Consiglio regionale del Veneto

the real Jacobites were, I believe, in a far less proportion among the commons. The hopes of that wretched victim of his own bigotry and violence rested less on the loyalty of his former subjects, or on their disaffection to his rival, than on the perfidious conspiracy of English statesmen and admirals, of lord-lieutenants and governors of towns, and on so numerous a French army as an ill-defended and disunited kingdom would be incapable to resist. He was to return, not as his brother, alone and unarmed, strong only in the consentient voice of the nation, but amidst the bayonets of 30,000 French auxiliaries. These were the pledges of just and constitutional rule, whom our patriot Jacobites invoked against the despotism of William III. It was from a king of the house of Stuart, from James II., from one thus encircled by the soldiers of Louis XIV., that we were to receive the guarantee of civil and religious liberty. Happily the determined love of arbitrary power, burning unextinguished amidst exile and disgrace, would not permit him to promise, in any distinct manner, those securities which a large portion of his own adherents required. The Jacobite faction was divided between compounders and non-compounders; the one insisting on the necessity of holding forth a promise of such new enactments upon the king's restoration as might remove all jealousies as to the rights of the church and people; the other, more agreeably to James's temper, rejecting every compromise with what they called the republican party at the expense of his ancient prerogative.* In a declaration which he issued from St. Germain in 1692 there was so little acknowledgment of error, so few promises of security, so many exceptions from the amnesty he offered, that the wiser of his partisans in England were willing to insinuate that it was not authentic.† This declaration, and the virulence of Jacobite pamphlets in the same tone, must have done harm to his cause.‡ He published another de-

Schemes for his restoration.

* Macpherson, 433. Somers Tracts, xi. 94. This is a pamphlet of the time, exposing the St. Germain faction, and James's unwillingness to make concessions. Itis confirmed by the most authentic documents.

† Ralph, 350. Somers Tracts, x. 211.

‡ Many of these Jacobite tracts are printed in the Somers Collection, vol. x. The more we read of them, the more cause appears for thankfulness that the nation escaped from such a furious party. They confess, in general, very little error or misgovernment in James, but abound with malignant calumnies on his successor. The name of Tullia is repeatedly

claration next year at the earnest request of those who had seceded to his side from that of the revolution, in which he held forth more specific assurances of consenting to a limitation of his prerogative.* But no reflecting man could avoid perceiving that such promises wrung from his distress were illusory and insincere, that in the exultation of triumphant

given to the mild and pious Mary. The best of these libels is styled "Great Britain's just Complaint," (p. 429.) by sir James Montgomery, the false and fickle proto-apostate of whiggism. It is written with singular vigour, and even elegance; and rather extenuates than denies the faults of the late reign.

* Ralph, 418. See the Life of James, 501. It contains chiefly an absolute promise of pardon, a declaration that he would protect and defend the church of England as established by law, and secure to its members all the churches, universities, schools, and colleges, together with its immunities, rights, and privileges, a promise not to dispense with the test, and to leave the dispensing power in other matters to be explained and limited by parliament, to give the royal assent to bills for frequent parliaments, free elections, and impartial trials, and to confirm such laws made under the present usurpation as should be tendered to him by parliament. "The king," he says himself, "was sensible he should be blamed by several of his friends for submitting to such hard terms; nor was it to be wondered at, if those who knew not the true condition of his affairs were scandalised at it; but after all he had nothing else to do." P. 505. He was so little satisfied with the articles in this declaration respecting the church of England, that he consulted several French and English divines, all of whom, including Bossuet, after some difference, came to an opinion that he could not in conscience undertake to protect and defend an erroneous church. Their objection, however, seems to have been rather to the expression than the plain sense; for they agreed that he might promise to leave the protestant church in possession of its endowments and privileges. Many too of the English Jacobites, especially the non-juring bishops, were displeased with the declaration, as limiting the prerogative; though it contained nothing which they were not clamorous to obtain from William. P. 514. A decisive proof how little that party cared for civil liberty, and how little would have satisfied them at the revolution, if James had put the church out of danger! The next paragraph is remarkable enough to be extracted for the better confirmation of what I have just said. "By this the king saw he had out-shot himself more ways than one in this declaration; and therefore what expedient he would have found in case he had been restored, not to put a force either upon his conscience or honour, does not appear, because it never came to a trial; but this is certain, his church of England friends absolved him beforehand, and sent him word, that if he considered the preamble and the very terms of the declaration, he was not bound to stand by it, or to put it out verbatim as it was worded; that the changing some expressions and ambiguous terms, so long as what was principally aimed at had been kept to, could not be called a receding from his declaration, no more than a new edition of a book can be accounted a different work, though corrected and amended. And indeed the preamble showed his promise was conditional, which they not performing, the king could not be tied; for my lord Middleton had writ, that, if the king signed the declaration, those who took it engaged to restore him in three or four months after; the king did his part, but their failure must needs take off the king's future obligation."

In a Latin letter, the original of which is written in James's own hand, to Innocent XII., dated from Dublin, Nov. 26. 1689, he declares himself "Catholicam fidem reducere in tria regna statuisse." Somers Tracts, x. 552. Though this may have been drawn up by a priest, I suppose the king understood what he said. It appears also by lord Balcarras's Memoir, that lord Melfort had drawn up the declaration as to indemnity and indulgence in such a manner, that the king might break it whenever he pleased. Somers Tracts, xi. 517.

loyalty, even without the sword of the Gaul thrown into the scale of despotism, those who dreamed of a conditional restoration and of fresh guarantees for civil liberty, would find, like the presbyterians of 1660, that it became them rather to be anxious about their own pardon, and to receive it as a signal boon of the king's clemency. The knowledge thus obtained of James's incorrigible obstinacy seems gradually to have convinced the disaffected that no hope for the nation or for themselves could be drawn from his restoration.* His connexions with the treacherous counsellors of William grew weaker; and even before the peace of Ryswick it was evident that the aged bigot could never wield again the sceptre he had thrown away. The scheme of assassinating our illustrious sovereign, which some of James's desperate zealots had devised without his privity, as may charitably and even reasonably be supposed†, gave a fatal blow to the interests of that

* The protestants were treated with neglect and jealousy, whatever might have been their loyalty, at the court of James, as they were afterwards at that of his son. The incorrigibility of the Stuart family is very remarkable. Kennet, p. 638. and 738., enumerates many instances. Sir James Montgomery, the earl of Middleton, and others, were shunned at the court of St. Germain as guilty of this sole crime of heresy, unless we add that of wishing for legal securities.

† James himself explicitly denies, in the extracts from his Life, published by Macpherson, all participation in the scheme of killing William, and says that he had twice rejected proposals for bringing him off alive; though it is not true that he speaks of the design with indignation, as some have pretended. It was very natural, and very comfortable to the principles of kings, and others besides kings, in former times, that he should have lent an ear to this project; and as to James's moral and religious character, it was not better than that of Clarendon, whom we know to have countenanced similar designs for the assassination of Cromwell. In fact, the received code of ethics has been improved in this respect. We may be sure, at least, that those who ran such a risk for James's sake expected to be thanked and rewarded in the event of success. I cannot therefore agree with Dalrymple, who says that nothing but the fury of party could have exposed James to this suspicion. Though the proof seems very short of conviction, there are some facts worthy of notice. 1. Burnet positively charges the late king with privity to the conspiracy of Grandval, executed in Flanders for a design on William's life, 1692 (p. 95.); and this he does with so much particularity, and so little hesitation, that he seems to have drawn his information from high authority. The sentence of the court martial on Grandval also alludes to James's knowledge of the crime (Somers Tracts, x. 580.), and mentions expressions of his, which, though not conclusive, would raise a strong presumption in any ordinary case. 2. William himself, in a memorial intended to have been delivered to the ministers of all the allied powers at Ryswick, in answer to that of James (Id. xi. 103. Ralph, 730.), positively imputes to the latter repeated conspiracies against his life; and he was incapable of saying what he did not believe. In the same memorial he shows too much magnanimity to assert that the birth of the prince of Wales was an imposture. 3. A paper by Charnock, undeniably one of the conspirators, addressed to James, contains a marked allusion to William's possible death in a short time; which even Macpherson calls a delicate mode of hinting

faction. It was instantly seen that the murmurs of malecontent whigs had nothing in common with the disaffection of Jacobites. The nation resounded with an indignant cry against the atrocious conspiracy. An association abjuring the title of James, and pledging the subscribers to revenge the king's death, after the model of that in the reign of Elizabeth, was generally signed by both houses of parliament, and throughout the kingdom.* The adherents of the exiled family dwindled into so powerless a minority that they could make no sort of opposition to the act of settlement, and did not recover an efficient character as a party till towards the latter end of the ensuing reign.

