of modern European nations, it acquired more authority in some of these nations than in others. The German emperors appear to have considered themselves as the successors to the Roman empire in the West, and their dominions as therefore subject to that system of law by which the Romans were governed. Hence, in Germany, properly so called, in the Southern part of France, or what are called the *Pays de droit écrit*, and in several parts of Italy, which, at the time when the German emperors enjoyed the highest prosperity, were included under their dominion, the Roman law is understood to be the common law of the country, to which the inhabitants, upon the

\* Giannone, History of Naples.

failure

failure of their own municipal customs and regulations, are bound to submit. In other European countries it is viewed in the light of a foreign system; which, however, from its intrinsic merit, is entitled to great attention and regard; and of which many particulars have been, in a manner, naturalized by long usage, or adopted by the positive will of the legislature. This is the case in Spain, in Portugal, in the Northern parts, or what are called the *Pays des coutumes*, in France, in Sweden, in Denmark, and in Scotland\*.

Upon the revival of letters, the same regard to the Roman law was discovered in England as in the other countries of Europe. It was propagated with equal zeal by the clergy, and, in the twelfth century, became the subject of public lectures in both the universities. The decisions and principles delivered in the writings of Justinian, were borrowed, and even the expression was frequently copied, by Bracton, by the author of Fleta, and by other English lawyers of that period. The work attributed to Glanville, the grand justiciary of Henry the Second, and a Scotch law-book, known by the name of *Regiam Magistram*, both set out with a passage which is almost literally the same; whence, as well as for other reasons, it is concluded, that the latter of these productions has been copied from the former. Upon examination, however, the passage in question is found in the preface to the Institutes of Justinian.

The settlement of the chief courts of common law in the neighbourhood of the capital, which was begun in conse-

\* Duck de Auctoritate Jur. Civil.—It should seem, that, since the time when this author wrote, the ideas of the inhabitants, in some of those countries, have undergone a considerable change upon that subject.

quence of the great charter of king John, and completed in the reign of Edward the First, made it necessary that the lawyers, and other practitioners in those courts, should reside there also. Hence arose the *inns of court*, and of *chancery*, which were lodging-places in the neighbourhood of London, intended for the accommodation of the retainers about the courts at Westminster. Seminaries of common law were soon formed in those places of resort; and lectures upon that subject were given to the elder students, in the inns of court, and to the younger students, in the inns of chancery. The king gave encouragement to these institutions, by forming the members of each lodging-place into a sort of corporation, and by establishing a set of rules for their conduct. We find that Henry the Third bestowed upon them an exclusive privilege, by prohibiting any other school for teaching law within the city of London.

The universities of Oxford, and of Cambridge, were the only other institutions in the kingdom, in which law was taught with public encouragement. But in those learned societies, the only systems which had reputation, and which were thought worthy of public lectures, were those of the civil and the canon law. The municipal law, from its tendency, in many particulars, to encourage violence and disorder, from the barbarous jargon in which it was involved, and from the want of literature among its practitioners, was treated with contempt. These practitioners, we may easily imagine, were disposed to retaliate those unfavourable sentiments. Upon this account, and from the distance between the seats of instruction, in civil and municipal law, the former contributed no assistance to the latter. Those two branches of education were carried on apart,  
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and became entirely distinct, and separate. The teachers of each, instead of co-operating, in order to form a complete lawyer, were actuated by mutual jealousy and opposition; and the one science being treated as despicable in the universities, the other was probably represented as useless by the practitioners of the common law.

For some time the civil law, under the patronage of the clergy, and of the universities, was in the highest esteem throughout the nation; and the study of the municipal law was confined to mere lawyers by profession; but at length, from the natural course of things, the comparative value of those two branches of science was of necessity altered. The latter, being that system by which the property and the conduct of individuals were chiefly regulated, could not fail to rise in consideration and importance: at the same time that, by the progress of judges in experience and refinement, its defects were gradually supplied; while the laws of Rome, which were unconnected with the ordinary courts of justice, and therefore of no practical utility, became an object of little attention.

We accordingly find, that, in the reign of Edward the Fourth, and even before that time, the inns of court and chancery had become the fashionable places of education for men of rank and fortune, and were frequented by a great multitude of students. There were four inns of court, and no less than ten of chancery: in each of the former, the number of students amounted to about two hundred, in each of the latter, to about an hundred. Neither was the system of education, in this great seminary, confined entirely to law: it comprehended all exercises, and every sort of accomplishment, becoming a gentleman of the king's  
court;

court; such as dancing and music. Sir John Fortescue informs us, that it was likewise customary to study divinity on festival days; I suppose, by way of relaxation\*.

Justice Shallow is introduced by Shakepear, boasting, that he had been a student of *Clement's Inn*, and that he had often heard the chimes at midnight; as a proof that he was a young man of fashion and spirit.—In the same manner, as he boasted of his acquaintance with John of Gaunt.

When those teachers of the common law had begun to feel their own consequence, they assumed the privilege of bestowing rank upon their students of a certain standing; and conferred the degrees of *serjeant*, and *apprentice*, corresponding to those of *doctor* and *bachelour* in the universities.

As the separation of the civil and the municipal law produced an aversion to the former in the inns of court and chancery, we may easily conceive, that the same prejudice would be communicated to their numerous pupils, and thus become prevalent among the nobility and gentry of the kingdom. Hence the jealousy discovered, on several occasions, by the English parliament, lest, by the influence of the clergy, the laws of ancient Rome should be introduced into England; of which a remarkable instance is mentioned in the reign of Richard the Second; when the nobility, in parliament, declare, “that the realm of England hath never been unto this hour, neither by the consent of our lord the king, and the lords of parliament, shall it ever be

\* Fortescue de laudibus Leg. Ang.—Also the discourses on this subject preserved in Hearne's collection of antiquities.

“ruled

“ruled or governed by the civil law\*.” As the laws of ancient Rome had not been incorporated in the municipal system, they seem to have been viewed, by the partizans of the latter, in the same light with the doctrines of a rival sect, which has with difficulty been prevented from acquiring the superiority in the national establishment.

It has been alledged by authors of note, that the opposition of the English nobility to the civil law, arose from its being the law of a despotic government, and therefore inconsistent with their notions of English liberty. But whoever has examined the compilations of Justinian with any attention, must be sensible that there is no foundation for this remark. Those collections relate almost entirely to the private, and touch very slightly upon the public law of the empire. But with respect to property, and the rights of private persons, the opinions and decisions of the Roman lawyers do not seem to have been at all perverted by the nature of their government. Perhaps it will be difficult to point out any modern system of law, in which the rules of justice among individuals appear to be so little warped by the interest of the crown, and in which the natural rights of mankind are investigated and enforced with greater impartiality. In one or two cases, you meet with an observation, “that the prince is above the laws.” These, however, are detached, and, as it were, insulated expressions, delivered in general terms, and without any visible effect upon the body of the work; which relates, not to disputes between the emperor and his subjects, but to such as may arise among the people.

\* Blackstone's Commentaries.

After

After the free government of Rome was overturned, the emperors found it expedient for a long time to conceal the extent of their usurpation, and to leave the ordinary judges, in a great measure, undisturbed in the exercise of that jurisdiction which had been founded in the more fortunate times of the republic. Augustus first set the example of this prudent dissimulation, which was copied by a great number of his successors. Beside the apprehension that the old republican spirit was not entirely extinguished, and the circumstance that the throne continued elective, the emperors were kept in awe by those powerful armies, under particular officers of distinction, which were maintained in the provinces. These were much superior to that pretorian guard, which, for the immediate support of the imperial dignity, was established in the neighbourhood of Rome. In this manner a sort of balance, however precarious, was for some time held, by the military forces dispersed over the empire, and by the jealousy between the emperor and the leader of each considerable army; in consequence of which, the former was deterred from invading and destroying the internal structure of the constitution.

Some of the first emperors, indeed, were guilty of enormous crimes and disorders; but the effect of these appears to have been limited, in a great measure, to persons high in office, or in such rank or station as to be involved in the intrigues of the court. In the succeeding period the Romans were equally fortunate, and the throne was filled by a series of princes who are an honour to human nature; Nerva, Trajan, Adrian, Antoninus Pius, and Marcus Aurelius. Under these emperors no interference of the crown prevented

prevented the equal distribution of justice; the experience of an empire, which included the whole civilized world, was accumulated in one mass; and the system of private law was thus brought to much greater perfection than it had attained in the preceding ages.

In the reign of Adrian was composed the *perpetual edict*, the first great compilation of the rules of decision; and this became the ground-work of most of the writings published by succeeding lawyers. It was about this time that the law began to be regularly cultivated as a science; that it became the object of a lucrative profession; and that it was taught at Rome with public encouragement\*.

Severus new modelled the Prætorian guard, by appointing that it should consist of above fifty thousand men; about four times the ancient number; and that it should be recruited, not, as formerly, from the effeminate inhabitants of Italy, but from the hardy and well-disciplined legions upon the frontiers. With the command of this army the emperor possessed a force which nothing in the whole empire was able to oppose; and the government of course degenerated into an absolute military despotism. From this time, therefore, the law could not fail to decline. From the influence of long usage, however, it appears to have declined very slowly; and, notwithstanding the ignorance and barbarism in which the people were sunk, together with the heavy yoke of tyranny to which they were subjected, the ancient system was treated with respect.

\* The practice of lawyers taking an *honorarium*, had been introduced before the end of the commonwealth, but was prohibited by statute. Complaints of the violation of this law were made in the reign of Claudius; when it was enacted, that no lawyer should receive, in one cause, more than 100 *aurei*, or about 80 l. sterling.

It merits attention, that the opinions and decisions contained in the *Pandects* of Justinian, were delivered by authors, who either lived entirely, or at least received their education, before this great revolution was introduced; and probably a considerable time before its effects, in subverting the private law of the country, had been very sensibly felt. Modestinus, the latest of those authors, wrote in the reign, I think, of the younger Gordian, and only about thirty years below that of Severus.

The *Institutes*, an elementary book upon the science of law, intended as an introduction to the perusal of the former, was likewise composed, with a very few additions of Justinian, by an old lawyer, who lived within the period above mentioned.

As the proscription of civil law from the courts of Westminster-hall proceeded entirely from the animosity and opposition between the universities and the inns of court and chancery; it may be supposed that this would continue no longer than while the latter preserved their consideration and popularity. For a long time, however, these institutions have not only ceased to be the great seminaries for educating the nobility and gentry; but have become of little use for conveying instruction to practical lawyers. No lectures are now given in the inns of court or chancery; no exercises are performed; no measures are taken for directing the application of those who, of their own accord, may be disposed to study. The whole care of education seems to be devolved upon the cook; and the only remaining part of the ancient regulations is, that the student shall eat his commons for a certain number of terms.

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The causes of this alteration it is not difficult to discover. Beside the luxury of a great metropolis, which is calculated to produce idleness and dissipation both in teachers and scholars, the profits arising from the practice of the law, together with the prospect of preferment in the state, have allured men of spirit and abilities to desert the more speculative and less distinguished employment of communicating the principles of the science to a set of pupils. To counteract this natural tendency, and to maintain the vigour of teaching law, notwithstanding the superior advantages derived from the practical profession of a lawyer, public encouragement, as well as the strictest regulation, would have been requisite; but this object appears to have been overlooked by government; and, upon the advancement of national wealth and prosperity, the old institutions were left to their natural course.

But the decay of the inns of court and chancery did not immediately change the ideas which, in their more flourishing condition, they had impressed upon the nation. The movement continued, and its direction was little varied, for a long time after the hand that gave it was withdrawn. It is but of late years that the prejudices, which had so long prevailed, have begun to disappear, and that the same liberal spirit, with which the nation is animated in the prosecution of other sciences, has been extended to the interpretation of the rules of justice. In ecclesiastical courts, indeed, and in those of the universities, the civil law has been long followed; but this proceeded in some measure from prepossession; as the rejection of that system, in the courts of Westminster-hall,

was the effect of prejudice. Upon the rise of the court of chancery, its decisions were commonly directed by a clergyman; who naturally possessed an attachment to that system of equity, the propagation of which was the great aim of the whole ecclesiastical order. In the court of the admiral, which acquired a jurisdiction in maritime causes, the principles adopted were such as had been suggested, not by the peculiar customs of England, but by the common intercourse of commercial nations, and in which a great proportion of the civil law was introduced. A similar system was embraced in the courts of the constable and marshal; who, from having the command of armies, more especially when engaged in foreign expeditions, were permitted to assume a military jurisdiction. These officers, as might be expected, were led to imitate the general practice of Europe, or what may be called the law of nations.

It was reserved for the enlightened judges of the present age to estimate the system of Roman jurisprudence according to its intrinsic merit; and, without being influenced by adventitious circumstances, to derive from it, in the courts of common law, such assistance as it was capable of bestowing. Of all the sciences, law seems to be that which depends the most upon experience, and in which mere speculative reasoning is of the least consequence. As the Roman system contains the accumulated experience and observation of ages, and of the most extensive empire that ever existed in a civilized form; the advantages resulting from it, as an example to the lawyers and judges of any modern country, must be proportionably great. It presents the largest collection of equitable

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 table decisions, and rules, that is any where to be found. These are calculated to enlarge the compass of legal knowledge, without having the influence to mislead; they have all the benefit of precedents, without any authority to impose; and, therefore, may render the system of English law more full and comprehensive, without any danger of corrupting it.

SECT. IV. *The Rise of the Court of Chancery.*

IN attempting a general outline of the principal English courts, the judicial authority of the Chancellor now remains to be considered. The jurisdiction of this officer was plainly derived from the nature of his employment in the king's household, and from the ministerial powers over the kingdom, with which he thence came to be invested. By being the king's secretary and chaplain, he enjoyed the peculiar confidence of his master; and had the sole charge of writing his letters; and afterwards of issuing *writs* in the name of the crown. As it became customary that every vassal should hold his fief by a charter from the superior, the power of granting those deeds, throughout the royal demesne, became the source of great influence, and, after the Norman conquest, when the nobility were all reduced into the state of crown-vassals, raised the chancellor to be a principal officer of state.

When the deeds issuing from the crown became numerous, the care of expediting many of them was devolved upon inferior persons; and, to ascertain their authenticity, the

the subscription of the chancellor, and afterwards a public seal, of which he obtained the custody, was adhibited\*.

At what time signatures became customary, in England, to deeds proceeding from the crown, appears uncertain. It is probable that they were known to the Anglo-Saxons; but that they did not become frequent until the settlement of the Norman princes. From this period the chancellor was considered as having a title to the keeping of the great seal; but as, from the caprice of the monarch, there occurred some instances in which it was entrusted to a different person, a statute was made in the reign of Henry the Third, requiring that the employments of lord-keeper and chancellor should always be conjoined; a regulation which, having sometimes been overlooked, was afterwards renewed in the reign of Elizabeth †.

In this manner all important writings, issued by the king, either came through the medium of the chancellor, or were subjected to his inspection. Before he affixed the great seal to any deed, he was bound to examine its nature, and, if it proceeded upon a false representation, or contained any thing erroneous or illegal, to repeal and cancel it. So early were laid the foundations of a maxim, which in after days has been gradually extended; that the servants of the crown are justly responsible for measures which cannot be exe-

\* The subscription of the *referendarius*, who was probably the chancellor, occurs as far back, in the Anglo-Saxon period, as the reign of Ethelbert, the first Christian king. In the reign of Edward the Confessor we meet with a charter subscribed by the chancellor, under that express appellation: "Ego Rembaldus cancellarius subscripsi." Selden on the office of lord chancellor in England.

In France, and probably in all the kingdoms in the Western part of Europe, the chancellor came to be the ordinary keeper of the king's seal.

† Selden on the office of chancellor, 5 Eliz. c. 18.

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cutud without their concurrence. As the exercise of these powers required a previous examination and cognizance, it gave rise to an ordinary jurisdiction, which, although of great importance, has occasioned no controversy, and appears to have excited little attention.

The extraordinary jurisdiction of the chancellor arose more indirectly, from his character and situation. The origin of his interposition, to correct the decisions of the ordinary tribunals, was formerly suggested. When the king's baron-court, confining itself within the rules of common law, had been laid under the necessity of giving a decision, which, in its application to particular cases, was found hard and oppressive, the party aggrieved was accustomed to petition the king for relief. Applications of this nature were brought before the privy council; and the consideration of them was naturally referred to the chancellor; who, as the secretary of the king, being employed to register the decrees, and to keep the records of his baron-court, was rendered peculiarly conversant and intelligent in all judicial discussions.

A jurisdiction of this nature appears to have been acquired by the same officer, in several, if not in the greater part, of the kingdoms of Europe. Such, in particular, was that of the chancellor in France; who, under the kings of the first and second race, had the custody of their seal, and was distinguished by the appellation of the *grand referendaire* \*.

In England, it should seem that, before the end of the Saxon government, the chancellor was employed in giving redress against the hard sentences pronounced by the judges

\* See Paquier, Recherches de la France, and the authorities to which he refers.

of



of the king's demesne. As those judges, however, had then a very limited authority, his interpositions were proportionably of little importance. But, after the accession of William the Conqueror, when the *aula regis* became the king's ordinary baron court, and drew to itself almost the whole judicial business of the nation, the exercise of such extraordinary jurisdiction began to appear in a more conspicuous light. From this period, the multiplication of law-suits before the grand justiciary, produced more various instances of imperfection in the rules of common law; and, from greater experience and refinement, the necessity of relaxing in the observance of these rules, by the admission of numerous exceptions, was more sensibly felt.