Attainder of sir John Fenwick.

Perhaps the indignation of parliament, against those who sought to bring back despotism through civil war and the murder of an heroic sovereign, was carried too far in the bill for attainting sir John Fenwick of treason. Two witnesses, required by our law in a charge of that nature, Porter and Goodman, had deposed before the grand jury to Fenwick's share in the scheme of invasion,

the assassination-plot to him. Macpherson, State Papers, i. 519. Compare also State Trials, xii. 1323. 1327. 1329. 4. Somerville, though a disbeliever in James's participation, has a very curious quotation from Lamberti, tending to implicate Louis XIV., p. 428.; and we can hardly suppose that he kept the other out of the secret. Indeed, the crime is greater and less credible in Louis than in James. But devout kings have odd notions of morality; and their confessors, I suppose, much the same. I admit, as before, that the evidence falls short of conviction; and that the verdict, in the language of Scots law, should be, Not Proven; but it is too much for our Stuart apologists to treat the question as one absolutely determined. Documents may yet appear that will change its aspect.

I leave the above paragraph as it was written before the publication of M. Mazure's valuable History of the Revolution. He has therein brought to light a commission of James to Crosby, in 1693, authorising and requiring him "to seize and secure the person of the prince of Orange, and to bring him before us, taking to your assistance such other of our faithful subjects in whom you may place confidence." Hist. de la Révol. iii. 443. It is justly observed by M. Mazure, that Crosby might think no renewal of his authority necessary in 1696 to do that which he had been required to do in 1693. If we look attentively at James's own language in Macpherson's extracts, without much regarding the glosses of Innes, it will appear that he does not deny in express terms that he had consented to the attempt in 1696 to seize the prince of Orange's person. In the commission to Crosby he is required not only to do this, but *to bring him before the king*. But is it possible to consider this language as any thing else than an euphemism for assassination?

Upon the whole evidence, therefore, I now think that James was privy to the conspiracy, of which the natural and inevitable consequence must have been foreseen by himself; but I leave the text as it stood, in order to show that I have not been guided by any prejudice against his character.

* Parl. Hist. 991. Fifteen peers and ninety-two commoners refused. The names of the latter were circulated in a printed paper, which the house voted to be a breach of their privilege, and destruction of the freedom and liberties of parliament. Oct. 30. 1696. This, however, shows the unpopularity of their opposition.

though there is no reason to believe that he was privy to the intended assassination of the king. His wife subsequently prevailed on Goodman to quit the kingdom; and thus it became impossible to obtain a conviction in the course of law. This was the apology for a special act of the legislature, by which he suffered the penalties of treason. It did not, like some other acts of attainder, inflict a punishment beyond the offence, but supplied the deficiency of legal evidence. It was sustained by the production of Goodman's examination before the privy-council, and by the evidence of two grand-jurymen as to the deposition he had made on oath before them, and on which they had found the bill of indictment. It was also shown that he had been tampered with by lady Mary Fenwick to leave the kingdom. This was undoubtedly as good secondary evidence as can well be imagined; and, though in criminal cases such evidence is not admissible by courts of law, it was plausibly urged that the legislature might prevent Fenwick from taking advantage of his own underhand management, without transgressing the moral rules of justice, or even setting the dangerous precedent of punishing treason upon a single testimony. Yet, upon the whole, the importance of adhering to the stubborn rules of law in matters of treason is so weighty, and the difficulty of keeping such a body as the house of commons within any less precise limits so manifest, that we may well concur with those who thought sir John Fenwick much too inconsiderable a person to warrant such an anomaly. The jealous sense of liberty prevalent in William's reign produced a very strong opposition to this bill of attainder; it passed in each house, especially in the lords, by a small majority.* Nor, perhaps, would it have been

* Burnet; see the notes on the Oxford edition. Ralph, 692. The motion for bringing in the bill, Nov. 6. 1696, was carried by 169 to 61; but this majority lessened at every stage: and the final division was only 189 to 156. In the lords it passed by 68 to 61; several whigs, and even the duke of Devonshire, then lord steward, voting in the minority. Parl. Hist. 996—1154. Marlborough probably made prince George of Denmark support the measure. Shrewsbury Correspondence, 449. Many remarkable letters on the subject are to be found in this collection; but I warn the reader against trusting any part of the volume except the letters themselves. The editor has, in defiance of notorious facts, represented sir John Fenwick's disclosures as false; and twice charges him with prevarication (p. 404.), using the word without any knowledge of its sense, in declining to answer questions put to him by members of the house of commons, which he could not have answered without inflaming the animosity that sought his life.

It is said in a note of lord Hardwicke on Burnet, that "the king, before the

carried but for Fenwick's imprudent disclosure, in order to save his life, of some great statesmen's intrigues with the late king; a disclosure which he dared not, or was not in a situation to confirm, but which rendered him the victim of their fear and revenge. Russell, one of those accused, brought into the commons the bill of attainder; Marlborough voted in favour of it, the only instance wherein he quitted the tories; Godolphin and Bath, with more humanity, took the other side; and Shrewsbury absented himself from the house of lords.* It is now well known that Fenwick's discoveries went not a step beyond the truth. Their effect, however, was beneficial to the state; as by displaying a strange want of secrecy in the court of St. Germains, Fenwick never having had any direct communication with those he accused, it caused Godolphin and Marlborough to break off their dangerous course of perfidy.†

Ill success of the war.

Amidst these scenes of dissension and disaffection, and amidst the public losses and decline which aggravated them, we have scarce any object to contemplate with pleasure, but the magnanimous and unconquerable soul of William. Mistaken in some parts of his domestic policy, unsuited by some failings of his character for the English nation, it is still to his superiority in virtue and

session, had sir John Fenwick brought to the cabinet council, where he was present himself. But sir John would not explain his paper." See also Shrewsbury Correspondence, 419. et post. The truth was, that Fenwick, having had his information at second-hand, could not prove his assertions, and feared to make his case worse by repeating them.

* Godolphin, who was then first commissioner of the treasury, not much to the liking of the whigs, seems to have been tricked by Sunderland into retiring from office on this occasion. Id. 415. Shrewsbury, secretary of state, could hardly be restrained by the king and his own friends from resigning the seals as soon as he knew of Fenwick's accusation. His behaviour shows either a consciousness of guilt, or an inconceivable cowardice. Yet at first he wrote to the king, pretending to mention candidly all that had passed between him and the earl of Middleton, which in fact amounted to nothing. P. 147. This letter, however, seems to show that a story which has been several times told, and is confirmed by the biographer of James II. and by Macpherson's Papers, that William compelled Shrewsbury to accept office in 1693, by letting him know that he was aware of his connexion with St. Germains, is not founded in truth. He could hardly have written in such a style to the king with that fact in his way. Monmouth, however, had some suspicion of it; as appears by the hints he furnished to sir J. Fenwick towards establishing the charges. P. 450. Lord Dartmouth, full of inveterate prejudices against the king, charges him with personal pique against sir John Fenwick, and with instigating members to vote for the bill. Yet it rather seems that he was, at least for some time, by no means anxious for it. Shrewsbury Correspondence: and compare Coxe's Life of Marlborough, i. 63.

† Life of James, ii. 558.

energy over all her own natives in that age that England is indebted for the preservation of her honour and liberty; not at the crisis only of the revolution, but through the difficult period that elapsed until the peace of Ryswick. A war of nine years, generally unfortunate, unsatisfactory in its result, carried on at a cost unknown to former times, amidst the decay of trade, the exhaustion of resources, the decline, as there seems good reason to believe, of population itself, was the festering wound that turned a people's gratitude into factiousness and treachery. It was easy to excite the national prejudices against campaigns in Flanders, especially when so unsuccessful, and to inveigh against the neglect of our maritime power. Yet, unless we could have been secure against invasion, which Louis would infallibly have attempted, had not his whole force been occupied by the grand alliance, and which, in the feeble condition of our navy and commerce, at one time could not have been impracticable, the defeats of Steenkirk and Landen might probably have been sustained at home. The war of 1689, and the great confederacy of Europe, which William alone could animate with any steadiness and energy, were most evidently and undeniably the means of preserving the independence of England. That danger, which has sometimes been in our countrymen's mouths with little meaning, of becoming a province to France, was then close and actual; for I hold the restoration of the house of Stuart to be but another expression for that ignominy and servitude.

The expense therefore of this war must not be reckoned unnecessary; nor must we censure the government for that small portion of our debt which it was compelled to entail on posterity.* It is to the honour of William's

Its expenses.

* The debt at the king's death amounted to 16,394,702*l.*, of which above three millions were to expire in 1710. Sinclair's Hist. of Revenue, i. 425. (third edition.)

Of this sum 664,263*l.* was incurred before the revolution, being a part of the money of which Charles II. had robbed the public creditor by shutting up the exchequer. Interest was paid upon this down to 1683, when the king stopped it. The legislature ought undoubtedly to have done justice more effectually and speedily than by passing an act in 1699, which was not to take effect till December 25. 1705; from which time the excise was charged with three per cent. interest on the principal sum of 1,328,526*l.*, subject to be redeemed by payment of a moiety. No compensation was given for the loss of so many years' interest. 12 & 13 W. 3. c. 12. § 15. Sinclair, i. 397. State Trials, xiv. 1. et post. According to a particular statement in Somers Tracts, xii. 383., the receipts of the ex-

administration, and of his parliaments, not always clear-sighted, but honest and zealous for the public weal, that they deviated so little from the praiseworthy, though sometimes impracticable, policy of providing a revenue commensurate with the annual expenditure. The supplies annually raised during the war were about five millions, more than double the revenue of James II. But a great decline took place in the produce of the taxes by which that revenue was levied. In 1693, the customs had dwindled to less than half their amount before the revolution, the excise duties to little more than half.* This rendered heavy impositions on land inevitable; a tax always obnoxious, and keeping up disaffection in the most powerful class of the community. The first land-tax was imposed in 1690, at the rate of three shillings in the pound on the rental; and it continued ever afterwards to be annually granted, at different rates, but commonly at four shillings in the pound, till it was made perpetual in 1798. A tax of twenty per cent. might well seem grievous; and the notorious inequality of the assessment in different counties tended rather to aggravate the burthen upon those whose contribution was the fairest. Fresh schemes of finance were devised, and, on the whole, patiently borne by a jaded people. The Bank of England rose under the auspices of the whig party, and materially relieved the immediate exigencies of the government, while it palliated the general distress, by discounting bills and lending money at an easier rate of interest. Yet its notes were depreciated by twenty per cent. in exchange for silver; and exchequer tallies at least twice as much, till they were funded at an interest of eight per cent.† But,

chequer, including loans, during the whole reign of William, amounted to rather more than 72,000,000*l.* The author of the Letter to the Rev. T. Carte, in answer to the latter's Letter to a By-stander, estimates the sums raised under Charles II., from Christmas, 1660, to Christmas, 1684, at 46,233,923*l.* Carte had made them only 32,474,265*l.* But his estimate is evidently false and deceptive. Both reckon the gross produce, not the exchequer payments. This controversy was about the year 1742. According to Sinclair, Hist. of Revenue, i. 309., Carte had the last word; but I cannot conceive how he answered the above-mentioned letter to him. Whatever might be the relative expenditure of the two reigns, it is evident that the war of 1689 was brought on in a great measure by the corrupt policy of Charles II.

* Davenant, Essay on Ways and Means. In another of his tracts, vol. ii. 266. edit. 1771, this writer computes the payments of the state in 1688 at one shilling in the pound of the national income; but after the war at two shillings and sixpence.

† Godfrey's Short Account of Bank of England, in Somers Tracts, xi. 5. Ken-

these resources generally falling very short of calculation, and being anticipated at such an exorbitant discount, a constantly increasing deficiency arose; and public credit sunk so low, that about the year 1696 it was hardly possible to pay the fleet and army from month to month, and a total bankruptcy seemed near at hand. These distresses again were enhanced by the depreciation of the circulating coin, and by the bold remedy of a re-coinage, which made the immediate stagnation of commerce more complete. The mere operation of exchanging the worn silver coin for the new, which Mr. Montague had the courage to do without lowering the standard, cost the government two millions and a half. Certainly the vessel of our commonwealth has never been so close to shipwreck as in this period; we have seen the storm raging in still greater terror round our heads, but with far stouter planks and tougher cables to confront and ride through it.

Those who accused William of neglecting the maritime force of England, knew little what they said, or cared little about its truth.* A soldier and a native of Holland, he naturally looked to the Spanish Netherlands as the theatre on which the battle of France and Europe was to be fought. It was by the possession of that country and its chief fortresses that Louis aspired to hold Holland in vassalage, to menace the coasts of England, and to keep the Empire under his influence. And if, with the assistance of those brave regiments, who learned, in the well-contested though unfortunate battles of that war, the skill and discipline which

net's complete Hist. iii. 723. Ralph, 681. Shrewsbury Papers. Macpherson's Annals of Commerce, A. D. 1697. Sinclair's Hist of Revenue.

* "Nor is it true that the sea was neglected; for I think during much the greater part of the war which began in 1689 we were entirely masters of the sea, by our victory in 1692, which was only three years after it broke out; so that for seven years we carried the *broom*. And for any neglect of our sea affairs otherwise, I believe, I may in a few words prove that all the princes since the Conquest never made so remarkable an improvement to our naval strength as king William. He (Swift) should have been told, if he did not know, what havoc the Dutch had made of our shipping in king Charles the Second's reign; and that his successor, king James the Second, had not in his whole navy, fitted out to defeat the designed invasion of the prince of Orange, an individual ship of the first or second rank, which all lay neglected, and mere skeletons of former services, at their moorings. These this abused prince repaired at an immense charge, and brought them to their pristine magnificence." Answer to Swift's Conduct of the Allies, in Somers Tracts, xiii. 247.

made them conquerors in the next, it was found that France was still an overmatch for the allies, what would have been effected against her by the decrepitude of Spain, the perverse pride of Austria, and the selfish disunion of Germany? The commerce of France might, perhaps, have suffered more by an exclusively maritime warfare; but we should have obtained this advantage, which in itself is none, and would not have essentially crippled her force, at the price of abandoning to her ambition the quarry it had so long in pursuit. Meanwhile the naval annals of this war added much to our renown; Russell, glorious in his own despite at La Hogue, Rooke, and Shovel kept up the honour of the English flag. After that great victory, the enemy never encountered us in battle; and the wintering of the fleet at Cadiz in 1694, a measure determined on by William's energetic mind, against the advice of his ministers, and in spite of the fretful insolence of the admiral, gave us so decided a pre-eminence both in the Atlantic and Mediterranean seas, that it is hard to say what more could have been achieved by the most exclusive attention to the navy.* It is true that, especially during the first part of the war, vast losses were sustained through the capture of merchant ships; but this is the inevitable lot of a commercial country, and has occurred in every war, until the practice of placing the traders under convoy of armed ships was introduced. And, when we consider the treachery which pervaded this service and the great facility of secret intelligence which the enemy possessed, we may be astonished that our failures and losses were not still more decisive.