As applications for this purpose became frequent, provision was made in order to facilitate their progress; and the tribunal to which they were directed grew up into a regular form. A committee of the privy council had, in each case, been originally appointed along with the chancellor, to determine the points in question. But, as these counsellors paid little or no attention to the business, of which they had seldom any knowledge; their number, which had been arbitrary, was therefore gradually diminished; and at last their appointment, having come to be regarded as a mere ceremony, was entirely discontinued. Subordinate officers were, on the other hand, found requisite in various departments, to assist the chancellor in preparing his decisions, and in discharging the other branches of his duty.

The authority, however, which was thus exercised by this great magistrate, in order to correct and to supply the most remarkable errors and defects in the ancient rules of law,

law, appears to have still proceeded upon references from the king or from the privy council. His interpositions depended upon the decisions given by other courts; and were of too singular a nature to be easily reduced into a system, or to be viewed in the light of a common remedy.

It was at a later period, that the chancery became an *original court*, for determining causes beyond the reach of the ordinary tribunals. This institution, arising from circumstances more accidental than those which produced the jurisdiction above-mentioned, does not seem to have prevailed the other European countries, but is in a great measure peculiar to England.

According to the feudal policy in the western part of Europe, all jurisdiction was inseparably connected with landed property; and actions of every sort proceeded upon a mandate, or commission, from that particular superior within whose territory the cause was to be tried. If an action was intended before a court deriving its jurisdiction from the king, the plaintiff made application to the crown, stating the injustice of which he complained; in answer to which, the sovereign ordered the adverse party to appear before a particular court, in order that the cause might be heard and determined. The *writ* or *brief*, issued for this purpose by the king, served not only to summon the defendant into court, but also, in that particular question, to authorize the investigation of the magistrate. The different barons, in their respective demesnes, issued briefs in like manner, for bringing any law-suit under the cognizance of their several courts.

In England this mode of litigation was uniformly observed, in proceedings before the *aula regis*; and was afterwards

afterwards adopted in the three courts of common law, among which the powers of the grand judiciary were divided.

The primitive writs, upon which any action was commenced, being accommodated to the few simple claims that were anciently enforced in a court of justice, were probably conceived in such terms as might occur without much reflection. But complaints upon the same principle of law being frequently repeated, the same terms naturally continued; so that, by long usage, a particular form of writ was rendered invariable and permanent in every species of action. This preservation of uniformity, although perhaps the effect of that propensity, so observable in all mankind, to be governed on every occasion by analogy, proved, at the same time, of great advantage, by ascertaining and limiting the authority of the judge. From the advancement of property, however, and from the multiplied connections of society, there arose new claims, which had never been the subject of discussion. These required a new form of writ; the invention of which, in consistency with the established rules of law, and so calculated as to maintain good order and regularity in the system of judicial procedure, became daily a matter of greater nicety and importance.

Application, in such cases, was made to the chancellor; who, from a scrupulous regard to precedents, was frequently unwilling to interpose, but referred the parties to the next meeting of parliament. These references, however, as might be expected, soon became burdensome to that assembly; and, by a statute in the reign of Edward the First, it was provided, that, "Whensoever, from thenceforth, it shall fortune in chancery that, in one case a  
" writ

" writ is found, and in like case, falling under like law,  
" and requiring like remedy, is found none, the clerks in  
" chancery shall agree in making the writ, or shall adjourn the plaintiffs to the next parliament, where a  
" writ shall be framed, by consent of the learned in the  
" law; lest it might happen for the future, that the court  
" of our lord the king should long fail in doing justice to  
" the suitors \*."

The new writs, devised in consequence of this law, were, for some time, directed to such of the ordinary courts as, from the nature of the case, appeared to have the most proper jurisdiction. At length, however, there occurred certain claims, in which, though seeming to require the interposition of a judge, it was thought the courts of common law would not interfere. In these, the chancellor, willing to grant a remedy, and, perhaps, not averse to the extension of his own authority, ventured to call the parties before himself, and to determine their difference †. This innovation is said to have been introduced about the time of Richard the Second, and for the purpose of supporting a contrivance to elude the statute of *mortmain*, by the appointment of trustees to hold a landed estate, for the benefit of those religious corporations to which it could not be directly bequeathed. The courts of common law could give no countenance to a stratagem so palpably intended to disappoint the will of the legislature. But the chancellor, as a clergyman, was led, by a fellow-feeling with his own order, to support this evasion; and, pretending to consider it as a matter of conscience, that the trustees should be

\* Statutes at Large, 13 Edward I. c. 24.

† This was done by the writ of *subpœna*.

bound to a faithful discharge of their trust, took upon him to enforce the will of a testator, in opposition to the law of the land.

Having successfully assumed the cognizance of one case, in which he was particularly interested, the chancellor found little difficulty in extending his jurisdiction to others. In these, he appears to have acted more from a general regard to justice; and, in consequence of the limited views entertained by the ordinary courts, his interposition seemed immediately necessary. His authority thus grew up imperceptibly: what was begun in usurpation, by acquiring the sanction of long usage, became a legal establishment; and, when it afterwards excited the jealousy of the courts of common law, its abolition was regarded as impolitic and dangerous. After the direction of chancery had long been possessed by clergymen, who, from their situation, were intent upon the increase of its jurisdiction, it was, upon some occasions, committed to lawyers by profession; by whom its procedure was more digested into a regular system.

From what has been observed, concerning the extraordinary jurisdiction of the court of chancery, there can be no doubt that it was originally distinguished from that of the other courts of Westminster-hall, by the same limits which mark the distinction between *common*, or *strict law*, and *equity*. Its primitive interpositions were intended to decide according to conscience, upon those occasions when the decisions of other courts, from an adherence to ancient rules, were found hard and oppressive. It was afterwards led to interpose in original actions, in order to make effectual those new claims which the ordinary courts accounted beyond

beyond the limits of their jurisdiction. The first branch of this authority in the court of chancery was therefore designed to correct the *injustice*, the other to supply the *defects*, of the other tribunals.

This accordingly seems to have been the universally received idea of that court; which is called a *court of equity*, by every author who has occasion to mention it. In this view it is considered by Lord Bacon, who himself held the office of chancellor, and who, among all his cotemporaries, appears to have been the best qualified to understand its nature. The same opinion of this court was entertained by the learned Selden. "Equity," says that author, "is a roguish thing; for law we have a measure; know what to trust to. Equity is according to the conscience of him that is chancellor; and, as that is larger or narrower, so is equity. It is all one as if they should make the standard for measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot; another a short foot; a third, an indifferent foot. 'Tis the same thing in the chancellor's conscience\*."

The ingenious and acute author of "The Principles of Equity" has adopted this notion concerning the nature of the court of chancery; and disputes with Lord Bacon, whether it is more expedient, that the equitable jurisdiction, and the jurisdiction according to strict law, should be united in the same court, as in ancient Rome; or divided between different courts, as in England?

In opposition to these authorities, Justice Blackstone, a writer whom, in a practical point of this nature, we can

\* Selden's Table-talk.

hardly suppose to be mistaken, affirms\* that there is no such distinction between the chancery and the other courts of Westminster; and maintains that the latter are possessed of an equitable jurisdiction; while the former, to which, like other writers, he gives the appellation of a *court of equity*, is accustomed to decide according to the rules of strict law.

To reconcile these different opinions, it seems necessary to suppose that they refer to different periods; and that both the chancery, and the other courts in question, have, since their first establishment, been subjected to great alterations. This is what, from the nature of things, might reasonably be expected. Lord Bacon and Mr. Selden speak of the court of chancery as it stood in a remote period: and, in a matter relating to the history, or even the philosophy of law, Justice Blackstone might easily be deceived.

The distinction between strict law and equity is never, in any country, a permanent distinction. It varies according to the state of property, the improvement of arts, the experience of judges, the refinement of a people.

In a rude age the observation of mankind is directed to particular objects; and seldom leads to the formation of general conclusions. The first decisions of judges, agreeable to the state of their knowledge, were such as arose, in each case, from immediate feelings; that is, from considerations of equity. These judges, however, in the course of their employment, had afterwards occasion to meet with many similar cases; upon which, from the same impressions of justice, as well as in order to avoid the appearance of partiality, they were led to pronounce a similar decision. A

\* See his Commentaries, Book III. chap. 4 and 7.

number

number of precedents were thus introduced, and, from the force of custom, acquired respect and authority. Different cases were decided, from the view of certain great and leading circumstances in which they resembled each other; and the various decisions, pronounced by the courts of law, were gradually reduced into order, and distributed into certain classes, according to the several grounds and principles upon which they proceeded. The utility of establishing general rules for the determination of every law became also an object of attention. By limiting and circumscribing the power of a judge, they contributed to prevent his partiality in particular situations, and by marking out the precise line of conduct required from every individual, they bestowed upon the people at large, the security and satisfaction arising from the knowledge of their several duties and rights.

But although the simplification of decisions, by reducing them to general principles, was attended with manifest advantage, it was, in some cases, productive of inconvenience and hardship. It is difficult, upon any subject, to establish a rule which is not liable to exceptions. But the primitive rules of law, introduced by unexperienced and ignorant judges, were even far from attaining that perfection which was practicable. They were frequently too narrow; and frequently too broad. They gave rise to decisions, which, in many instances, fell extremely short of the mark; and which, in many others, went far beyond it. In cases of this nature, it became a question; whether it was more expedient, by a scrupulous observance of rules, to avoid the possibility of arbitrary practice, or, by a particular deviation from them, to prevent an unjust determination? In order to prevent gross injustice under the sanc-

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tion of legal authority; an evil of the most alarming nature; it was thought adviseable, upon extraordinary occasions, to depart from established maxims, and, from a complex view of every circumstance, to decide according to the feelings of justice. The distinction between *strict law* and *equity* was thus introduced; the former comprehending the established rules; the latter, the exceptions made to those rules in particular cases.

But when questions of equity became numerous, they, too, were often found to resemble one another; and, requiring a similar decision, were by degrees arranged and classified according to their principles. After a contract, for example, had been enforced by a general rule, it might happen, on different occasions, that an individual had given a promise, from the undue influence of threats and violence, from his being cheated by the other party, or from advantage being taken of his ignorance and incapacity. On every occasion of this nature an equitable decision was given; and, by an exception to the common rule of law, the promiser was relieved from performance. But, the remedy given in such cases being reduced into a regular system, could no longer be viewed in the light of a singular interposition; and, by the ordinary operation of law, every contract extorted by force, elicited by fraud, or procured in consequence of error and incapacity, was rendered ineffectual. Every primitive rule of justice was productive of numerous exceptions; and each of these was afterwards reduced under general principles; to which, in a subsequent period, new exceptions became necessary: as from the trunk of a spreading tree there issue large branches; each of which gives rise to others, that are lost in various divisions.

Law

Law and equity are thus in continual progression; and the former is constantly gaining ground upon the latter. Every new and extraordinary interposition is, by length of time, converted into an old rule. A great part of what is now strict law was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next.

Although the chancellor, therefore, was originally entrusted with the mere province of equity, the revolutions of time have unavoidably changed the nature of his jurisdiction. He continues to exert an authority in all such claims as were anciently taken under his protection; but his interpositions concerning them are now directed by general principles, to which various exceptions, according to equity, have since been introduced. He continues, likewise, those modes of procedure which were suitable to his primitive situation, and adapted to such investigations as the purpose of his establishment required.

The ordinary courts of Westminster-hall have, on the other hand, extended their jurisdiction beyond its ancient limits. Though they originally did not venture to deviate from the rules of strict law, the improvements of a later age have inspired them with a more liberal spirit; and have rendered their decisions more agreeable to the natural dictates of justice.

Thus the court of chancery has been gradually divesting itself of its original character, and assuming that of the courts of common law; while these latter have been, in the same proportion, enlarging their powers, and advancing within the precincts of equity.

According to Justice Blackstone, the essential difference at present, between the chancery and the courts of common

law, consists in the modes of administering justice peculiar to each. It may deserve to be remarked, that these differences are such as would naturally arise between courts originally distinguished, by having the separate departments of strict law and of equity.

1. From the mode of proof adopted by chancery, all questions which require a reference to the oath of a party are appropriated to that court. This peculiarity arose from an opinion, entertained by early judges, that it was a hardship to compel any person to furnish evidence against himself. But the view suggested by equity was more liberal and refined. It appeared unjust that a defendant should refuse to satisfy a claim which he knew to be well founded; and, unless he was conscious of having fraudulently withheld performance, he could suffer no damage by his judicial declaration.

2. The chancery alone is competent for taking proofs by commission, when witnesses are abroad, or shortly to leave the kingdom, or hindered by age or infirmity from attending. In the courts of common law, the method of trial by a jury was universally established; and as this form required that the witnesses should be examined in court, the interposition of equity was indispensable, to authorize their examination in absence.

3. Instead of awarding damages for the neglecting to fulfil a contract, the court of chancery has power to order specific performance. From the narrow principles embraced, in early times, by the courts of strict law, no complaint was regarded unless the plaintiff had suffered in his pecuniary interest; and, consequently, upon the breach of contract, nothing farther could be claimed than reparation of the damage incurred. In a more equitable view, it appeared

peared that every innocent and reasonable purpose of the contractors ought to be enforced; although, perhaps, the loss arising from the failure of performance could not be estimated in money. A court of equity, therefore, was accustomed to enjoin, that a contract should be expressly fulfilled.

4. Two other branches of power are mentioned as peculiar to the court of chancery: the one to interpret securities for money lent. This arose from the prohibition, introduced by the canon law, of taking interest for the loan of money; which occasioned an evasion, by means of what is called a *double bond*. The true construction of this deed, according to the intention of the parties, and in opposition to the words, was beyond the jurisdiction of the ordinary courts. The other branch of power alluded to was that of enforcing a *trust*. This, as I formerly observed, was intended to evade the statute of *mortmain*; and afforded the chancellor the first ground for assuming his extraordinary authority in original actions.

Considering the origin of the court of chancery, there was no reason to expect that its jurisdiction would be separated from that of the ordinary courts by any scientific mode of arrangement. It was the offspring of accidental emergency; being merely a temporary expedient for granting an immediate relief to those who had suffered from legal injustice. Supposing that, after it became a permanent and regular tribunal, it had remained upon its original footing, the advantages likely to have resulted from it may reasonably be called in question. That one court should have a jurisdiction according to strict law, and another according to equity; that the former should be obliged, with eyes open, to pronounce an unjust sen-

tence, in conformity to an old rule, leaving parties to procure relief by an application to the latter; that, in a word, the common-law tribunal should be empowered to view the law-suit only upon one side, and the court of equity upon a different one; such a regulation appears in itself no less absurd and ridiculous, than its consequences would be hurtful, by producing a waste of time, and an accumulation of expences: not to mention the uncertainty and fluctuation of conduct arising from the inaccurate and variable boundaries by which equity and strict law must ever be distinguished. Even according to the later form which the chancery has assumed, and by which it has appropriated causes of a very peculiar description, or such as require a singular mode of procedure, its line of partition from the ordinary civil courts may be thought rather arbitrary and whimsical. But, however the present distribution of the judicial powers may be deficient in speculative propriety, it seems in practice to be attended with no inconvenience. The province belonging to each of the courts of Westminster-hall appears now to be settled with an exactness which prevents all interference or embarrassment; and there is, perhaps, no country in the world where equity and strict law are more properly tempered with each other, or where the administration of justice, both in civil and criminal matters, has a freer and more uniform course.

## C H A P. VIII.

*Of the Circumstances which promoted Commerce, Manufactures, and the Arts, in modern Europe, and particularly in England.*

THE commerce of the ancient world was confined, in a great measure, to the coasts of the Mediterranean and of the Red Sea. Before the invention of the mariner's compass, navigators were afraid of venturing to a great distance from land; and in those narrow seas, found it easy, by small coasting expeditions, to carry on an extensive traffic. Not to mention what is related concerning the fleets of Sesostris and of Solomon, which are said to have been built upon the Red Sea, we may ascribe to this cause the commerce of the Phenicians, the Carthaginians, the Athenians, the Rhodians, and many other states, in the islands and upon the coast of the Mediterranean.

From the time of Alexander the Great, when Greece had become one extensive kingdom, and had formed connections with Asia, the two narrow seas above-mentioned became the channel of a more distant commerce along the Indian ocean, by which the valuable productions of the East were imported into Europe. It was in order to facilitate this traffic, that the city of Alexandria is said to have been built.

The same commerce was carried on, and probably much extended, in the flourishing periods of the Roman empire, when the numerous articles of Asiatic luxury were in such universal

universal request among that opulent people. The decline of the Roman power tended gradually to diminish that branch of trade; but did not entirely destroy it. Even after the downfall of Rome, when Italy had been, often ravaged, and a great part of it subdued, by the barbarous nations, there arose upon the sea-coast some considerable towns, the inhabitants of which continued the ancient course of navigation, and still maintained a degree of traffic with India. The road, however, to that country was a good deal changed by the revolutions and disorders which happened in Egypt, and by the rise of the Saracen empire; so that the Indian trade was carried on less frequently by Alexandria, and most commonly by the Black Sea and part of Tartary, or by a middle way through the city of Bagdat.