Treaty of Ryswick.

The treaty of Ryswick was concluded on at least as fair terms as almost perpetual ill fortune could warrant us to expect. It compelled Louis XIV. to recognise the king's title, and thus both humbled the court of St. Germains, and put an end for several years to its intrigues.

* Dalrymple has remarked the important consequences of this bold measure; but we have learned only by the publication of lord Shrewsbury's Correspondence, that it originated with the king, and was carried through by him against the mutinous remonstrances of Russell. See pp. 68. 104. 202. 210. 234. This was a most odious man; as ill-tempered and violent as he was perfidious. But the rudeness with which the king was treated by some of his servants is very remarkable. Lord Sunderland wrote to him at least with great bluntness. Hardwicke Papers, 444.

It extinguished, or rather the war itself had extinguished, one of the bold hopes of the French court, the scheme of procuring the election of the dauphin to the Empire. It gave at least a breathing time to Europe, so long as the feeble lamp of Charles II.'s life should continue to glimmer, during which the fate of his vast succession might possibly be regulated without injury to the liberties of Europe.* But to those who looked with the king's eyes on the prospects of the Continent, this pacification could appear nothing else than a preliminary armistice of vigilance and preparation. He knew that the Spanish dominions, or at least as large a portion of them as could be grasped by a powerful arm, had been for more than thirty years the object of Louis XIV. The acquisitions of that monarch at Aix-la-Chapelle and Nimeguen had been comparatively trifling, and seem hardly enough to justify the dread that Europe felt of his aggressions. But in contenting himself for the time with a few strong towns, or a moderate district, he constantly kept in view the weakness of the king of Spain's constitution. The queen's renunciation of her right of succession was invalid in the jurisprudence of his court. Sovereigns, according to the public law of France, uncontrollable by the rights of others, were incapable of limiting their own. They might do all things but guarantee the privileges of their subjects or the independence of foreign states. By the queen of France's death, her claim, upon the inheritance of Spain had devolved upon the dauphin; so that ultimately, and virtually in the first instance, the two great monarchies would be consolidated, and a single will would direct a force much more than equal to all the rest of Eu-

* The peace of Ryswick was absolutely necessary, not only on account of the defection of the duke of Savoy, and the manifest disadvantage with which the allies carried on the war, but because public credit in England was almost annihilated, and it was hardly possible to pay the army. The extreme distress for money is forcibly displayed in some of the king's letters to lord Shrewsbury. P. 114, &c. These were in 1696, the very *nadir* of English prosperity; from which, by the favour of Providence and the buoyant energies of the nation, we have, though not quite with an uniform motion, culminated to our present height (1824).

If the treaty could have been concluded on the basis originally laid down, it would even have been honourable. But the French rose in their terms during their negotiation; and through the selfishness of Austria obtained Strasburg, which they had at first offered to relinquish, and were very near getting Luxemburg. Shrewsbury Correspondence, 316, &c. Still the terms were better than those offered in 1693, which William has been censured for refusing.

rope. If we admit that every little oscillation in the balance of power has sometimes been too minutely regarded by English statesmen, it would be absurd to contend, that such a subversion of it as the union of France and Spain under one head did not most seriously threaten both the independence of England and Holland.

Jealousy of the commons.

The house of commons which sat at the conclusion of the treaty of Ryswick, chiefly composed of whigs, and having zealously co-operated in the prosecution of the late war, could not be supposed lukewarm in the cause of liberty, or indifferent to the aggrandisement of France. But the nation's exhausted state seemed to demand an intermission of its burthens, and revived the natural and laudable disposition to frugality which had characterised in all former times an English parliament. The arrears of the war, joined to loans made during its progress, left a debt of about seventeen millions, which excited much inquietude, and evidently could not be discharged but by steady retrenchment and uninterrupted peace. But, besides this, a reluctance to see a standing army established prevailed among the great majority both of whigs and tories. It was unknown to their ancestors — this was enough for one party; it was dangerous to liberty — this alarmed the other. Men of ability and honest intention, but, like most speculative politicians of the sixteenth and seventeenth centuries, rather too fond of seeking analogies in ancient history, influenced the public opinion by their writings, and carried too far the undeniable truth, that a large army at the mere control of an ambitious prince may often overthrow the liberties of a people.* It was not sufficiently remembered that the bill of rights, the annual mutiny-bill, the necessity of annual votes of supply for the maintenance of a regular army, besides, what was far more than all, the publicity of all acts of government, and the strong spirit of liberty burning in the people, had materially diminished a danger which it would not be safe entirely to contemn.

* Moyle now published his "Argument, showing that a standing army is inconsistent with a free government, and absolutely destructive to the constitution of the English monarchy." (State Tracts, temp. W. III. ii. 564.); and Trenchard his History of Standing Armies in England. Id. 653. Other pamphlets of a similar description may be found in the same volume.

Such, however, was the influence of what may be called the constitutional antipathy of the English in that age to a regular army, that the commons, in the first session after the peace, voted that all troops raised since 1680 should be disbanded, reducing the forces to about 7000 men, which they were with difficulty prevailed upon to augment to 10,000.* They resolved at the same time that, "in a just sense and acknowledgment of what great things his majesty has done for these kingdoms, a sum not exceeding 700,000*l.* be granted to his majesty during his life, for the support of the civil list." So ample a gift from an impoverished nation is the strongest testimony of their affection to the king.† But he was justly disappointed by the former vote, which, in the hazardous condition of Europe, prevented this country from wearing a countenance of preparation, more likely to avert than to bring on a second conflict. He permitted himself, however, to carry this resentment too far, and lost sight of that subordination to the law which is the duty of an English sovereign, when he evaded compliance with this resolution of the commons, and took on himself the unconstitutional responsibility of leaving sealed orders, when he went to Holland, that 16,000 men should be kept up, without the knowledge of his ministers, which they as unconstitutionally obeyed. In the next session a new parliament having been elected, full of men strongly imbued with what the courtiers styled commonwealth principles, or an extreme jealousy of royal power‡, it was found impossible to resist a

Army reduced.

* Journals, 11th Dec. 1697. Parl. Hist. 1167.

† Journals, 21st Dec. 1697. Parl. Hist. v. 1168. It was carried by 225 to 86.

‡ "The elections fell generally," says Burnet, "on men who were in the interest of government; many of them had indeed some popular notions, which they had drank in under a bad government, and thought this ought to keep them under a good one; so that those who wished well to the public did apprehend great difficulties in managing them." Upon which speaker Onslow has a very proper note: "They might happen to think," he says, "a good one might become a bad one, or a bad one might succeed to a good one. They were the best men of the age, and were for maintaining the revolution government by its own principles, and not by those of a government it had superseded." "The elections," we read in a letter of Mr. Montague, Aug. 1698, "have made a humour appear in the counties that is not very comfortable to us who are in business. But yet, after all, the present members are such as will neither hurt England nor this government, but I believe they must be handled very nicely." Shrewsbury Correspondence, 551. This parliament, however, fell into a great mistake about the reduction of the army; as Bolingbroke in his Letters on History very candidly admits, though connected with those who had voted for it.

diminution of the army to 7000 troops.* These two were voted to be natives of the British dominions; and the king incurred the severest mortification of his reign, in the necessity of sending back his regiments of Dutch guards and French refugees. The messages that passed between him and the parliament bear witness how deeply he felt, and how fruitlessly he deprecated, this act of unkindness and ingratitude, so strikingly in contrast with the deference that parliament has generally shown to the humours and prejudices of the crown in matters of far higher moment.† The foreign troops were too numerous, and it would have been politic to conciliate the nationality of the multitude by reducing their number; yet they had claims which a grateful and generous people should not have forgotten: they were, many of them, the chivalry of protestantism, the Huguenot gentlemen who had lost all but their swords in a cause which we deemed our own; they were the men who had terrified James from Whitehall, and brought about a deliverance, which, to speak plainly, we had neither sense nor courage to achieve for ourselves, or which at least we could never have achieved without enduring the convulsive throes of anarchy.

Irish forfeitures resumed.

There is, if not more apology for the conduct of the commons, yet more to censure on the king's side, in another scene of humiliation which he passed through, in the business of the Irish forfeitures. These confiscations of the property of those who had fought on the side of James, though, in a legal sense, at the crown's disposal, ought undoubtedly to have been applied to the public service. It was the intention of parliament that two thirds at least of these estates should be sold for that purpose; and William had, in answer to an address (Jan. 1690), promised to make

* Journals, 17th Dec. 1698. Parl. Hist. 1191.

† Journals, 10th Jan. 18th, 20th, and 25th March. Lords' Journals, 8th Feb. Parl. Hist. 1167. 1191. Ralph, 808. Burnet, 219. It is now beyond doubt that William had serious thoughts of quitting the government, and retiring to Holland, sick of the faction and ingratitude of this nation. Shrewsbury Correspondence, 571. Hardwicke papers, 362. This was in his character, and not like the vulgar story which that retailer of all gossip, Dalrymple, calls a well-authenticated tradition, that the king walked furiously round his room, exclaiming, "If I had a son, by G— the guards should not leave me." It would be vain to ask how this son would have enabled him to keep them against the bent of the parliament and people.

no grant of them till the matter should be considered in the ensuing session. Several bills were brought in to carry the original resolutions into effect, but, probably through the influence of government, they always fell to the ground in one or other house of parliament. Meanwhile the king granted away the whole of these forfeitures, about a million of acres, with a culpable profuseness, to the enriching of his personal favourites, such as the earl of Portland and the countess of Orkney.* Yet as this had been done in the exercise of a lawful prerogative, it is not easy to justify the act of resumption passed in 1699. The precedents for resumption of grants were obsolete, and from bad times. It was agreed on all hands that the royal domain is not inalienable; if this were a mischief, as could not perhaps be doubted, it was one that the legislature had permitted with open eyes till there was nothing left to be alienated. Acts therefore of this kind shake the general stability of possession, and destroy that confidence in which the practical sense of freedom consists, that the absolute power of the legislature, which in strictness is as arbitrary in England as in Persia, will be exercised in consistency with justice and lenity. They are also accompanied for the most part, as appears to have been the case in this instance of the Irish forfeitures, with partiality and misrepresentation as well as violence, and seldom fail to excite an odium far more than commensurate to the transient popularity which attends them at the outset.†

* The prodigality of William in grants to his favourites was an undeniable reproach to his reign. Charles II. had, however, with much greater profuseness, though much less blamed for it, given away almost all the crown lands in a few years after the restoration; and the commons could not now be prevailed upon to shake those grants, which was urged by the court, in order to defeat the resumption of those in the present reign. The length of time undoubtedly made a considerable difference. An enormous grant of the crown's domanial rights in North Wales to the earl of Portland excited much clamour in 1697, and produced a speech from Mr. Price, afterwards a baron of the exchequer, which was much extolled for its boldness, not rather to say, virulence and disaffection. This is printed in Parl. Hist. 978., and many other books. The king, on an address from the house of commons revoked the grant, which indeed was not justifiable. His answer on this occasion, it may here be remarked, was by its mildness and courtesy a striking contrast to the insolent rudeness with which the Stuarts, one and all, had invariably treated the house.

† Parl. Hist. 1171. 1202, &c. Ralph, Burnet, Shrewsbury Correspondence. See also Davenant's Essay on Grants and Resumptions, and sundry pamphlets in Somers Tracts, vol. ii., and State Tracts, temp. W. III. vol. ii.

But, even if the resumption of William's Irish grants could be reckoned defensible, there can be no doubt that the mode adopted by the commons, of tacking, as it was called, the provisions for this purpose to a money bill, so as to render it impossible for the lords even to modify them without depriving the king of his supply, tended to subvert the constitution and annihilate the rights of a co-equal house of parliament. This most reprehensible device, though not an unnatural consequence of their pretended right to an exclusive concern in money bills, had been employed in a former instance during this reign.* They were again successful on this occasion; the lords receded from their amendments, and passed the bill at the king's desire, who perceived that the fury of the commons was tending to a terrible convulsion.† But the precedent was infinitely dangerous to their legislative power. If the commons, after some more attempts of the same nature, desisted from so unjust an encroachment, it must be attributed to that which has been the great preservative of the equilibrium in our government, the public voice of a reflecting people, averse to manifest innovation, and soon offended by the intemperance of factions.

Parliamentary enquiries.

The essential change which the fall of the old dynasty had wrought in our constitution displayed itself in such a vigorous spirit of enquiry and interference of parliament with all the course of government as, if not absolutely new, was more uncontested and more effectual than before the revolution. The commons indeed under Charles II. had not wholly lost sight of the precedents which the long parliament had established for them; though with continual resistance from the court, in which their right of examination was by no means admitted. But the tories throughout the reign of William evinced a departure from the ancient principles of their faction in nothing more than in asserting to the fullest extent the powers and privileges of the commons; and, in the coalition they formed with the malecontent whigs, if the men of liberty adopted the nickname of the men of prerogative, the latter did not less take up the maxims and

* In Feb. 1692.

† See the same authorities, especially the Shrewsbury Letters, p. 602.

feelings of the former. The bad success and suspected management of public affairs co-operated with the strong spirit of party to establish this important accession of authority to the house of commons. In June, 1689, a special committee was appointed to enquire into the miscarriages of the war in Ireland, especially as to the delay in relieving Londonderry. A similar committee was appointed in the lords. The former reported severely against colonel Lundy, governor of that city; and the house addressed the king, that he might be sent over to be tried for the treasons laid to his charge.* I do not think there is any earlier precedent in the Journals for so specific an enquiry into the conduct of a public officer, especially one in military command. It marks therefore very distinctly the change of spirit which I have so frequently mentioned. No courtier has ever since ventured to deny this general right of enquiry, though it is a frequent practice to elude it. The right to enquire draws with it the necessary means, the examination of witnesses, records, papers, enforced by the strong arm of parliamentary privilege. In one respect alone these powers have fallen rather short; the commons do not administer an oath; and having neglected to claim this authority in the irregular times when they could make a privilege by a vote, they would now perhaps find difficulty in obtaining it by consent of the house of peers. They renewed this committee for enquiring into the miscarriages of the war in the next session.† They went very fully into the dispute between the board of admiralty and admiral Russell, after the battle of La Hogue‡; and the year after investigated the conduct of his successors, Killigrew and Delaval, in the command of the Channel fleet.§ They went, in the winter of 1694, into a very long examination of the admirals and the orders issued by the admiralty during the preceding year; and then voted that the sending the fleet to the Mediterranean, and the continuing it there this winter, has been to the honour and interest of his majesty and his kingdoms.‖ But it is

* Commons' Journals, June 1. Aug. 12.