During the barbarous period that succeeded the destruction of the Roman empire, the same cause which had formerly promoted the commerce of the Mediterranean, gave rise, in the Northern part of Europe, to a small degree of traffic upon the narrow sea of the Baltick. The inhabitants of the Southern coast of Scandinavia, and the Northern parts of Germany, being necessitated, in that inhospitable climate, to fish for their subsistence, became early acquainted with navigation, and were thereby encouraged not only to undertake piratical expeditions, but also to exchange with each other the rude produce of the country. From the conveniency of that situation, numbers of people were drawn, by degrees, to reside in the neighbourhood, and trading towns were formed upon the coast, or in the mouths of the adjoining rivers. For several centuries, the commerce of the Northern part of Europe was ingrossed by those towns, in the same manner as that of the Southern

was

was ingrossed by some of the Italian states. As the laws relating to commerce are usually established by the general custom of merchants, it commonly happens, that the practice of nations who have gained a remarkable superiority in trade, becomes a model for imitation to their neighbours, or such as come after them in the same employment. Thus, as the Rhodian laws at one period regulated the commerce of the ancient world, the states of Wisby, the famous capital of Gothland, in the Baltick, obtained a similar authority, and have since been considered, by many European states, as the basis of all their mercantile regulations.

In modern Italy, the maritime laws of Amalphi were, in like manner, respected and observed by the merchants in that part of Europe\*. Nothing can shew more decisively the early advances in trade which were made by those towns.

While the inhabitants of those different parts of Europe were thus advancing in navigation and in commerce, they could hardly fail to make some progress also in manufactures. By having a vent for the rude produce of the country, they must have had frequent opportunities of observing that, by bestowing a little labour upon their native commodities, they could draw a much greater profit upon the exchange of them. In this manner they were encouraged to occupy themselves in working up the raw materials; to acquire habits of industry; and to make proficiency in mechanical employments. If we examine the history of commercial nations, those especially of the ancient world, we shall find that this has been the usual course of

\* Giannone's Hist. of Naples.

their



their advancement; and that their trade and manufactures have been commonly derived from a convenient maritime situation; which, by affording them the benefit of water-carriage, opened a distant market for their goods, and tempted them to engage in foreign commerce.

The commerce of Italy seems accordingly to have been followed by a rapid improvement of the mechanical arts. In the twelfth and thirteenth centuries, many of the Italian towns had arrived at great perfection in manufactures; among which we may take notice of Venice, Genoa, Bologna, Pisa, Siena, and Florence. It was from Italy that the art of making clocks and watches, as well as many other of the finer branches of manufacture, together with the most accurate method of keeping mercantile accounts, was afterwards communicated to the other nations of Europe.

The advancement of the common arts of life was naturally succeeded by that of the fine arts, and of the sciences; and Florence, which had led the way in the former, was likewise the first that made considerable advances in the latter. That city, after having been aggrandized by trade, banking, and manufactures, began, about the middle of the thirteenth century, to discover a taste of elegance and refinement, and to promote the cultivation of letters. Charles of Anjou, who then obtained the kingdom of Naples as a donation from the Pope, and who was, at the same time, the feudal sovereign of Florence, is said to have been a zealous encourager of these liberal pursuits. The example of the Florentines was soon followed by the other states of Italy, in proportion as trade and manufactures had raised them to ease and opulence.

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The intercourse of those Italian states with some of the opulent nations of the East, in consequence of the crusades, or of other casual events, may have contributed something towards the revival of letters in Europe. But the operation of this accidental circumstance must have been entirely subordinate to the great natural cause of improvement already suggested. While the inhabitants of Europe continued rude and barbarous, they were not likely to procure much knowledge by their transient or hostile communication with Asia; but after they had acquired a taste for the cultivation of arts and sciences, they, doubtless, found instructors in that part of the world.

As the people upon the coast of the Baltick inhabited a poorer country, the produce of which was not so easily wrought up into valuable manufactures, they made a proportionably slower progress in the mechanical arts; though, by continuing to export their native commodities, they acquired a degree of wealth, and many of their towns became large and powerful. Having been much oppressed, and obstructed in their trade, by the barons and military people in their neighbourhood, they were led by degrees into joint measures for their own defence; and, about the twelfth century, entered into that famous Hanseatic league, which, being found of great advantage to the commercial interest, was at length rendered so extensive as to include many cities in other parts of Europe.

As the situation of towns, upon the coast of a narrow sea, was favourable to foreign commerce, a country intersected by many navigable rivers gave a similar encouragement to inland trade, and thence likewise to manufactures. An inland trade, however, cannot be rendered very extensive, without greater expence than is necessary to the

trade of a maritime town. That all the inhabitants may have the benefit of a market, canals become requisite, where the river-navigation is cut off; roads must be made, where water-carriage is impracticable; machinery must be constructed, and cattle, fit for draught, must be procured and maintained. It may be expected, therefore, that inland trade will be improved more slowly than the commerce which is carried on along the sea-coast; but, as the former holds out a market to the inhabitants of a wider country, it is apt, at length, to produce a more extensive improvement of manufactures.

We accordingly find, that, after the towns of Italy, and those upon the coast of the Baltick, the part of Europe which made the quickest advances in trade was the Netherlands; where the great number of navigable rivers, which divide themselves into many different branches, and the general flatness of the country, which made it easy to extend the navigation by canals, encouraged the inhabitants to employ themselves in the manufacture of their natural productions.

Beside the facility of water-carriage, the inhabitants of the Netherlands appear to have derived another advantage from the nature of their soil. The two most considerable branches of manufacture, which contribute to supply the conveniencies or luxuries of any people, are the making of linen and of woollen cloth. With regard to the former of these branches, that country seems fitted to produce the rude materials in the greatest perfection. As early as the tenth century, we accordingly find that the people had, by this peculiar circumstance, been excited to attempt the manufacture of linens; and that, in order to promote an inland

inland trade of this kind, which supposes that the commodity must often be carried to a considerable distance, Baldwin the young, the hereditary count of Flanders, established fairs and markets in particular towns, as the most convenient places of rendezvous between the merchants and their customers.

After the Flemings had made some progress in this trade, and when, of consequence, individuals among them had acquired some stock, as well as habits of industry, they also endeavoured to supply the demand for *woollen* manufactures, which required no very different species of skill and dexterity from what they had already attained. In this employment, however, they were subjected to greater inconveniency; as, after pushing it to any considerable extent, they were under the necessity of purchasing the rude materials from foreign nations. This obliged them to carry on a regular trade with Spain, and with Britain, the two countries of Europe in which wool was produced in greatest abundance. The union, however, of the sovereignty of Spain with that of the Netherlands, which happened in the person of the emperor Charles the Fifth, contributed in part to remove that inconveniency, by securing to the latter country the wool produced by the former; and the Spanish monarch, who saw the rude materials manufactured within his own dominions, had an opportunity of protecting and encouraging every branch of the labour connected with that employment. From this time the woollen and linen manufactures of the Netherlands came to be in the same flourishing condition.

But while this part of Europe enjoyed such advantages for inland trade, it was not entirely excluded from a share in foreign commerce, by means of Antwerp, and of some

other maritime towns in the neighbourhood. The inhabitants of Italy, and of the countries upon the coast of the Baltick, having reciprocally a demand for the commodities produced in such different climates, were led by degrees into a regular traffic. As the ships, employed in this extensive navigation, found a convenient middle station in the ports of the Netherlands, the merchants of this country were furnished with opportunities of transporting their linen or woollen cloths, both to the Southern and Northern parts of Europe; and a free market was thus opened for those valuable commodities. It merits attention, that the opulence, thus acquired by Flanders, and the neighbouring provinces of the low countries, had the same effect as in Italy, of giving encouragement to literature, and to the cultivation of the fine arts. The rise of the Flemish painters was later than that of the Italian, because the trade of the Netherlands was of a posterior date; and their not attaining the same perfection may, among other causes, be ascribed to this circumstance, that the flourishing trade of that country was of shorter duration.

The encouragement given, in the Netherlands, to painting, was extended also to music, and was productive of a similar proficiency in that art. It is observed, that the Flemings were accustomed, in this period, to supply the rest of Europe with musicians, as is done in our days by the Italians\*.

Towards the end of the sixteenth, and the beginning of the seventeenth century, three great events concurred to produce a remarkable revolution upon the state of trade

\* See Reflections on Poetry, Painting, and Music, by the Abbé du Bos.

and

and manufactures in general, and that of Europe in particular.

1. The first of these was the invention of the mariner's compass; which changed the whole system of navigation, by enabling navigators to find their way with certainty in the wide ocean, to undertake more distant expeditions, and to complete them with much greater quickness. When this discovery had been properly ascertained, and reduced to practice, those who inhabited the coast of a narrow sea had no longer that superiority, with respect to commerce, which they formerly possessed; for, whatever advantages they might have in a small coasting navigation, these were overbalanced by the inconveniences of their situation, whenever they had occasion to sail beyond those adjacent capes or promontories by which they were limited and circumscribed. The harbours, which became then most favourable to commerce, were such as had formerly been least so; those which were the farthest removed from freights, or dangerous shores, and, by their distance from opposite lands, admitted the freest passage to every quarter of the globe.

2. The discovery of America, and the opening of a passage to the East-Indies by the Cape of Good Hope, which may be regarded as a consequence of the preceding improvement in navigation, contributed still farther to change the course of European trade. By these discoveries a set of new and magnificent objects of commerce was presented, and Europe began to entertain the prospect of forming settlements in distant countries; of trading with nations in various climates, producing a proportional variety of commodities; and of maintaining an easy correspondence between the remotest parts of the world. The merchants of Italy,

Italy, and of the Northern parts of Germany, were naturally left behind, in the prosecution of these magnificent views. Their situation, hemmed in by the coast of the Baltick, or of the Mediterranean, was particularly unfavourable for that new species of trade. They had, besides, a reluctance, we may suppose, to abandon their old habits, and to relinquish that settled traffic in which they had been long engaged, for the new and hazardous adventures which were then pointed out to them. Adhering, therefore, to their former course, they found their profits decrease according as the new commerce became considerable; and their commercial importance was at length, in a great measure, sunk and annihilated.

3. The violent shock given, by the Spanish government, to the trading towns of the Netherlands, occasioned, about this period, a change in the manufactures of Europe, no less remarkable than the two foregoing circumstances produced in its commerce. Philip the Second of Spain embraced the narrow and cruel policy of his father Charles the Fifth, in attempting to extirpate the doctrines of Luther throughout his dominions; at the same time that he added a bigotry, peculiar to himself, which led him to seek the accomplishment of his purpose by measures yet more imprudent and sanguinary. The doctrines of the reformation had been spread very universally in the Netherlands; and had been adopted with a zeal not inferior to that which appeared in any other part of Europe. Philip employed the whole force of the Spanish monarchy in order to subdue that spirit of religious innovation; and, after a long and obstinate struggle, he at last prevailed; but it was by extirpating a great part of the inhabitants, and ruining the manufactures of the country. The most independent

pendent and spirited, that is, the most active and skilful part of the manufacturers, disdaining to submit to a tyranny by which they were oppressed in their most valuable rights, fled from their native country; and, finding a refuge in other European nations, carried along with them that knowledge and dexterity in manufactures, and those habits of industry, which they possessed in so eminent a degree.

Of all the European nations, Great Britain was in a condition to reap the most immediate profit from these important changes in the state of commerce and manufactures.

England has long enjoyed the peculiar advantage of rearing a greater number of sheep, and producing larger quantities of wool, fit for manufacture, than most other parts of the world. This is probably derived from the flatness of the country, by which a great part of it is plentifully supplied with moisture, and from the moderate temperature of its climate; both of which circumstances appear favourable to the production of pasture, and to the proper cultivation of sheep. But, whatever be the causes of it, the fact is certain, that, Spain excepted, no other country can, in this particular, be brought in competition with England. Particular mention is made of the English wool, even when Britain was a Roman province; and, in the early periods of our history, the exportation of that commodity was a considerable article of commerce. What is remarkable, the English wool of former times appears to have been of a finer quality than the present; and there is even reason to believe that it was held superior to the Spanish\*. Of this

\* See Observations upon National Industry, by James Anderson, and the authorities to which he refers.

extraordinary

extraordinary fact it seems difficult to give any satisfactory account. I am credibly informed, that the improvements, made of late years, in the pasture-grounds of England, have greatly debased the quality of the wool; though, by the increase of the quantity, they have sufficiently indemnified the proprietors.

By possessing the raw material in great plenty, the English appear to have been incited, at an early period, to make some attempts toward the fabrication of it. The woollen cloth of England is taken notice of while the country was under the dominion of the Romans. The disorders which followed while the Saxons were subduing the country, and during the subsequent ravages of the Danes, gave great interruption to manufactures; but, soon after the Norman conquest, and particularly in the reigns of Henry the Third and Edward the First, that of woollen cloth appears to have become an object of attention.

The flourishing reign of Edward the Third was extremely favourable to improvements; and that enterprising monarch, notwithstanding his ardour in the pursuit of military glory, was attentive to reform the internal policy of the kingdom, and gave particular encouragement to the woollen manufacture. He invited and protected foreign manufacturers; and, in his reign, a number of Walloon weavers, with their families, came and settled in England. An act of parliament was made, which prohibited the wearing of foreign cloth; and another, by which the exportation of wool was declared to be felony. These regulations, however narrow the principles upon which they were built, were certainly framed with the best intentions; but they could have little or no effect, as the English, at that time, were neither capable of manufacturing the whole

whole of their wool, nor even of supplying their own demand for woollen cloth. The crown, therefore, in virtue of its dispensing power, was accustomed to relieve the raisers of wool, by granting occasionally, to individuals, a licence for exportation; and, as a dispensation in this case was absolutely necessary to procure a market for the commodity, it became the source of a revenue to the sovereign, who obtained a price for every licence which he bestowed.

The woollen trade of England made considerable advances in the reign of Henry the Seventh, when, after a long course of civil dissension, the people began to enjoy tranquillity under a prince who favoured and protected the arts of peace. About this time were set on foot the coarse woollen manufactures of Yorkshire; particularly at Wakefield, Leeds, and Halifax; places remarkably well adapted to that species of work, from the plenty of coal, and the numerous springs of water with which they are supplied.

The extension of manufactures, about this period, became so considerable as to produce an alteration in the whole face of the country; and in particular, gave rise to remarkable improvements in husbandry, and in the different arts connected with it. The enlargement of towns and villages, composed of tradesmen and merchants, could not fail to encrease the demand for provisions in the neighbourhood, and, by enhancing the value of every article raised by the farmers, to advance the profits of their employment. From this improvement of their circumstances, the tenants were soon enabled, by offering an additional rent, to procure leases for a term of years; and the master,

whose daily expences were encreased by the progress of trade and luxury, was content to receive a pecuniary compensation, for the loss of that authority over his dependants, which he was obliged to relinquish. Thus the freedom and independence, which the mercantile and manufacturing people derived from the nature of their employment, was, in some measure, communicated to the peasantry; who, instead of remaining tenants at will, were secured for a limited term in the possession of their farms.

In consequence of these changes, the number of villeins in England was greatly diminished, in the reign of Henry the Seventh; and before the accession of James the First, that class of men had entirely disappeared. Without any public law upon the subject, their condition was gradually improved by particular bargains with their master; and, according as their opulence enabled them to purchase higher privileges, they acquired longer leases, or were converted into *copyholders*, or *freeholders*.

As, from this time, the English continued, with unremitting ardour, to prosecute their improvements, and were continually advancing in opulence, as well as in skill and dexterity, and in the habits of industry, it was to be expected that, in the long run, the possession of the rude material of the woollen manufacture would give them a manifest superiority in that branch of business, and put it in their power to undersell other nations who had not the same advantage.

In the reign of queen Elizabeth, that severe blow, which I formerly mentioned, was given to the trade of the Low Countries; by which every branch of manufacture was greatly impaired, and that of woollen cloth was totally destroyed.

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destroyed. Thus the destruction of the woollen trade of the Netherlands happened at the very critical period, when the English were come to be in a condition of turning that event to their own emolument. - The manufacturers who had been driven from their native land found a welcome refuge from queen Elizabeth; and the greater part of them took up their residence in England; so that the inhabitants of the former country became, in the highest degree, instrumental in promoting the trade of the latter; instead of retarding or depressing it, by that superiority of industry and skill, and that uninterrupted possession of the market which they had long maintained.

In Spain, the only other country of Europe enjoying similar advantages to those of England, the improvement of the woollen manufacture was prevented by a variety of concurring circumstances. The rooted animosity between the professors of the Christian and Mahometan religions, cherished by the remembrance of many acts of cruelty and oppression, had excited Ferdinand of Arragon, when he became master of the country, to persecute the Moors, the only industrious part of the inhabitants. In a subsequent reign, they were entirely extirpated. The same imprudent and barbarous policy interrupted and discouraged the trade of the Netherlands; and, after these two fatal events, the sudden importation of gold and silver into Spain, in consequence of the possession of America, completed the destruction of industry among the people, by raising individuals to sudden wealth, and making them despise the slow and distant returns of trade and manufactures.

Upon the ruin of the Spanish Netherlands, were established the fine woollen manufactures of Wiltshire, and

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some of the neighbouring counties; those parts of England which produced the greatest number of sheep, and in which the superior quality of the wool was most remarkable. The rapid improvements in that great branch of manufacture, which became conspicuous in England, had a natural tendency to introduce other branches, more or less connected with it; and, when a great body of the people had acquired industry and skill in one sort of employment, it was not very difficult, as occasion required, to extend their application to other trades and professions.

While these circumstances bestowed upon England a superiority in manufactures, she began to enjoy advantages no less conspicuous, with regard to navigation and commerce. When the people of Europe had become qualified for extensive naval undertakings, the distance of Britain from the continent, and her situation as an island, afforded her a superiority to most other countries in the number of such harbours as have a free communication with all parts of the globe. Her insular situation was, at the same time, not less advantageous with respect to inland trade; from the numerous bays and rivers, which, by intersecting the country in different places, extended the benefit of water-carriage to the greater part of the inhabitants. As the bulk of the people became thus familiar with the dangers and vicissitudes incident to those who live upon water, they acquired habits which fitted them for a seafaring life, and rendered them dextrous in those arts which are subservient to navigation, the great instrument of commerce. In these circumstances, there has been formed a numerous body of sailors, equally prepared for commercial and for military

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military enterprises. As, in the early state of the feudal nations, the great body of the people were, without labour or expence, qualified for all the services of the field; so, in Britain, a great proportion of the inhabitants, after the advancement of commerce, became a sort of naval militia, ready, upon all occasions, for the equipment of her fleets, and, without the assistance of *navigation acts*, or other precautions of the legislature, fully sufficient for the defence of the country.

These advantages, however, were rendered more stable and permanent by the great extent of this island, superior to that of most others upon the globe. This, as it united the inhabitants in one great state, made them capable of exerting a force adequate to the protection of its commerce and manufactures. To the extent of her dominions Great Britain is indebted for her long-continued prosperity. The commercial states, both in ancient and modern times, which were formed in islands of small extent, have been frequently overturned in a short time, either by the jealousy of neighbours, or by an accidental collision with more powerful nations. The present combination of European powers against Great Britain, demonstrates the jealousy which a national superiority in trade is likely to excite, and the force which is necessary to maintain that dangerous pre-eminence\*.

That the government of England, in that period, had also a peculiar tendency to promote her trade and manufactures, it is impossible to doubt. As the inhabitants were better secured in their property, and protected from oppressive taxes, than in any other European kingdom, it

\* This was written before the peace in 1782.

is natural to suppose that their industry was excited by the certain prospect of enjoying whatever they should acquire. Though the English constitution was then destitute of many improvements which it has now happily received, yet, compared with the other extensive governments of Europe in that age, it may be regarded as a system of liberty.

## C H A P. IX.

*Of Henry the Seventh.—Circumstances which, in his reign, contributed to the exaltation of the Crown.—Review of the Government of this period.*

**I**N the reign of Henry the Seventh, the power of the crown, which had been gradually advancing from the Norman conquest, was exalted to a greater height than it had formerly attained. The circumstances which produced this alteration, either arose from the general state of the country, and the natural tendency of its government; or were the consequence of singular events, and occasional conjunctures.

1. The improvements in agriculture, and in trade and manufactures, which appeared so conspicuously from the accession of the Tudor family, contributed, more than any other circumstance, to increase the influence and authority of the crown. By these improvements, persons of the lower class were led to the acquisition of different privileges and immunities: instead of remaining in the idle state of retainers, they found employment either as farmers, who paying a fixed rent, were exempted from the arbitrary will of a master, or as tradesmen and merchants, who, at a distance from any superior, were enriched by the profits of their industry. These circumstances naturally produced that spirit of independence which is so favourable to civil liberty.



liberty, and which, in after times, exerted itself in opposition to the power of the crown. But such was the situation of the great body of the people, upon their first exaltation, that, instead of attempting to depress, they were led to support the political influence of the monarch. His protection they had formerly experienced, in opposition to those great proprietors of land in their neighbourhood, by whom they had been oppressed, and who still were endeavouring to retain them in subjection. Notwithstanding the change of their condition, their power was not so established as to enable them, alone and unprotected, to withstand these ancient oppressors; and from their former habits, as well as from the dangers and difficulties which were not yet entirely removed, they still adhered to the sovereign as their natural protector. In this peculiar state of things, the interest of the crown coincided with that of the great body of the people; while the ambition of the nobles appeared equally inconsistent with both. To humble the aristocracy was therefore the first aim of the lower order of the inhabitants; but, in their attempts to destroy two or three hundred petty tyrants, they incurred the hazard of raising up a single one more powerful than them all.

This union of the crown with the great body of the people, at the same time that it primarily encreased the authority of the monarch, contributed indirectly to preserve the ancient privileges of parliament. As the house of commons, which daily rose to higher consideration, was in the interest of the king, and usually supported his measures if not extremely odious and oppressive, he found it expedient to call frequent meetings of that assembly. Thus the very power, which the interpositions of parliament were calculated to restrain, invited and prompted this national council

council to exercise its rights; because, in the exercise of them, it was disposed to gratify the inclination or humour of the sovereign, who regarded present convenience more than the future effects of example.

The same views of interest, which led the king to call frequent meetings of parliament, induced him to bestow additional weight upon the house of commons, by encreasing the number of its members. For this purpose, many small towns, upon the demesne of the crown, were incorporated, and invested with all the privileges of royal boroughs; in consequence of which they became entitled to send the usual number of burgeses to parliament. In other towns, which had anciently been incorporated, but which had long neglected to send representatives, that obligation was renewed and enforced. The poorer and more insignificant these boroughs were, they promoted more effectually the design with which they were created; being so much the more dependant upon the sovereign, and the more likely to choose representatives willing to follow his direction.

During the reigns of the Tudor princes, after that of Henry the Seventh, and even upon the accession of the Stewart-family, this expedient was put in practice to a great extent, and apparently with great success. Henry the Eighth restored, or gave, to twelve counties, and to as many boroughs in Wales, the right of sending, each of them, one representative. In other parts of his domain he also created eight new boroughs, requiring two delegates from each. Edward the Sixth created thirteen boroughs; and restored ten of those which had given up the right of representation. Mary created ten, and renewed the ancient privilege in two. In the reign of Elizabeth, no fewer than

twenty-four parliamentary boroughs were created; and seven were restored. James the First created six, and restored eight. Charles the First restored nine. From each of these boroughs two representatives appear to have been admitted\*.

The circumstances now mentioned will, in a great measure, account for that very unequal representation in parliament, which has been so often and so justly complained of. No view of national utility could ever have produced so gross an absurdity. But, as the king had an interest in augmenting the house of commons, in order, with their assistance, to counteract the influence of the peers; so by multiplying the small and insignificant boroughs, he secured a more numerous party in that house, and was enabled, with greater facility, to over-rule its determinations.

2. The occurrences which had preceded the accession of Henry the Seventh, and the general disposition which these had produced in the nation, were likewise highly favourable to the interest of the monarch. During the long and bloody-civil war between the houses of York and Lancaster, every person of distinction had been engaged in supporting one or other of the competitors; and, from the various turns of fortune exhibited in the progress of the contest, had alternately fallen under the power of the adverse party. At the final termination of the dispute, many of the great families were totally ruined; all of them were much exhausted and weakened. The dignity of the crown had, indeed, from the same causes, been also greatly impaired. But the royal demerits were not so liable to be

\* See Notitia Parliamentaria, by Browne Willis.

dismembered

dismembered as those of the nobility; and, upon the restoration of public tranquillity, the numerous resources of the monarch, which were all directed to the same object, afforded him great advantages, in extending his authority over a broken and disjointed aristocracy. During the alternate government of the two contending branches of the royal family, the partizans of both had probably occasion to think their services undervalued; and to be disgusted with the system of administration which prevailed. Henry the Sixth, in whom the line of Lancaster forfeited the crown, had, by his incapacity, excited universal contempt. The crimes of Richard the Third, the last monarch of the house of York, had rendered him the object of horror and detestation. Time and experience had gradually abated the zeal of party; and the nation, tired in wasting its blood and treasure in so unprofitable a quarrel, was become willing to adopt any system that promised a removal of the present disorders. Henry the Seventh, accordingly, obtained the crown by a sort of compromise between the two parties; being the acknowledged head of the house of Lancaster; and having come under a solemn engagement to marry Elizabeth, the daughter of Edward the Fourth, and now heiress of the house of York. In that conjuncture a better bargain for the Yorkists, or one more likely to promote the general interest of the nation, could hardly be expected. Henry was the deliverer of his country from the tyranny of Richard; and appears to have been the only person possessed of such credit and influence, as were necessary to hold the scepter with steadiness, and to create the expectation of a quiet and permanent reign. The same views and dispositions, which had established this prince upon the throne, were likely to produce a general

submission to his authority, and aversion to every measure which might occasion fresh disturbance, or threaten once more to plunge the nation into the former calamities.

3. The personal character of Henry was calculated for improving, to the utmost, the advantages which he derived from his peculiar situation. Less remarkable for the brilliancy of his talents, or the extent of his genius, than for the solidity of his judgment, he discovered uncommon sagacity in discerning his own interest, and unremitting assiduity and vigour in promoting it. His great objects were, to maintain the possession of the throne, to depress the nobility, and to exalt the prerogative; and these he appears to have invariably pursued, without being ever blinded by passion, relaxed by indolence, or misled by vanity. Cautious in forming no visionary or distant schemes, he was resolute in executing his measures, and dextrous in extricating himself from difficulties. In war he displayed activity, valour, and conduct, and was fortunate in all his undertakings; but he seems to have engaged in them from necessity, or from the prospect of emolument, more than from the desire of procuring military reputation. Full of suspicion, he admitted no person to his confidence; but assumed the entire direction of every public department; and was even attentive to the most minute and trivial concerns. His ministers were generally ecclesiastics, or men of low rank; and were employed as the mere instruments of his government.

The jealousy which Henry discovered of all the friends of the York family, and the severity with which he treated them, have been usually censured as illiberal and impolitic. To the praise of liberal views and sentiments, this monarch

monarch had certainly no claim. But that this plan of conduct was contrary to the maxims of sound policy, may perhaps be doubted. When a political junto is so much broken and reduced as to be no longer formidable, prudence seems to require that its members should not be pointed out by invidious distinctions; but that, by gentle treatment, they should be induced to lay aside their peculiar principles and opinions. But when the individuals of an unsuccessful party are still possessed of so much power, as to afford the prospect of rising to superiority in the state, it is vain to expect that their attachment will be secured by marks of confidence and favour. Hope co-operates with resentment, to keep alive the spirit of opposition; and the participation of honours and emoluments is only furnishing them with weapons for the destruction of their political enemies. Such was the situation of the numerous adherents of the house of York. They had, indeed, yielded to the exigency of the times; but they were still possessed of much influence, and were far from being thoroughly reconciled to the advancement of a family which they had so long opposed.

From the imputation of avarice the character of Henry cannot so easily be vindicated. That vice, it should seem, was equally promoted by those habits of minute attention for which he was noted, and by the circumstances of the crown during the period in which he lived. In the present age, when the chief support of government is derived from taxes, and when it is regarded as a duty upon the people to supply all the deficiencies of the public revenue, the disposition of the king to accumulate wealth would be a most extravagant and ridiculous propensity. But in those times, when the private estate of the sovereign was the principal

principal fund for defraying his expences, and when every new exaction from his subjects was deemed a general grievance, he had the same interest with every other individual to practice oeconomy; and his love of money might be in reality the love of independence and of power. In all countries, accordingly, in which commerce and the arts have made little progress, it becomes the aim of every wise prince, by frugality in time of peace, to prepare for war by amassing a treasure. "Whereunto," says my Lord Bacon, in his character of Henry the Seventh, "I should add, that having every day occasion to take notice of the necessities and shifts for money, of other great princes abroad, it did the better, by comparison, set off to him the felicity of full coffers."

The use that might be made of the advancement of the commons, in raising the power of the crown, in opposition to that of the nobility, seems not to have escaped the penetration of Henry; and in the statutes which passed in his reign, we discover the policy of the monarch, co-operating with the natural improvements of society, in diminishing the influence of the aristocracy.

The artifice of entails, rendered effectual by a statute, in the reign of Edward the First, had for a long time prevented the barons from dismembering their estates. But the general propensity to alienation, arising from the advancement of commerce and manufactures, became at length so strong, that it could no longer be withstood by such unnatural restraints. When a law is directly contrary to the bent of a whole people, it must either be repealed or evaded. In the reign of Edward the Fourth, the device of a *common recovery*, that is, a collusive judgment by a court of justice, was accordingly held sufficient to defeat an entail.

entail. For the same purpose, the ingenuity of lawyers had suggested the expedient of a *fine*, or collusive agreement, entered upon the records of a court; to which Henry the Seventh, by an act of parliament, in the fourth year of his reign, procured the sanction of the legislature. Thus, by the dissolution of entails, an unbounded liberty was given to the alienation of land; and by the growing luxury of the times, a great part of the wealth, which had been artificially accumulated in the possession of the nobility, was gradually dissipated and transferred to the commons. Whatever might be the ultimate consequences of this alteration, its immediate effects were undoubtedly advantageous to the monarch.

The wealth of the barons being lessened, while their manner of living was becoming more expensive, they were laid under the necessity of reducing the number of their military servants. This change in the situation of the nobility, so conducive to the good order of the kingdom, parliament had repeatedly endeavoured to promote, by prohibiting their keeping retainers in liveries, for the purpose of assisting them in their quarrels; a regulation which Henry is said to have exerted the utmost vigilance and activity to enforce.

Many other regulations were introduced in this reign, which, by tending to improve the police, and to promote the industry and the importance of the lower orders of the people, contributed more indirectly to the same political changes.

From these concurring circumstances, the prerogative was, no doubt, considerably advanced, after the accession of Henry the Seventh. Its advancement, however, appears not so much in the assumption of new powers by the monarch,

monarch, as in the different spirit with which the ancient powers began to be exercised. This will be evident from an examination of those different branches of government which custom had then appropriated to the king, and to the national assembly.

The legislative power, in conformity to the ancient constitution, was, without all question, exclusively vested in parliament; as the executive power, that of declaring peace and war, of levying troops, of commanding the armies, and, in general, that of providing for the national defence, was committed the king. There were two methods, however, by which, upon some occasions, the king evaded or encroached upon this power of parliament.

When a statute prohibited any action, or enjoined any rule of conduct, the king, as representing the community, might remit the penalties incurred by the transgression of it. From a step of this nature it was thought no considerable stretch, that he should previously give to individuals a dispensation from the observance of the law; since the latter seemed to be nothing more than a different mode of exercising a power which he was universally allowed to possess. To pardon a criminal, after he has been guilty, is indeed less dangerous to society than to give a previous indulgence to the commission of crimes; but in a rude age, this difference was likely to be overlooked. Hence the origin of the *dispensing power*; which was early exercised by the sovereign; and which, as long as it was kept within a narrow compass, appears to have excited little attention. By degrees, however, these extraordinary interpositions of the crown were multiplied, and extended to things of greater importance; and in some cases, instead of granting a mere exemption to particular persons, were at length carried

carried so far as at once, by a general dispensation, to suspend all the effects of a statute. This last exertion of the regal power, which was of much greater magnitude, appears to have been, in some measure, concealed under the mask of the former; and had never been avowed as a distinct branch of the prerogative\*. It was indeed impossible that the parliament could admit such a claim of the sovereign, without surrendering to him its legislative authority. The general suspension of a law is equal to a temporary abrogation; and therefore can only proceed from the same power by which the law was made.

But the dispensing power of the crown, even in favour of particular persons, had been virtually disallowed and reprobated in parliament. In the reign of Richard the Second, a power was granted to the king of *making such sufferance, touching the statute of provisors, as should seem to him reasonable and profitable*. But this statute, at the same time that it implies his having, of himself, no such authority, allows this power only until the next parliament; and contains a protestation, that it is a *novelty*, and that it shall not be drawn into example for the time to come †.

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\* See the trial of the Bishops in the reign of James II. In the course of that trial, in which all the lawyers of eminence were engaged, and contended every point with great eagerness, it is asserted by the counsel for the bishops, and not contradicted on the other side, that from the Norman conquest, until the accession of the house of Stewart, a general power of suspending or dispensing with the laws had never been directly claimed by the crown.