† Id. Nov. 1.

‡ Parl. Hist. 657. Dalrymple. Commons' and Lords' Journals.

§ Parl. Hist. 793. Delaval and Killigrew were Jacobites, whom William generously but imprudently put into the command of the fleet.

‖ Commons' Journals, Feb. 27. 1694–5.

hardly worth while to enumerate later instances of exercising a right which had become indisputable, and, even before it rested on the basis of precedent, could not reasonably be denied to those who might advise, remonstrate, and impeach.

It is not surprising that, after such important acquisitions of power, the natural spirit of encroachment, or the desire to distress a hostile government, should have led to endeavours, which by their success would have drawn the executive administration more directly into the hands of parliament. A proposition was made by some peers, in December, 1692, for a committee of both houses to consider of the present state of the nation, and what advice should be given to the king concerning it. This dangerous project was lost by 48 to 36, several tories and dissatisfied whigs uniting in a protest against its rejection.* The king had in his speech to parliament requested their advice in the most general terms; and this slight expression, though no more than is contained in the common writ of summons, was tortured into a pretext for so extraordinary a proposal as that of a committee of delegates, or council of state, which might soon have grasped the entire administration. It was at least a remedy so little according to precedent, or the analogy of our constitution, that some very serious cause of dissatisfaction with the conduct of affairs could be its only excuse.

Burnet has spoken with reprobation of another scheme engendered by the same spirit of enquiry and control, that of a council of trade, to be nominated by parliament, with powers for the effectual preservation of the interests of the merchants. If the members of it were intended to be immovable, or if the vacancies were to be filled by consent of parliament, this would indeed have encroached on the prerogative in a far more eminent degree than the famous India bill of 1783, because its operation would have been more extensive and more at home. And, even if they were only named in the first instance, as has been usual in parliamentary commissioners of account or enquiry, it would still be material to ask, what extent of power for the preservation of trade was to be placed in their hands. The precise nature of the scheme is not

* Parl. Hist. 941. Burnet, 105.

explained by Burnet. But it appears by the Journals that this council was to receive information from merchants as to the necessity of convoys, and send directions to the board of admiralty, subject to the king's control, to receive complaints and represent the same to the king, and in many other respects to exercise very important and anomalous functions. They were not however to be members of the house. But even with this restriction, it was too hazardous a departure from the general maxims of the constitution.*

The general unpopularity of William's administration, and more particularly the reduction of the forces, afford an ample justification for the two treaties of partition, which the tory faction, with scandalous injustice and inconsistency, turned to his reproach. No one could deny that the aggrandisement of France by both of these treaties was of serious consequence. But, according to English interests, the first object was to secure the Spanish Netherlands from becoming provinces of that power; the next to maintain the real independence of Spain and the Indies. Italy was but the last in order; and though the possession of Naples and Sicily, with the ports of Tuscany, as stipulated in the treaty of partition, would have rendered France absolute mistress of that whole country and of the Mediterranean sea, and essentially changed the balance of Europe, it was yet more tolerable than the acquisition of the whole monarchy in the name of a Bourbon prince, which the opening of the succession without previous arrangement was likely to produce. They at least who shrunk from the thought of another war, and studiously depreciated the value of continental alliances, were the last who ought to have exclaimed against a treaty which had been ratified as the sole means of giving us something like security without the cost of fighting for it. Nothing therefore could be more unreasonable than the clamour of a tory house of commons in 1701 (for the malecontent whigs were now so consolidated with the tories as in general to bear their name) against the partition treaties; nothing more unfair than the impeachment of the four lords, Portland, Orford,

Treaties of partition.

* Burnet, 163. Commons' Journals, Jan. 31. 1695–6. An abjuration of king James's title in very strong terms was proposed as a qualification for members of this council; but this was lost by 195 to 188.

Somers, and Halifax, on that account. But we must at the same time remark, that it is more easy to vindicate the partition treaties themselves, than to reconcile the conduct of the king and of some others with the principles established in our constitution. William had taken these important negotiations wholly into his own hands, not even communicating them to any of his English ministers, except lord Jersey, until his resolution was finally settled. Lord Somers, as chancellor, had put the great seal to blank powers, as a legal authority to the negotiators; which evidently could not be valid, unless on the dangerous principle that the seal is conclusive against all exception.* He had also sealed the ratification of the treaty, though not consulted upon it, and though he seems to have had objections to some of the terms; and in both instances he set up the king's command as a sufficient defence. The exclusion of all those whom, whether called privy or cabinet counsellors, the nation holds responsible for its safety, from this great negotiation, tended to throw back the whole executive government into the single will of the sovereign, and ought to have exasperated the house of commons far more than the actual treaties of partition, which may probably have been the safest choice in a most perilous condition of Europe. The impeachments however were in most respects so ill substantiated by proof, that they have generally been reckoned a disgraceful instance of party spirit.†

* See speaker Onslow's Note on Burnet (Oxf. edit. iv. 468.), and lord Hardwicke's hint of his father's opinion. Id. 475. But see also lord Somers's plea as to this. State Trials, xiii. 267.

† Parl. Hist. State Trials, xiv. 233. The letters of William, published in the Hardwicke State Papers, are both the most authentic and the most satisfactory explanation of his policy during the three momentous years that closed the seventeenth century. It is said, in a note of lord Hardwicke on Burnet (Oxford edit. iv. 417.) (from lord Somers's papers), that when some of the ministers objected to parts of the treaty, lord Portland's constant answer was, that nothing could be altered; upon which one of them said, if that was the case, he saw no reason why they should be called together. And it appears by the Shrewsbury Papers, p. 371., that the duke, though secretary of state, and in a manner prime minister, was entirely kept by the king out of the secret of the negotiations which ended in the peace of Ryswick: whether, after all, there remained some lurking distrust of his fidelity, or from whatever other cause this took place, it was very anomalous and unconstitutional. And it must be owned, that by this sort of proceeding, which could have no sufficient apology but a deep sense of the unworthiness of mankind, William brought on himself much of that dislike which appears so ungrateful and unaccountable.

As to the impeachments, few have pretended to justify them; even Ralph is

The whigs, such of them at least as continued to hold that name in honour, soon forgave the mistakes and failings of their great deliverer; and indeed a high regard for the memory of William III. may justly be reckoned one of the tests by which genuine whiggism, as opposed both to tory and republican principles, has always been recognised. By the opposite party he was rancorously hated; and their malignant calumnies still sully the stream of history.* Let us leave such as prefer Charles I. to William III. in the enjoyment of prejudices which are not likely to be overcome by argument. But it must ever be an honour to the English crown that it has been worn by so great a man. Compared with him, the statesmen who surrounded his throne, the Sunderlands, Godolphins, and Shrewsburys, even the Somerses and Montagues, sink into insignificance. He was, in truth, too great, not for the times wherein he was called to action, but for the peculiar condition of a king of England after the revolution; and as he was the last sovereign of this country, whose understanding and energy of character have been very distinguished, so was he the last who has encountered the resistance of his parliament, or stood apart and undisguised in the maintenance of his own prerogative. His reign is no doubt one of the most important in our constitutional history, both on account of its general character, which I have slightly sketched, and of those beneficial alterations in our law to which it gave rise. These now call for our attention.

Improvements in constitution under William.

The enormous duration of seventeen years, for which Charles II. protracted his second parliament, turned the thoughts of all who desired improvements in the constitution towards some limitation on a prerogative which had not hitherto been thus abused. Not only

Bill for triennial parliaments.

half ashamed of the party he espouses with so little candour towards their adversaries. The scandalous conduct of the tories in screening the earl of Jersey, while they impeached the whig lords, some of whom had really borne no part in a measure he had promoted, sufficiently displays the factiousness of their motives. See lord Haversham's speech on this. Parl. Hist. 1298.

* Bishop Fleetwood, in a sermon, preached in 1703, says of William, "whom all the world of friends and enemies knew how to value, except a *few English wretches*." Kennet, 840. Boyer, in his History of the Reign of Queen Anne, p. 12., says that the king spent most of his private fortune, computed at no less than two millions, in the service of the English nation. I should be glad to have found this vouched by better authority.

the continuance of the same house of commons during such a period destroyed the connexion between the people and their representatives, and laid open the latter, without responsibility, to the corruption which was hardly denied to prevail; but the privilege of exemption from civil process made needy and worthless men secure against their creditors, and desirous of a seat in parliament as a complete safeguard to fraud and injustice. The term of three years appeared sufficient to establish a control of the electoral over the representative body, without recurring to the ancient but inconvenient scheme of annual parliaments, which men enamoured of a still more popular form of government than our own were eager to recommend. A bill for this purpose was brought into the house of lords in December, 1689, but lost by the prorogation.* It passed both houses early in 1693, the whigs, generally supporting, and the tories opposing it; but on this, as on many other great questions of this reign, the two parties were not so regularly arrayed against each other as on points of a more personal nature.† To this bill the king refused his assent: an exercise of prerogative which no ordinary circumstances can reconcile either with prudence or with a constitutional administration of government, but which was too common in this reign. But the commons, as it was easy to foresee, did not abandon so important a measure; a similar bill received the royal assent in November, 1694.‡ By the triennial bill it was simply provided that every parliament should cease and determine within three years from its meeting. The clause contained in the act of Charles II. against the intermission of parliaments for more than three years is repeated; but it was not thought necessary to revive the somewhat violent and perhaps impracticable provisions by which the act of 1641 had secured their meeting; it being evident that even annual sessions might now be relied upon as indispensable to the machine of government.

This annual assembly of parliament was rendered necessary, in the first place, by the strict appropriation of the revenue according to votes of supply. It was secured next,

* Lords' Journals. † Parl. Hist. 754. ‡ 6 W. & M. c. 2.

by passing the mutiny-bill, under which the army is held together, and subjected to military discipline, for a short term, seldom or never exceeding twelve months. These are the two effectual securities against military power; that no pay can be issued to the troops without a previous authorisation by the commons in a committee of supply, and by both houses in an act of appropriation; and that no officer or soldier can be punished for disobedience, nor any court martial held, without the annual re-enactment of the mutiny-bill. Thus it is strictly true that, if the king were not to summon parliament every year, his army would cease to have a legal existence; and the refusal of either house to concur in the mutiny-bill would at once wrest the sword out of his grasp. By the bill of rights, it is declared unlawful to keep any forces in time of peace without consent of parliament. This consent, by an invariable and wholesome usage, is given only from year to year; and its necessity may be considered perhaps the most powerful of those causes which have transferred so much even of the executive power into the management of the two houses of parliament.

The reign of William is also distinguished by the provisions introduced into our law for the security of the subject against iniquitous condemnations on the charge of high treason, and intended to perfect those of earlier times, which had proved insufficient against the partiality of judges. But upon this occasion it will be necessary to take up the history of our constitutional law on this important head from the beginning. Law of treason.

In the earlier ages of our law, the crime of high treason appears to have been of a vague and indefinite nature, determined only by such arbitrary construction as the circumstances of each particular case might suggest. It was held treason to kill the king's father or his uncle; and Mortimer was attainted for accroaching, as it was called, royal power; that is, for keeping the administration in his own hands, though without violence towards the reigning prince. But no people can enjoy a free constitution, unless an adequate security is furnished by their laws against this discretion of judges in a matter so closely connected with the mutual relation between the government and its subjects. A petition

was accordingly presented to Edward III. by one of the best parliaments that ever sat, requesting that "whereas the king's justices in different counties adjudge men indicted before them to be traitors for divers matters not known by the commons to be treasonable, the king would, by his council, and the nobles, and learned men (les grands et sages) of the land, declare in parliament what should be held for treason." The answer to this petition is in the words of the existing statute, which, as it is by no means so prolix as it is important, I shall place before the reader's eyes.

"Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the king, of my lady his queen, or of their eldest son and heir: or if a man do violate the king's companion or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir: or if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be proveably attainted of open deed by people of their condition; and if a man counterfeit the king's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England, as the money called Lusheburg, or other like to the said money of England, knowing the money to be false, to merchandise or make payment in deceipt of our said lord the king and of his people; and if a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their place doing their offices; and it is to be understood, that in the cases above rehearsed, it ought to be judged treason which extends to our lord the king and his royal majesty. And of such treason the forfeiture of the escheats pertaineth to our lord the king, as well of the lands and tenements holden of others as of himself."*

Statute of Edward III.

* Rot. Parl. ii. 239. 3 Inst. 1.

It seems impossible not to observe that the want of distinct arrangement natural to so unphilosophical an age, and which renders many of our old statutes very confused, is eminently displayed in this strange conjunction of offences; where to counterfeit the king's seal, which might be for the sake of private fraud, and even his coin, which must be so, is ranged along with all that really endangers the established government, with conspiracy and insurrection. But this is an objection of little magnitude, compared with one that arises out of an omission in enumerating the modes whereby treason could be committed. In most other offences, the intention, however manifest, the contrivance, however deliberate, the attempt, however casually rendered abortive, form so many degrees of malignity, or at least of mischief, which the jurisprudence of most countries, and none more, at least formerly, than England, has been accustomed to distinguish from the perpetrated action by awarding an inferior punishment, or even none at all. Nor is this distinction merely founded on a difference in the moral indignation with which we are impelled to regard an inchoate and a consummate crime, but is warranted by a principle of reason, since the penalties attached to the completed offence spread their terror over all the machinations preparatory to it; and he who fails in his stroke has had the murderer's fate as much before his eyes as the more dexterous assassin. But those who conspire against the constituted government connect in their sanguine hope the assurance of impunity with the execution of their crime, and would justly deride the mockery of an accusation which could only be preferred against them when their banners were unfurled, and their force arrayed. It is as reasonable therefore, as it is conformable to the usages of every country, to place conspiracies against the sovereign power upon the footing of actual rebellion, and to crush those by the penalties of treason, who, were the law to wait for their opportunity, might silence or pervert the law itself. Yet in this famous statute we find it only declared treasonable to compass or imagine the king's death; while no project of rebellion appears to fall within the letter of its enactments, unless it ripen into a substantive act of levying war.

Its constructive interpretation.