† The statute, which passed in the fifteenth of Richard the Second, is as follows:—  
 “ Be it remembered, touching the statute of *Provisors*, that the commons (for the  
 “ great confidence which they have in the person of our lord the king, and in his  
 “ most excellent knowledge, and in the great tenderness which he hath for his crown,  
 “ and

As the king attempted, in some cases, to interrupt the course of the statutes already made, so he endeavoured, sometimes, by his commands, to supply the place of new regulations. In the character of chief magistrate, he assumed the care of maintaining the police of the kingdom; and, in order to put his subjects upon their guard, so that none might pretend ignorance of the duties required of them, he frequently issued proclamations, with respect to those rules of conduct which he had occasion to enforce. But as these commands of the sovereign were not always confined to

“ and the rights thereof, and also in the noble and high discretion of the lords) have assented in full parliament, that our said lord the king, by advice and assent of the said lords, may make such sufferance, touching the said statute, as shall seem to him reasonable and profitable, until the next parliament, so as the said statute be not repealed in no article thereof: and that all those who have any benefices by force of the said statute, before this present parliament; and also that all those, to whom any aid, tranquillity, or advantage is accrued by virtue of the said statute, of the benefices of holy church (of which they were heretofore in possession) as well by presentation or collation of our lord the king, as of the ordinaries, or religious persons whatsoever, or by any other manner or way whatsoever; may freely have and enjoy them, and peaceably continue their possession thereof, without being ousted thereof, or any ways challenged, hindered, molested, disquieted, or grieved hereafter, by any provisors or others, against the form and effect of the statute aforesaid, by reason of the said sufferance, in any time to come. And moreover, that the said commons may disagree, at the next parliament, to this sufferance, and fully resort to the said statute, if it shall seem good to them to do it: with protestation, this assent, which is a novelty, and has not been done before this time, be not drawn into example or consequence, for time to come. And they prayed our lord the king, that the protestation might be entered of record in the roll of parliament: and the king granted and commanded to do it.”

The statute of *Provisors* had prohibited, under severe penalties, the procuring or accepting ecclesiastical benefices from the pope; and it is evident that, by the present act of parliament, it was intended that the king should dispense with that statute in favour of particular persons only, not that he should all at once suspend the effect of it. Even this dispensation to individuals is termed a *novelty*.

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the mere execution of the laws already in being, it was not easy for the people at large to distinguish in what cases they exceeded that boundary, or to determine the degree of obedience to which they were strictly entitled. As, however, few would be willing to incur the king's displeasure by calling their validity in question, the royal proclamations were allowed to advance in authority, according to the increasing influence and dignity of the crown. In the reign of Henry the Seventh, they rose to higher consideration than they had possessed in any former period. But even in this reign, it is not pretended that they had the force of laws; nor does it appear that they were made effectual by the ordinary courts of justice.

2. Under the legislative power was included that of determining the rules by which the people should contribute to defray the expence of government. The right of imposing taxes had therefore been invariably claimed and exercised by parliament. But, in order to procure money, without the authority of that assembly, the king had recourse to a variety of expedients.

The first, and most obvious, was that of soliciting a *benevolence*. This was originally a contribution made by the king's immediate vassals; but, from a relaxation of the ancient feudal principles, had afterwards, in the reign of Edward the Fourth, been extended over the whole kingdom\*. It was always, except in three singular cases, considered as a free gift; and could not be levied, by force, from such as persisted in refusing it. But

\* This extension of a *benevolence* is probably what is meant by Lord Bacon, when he says, “ This tax was devised by Edward the Fourth, for which he sustained much “ envy.”

although the people were not bound, in law, to contribute; they had every inducement from expediency; since a refusal was likely to be attended with greater inconveniency than the payment of the money which was demanded. From the discretionary power of executing the law, the crown had many opportunities of harrassing those who shewed themselves unwilling to relieve its necessities; and seldom could fail to make them heartily repent of their obstinacy. In particular, from the direction of the army, the king had the power of quartering troops in any part of the kingdom; by which means he was enabled, however unjustly, to create expence and vexation to such of the inhabitants as had not complied with his demands. The very solicitation of a benevolence upon the part of the crown, was therefore justly regarded in the light of hardship; and, in the preceding reign, appears to have been, in every shape, condemned and prohibited by parliament: which provides, "that the king's subjects shall from henceforth, in no wise, be charged by such charge, exaction, or imposition called a *benevolence*, nor by such like charge; and that such exactions called *benevolences*, before this time taken, be taken for no example, to make any such, or any like charge of any of the king's subjects hereafter, but shall be *damned and annulled for ever*.\*"

Notwithstanding the violence with which the legislature had thus testified its disapprobation of this practice, we find that in the seventh year of Henry the Seventh, the parliament, upon occasion of a war with France, expressly permitted the king to levy a *benevolence*. That this, however, was intended as a mere voluntary contribution, ap-

\* 1 Richard III. c. 2.

pears

pears from the account of it given by Lord Bacon, who says, it was to be levied *from the more able sort*, and mentions a tradition concerning the arguments which the commissioners for gathering the benevolence were instructed to employ; "that, if they met with any that were sparing, they should tell them, that they must needs have, because they laid up; and if they were spenders, they must needs have, because it was seen in their port, and manner of living: so neither kind came amiss." This was called by some bishop Morton's *fork*; by others his *crutch*\*.

In a few years after, parliament made what my Lord Bacon calls an *underpropping act of the benevolence*, by ordaining that the sums, which any person had agreed to pay, might be levied by the ordinary course of law. This act, however, still supposes that, independent of the consent of the party, no contribution of this nature could ever be made effectual.

Beside the benevolence formerly mentioned, which was obtained by the permission of the legislature, there was only one more levied by Henry the Seventh. On all other occasions, the general assessments procured by this monarch were supported by the authority of parliament, and imposed in the direct form of a tax.

When the kings of England had reason to suspect that the benevolence of their subjects might be exhausted, they had sometimes recourse to another expedient, that of requesting a *loan*. This mode of relief, as it strongly marked the necessities of the crown, and its reluctance to burden the people, and required no more than the temporary use

\* Hist. of the reign of Henry the Seventh.

of

of their money, could with less decency be withheld. But, in reality, a loan, when granted to the sovereign, came to be nearly of the same amount with a benevolence. From the condition of the debtor, he could never be compelled to do justice to his creditors; and his circumstances were such as always afforded plausible pretences for delaying and evading repayment. Although the nature of a loan, implying a mutual transaction, appeared to exclude any idea of right in demanding it, yet the same indirect methods might easily be practised by the crown for procuring a supply in this manner, as under the form of a benevolence. We accordingly find, that in a parliament, as early as the reign of Edward the Third, the commons pray the king, "that the loans which were granted to the king by many of that body may be released; and none compelled to make such loans for the future against his will, for that it was against reason and the franchise of the land; and that restitution might be given to those who had made the loans." The king's answer was, "that it should be done\*." It does not appear that Henry the Seventh ever practised this mode of exaction.

Purveyance was another species of exaction, by which the people were exposed to great vexation from the crown. It was requisite that the king and his followers, who in early times were frequently moving over different parts of the country, should, wherever they came, be speedily supplied with provisions. Instead of making, therefore, a previous bargain with the inhabitants, the officers of the crown were accustomed to lay hold of such commodities as were wanted, leaving commonly the indemnification of the

\* 26th of Edward III. See Parliamentary History in that year.

proprietors

proprietors to some future occasion. It may easily be supposed, that this practice was liable to much abuse, and that those whom the king employed in this department would endeavour to make profit at the expence of the people. The number of statutes, that, from the reign of Edward the First, were made for preventing the fraud and oppression of the king's purveyors, afford sufficient evidence of the great enormities with which that set of people had been charged, and of which they probably were guilty\*.

It must not be overlooked, that, from the exclusive power of making laws, with which parliament was invested, that assembly had the privilege of restraining these, and all other arbitrary proceedings of the crown. Its exertions for this purpose, however, were frequently interrupted or prevented by the want of a fixed rule with respect to the times of its meeting.

Upon the disuse of the ancient practice, by which parliaments had been regularly held at the three stated festivals of Easter, Whitfuntide, and Christmas, the power of convening those assemblies devolved entirely upon the king. The magistrate, intrusted with the supreme execution of the laws already existing, was the best qualified to discover, in what cases these were defective, and upon what occasions a new interposition of the legislature was requisite. In that simple age it was perhaps not apprehended that, with a view of extending the prerogative, he would be disposed to avoid the meetings of parliament; or rather, the barons trusted, that, whenever they had a mind, they could

\* See 28 Edw. I. c. 2.—4 Edw. III. c. 4.—5 Edw. III. c. 2.—10 Edw. III. stat. 2.—25 Edw. III. stat. 5.—36 Edw. III.—1 Rich. II. c. 3.—6 Rich. II. stat. 2. c. 2.—23 Henry VI.

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compel him to summon those meetings. But when experience had shewn the abuses in this particular, which were likely to arise, it was thought proper that the discretionary power of the crown should be limited; and accordingly, by a statute in the fourth year of Edward the Third, it was expressly provided, that "a parliament shall be held every year once, and oftener if need be." By another statute, in the thirty-sixth year of the same reign, this regulation is confirmed\*. In a subsequent period, when the house of commons had begun to throw considerable weight into the scale of the crown, it became the interest of the king to summon frequent meetings of parliament; and the nobility were, of consequence, less anxious to enforce this branch of his duty. Henry the Seventh, during a reign of twenty-three years, had occasion to convene seven different parliaments.

To dissolve a parliament was originally nothing more than to put an end to the attendance of its members; with which, as it saved them from farther expences, they were commonly well satisfied. Before the introduction of representatives into that assembly, every new meeting of the barons was properly a new parliament; and there could be no distinction between a *dissolution* of parliament and a *prorogation*. But, after the establishment of the house of commons, which consisted of members whose election was attended with trouble and expence, it became convenient that the same parliament should, in some cases, be prolonged, and that there should be intervals in its meeting. When the meetings of parliament came thus to be divided into different sessions, the power of proroguing a parlia-

\* Statutes at Large.

ment

ment from one session to another, like that of dissolving it, was devolved upon the crown; and, for a long time, this branch of the prerogative was exercised within such narrow limits as to excite no apprehension or jealousy. The danger of allowing too great an interval between one parliament and another, as well as that of permitting the king to reign entirely without a parliament, was always manifest; but the mischiefs arising from the long continuance of the same parliament; the reducing the members of the house of commons, more immediately, under the influence of the crown, and rendering them less dependent upon their constituents; in a word, the erection of the national assembly into a standing senate, and destroying, or at least greatly impairing, its representative character; these evils had never been felt, and, in that early age, were not likely to be foreseen.

3. With respect to the judicial power, it must be acknowledged, that the extent of the prerogative was, in several respects, incompatible with an equal and proper distribution of justice.

The nature and origin of the *Star-chamber* have been formerly considered. This court consisted of the king and his privy-council, together with the judges of the principal courts, and such other persons as, in each particular case, he thought proper to nominate; and was intended for the determination of such criminal actions as were beyond the jurisdiction of the ordinary tribunals. Being calculated to supply the deficiency of the common rules of penal law, like the chancery in those relating to civil rights, it was regarded, in early times, as an institution of great utility. But, as the limits of its jurisdiction could not be ascertained with accuracy; as the actions of which it took cognizance

nizance related principally to crimes affecting the state, in which the crown was immediately interested; and as the king, by sitting in this tribunal, was enabled to controul and direct its decisions; we have every reason to believe that its proceedings were partial and arbitrary, and that it might easily be employed as an engine of ministerial oppression. According as the crown rose in authority, the jurisdiction of this court was enlarged; and being, in certain cases, confirmed by act of parliament, in the reign of Henry the Seventh, was, by the subsequent princes of the Tudor line, rendered yet more instrumental in promoting the incroachments of the monarch.

When a military enterprize had occasioned the levying of troops, it was necessary that among these a stricter and more severe discipline should be enforced, than among the rest of the people. Hence the origin of the *martial law*, as distinguished from the common law of the kingdom. As, according to the policy of the feudal governments, the king had the power of calling out into the field all his military vassals, with their followers, it seemed a natural consequence, that he might, at pleasure, extend to the whole of his subjects that arbitrary system of law, which was held suitable to men living in camps. In that period of the English history, when family feuds and civil wars were frequent and universal, this extension might often prove salutary, as the means of quelling and preventing disorders. It was, at the same time, a measure from which great abuses might be expected; as it superseded, at once, that mild and equitable system of regulations, by which the rights and liberties of the nation were secured.

But the chief handle for the oppression of individuals, arose from the influence of the crown in the direction and  
conduct

conduct of public prosecutions. As every public prosecution proceeded in the name of the king, and was carried on by an officer whom he appointed during pleasure, he possessed, of course, a discretionary power in bringing the trial to an issue. Thus, by directing the prosecution of individuals for any atrocious crime, it was in the power of the sovereign to deprive them of their liberty, and subject them to an indefinite imprisonment. Early attempts had been made to prevent this abuse of the prerogative; and in the great charter of king John, as well as in that of Henry the Third, it is provided, that there shall be no unreasonable delay of justice. This regulation was conceived in terms too vague and general, to be of much advantage; although its meaning and spirit are sufficiently obvious. Henry the Seventh carried the abuse to such a height, as, upon pretence of crimes, to make a trade of imprisoning persons of great opulence, and of extorting from them sums of money as the price of their liberty. The names of Empson and Dudley, as the common agents of the crown in that infamous traffic, have been handed down to posterity; and it is remarkable that the house of commons, instead of discovering a resentment of such notorious oppression, made choice of Dudley for their speaker. The house of commons were, at this period, attached to the crown; and probably took little concern in the fate of the great barons, against whom, upon account of their opulence, and their opposition to the king, this kind of extortion was most likely to be committed. But although these minions, for some time, escaped the vengeance due to their iniquitous practices, it overtook them in the beginning of the next reign; when, in consequence both of the sentence

of a court, and of a bill of attainder in parliament, they were condemned to death and executed.

Upon the whole, it is a gross error to suppose, that the English government was rendered absolute in the reign of Henry the Seventh. There is, on the contrary, no reason to believe, that any material variation was produced in the former constitution. Although the influence of the crown was increased, the prerogative remained upon its former basis. The king's authority was entirely subordinate to that of the national assembly; and if, in some cases, precautions had not been taken to prevent his arbitrary and oppressive measures, this was owing to the want of experience, which prevented the legislature from suggesting a remedy. Those abuses of prerogative, although they might have excited occasional discontent and clamour, had not yet attained such magnitude, or been so long continued, as to demonstrate that a general limitation was necessary.

The period of Henry the Seventh in England, corresponded, in some measure, to that of Lewis the Eleventh in France. Charles the Seventh, the father of this prince, had recovered the kingdom from the English; and, after long convulsions and disorders, had re-established the public tranquillity. The nature of the struggle in which he was engaged, had excited a national spirit in favour of the crown, while the success of his undertaking rendered him highly popular, and disposed his subjects to promote and support all his measures. By the seizure of those lands which had been in the possession of the enemy, it is probable that the royal demesnes were also augmented. Lewis came to the throne at a time when these favourable circumstances

stances had begun to operate, and by his abilities and political character was capable of improving them to the utmost. The sudden annexation of many great fiefs to the crown contributed likewise to extend its influence. Upon the decease of the duke of Burgundy, without male descendants, the monarch found himself in a condition to seize that dutchy, as not being transmissible to females. He acquired Provence by a legacy; and, in a little time after, his son Charles the Long, by marrying the heiress of Brittany, became the master of that territory.

The authority of the sovereign, however, which had formerly been advancing with greater rapidity in France than in England, became now much more absolute, and unlimited. Lewis the Eleventh new-modelled, and afterwards laid aside, the convention of estates, having united in his own person the legislative and executive powers. The same line of conduct was in general pursued by his successors; although, in one or two extraordinary cases, the temporary exigence of the prince might induce him to summon that ancient assembly. In several other governments upon the continent, we may also observe, that, nearly about the same period, the circumstances of the monarch were such as produced a similar exaltation of the prerogative.

## C H A P. X.

*Of Henry the Eighth.—The Reformation.—Its Causes.—The Effects of it upon the Influence of the Crown.*

**H**ENRY the Eighth reaped the full benefit of those favourable circumstances which began to operate, and of that uniform policy which had been exerted, in the reign of his father. By uniting, at the same time, in the right of his father and mother, the titles of the two houses of York and Lancaster, he put an end to the remains of that political animosity which had so long divided the nation; and was universally acknowledged by his subjects as the lawful heir of the kingdom. The personal character of this monarch was better suited to the possession and enjoyment of power, than to the employment of the slow and gradual means by which it is to be acquired. Vain, arrogant, headstrong, and inflexible, he shewed little dexterity in the management of his affairs; was unable to brook opposition or controul; and, instead of shunning every appearance of usurpation, was rather solicitous to let slip no opportunity for the display of his authority.

The most remarkable event, in the reign of Henry the Eighth, was the sudden downfall of that great system of ecclesiastical tyranny, which, during the course of many centuries, the policy of the Roman pontiff had been continually extending. To this religious reformation, the minds of men, in other European countries as well as in England, were

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were predisposed and excited by the changes which had lately occurred in the general state of society.

I. The Christian religion, by teaching mankind to believe in the unity of the Deity, presented to their minds the contemplation of the astonishing attributes displayed in the government of the universe. While the professors of Christianity thus agreed in the main article of their belief, their disposition to speculate upon other points was promoted by their differences of opinion, by the controversies with one another in which they were unavoidably engaged, and by the variety of sects into which they were at length divided. The church, however, assumed the power of determining the orthodox faith; and by degrees availed herself of the prevailing superstition, in order to propagate such opinions as were most subservient to her interest. Hence the doctrines relating to purgatory, to the imposition of penances, to auricular confession, to the power of granting a remission of sins, or a dispensation from particular observances, with such other tenets and practices as contributed to encrease the influence of the clergy, were introduced and established. Not contented with requiring an implicit belief in those particular opinions, the church proceeded so far as to exclude entirely the exercise of private judgment in matters of religion; and, in order to prevent all dispute or enquiry upon that subject, even denied to the people the perusal of the sacred scriptures, which had been intended to direct the faith and manners of Christians. A system of such unnatural restraint, which nothing but extreme ignorance and superstition could have supported, it was to be expected that the first advances of literature would be sufficient to overturn. Upon the revival of letters, accordingly, in the fourteenth and fifteenth centuries,

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it was no longer possible to prevent mankind from indulging their natural propensity in the pursuit of knowledge, and from examining those fundamental tenets of Christianity which had been so anxiously withheld from their view. They were even prompted, so much the more, to pry into the mysteries of religion, because it was prohibited. To discover the absurdity of many of those doctrines, to which an implicit assent had been required, was not difficult. But the mere examination of them was to reject the decrees of the church, and to merit the censure of contumacy.

2. While the advancement of knowledge disposed men to exert their own judgment in matters of religion, the progress of arts, and of luxury, contributed to diminish the personal influence of the clergy. "In the produce of arts, manufactures, and commerce," says the ingenious and profound author of the *Inquiry into the Nature and Causes of the Wealth of Nations*\*, "the clergy, like the great barons, found something for which they could exchange their rude produce, and thereby discovered the means of spending their whole revenue upon their own persons, without giving any considerable share of them to other people. Their charity became gradually less extensive, their hospitality less liberal, or less profuse. Their retainers became consequently less numerous, and by degrees dwindled away altogether. The clergy, too, like the great barons, wished to get a better rent from their

\* I am happy to acknowledge the obligations I feel myself under to this illustrious philosopher, by having, at an early period of life, had the benefit of hearing his lectures on the History of Civil Society, and of enjoying his unreserved conversation on the same subject.—The great Montésquieu pointed out the road. He was the Lord Bacon in this branch of philosophy. Dr. Smith is the Newton.

“ landed

“ landed estates, in order to spend it, in the same manner, upon the gratification of their own private vanity and folly. But this increase of rent could be got only by granting leases to their tenants, who thereby became, in a great measure, independent of them. The ties of interest, which bound the inferior ranks of people to the clergy, were, in this manner, gradually broken and dissolved.—The inferior ranks of people no longer looked upon that order, as they had done before, as the comforters of their distress, and the relievers of their indigence. On the contrary, they were provoked and disgusted by the vanity, luxury, and expence of the richer clergy, who appeared to spend upon their own pleasures what had always before been regarded as the patrimony of the poor.”

3. The improvement of arts, which obliged the dignified clergy, as well as the great barons, to dismiss their retainers, enabled this inferior class of men to procure subsistence in a different manner, by the exercise of particular trades and professions. By this way of life, they were placed in a condition which rendered them less dependent upon their superiors, and by which they were disposed to resist every species of tyranny, whether ecclesiastical or civil. That spirit of liberty, however, which, from these circumstances, was gradually infused into the great body of the people, began sooner to appear in opposing the usurpations of the church, than in restraining the encroachments of the king's prerogative. In pulling down the fabric of ecclesiastical power, and in stripping the clergy of their wealth, all who had any prospect of sharing in the spoil might be expected to give their concurrence. But in limiting the power of the crown, the efforts of the people were counteracted

teracted by the whole weight of the civil authority. Thus, in England, the reformation was introduced more than a century before the commencement of the struggle between Charles the First and his parliament; although the same principle which produced the latter of these events, was evidently the chief cause of the former.

But whence has it happened, that the circumstances above-mentioned have operated more effectually in some parts of Europe than in others? What has enabled the pope to retain in obedience one half of his dominions, while the other has rejected his authority? That this was owing, in some measure, to accident, it seems impossible to deny. The existence of such a person as Luther in Germany, the dispute that arose in England between Henry the Eighth and his wife, the policy of particular princes, which led them to promote or to oppose the interest of his holiness; these, and other such casual occurrences, during the course of this great religious controversy, had undoubtedly a considerable influence in determining its fate. We may take notice, however, of certain fixed causes, which contributed more to the progress of the reformation in some of the European countries than in others.

1. The Roman pontiff found it easier to maintain his authority in the neighbourhood of his capital than in countries at a greater distance. The superstition of the people was not, indeed, greater in the neighbourhood of Rome than in the distant parts of Europe. The contrary is well known to have been the case. But Rome was the centre of ecclesiastical preferment, and the residence, as well as the occasional resort, of great numbers of the most opulent churchmen, whose influence over the people was proportionably extensive. Here the pope was a temporal,

poral, as well as an ecclesiastical sovereign; and could employ the arm of flesh, as well as the arm of the spirit. Besides, he had here a better opportunity, than in remoter countries, of observing and managing the dispositions and humours of the inhabitants; and, being at hand to discover the seeds of any disorder, was enabled to crush a rebellion in the bud. This circumstance tended to prevent, or to check, the reformation in Italy, or in France, more than in Sweden, in Denmark, in Germany, in England, or in Scotland.

2. Independent of accidental circumstances, it was to be expected that those countries, which made the quickest progress in trade and manufactures, would be the first to dispute and reject the papal authority. The improvement of arts, and the consequent diffusion of knowledge, contributed, on the one hand, to dispel the mist of superstition, and, on the other, to place the bulk of a people in situations which inspired them with sentiments of liberty. That principle, in short, which is to be regarded as the general cause of the reformation, produced the most powerful effects in those countries where it existed the soonest, and met with the greatest encouragement.

This alone will account for the banishment of the Romish religion from the independent towns of Germany, from the Dutch provinces, and from England; those parts of Europe which were soon possessed of an extensive commerce. In the ten provinces of the Netherlands, the advancement of trade and manufactures was productive of similar effects. The inhabitants acquired an attachment to the doctrines of the reformation; and maintained them with a degree of courage and firmness which nothing less than the whole power of the Spanish monarchy was able to subdue.

subdue. In France too the same spirit became early conspicuous, in that part of the inhabitants which had made the greatest improvement in arts; and, had it not been for the most vigorous efforts of the crown, accompanied with the most infamous perfidy and barbarity, and assisted by the celebrated league of the Catholic powers, it is probable that Calvinism would have obtained the dominion of the Gallican church. The tendency of mercantile improvements to introduce an abhorrence of the Catholic superstition, and of papal domination, is thus equally illustrated from the history of those kingdoms where it prevailed, as of those where, by the concurrence of casual events, it was obstructed and counteracted.

3. In those countries where the smallness of a state had given rise to a republican constitution, the same notions of liberty were easily extended from civil to ecclesiastical government. The people, in those governments, were not only disposed to reject the authority of the pope, as they did that of a temporal sovereign; but were even disgusted with the hierarchy, no less than with that subordination which is required in a monarchy. Hence that high-toned species of reformation, which began in Geneva, and in some of the Swiss cantons; and which, from the weakness and imprudent opposition of the crown, was introduced by the populace into Scotland.

The small states of Italy, indeed, although they fell under a republican government, and some of them were distinguished by their early advancement in commerce, have remained in the Catholic church. In some of the cantons of Switzerland, notwithstanding their very limited extent, and their popular government, the reformation has likewise been unsuccessful. The vicinity of the pope's residence,

dence, and of his temporal dominions, appear, in spite of the circumstances which had so plainly an opposite tendency, to have retained them under his jurisdiction. It may deserve, however, to be remarked, that the Venetians, the principal traders of Italy, and who formed the most eminent republic, though they did not establish the doctrines of any sect of the reformers, effected what is perhaps more difficult, and had more the appearance of moderation: they diminished the authority of the pope, without rejecting it altogether; and, though they did not attempt to root out the ancient system, they lopped off such parts of it as they deemed inconsistent with their civil constitution.

After the controversy between the Catholics and Protestants had proceeded so far, in England, as to divide the whole nation, Henry the Eighth became possessed of additional influence, by holding a sort of balance between the two parties. Although that prince had quarrelled with the papal authority, and was willing to enrich himself by the plunder of the church, he adhered religiously to many of those tenets which had given the greatest offence to the reformers. While he took the lead in the reformation, he assumed the power of directing and controuling its progress; and, as he still kept measures with both parties, he was at the same time feared and courted by both. In the end, however, he established a system which was agreeable to neither.

The reformation, as it was modelled in this reign, opened a new source of influence and authority to the sovereign. The dissolution of the monasteries, whose revenues were immediately annexed to the crown, bestowed upon him a large accession of riches. These funds, indeed, in consequence

quence of the improvements in trade and manufactures, which tended to augment the expences of the king, as well as of the great barons, were afterwards diffipated, and, in the end, transferred to that lower order of people who by their industry were enabled to accumulate wealth.

As the pope was stripped of all that authority which he had possessed in England, the king became the head of the church; and as the English hierarchy was, without any variation, permitted to remain, he acquired, by the disposal of all the higher benefices, the entire direction of the clergy, and consequently the command of that influence which they still maintained over the people. By claiming, at the same time, the supremacy of the Roman pontiff, the sovereign was furnished with a new pretext for assuming the power to dispense with the law.

But, notwithstanding all the circumstances which contributed to extend the influence of the crown, the prerogative, during the greatest part of this king's reign, appears to have remained upon the same footing as in that of his predecessor. Through the whole of it, the power of imposing taxes was uniformly exercised by parliament. Upon one occasion, a loan was demanded by the king; but so little money was raised by it, that an immediate application to parliament became necessary for procuring a subsidy.

Cardinal Wolsey, in the plenitude of his power, seems to have projected an encroachment upon this branch of the constitution. He began by interfering in the debates of the commons, in relation to a money-bill, and insisted upon the liberty of reasoning with them upon the subject. But this demand was peremptorily refused; and he was unable to procure the supply, in the terms which he had

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had proposed. Not long after, he attempted to levy a *tax* by the authority of the crown; but this measure excited such universal commotion, and resentment, that Henry thought fit to disavow the whole proceeding, and sent letters all over England, declaring, *that he would ask nothing but by way of benevolence*.\*

From this time no money was levied by the king without the consent of parliament; except in the thirty-fifth year of his reign, when a benevolence was again solicited. It is further to be observed, that the parliamentary grants of supply to the king, were sometimes preceded by an inquiry into the propriety of the wars which he had undertaken, or of the other measures of government by which his demand of money had been occasioned.

The legislative authority of the national council was no less regularly exerted. It was by act of parliament that the monasteries were suppressed; that the king became the head of the church; that the authority of the pope in England, together with all the revenues which he drew from that kingdom, was abolished; in short, that the ancient system of ecclesiastical government was overturned. In the numerous divorces procured by the sovereign, in the regulations that were made concerning the legitimacy of the children by his different wives, in the various and contradictory settlements of the crown, Henry never pretended to act by virtue of his own prerogative, but continually sheltered himself under the sanction of parliamentary establishment.

Nothing, indeed, could exceed the fervility with which the parliaments, especially in the latter part of this reign,

\* This attempt was made in the year 1526, and the 17th of this king. See *Parl. History*, vol. III.

complied



complied with the most eccentric inclinations of the monarch. Pleased with the general tendency of his measures, by which the nation was delivered from the yoke of papal dominion, they seem to have resolved not to quarrel with his ridiculous humours, nor even with particular acts of tyranny and oppression. In a dangerous distemper, they were unwilling to reject a violent medicine, on account of the uneasiness and trouble with which its operation was attended. Their complaisance, however, was at length carried so far as to make them abandon their own privileges. In the thirty-first year of Henry the Eighth, it was enacted, "That the king, with the advice of his council, might issue proclamations, under such penalties as he should think necessary, and that these should be observed, as though they were made by act of parliament," with this limitation, "that they should not be prejudicial to any person's inheritance, offices, liberties, goods, chattels, or life\*." What are the particular subjects of proclamation, which do not fall within the restrictions mentioned in this act, is not very clear. But there can be no doubt that it contains a delegation, from parliament, of its legislative authority; which, in practice, might soon have been extended beyond the original purpose for which it was granted. By another statute, about the same time, the king was empowered, with the assistance of a committee, or even by his own authority alone, to regulate the religious tenets, as well as the external observances, of the kingdom.

If these powers had been ascertained, and confirmed by usage, the government of England would have become as absolute as that of France was rendered by Lewis the

\* 31 Henry VIII. ch. 8.

Eleventh.

Eleventh. Fortunately, the English monarch, from the obsequiousness of parliament, had little occasion to exercise this new branch of prerogative; and, as he did not live to reduce it into a system, the constitution, in the reign of his successor, returned into its former channel. The last years of Henry the Eighth exhibited the greatest elevation, which the crown ever attained, under the princes of the Tudor family.

## C H A P. XI.

*Of Edward the Sixth—Mary—and Elizabeth.—General Review of the Government.—Conclusion of the Period from the Norman Conquest to the Accession of the House of Stewart.*

BY the minority of Edward the Sixth, the ambitious designs of his father became entirely abortive. The administration was committed to a council of the nobles; who, from want of authority, from disagreement among themselves, or from the desire of popularity, were induced to retrench all the late extensions of prerogative. The very first year of this reign produced a repeal of that offensive statute, by which royal proclamations had, in any case, obtained the force of laws. Other innovations, which had proceeded from the extraordinary influence of Henry the Eighth, were likewise abolished; and, in a short time, the former constitution was completely restored. The reformation, although it continued the direction which had been given to it by Henry the Eighth, was carried, in this reign, to an extent, and acquired a form, somewhat more agreeable to the general sentiments of the party by whom it was embraced.

The reign of Mary is chiefly distinguished by the violent struggle which it produced, in order to re-establish the Roman catholic superstition. Although the reformation

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was, at this time, acceptable to the majority of the nation, there still remained a numerous body, zealously attached to the ancient religion, and highly exasperated by the late innovations. With this powerful support, and by the most vigorous exertion of crown-influence upon the elections of the commons, Mary was able to procure a parliament entirely devoted to her interest, and willing to execute her designs\*. The restitution of the revenues, of which the monasteries had been plundered, and in which a great part of the nobility and gentry had been sharers, was the only measure at which they seemed to feel any scruple of conscience. But the reign of Mary, though it occasioned a violent shock to the reformation, was too short for extirpating those religious opinions, which had taken a deep root through the kingdom; and which, upon the accession of her successor, were prudently cultivated and brought to maturity.

In the English annals we meet with no reign so uniformly splendid and fortunate as that of Elizabeth. Never did any sovereign, since the days of Alfred, enjoy such high and such deserved popularity, or procure such extensive advantages to the nation. To her the nation was indebted for the security of religion, the great forerunner of civil liberty. Her own religion coincided with that of the greater part of her subjects; who looked up to her as their deliverer from a superstition which they abhorred. Nor did she appear in this light to her own subjects only: she was the great support and protector of the Protestant interest in Europe; and, while this drew upon her the enmity

\* Burnet's History of the Reformation.

of all the Catholic powers, she was endeared to her own people by the reflection, that her zeal in defending them from the tyranny of Rome, was continually exposing her to machinations, which threatened to bereave her of her crown and her life. Her magnanimity and public spirit, her penetration and dexterity, her activity and vigour of mind, her undaunted resolution, and command of a temper naturally violent and impetuous, were equally conspicuous in her domestic and foreign transactions; and, in the whole course of her administration, it will be hard to point out an instance where she mistook her political interest, or was guilty of any error or neglect in promoting it. Notwithstanding the number and power of her enemies, and in spite of all the combinations that were formed against her, she maintained invariably the peace and tranquillity of her own dominions; and her subjects, during a reign of five and forty years, enjoyed a course of uninterrupted prosperity and happiness.

Whether Elizabeth entertained a just idea of the English constitution, has been called in question. But such as her idea was, her behaviour seems to have been strictly conformable to it. Between the prerogative, and the privileges of parliament, she appears to have drawn a fixed line; and, as in her greatest prosperity she never exceeded this boundary, so in the utmost distress and perplexity she never permitted the least encroachment upon it.

With the legislative power of parliament she never interfered. The exclusive privilege of that assembly, in imposing taxes, was neither controverted by her, nor impaired. There is no vestige of her either attempting, or desiring, to violate these important branches of parliamentary

tary authority\*. Mention is made of her having, in one or two cases, obtained a loan from her subjects: but there is no appearance that any compulsion was employed in making it effectual; and her conduct is, in this particular, illustriously distinguished from that of most other princes, by her punctual repayment of the money.

Instead of asking a benevolence, she even refused it, when offered by parliament. Such expedients, indeed, for procuring supplies, were in a great measure superfluous. So rigid was her economy, so great and so apparent were the occasions upon which she ever demanded a supply, such was the confidence reposed in her by parliament, and so intimately did they conceive her enterprizes to be connected with the public welfare, that they never discovered any reluctance to grant whatever sums of money she thought proper to require.

There was one point invariably maintained by Elizabeth, in which, to those who form their notions of the English government from what is at present established, she appears to have been guilty of an encroachment. An act of parliament originally proceeded upon a petition to the sovereign for the redress of a grievance, or the removal of some inconvenience; and when this petition had obtained the king's consent, it acquired the force of a law. According to this method of conducting the business of legislation, the king had no occasion to declare his resolution concerning any bill, until it was discussed, and finally approved of, by both houses of parliament. Before this

\* In the 13th of Elizabeth, we find parliament strongly asserting its power to settle and limit the succession to the crown, by declaring it high treason for any person to call this power in question.

was done, it could not be considered as a national request, to which an answer from the throne was demanded.

From the nature of this transaction, and from the view of saving trouble to the sovereign, a regular course of procedure was thus introduced, by which any new law received the assent of the crown, after the sanction of the other two branches of the legislature had been given to its enactment. This practice, deriving authority from custom, was at length followed independent of the circumstances from which it had been originally suggested; and was confirmed by the experience of a later age, which discovered, that any deviation from it would be attended with dangerous consequences. When the proposal of a new law, after being fully debated in parliament, has excited the public attention, and its utility has become apparent to the nation, the crown is, in most cases, unwilling to counteract the inclinations of the people, by refusing its consent to the measure. But if the sovereign were permitted to smother any bill, the moment it was proposed in parliament, there could scarcely exist a possibility that any new law, disagreeable to the crown, or adverse to the views of a ministry, should ever be enacted. It has therefore become a fundamental principle of the constitution, that, with a few exceptions, the king shall not take notice of any bill depending in parliament; and that, before it has passed the two houses, the royal assent or negative shall not be declared.

But that this rule was completely and invariably established in the reign of Elizabeth, there is no reason to believe. The political expediency of such a regulation was, in that age, not likely to become an object of general attention. Neither was it inconsistent with the nature of the

the business, however contrary to the usual practice, that the king, upon the introduction of a bill into parliament, should prevent the labour of a fruitless discussion by an immediate interposition of his negative\*.

Of this interposition Elizabeth exhibited some remarkable instances. The first improvement of arts, manufactures, and commerce, by raising the lower class of the inhabitants to a better condition, disposed them to free themselves from the tyranny of the great barons, and, for that purpose, to court the protection of the crown. But when this improvement was farther extended, the great body of the people became still more independent, and found themselves capable of defending their privileges, whether in opposition to the crown or to the nobles. This gave rise to a new spirit, which became conspicuous after the accession of James the First, but of which the dawn began to appear in the reign of his predecessor; a spirit of liberty in the commons, by which they were incited to regulate and to restrain such branches of the prerogative as appeared the most liable to abuse, and most inconsistent with the enjoyment of those rights which they were disposed to assert.

Whenever a bill of this tendency was brought into parliament; such as that for limiting the crown as head of the church, or for the diminution of its power in granting monopolies; the queen made no scruple to declare immediately her opposition to the measure, and even to prohibit any farther debate upon the subject. In doing this, she

\* We find, however, that even so early as the second of Henry the Fourth, the commons petitioned the king, that he would not suffer any report to be made to him of matters debated amongst them, till they should be concluded; to which the king assented.

seems

seems to have considered herself as merely defending those rights of the crown which had been transmitted by her ancestors. Is not the sovereign, said the ministry in those cases, a branch of the legislature? Has she not a voice in the passing of laws? When her negative has once been interposed, all farther deliberation upon the subject must be entirely excluded; and the bill must be laid aside, in the same manner as if it had been rejected by either house of parliament.

This view of the prerogative suggested another exertion of authority, which, in the present age, has been thought still more illegal and arbitrary than the former. If, at any stage of a bill in parliament, the crown was entitled to interpose its negative, it seemed to be a consequence, that, upon the exercise of this right, any farther debate or deliberation upon the subject was precluded. The attempt to prosecute the bill, after such intimation was given upon the part of the crown, was to reject the determination of the legislature, to condemn the authority of the sovereign, and, by faction and clamour, to stir up disorder and discontent. A behaviour of this kind was thought liable to punishment; and Elizabeth, upon several occasions, adventured to imprison those members of parliament who persisted in pushing forward those bills which had been refused by the crown.

It is proper to remark, that these exertions of her power were limited to cases of that nature. She never prevented the discussion of any bill in parliament, except in cases where her ancient prerogative was invaded; nor did she ever pretend to punish the liberty of speech, unless when indulged in continuing to push those bills which she had declared her final resolution to reject.

That

That such proceedings, however, by intimidating members of parliament, are calculated to prevent the proper discharge of their duty, is indisputable. The liberal ideas upon this point, which are now happily reduced into practice, may be regarded as one of the greatest improvements in the British constitution. That a senator may be encouraged to perform his duty to the public with steadiness and confidence, he ought to enjoy an unbounded liberty of speech, and to be guarded against the resentment either of the sovereign, or of any other persons in power, whom that liberty may offend. From the controul of that house, of which he is a member, he is likely to be prevented from any great indecency and licentiousness in the exercise of this privilege; and his parliamentary conduct should not be impeached, or called in question, in any other court, or from any other quarter. This principle is now sufficiently understood, and universally acknowledged. Its establishment, however, marks a degree of refinement, and of experience in political speculation, which, under the government of the Tudor princes, the nation could hardly be supposed to attain; and the liberty of speech, then belonging to members of parliament, was probably limited to subjects which that assembly had a right to discuss.

The situation of religious controversy, in the reign of Elizabeth, gave rise to a new ecclesiastical tribunal, which, in after times, was likewise held inconsistent with free government, the *court of high commission*. It must be acknowledged, that the primitive reformers, in any country of Europe, though they zealously opposed the papal tyranny, were far from adopting the liberal principle of religious toleration. Such a principle would, perhaps, have been unsuitable to their circumstances, which required that

4 A

they

they should combat the most inveterate prejudices, and overturn a system, which for ages had been advancing in respect and authority. As, in England, the king succeeded to the supremacy, which had been vested in the Roman pontiff, he became the judge of orthodoxy in matters of religion; and assumed the power of directing the modes and forms of religious worship. This authority was, by Henry the Eighth, delegated to a single person, with the title of *Lord vicegerent*. In the reign of Elizabeth, parliament thinking it safer that such jurisdiction should be entrusted to a numerous meeting, empowered the queen to appoint a commission for the exercise of it\*. This alteration was a manifest improvement; yet the court of high commission was so little fettered by the rules of law, and was so much calculated to indulge the rancour and animosity inspired by theological disputes, that we may easily suppose the complaints, which it excited, were not without foundation. Its abolition, in a subsequent reign, was farther recommended from this consideration, that, after the full establishment of the reformation, the same necessity of inculcating uniformity of religious tenets could no longer be pretended.

The great historian of England, to whom the reader is indebted for the complete union of law with philosophy, appears very strongly impressed with a notion of the despotical government in the reign of Elizabeth, and of the arbitrary and tyrannical conduct displayed by that princess.

1. He observes, that "she suspended the laws, so far as  
"to order a great part of the service, the litany, the

\* Burnet, Hist. Reform.

" Lord's

" Lord's prayer, the creed, and the gospels, to be read in  
" English. And, having first published injunctions, that  
" all the churches should conform themselves to the  
" practice of her own chapel, she forbade the hoste to be  
" any more elevated in her presence; an innovation, which,  
" however frivolous it may appear, implied the most mate-  
" rial consequences."

But we must not forget, that, in this case, the dispensing power was exercised under great limitations and in very singular circumstances. Upon the accession of Elizabeth, the Protestants, who now formed the greatest part of her subjects, exasperated by the late persecution, and in full confidence of protection, began to make violent changes; to revive the service authorized by Edward the Sixth, to pull down images, and to affront the priests of the Roman catholic persuasion. The queen had called a parliament to settle the national religion; but, in order to stop the progress of these disorders, an immediate interposition of the crown was necessary. It was even pretended by some, that the parliaments, in the late reign, had not been legally held, and that of consequence the laws of Edward the Sixth, relating to the government of the church, were still in force\*. But, whatever regard might be due to this, a temporary indulgence to the Protestants, with respect to the external forms of religious worship, was highly expedient for quieting their minds, and for preventing the commission of greater enormities. This indulgence was followed by a proclamation prohibiting all innovations, until the matters in dispute should be finally determined by parliament; and, considering the circumstances of the case, ought to be regarded rather as a mea-

\* Burnet.

ture calculated for the present security of the established religion and its professors, than as a violent exertion of the prerogative, in opposition to the laws of the land.

2. But this author, not contented with ascribing to the crown a power of suspending the laws, has gone so far as to assert, that it was entitled, at pleasure, to introduce new statutes. "In reality," says he, "the crown possessed the full legislative power, by means of proclamations, which might affect any matter, even of the greatest importance, and which the star-chamber took care to see more rigorously executed than the laws themselves\*."

In answer to this, it will perhaps be thought sufficient to observe, that anciently the crown possessed no legislative power; that royal proclamations were first declared to have the force of laws, in the latter part of the reign of Henry the Eighth; that even then, this force was given them under great restrictions, and in singular cases; and that in the beginning of the subsequent reign, it was entirely abolished by the same authority from which it had proceeded.

If the star-chamber, therefore, supported this power in the reign of Elizabeth, it must have been in direct violation of the constitution; and it is not likely, that stretches of this kind would often be attempted. But let us consider what were the proclamations issued in this reign, which the star-chamber had an opportunity to enforce. In virtue of the papal supremacy, with which she was invested, Elizabeth prohibited *prophecying*s, or particular assemblies instituted for fanatical purposes, and not autho-

\* Hist. of Eng. vol. V. Appendix 3.

rized

rized by the church\*. Having the regulation of trade and manufactures, she also prohibited the culture of *woad*, a plant used for the purpose of dying. And, as a director of ceremonies, prescribing rules for the dress of those who appeared at court, or in public places, she gave orders that the length of the swords, and the height of the ruffs then in fashion, should be diminished. These are the important instances adduced in order to prove that Elizabeth superseded the authority of acts of parliament, and assumed the legislative power in her own person.

3. The same historian appears to conceive, that, among other branches of prerogative exercised by Elizabeth, was that of imposing taxes. "There was," he remarks, "a species of *ship-money* imposed at the time of the Spanish invasion: the several ports were required to equip a certain number of vessels at their own charge; and such was the alacrity of the people for the public defence, that some of the ports, particularly London, sent double the number demanded of them †." And in a subsequent period of the English history, having mentioned a requisition made by Charles the First, that the maritime towns, together with the adjacent counties, should arm a certain number of vessels, he adds; "This is the first appearance, in Charles's reign, of ship-money; a taxation which had once been imposed by Elizabeth, but which afterwards,

\* In the fifth of Elizabeth there was passed an act, conformable to a preceding one in the reign of Edward the Sixth, against *fond and fantastical prophecies concerning the queen and divers honourable persons*, which, it seems, had a tendency to stir up sedition. From the name, it is not unlikely that the assemblies, alluded to in the proclamation above-mentioned, were supposed guilty of the like practices, and that Elizabeth was merely following out the intention of an act of parliament.

† Vol. V. Appendix 3.

" when

“ when carried some steps farther by Charles, occasioned such violent discontents \*.”

Ship-money was originally a contribution by the maritime towns, for the support of the fleet, corresponding, in some measure, to the scutages which were paid by the military people in the room of personal service in the field. When it came, therefore, to be a regular assessment, exacted by public authority, it fell of course under the regulation of parliament; and, like other taxes, being gradually pushed beyond its original boundaries, was extended to the counties in the neighbourhood of the sea, and at length to the most inland parts of the kingdom. To oppose an invasion which threatened the immediate destruction of her empire, Elizabeth had recourse to the customary assistance of the sea-port towns; and, so far from using compulsion to procure it, was freely supplied with a much greater force than she required. How can this measure be considered as analogous to the conduct of Charles the First, in levying that *ship-money*, which gave rise to such violent complaints? The contribution obtained by Elizabeth was altogether voluntary: that which was levied by Charles was keenly disputed by the people, and enforced by the whole power of the crown. The supply granted to Elizabeth was furnished by the maritime towns only; who, by their employment and situation, were connected with the equipment of vessels: that which was extorted by Charles, had been converted into a regular tax; and was imposed upon the nation at large. The ship-money of Elizabeth was procured in a single case, and one of such extraordinary necessity as would have excused a deviation from the common rules of

\* Vol. VI.

government.

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government. But the ship-money of Charles was not palliated by any pretence of necessity: it was introduced, and, notwithstanding the clamours of the people, continued for a considerable period, with the avowed intention of enabling the king to rule without a parliament.

4. But the chief ground of this opinion, concerning the tyrannical behaviour of Elizabeth, and the despotical nature of her government, appears to be, her interference in the debates of parliament; her imprisonment of members for presuming to urge the prosecution of bills, after she had put a negative upon them; and the tameness with which parliament submitted to those exertions of prerogative.

It must be confessed, that if, in the present age, a British monarch should act in the same manner, and should meet with the same acquiescence from parliament, we might reasonably conclude that our freedom was entirely destroyed. But the submission of that assembly, at a period when the order, in which the king's negative should be interposed, was not invariably determined, does not argue the same corruption; and therefore will not warrant the same conclusion. Whatever might be the view entertained by some members of parliament in that age, the greater part of them were probably not aware of the consequences with which those exertions of the crown might be attended; and as, with reason, they placed great confidence in the queen's intentions, their jealousy was not roused by a measure which did not seem to violate any fixed rule of the government.

Neither have we any good reason to infer, that, because this point had hitherto been left undetermined, the constitution was of no value or efficacy to maintain the rights of the people. It was, no doubt, a great defect in the political



tical system, that the king might put a stop to any bill depending in parliament, and prevent any farther debate with relation to it. But even this power of the sovereign was far from rendering the government despotic. By means of it, he might the more effectually defend his own prerogative, but it could not enable him to encroach upon the liberty of the subject. The parliament, without whose authority no innovation could be made, was the less capable of introducing any new regulation; but not the less qualified to maintain the government as it stood. The power of taxation, at the same time, threw a prodigious weight into the scale of parliamentary influence. By the increasing expence of government, a consequence of the improvement of arts, and the advancement of luxury, the old revenues of the crown became daily more inadequate to the demands of the sovereign; which laid him under the necessity of making frequent applications to parliament for extraordinary supplies. This, as it reduced him to a dependence upon that assembly, enabled it to take advantage of his necessities, and to extort from him such concessions as experience had shown to be requisite for securing the rights and privileges of the people.

5. According to Mr. Hume, "the government of England, during that age, however different in other particulars, bore, in this respect, some resemblance to that of Turkey at present: the sovereign possessed every power, except that of imposing taxes: and in both countries this limitation, unsupported by other privileges, appears rather prejudicial to the people. In Turkey, it obliges the Sultan to permit the extortion of the bashaws and governors of provinces, from whom he afterwards squeezes presents, or takes forfeitures. In England, it

"engaged

"engaged the queen to erect monopolies, and grant patents for exclusive trade: an invention so pernicious, that had she gone on, during a tract of years, at her own rate, England, the seat of riches, and arts, and commerce, would have contained, at present, as little industry as Morocco, or the coast of Barbary\*."

But surely, in England, the sovereign was not possessed of every power, except that of imposing taxes. The power of legislation was vested in the king, lords, and commons. The judicial power was not, in ordinary cases, exercised by the crown, but was distributed among various courts of justice; and though, in these, the judges, from the manner of their appointment, might be supposed to favour the prerogative, yet the modes of their procedure, and the general rules of law, were in most cases too invariably determined, to permit very gross partiality. The institution of *juries*, besides, which had long been completely established in England, was calculated to counterbalance this natural bias of judges, and to secure the rights of the people. Is it possible that, in such a government, the power of the monarch can be seriously compared to that which prevails in Turkey?

The sovereign, indeed, was entitled to erect monopolies, and to grant exclusive privileges; which, in that period, were thought necessary for the encouragement of trade and manufactures. That these grants were often bestowed for the purpose merely of deriving a pecuniary advantage to the crown, it is impossible to deny. But who can believe that the perquisites, arising from this branch of the prerogative, or from such of the feudal incidents as were still of

\* History of England, vol. V. Appendix 3.

an arbitrary nature, were ever likely to defray the extraordinary expences of the crown, and to supersede the necessity of soliciting taxes from parliament?

The star-chamber, and the court of high commission, were doubtless arbitrary and oppressive tribunals; and were in a great measure under the direction of the sovereign. But their interposition, though justly the subject of complaint, was limited to singular and peculiar cases; and, had it been pushed so far as to give great interruption to the known and established course of justice, it would have occasioned such odium and clamour, as no prince of common understanding would be willing to incur.

To be satisfied, upon the whole, that the English constitution, at this period, contained the essential principles of liberty, we need only attend to its operation, when the question was brought to a trial, in the reigns of the two succeeding princes. At the commencement of the disputes between the house of commons and the two first princes of the Stewart family, the government stood precisely upon the same foundation as in the time of Elizabeth. Neither the powers of parliament had been encreased, nor those of the sovereign diminished. Yet, in the course of that struggle, it soon became evident, that parliament, without going beyond its undisputed privileges, was possessed of sufficient authority, not only to resist the encroachments of prerogative, but even to explain and define its extent, and to establish a more compleat and regular system of liberty. It was merely by withholding supplies, that the parliament was able to introduce these important and salutary regulations. Is the power of taxation, therefore, to be considered as prejudicial to the people? Ought it not rather to be regarded as the foundation of all their privileges,

leges, and the great mean of establishing that happy mixture of monarchy and democracy which we at present enjoy?

*Conclusion of the Period, from the Norman Conquest.*

WHEN we review the English constitution, under the princes of the Norman, the Plantagenet, and the Tudor line, it appears to illustrate the natural progress of that policy which obtained in the Western part of Europe, with such peculiar modifications, as might be expected, in Britain, from the situation of the country, and from the character and manners of the inhabitants. By the completion of the feudal system, at the Norman conquest, the authority of the sovereign was considerably encreased; at the same time that his powers, in conformity to the practice of every rude kingdom, were, in many respects, discretionary and uncertain. The subsequent progress of government produced a gradual exaltation of the crown; but the long-continued struggle between the king and his barons, and the several great charters which they extorted from him, contributed to ascertain and define the extent of his prerogative. While the monarchy was thus gaining ground upon the ancient aristocracy, the constitution was acquiring something of a regular form, and, by the multiplication of fixed laws, provision was made against the future exertions of arbitrary power.

By the insular situation of Britain, the English were little exposed to any foreign invasion, except from the Scots, whose attacks were seldom very formidable: and hence the

king, being prevented from engaging in extensive national enterprizes, was deprived of those numerous opportunities for signalizing his military talents, and for securing the admiration and attachment of his subjects, which were enjoyed by the princes upon the neighbouring continent. Thus the government of England, though it proceeded in a similar course to that of the other monarchies in Europe, became less absolute than the greater part of them; and gave admittance to many peculiar institutions in favour of liberty.

The same insular situation, together with the climate and natural produce of the country, by encouraging trade and manufactures, gave an early consequence to the lower order of the inhabitants; and, by uniting their interest with that of the king, in opposing the great barons, disposed him to encrease their weight and importance in the community. Upon this account, when the crown had attained its greatest elevation, under the princes of the Tudor family, the privileges of the commons were not regarded as hostile to the sovereign, but were cherished and supported as the means of extending his authority.

In consequence of these peculiar circumstances, the government of England, before the accession of James the First, had come to be distinguished from that of every other kingdom in Europe: the prerogative was more limited; the national assembly was constituted upon a more popular plan, and possessed more extensive powers; and, by the intervention of juries, the administration of justice, in a manner consistent with the rights of the people, was better secured.

These peculiarities, it is natural to suppose, could hardly escape the attention of any person, even in that period, who had

had employed himself in writing upon the government of his country. And yet the historian, whom I formerly quoted, imagines that, before the reign of James the First, the English had never discovered any difference between their own constitution and that of Spain or France; and declares, "that he has not met with any writer in that age, who speaks of England as a limited monarchy, but as an absolute one, where the people have many privileges\*." This appears the more extraordinary, as foreigners, he acknowledges, were sufficiently sensible of the distinction. "Philip de Comines remarked the English constitution to be more popular, in his time, than that of France. And Cardinal Bentivoglio mentions the English government as similar to that of the Low Countries. "under their princes, rather than to that of France or Spain †."

To prove that English authors did not conceive their government to be a limited monarchy, it is farther observed, that Sir Walter Raleigh, a writer suspected of leaning towards the puritanical party, divides monarchies into such as are *entire*, and such as are *limited or restrained*; and that he classes the English government among the former. It must be observed, however, that by a limited monarchy, in this passage, is meant that in which the king has not the sovereignty in time of peace, as in Poland.

But not to insist upon the expressions of Sir Walter Raleigh, a courtier, who thought it incumbent upon him to write of queen Elizabeth in a style of romantic love; an adventurer, continually engaged in projects which required the countenance and support of the prince; I shall mention

\* See note Q, at the end of vol. VI.

† Ibid.

two English writers, whose authority upon this point will perhaps be thought superior, and whose opinion is much more direct and explicit.

The first is Sir John Fortescue, the lord chief justice, and afterwards the chancellor to Henry the Sixth, who has written a treatise upon the excellence of the English laws, and who, from his profession, as well as from the distinguished offices which he held by the appointment of the sovereign, will not readily be suspected of prejudices against the prerogative\*. This author, instead of conceiving the English government to be an absolute monarchy, describes it in language that seems, in every respect, suitable to the state of our present constitution. After distinguishing governments into *regal* and *political*, that is, into absolute and limited, he is at pains, through the whole of his work, to inculcate, that the English government is of the latter kind, in opposition to the former. "The second point, most worthy prince, whereof you stand in fear," (I make use of the old translation, to avoid the possibility of straining the expression) "shall in like manner, and as easily as the other, be confuted. For you stand in doubt whether it be better for you to give your mind to the study of the laws of England, or of the civil laws; because they, throughout the whole world, are advanced in glory and renown above all men's laws. Let not this scruple of mind trouble you, O most noble prince: for the king of England cannot alter nor change the laws of his realm, at his pleasure. For why, he governeth his people by power, not only *regal* but *political*. If his power over

\* This book was translated into English, and published, in the reign of Elizabeth, by Robert Mulcaster, a student of law, and dedicated to one of her justices of the Common Pleas.

"them

"them were regal only, then he might change the laws of his realm, and charge his subjects with tallage and other burdens without their consent\*."—The aim of a limited monarchy he afterwards explains more fully. "Now you understand," says he, "most noble prince, the form of institution of a kingdom *political*; whereby you may measure the power, which the king thereof may exercise over the law, and subjects of the same. For such a king is made and ordained for the defence of the law of his subjects, and of their bodies, and goods, whereunto he receiveth power of his people, so that he cannot govern his people by any other power†."—Then follows a more particular application of this doctrine to the constitution of England. "Now whether the statutes of England, be good or not, that only remaineth to be discussed. For they proceed not only from the prince's pleasure, as do the laws of those kingdoms that are ruled only by *regal* government, where sometimes the statutes do so procure the singular commodity of the maker, that they redound to the hinderance and damage of

\* "Secundum vero, princeps, quod tu formidas, consimili nec majori opera elidetur. Dubitus nempe, an Anglorum legum, vel civilium studio te conferas, dum civiles supra humanas cunctas leges alias, fama per orbem extollat gloriosa, non te conturbet, fili regis, hæc mentis evagatio: nam non potest rex Angliæ ad libitum suum, leges mutare regni sui. Principatu namque, nedum *regali*, sed et *politico*, ipse suo populo dominatur. Se *regali* tantum ipse præset iis, leges regni sui mutare ille possit, tallagium quoque et cætera onera eis imponere ipsis inconsultis."—Fortescue, de Laudibus Legum Angliæ, c. 9.

† "Habes in hoc jam, princeps, instituti omnis politici regni formam, ex qua metire poteris potestatem quam rex ejus in leges ipsius, aut subditos valeat exercere. Ad tutelam namque legis subditorum, ac eorum corporum, et bonorum, rex hujusmodi erectus est; et ad hæc potestatem a populo effluxam ipse habet, quo ei non licet potestate alia suo populo dominari."—Cap. 13.

"his

“ his subjects.—But statutes cannot thus pass in England, for  
 “ so much as they are made, not only by the prince’s plea-  
 “ sure, but also by the assent of the whole realm : so that  
 “ of necessity they must procure the wealth of the people,  
 “ and in no wise tend to their hinderance \*.”—After stating  
 some objections, in the name of the Prince, he goes on ;  
 “ Do you not now see, most noble prince, that the more you  
 “ object against the laws of England, the more worthy they  
 “ appear ?—I see plainly, quoth the Prince, that in the case  
 “ wherein you have now travelled, they have the pre-  
 “ eminence above all other laws of the world ; yet we have  
 “ heard that some of my progenitors, kings of England,  
 “ have not been pleased with their own laws, and have  
 “ therefore gone about to bring in the civil laws to the  
 “ government of England, and to abolish their own coun-  
 “ try laws. For what purpose and intent they so did I  
 “ much marvel.—You would nothing marvel thereat, quoth  
 “ the Chancellor, if you did deeply consider with yourself  
 “ the cause of this intent. For you have heard before,  
 “ how that among the civil laws, that maxim or rule is a  
 “ sentence most notable, which thus singeth, *The prince’s*  
 “ *pleasure standeth in force of a law* ; quite contrary to the  
 “ decrees of the laws of England, whereby the king there-  
 “ of ruleth his people, not only by *regal* but also by *politi-*  
 “ *cal* government ; inasmuch that, at the time of his coro-

\* “ Statuta tunc Anglorum, bona sint necne, solum restat explorandum.  
 “ Non enim emanant illa a principis solum voluntate, ut leges in regnis, quæ tan-  
 “ tum *regaliter* gubernantur, ubi quandoque statuta ita constituentis procurant com-  
 “ modum singulare, quod in ejus subditorum ipsa redundant dispendium.—Sed non  
 “ sic Angliæ statuta oriri possunt, dum *sedum principis voluntate, sed et totius regni*  
 “ *assensu*, ipsa conduntur, quo populi læsuram illa efficere nequeunt, vel non eorum  
 “ commodum procurare.”—Cap. 18.

“ nation,

“ nation, he is bound by an oath to the observance of his  
 “ own law : which thing some kings of England, not well  
 “ brooking, as thinking that thereby they should not freely  
 “ govern their subjects as other kings do, whose rule is  
 “ only regal, governing their people by the civil law, and  
 “ chiefly by that foresaid maxim of the same law, whereby  
 “ they, at their pleasure, change laws, make new laws,  
 “ execute punishments, burden their subjects with charges ;  
 “ and also, when they list, do determine controversies of  
 “ suitors, as pleaseth them. Wherefore these your proge-  
 “ nitors went about to cast off the yoke *political*, that they  
 “ also might rule, or rather rage over the people their  
 “ subjects in *regal* wise only : not considering that the  
 “ power of both kings is equal, as in the foresaid treatise  
 “ of the law of nature is declared ; and that to rule the  
 “ people by government *political* is no yoke, but liberty,  
 “ and great security, not only to the subjects, but also to  
 “ the king himself, and further no small lightening or ease-  
 “ ment to his charge. And that this may appear more  
 “ evident unto you, ponder and weigh the experience of  
 “ both regiments ; and begin with the king of France,  
 “ perusing after what sort he ruleth his subjects, by *regal*  
 “ *government alone* : and then come to the effect of the  
 “ joint governance, *regal* and *political*, examining by expe-  
 “ rience how and in what manner the king of England  
 “ governeth his subjects \*.” After these observations, the  
 author,

\* “ Nonne vides jam, princeps clarissime, leges Angliæ tanto magis clarescere,  
 “ quanto eisdem tu amplius reluctaris ? *Princeps*, video, inquit, et eas inter totius  
 “ orbis jura (in casu quo tu jam sudasti) præfulgere considero ; tamen progenitorum  
 “ meorum Angliæ regnum quoddam audivimus, in legibus suis minime delegatos,  
 “ fatigantes proinde leges civiles ad Angliæ regimen inducere, et patrias leges repu-  
 “ diare  
 “ 4 C  
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author, in two separate chapters, contrasts the misery produced by the absolute government in France with the happiness resulting from the limited monarchy in England. The whole treatise is well worth an attentive perusal; as it contains the judgment of a celebrated lawyer, concerning the mixed form of the English constitution, at a period when some have conceived it to be no less arbitrary and despotic than that which was established in France or in any other kingdom of Europe.

It will occur to the reader, that the opinion of Sir John Fortescue, in the passages above quoted, is widely different from Mr. Hume, who maintains that the legislative power of the English parliament was a mere *fallacy*.

“ diare conatos: horum revera consilium vehementer admiror. *Cancellarius*. Non  
 “ admirareris, Princeps, si causam hujus conaminis mente sollicita pertractares. Au-  
 “ disti namque superius quomodo inter leges civiles præcipua sententia est, maxima  
 “ sive regula illa quæ sic canit, *quod principi placuit legis habet vigorem*: qualiter non  
 “ fanciunt leges Angliæ, dum nedum *regaliter*, sed et *politice* rex ejusdem dominatur  
 “ in populum suum, quo ipse in *coronatione* sua ad legis suæ observantiam astringitur  
 “ sacramento; quod reges Angliæ ægre ferentes, putantes proinde se non liberi  
 “ dominari in subditos, ut facient reges *regaliter* tantum principantes, qui lege civili,  
 “ et potissime prædicta legis illius maxima, regulant plebem suam, quo ipsi, ad eorum  
 “ libitum, jura mutant, nova condunt, poenas infligunt, et onera imponunt subditis  
 “ suis, propriis quoque arbitriis, contententium, cum velint dirimunt lités. Quare  
 “ moliti sunt ipsi progenitores tui hoc jugum *politicum* abjicere, ut consimiliter et ipsi  
 “ in subiectum populum *regaliter* tantum dominari, sed potius debacchari queant:  
 “ non attendentes quod æqualis est utriusque regis potentia; ut in prædicto tractatu  
 “ *de natura legis naturæ* docetur; et quod non jugum sed libertas est *politice* regere  
 “ populum, securitas quoque maxima nedum plebi, sed et ipsi regi, allevatio etiam  
 “ non minima sollicitudinis suæ. Quæ ut tibi apertius pateant, utriusque regiminis  
 “ experientiam percunctare, et a regimine *tantum regali*, qualiter rex Franciæ princi-  
 “ patür in subditos suos, exordium sumito: deinde a *regalis* et *politici* regiminis effec-  
 “ tu, qualiter rex Angliæ dominatur in sibi subditos populos, experientiam quære.”  
 Vide cap. 32, 33, 34.

The

The other English writer, from whose authority it appears that the government of England was, at this time, understood to be a limited monarchy, is Sir Thomas Smith, a distinguished lawyer, and principal secretary both to Edward the Sixth and to Elizabeth. In his *Commonwealth of England*; a work which unites liberality of sentiment with some philosophy; this author, after explaining the origin and progress of government, has occasion to consider more particularly the nature of the English constitution. “ The most high and absolute power,” says he, “ of the realm of England, consisteth in the parliament.—  
 “ The parliament abrogateth old laws, maketh new,  
 “ giveth order for things past, and for things hereafter to  
 “ be followed, changeth rights and possessions of private  
 “ men, legitimateth bastards, establisheth forms of religion,  
 “ altereth weights and measures, giveth form of succe-  
 “ sion to the crown, defineth of doubtful rights, whereof  
 “ no law is already made, appointeth subsidies, tailles,  
 “ taxes, and impositions, giveth most free pardons and  
 “ absolutions, restoreth in blood and name, as the highest  
 “ court, condemneth or absolveth them whom the prince  
 “ will put to that trial. And, to be short, all that ever  
 “ the people of Rome might do, either in *centuriatis*  
 “ *comitiis*, or *tributis*, the same may be done by the par-  
 “ liament of England, which representeth, and hath the  
 “ power of the whole realm, both the head and the  
 “ body. For every Englishman is intended to be there  
 “ present, either in person or by procurator and attorney,  
 “ of what preheminance, state, dignity, or quality soever he  
 “ be, from the prince, to the lowest person of England.  
 “ And the consent of the parliament is taken to be every  
 “ man’s

“ man’s consent \*.”—Among the privileges of parliament, mentioned by this well-informed writer, one is, that the members “ may frankly and freely say their minds, in disputing of such matters as may come in question, and that without offence to his majesty †.”—He also enumerates the several branches of the prerogative; such as, that of making peace and war, of coining money, of appointing the higher officers and magistrates of the realm, of drawing the tenths and first fruits of ecclesiastical benefices, of issuing writs and executions, of levying the wardship, and first marriage, of all those who hold of the king in chief. What he says concerning the *dispensing power* of the sovereign deserves particular notice, as he mentions the foundation of that power, and the limitations under which it was understood to be exercised.

“ The prince,” he observes, “ useth also to dispense with laws made, whereas equity requireth a moderation to be had, and with pains for transgressing of laws, where the pain of the law is applied only to the prince. But where the forfeit, (as in popular actions it chanceth many times) is part to the prince, the other part to the declarator, detector, or informer, there the prince doth dispense for his own part only. Where the criminal is intended by inquisition (that manner is called with us at the prince’s suit) the prince giveth absolution or pardon, yet with a clause, *modo stat rectus in curia*, that is to say, that no man object against the offender. Whereby, notwithstanding that he hath the prince’s pardon, if the person offended will take upon him the accusation (which

\* Commonwealth of England, b. ii. ch. 2.

† Ibid. ch. 3.

“ in

“ in our language is called the appeal) in cases where it lieth, the prince’s pardon doth not serve the offender \*.”

In perusing these accounts of the English government, we cannot fail to remark, that they are so little enforced by argument, and delivered with such plainness and simplicity, as makes it probable that they contained the doctrines universally received in that age, and which had never been the subject of any doubt or controversy.

The views of this important question, which have been suggested by other writers, it is not my intention to examine. But the opinions of this eminent historian are entitled to so much regard, and appear, in this case, to have so little foundation, that I could not help thinking it improper to pass them over in silence. The improvements made in the English government, from the accession of the house of Stewart to the present time, with the present state of the British constitution in all its principal branches, are intended for the subject of a future inquiry.

\* Commonwealth of England, b. ii. ch. 4.

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