We may be, perhaps, less inclined to attribute this material omission to the laxity which has been already remarked to be usual in our older laws, than to apprehensions entertained by the barons that, if a mere design to levy war should be rendered treasonable, they might be exposed to much false testimony and arbitrary construction. But strained constructions of this very statute, if such were their aim, they did not prevent. Without adverting to the more extravagant convictions under this statute in some violent reigns, it gradually became an established doctrine with lawyers, that a conspiracy to levy war against the king's person, though not in itself a distinct treason, may be given in evidence as an overt act of compassing his death. Great as the authorities may be on which this depends, and reasonable as it surely is that such offences should be brought within the pale of high treason, yet it is almost necessary to confess, that this doctrine appears utterly irreconcilable with any fair interpretation of the statute. It has indeed, by some, been chiefly confined to cases where the attempt meditated is directly against the king's person, for the purpose of deposing him, or of compelling him, while under actual duress, to a change of measures; and this was construed into a compassing of his death, since any such violence must endanger his life, and because, as has been said, the prisons and graves of princes are not very distant.* But it seems not very reasonable to found a capital conviction on such a sententious remark; nor is it by any means true that a design against a king's life is neces-

* 3 Inst. 12. 1 Hale's Pleas of the Crown, 120. Foster, 195. Coke lays it down positively, p. 14., that a conspiracy to levy war is not high treason, as an overt act of compassing the king's death. "For this were to confound the several classes or membra dividentia." Hale objects that Coke himself cites the case of lords Essex and Southampton, which seems to contradict that opinion. But it may be answered, in the first place, that a conspiracy to levy war was made high treason during the life of Elizabeth; and secondly, that Coke's words as to that case are, that they "intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her council, and *for that end did assemble a multitude of people*: this being raised to the end aforesaid, was a sufficient overt act of compassing the death of the queen." The earliest case is that of Storie, who was convicted of compassing the queen's death on evidence of exciting a foreign power to invade the kingdom. But he was very obnoxious; and the precedent is not good. Hale, 122.

It is also held that an actual levying war may be laid as an overt act of compassing the king's death, which indeed follows à fortiori from the former proposition; provided it be not a constructive rebellion, but one really directed against the royal authority. Hale, 123.

sarily to be inferred from the attempt to get possession of his person. So far indeed is this from being a general rule, that in a multitude of instances, especially during the minority or imbecility of a king, the purposes of conspirators would be wholly defeated by the death of the sovereign whose name they designed to employ. But there is still less pretext for applying the same construction to schemes of insurrection, when the royal person is not directly the object of attack, and where no circumstance indicates any hostile intention towards his safety. This ample extension of so penal a statute was first given, if I am not mistaken, by the judges in 1663, on occasion of a meeting by some persons at Farley Wood in Yorkshire*, in order to concert measures for a rising. But it was afterwards confirmed in Harding's case, immediately after the revolution, and has been repeatedly laid down from the bench in subsequent proceedings for treason, as well as in treatises of very great authority.† It has therefore all the weight of established precedent; yet I question whether another instance can be found in our jurisprudence of giving so large a construction, not only to a penal, but to any other statute.‡ Nor does it speak in favour of this construction, that temporary laws have been enacted on various occasions to render a conspiracy to levy war treasonable; for which purpose, according to this current doctrine, the statute of Edward III. needed no supplemental provision. Such acts were passed under Elizabeth, Charles II.,

* Hale, 121.

† Foster's Discourse on High Treason, 196. State Trials, xii. 646. 790. 818.; xiii. 62. (sir John Friend's case) et alibi. This important question having arisen on lord Russell's trial, gave rise to a controversy between two eminent lawyers, sir Bartholomew Shower and sir Robert Atkins; the former maintaining, the latter denying, that a conspiracy to depose the king and to seize his guards was an overt act of compassing his death. State Trials, ix. 719. 818.

See also Phillipps's State Trials, ii. 39. 78.; a work to which I might have referred in other places, and which shows the well-known judgment and impartiality of the author.

‡ In the whole series of authorities, however, on this subject, it will be found that the probable danger to the king's safety from rebellion was the groundwork upon which this constructive treason rested; nor did either Hale or Forster, Pemberton or Holt, ever dream that any other death was intended by the statute than that of nature. It was reserved for a modern crown lawyer to resolve this language into a metaphysical personification, and to argue that the king's person being interwoven with the state, and its sole representative, any conspiracy against the constitution must of its own nature be a conspiracy against his life. State Trials, xxiv. 1183.

and George III., each of them limited to the existing reign.* But it is very seldom that, in an hereditary monarchy, the reigning prince ought to be secured by any peculiar provisions; and though the remarkable circumstances of Elizabeth's situation exposed her government to unusual perils, there seems an air of adulation or absurdity in the two latter instances. Finally, the act of 57 G. 3. c. 6. has confirmed, if not extended, what stood on rather a precarious basis, and rendered perpetual that of 36 G. 3. c. 7., which enacts, "that, if any person or persons whatsoever, during the life of the king, and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of the same our sovereign lord the king, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of his majesty's dominions or countries, or to levy war against his majesty, his heirs and successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe, both houses, or either house of parliament, or to move or stir any foreigner or stranger with force to invade this realm, or any other his majesty's dominions or countries under the obeisance of his majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, and intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed; being legally convicted thereof upon the oaths of two lawful and credible witnesses, shall be adjudged a traitor, and suffer as in cases of high treason."

This from henceforth will become our standard of law in cases of treason, instead of the statute of Edward III., the latterly received interpretations of which it sanctions and embodies. But it is to be noted as the doctrine of our most approved authorities, that a conspiracy for many purposes

* 13 Eliz. c. 1.; 13 Car. 2. c. 1.; 36 G. 3. c. 7.

which, if carried into effect, would incur the guilt of treason, will not of itself amount to it. The constructive interpretation of compassing the king's death appears only applicable to conspiracies, whereof the intent is to depose or to use personal compulsion towards him, or to usurp the administration of his government.* But though insurrections in order to throw down all enclosures, to alter the established law or change religion, or in general for the reformation of alleged grievances of a public nature, wherein the insurgents have no special interests, are in themselves treasonable, yet the previous concert and conspiracy for such purpose could, under the statute of Edward III., only pass for a misdemeanour. Hence, while it has been positively laid down, that an attempt by intimidation and violence to force the repeal of a law is high treason†, though directed rather against the two houses of parliament than the king's person, the judges did not venture to declare that a mere conspiracy and consultation to raise a force for that purpose would amount to that offence.‡ But the statutes of 36 & 57 G. 3. determine the intention to levy war, in order to put any force upon or to intimidate either house of parliament, manifested by any overt act, to be treason, and so far have undoubtedly extended the scope of the law. We may hope that so ample a legislative declaration on the law of treason will put an end to the preposterous interpretations which have found too much countenance on some not very distant occasions. The crime of compassing and imagining the king's death must be manifested by some overt act; that is, there must be something done in execution of a traitorous purpose. For, as no hatred towards the person of the sovereign, nor any longings for his death, are the imagination which the law here intends, it seems to follow that loose words or writings, in which such hostile feelings may be embodied, unconnected with any positive design, cannot amount to treason. It is now therefore generally agreed, that no words will constitute that offence, unless as evidence of some overt act of treason; and the

* Hale, 123. Foster, 213.

† Lord George Gordon's case, State Trials, xxi. 649.

‡ Hardy's case, Id. xxiv. 208. The language of chief justice Eyre is sufficiently remarkable.

same appears clearly to be the case with respect at least to unpublished writings.*

The second clause of the statute, or that which declares the levying of war against the king within the realm to be treason, has given rise, in some instances, to constructions hardly less strained than those upon compassing his death. It would indeed be a very narrow interpretation, as little required by the letter as warranted by the reason of this law, to limit the expression of levying war to rebellions, whereof the deposition of the sovereign, or subversion of his government, should be the deliberate object. Force, unlawfully directed against the supreme authority, constitutes this offence; nor could it have been admitted as an excuse for the wild attempt of the earl of Essex, on this charge of levying war, that his aim was not to injure the queen's person, but to drive his adversaries from her presence. The only questions as to this kind of treason are; first, what shall be understood by force? and, secondly, where it shall be construed to be directed against the government? And the solution of both these, upon consistent principles, must so much depend on the circumstances which vary the character of almost every case, that it seems natural to distrust the general maxims that have been delivered by lawyers. Many decisions in cases of treason before the revolution were made by men so servile and corrupt, they violate so grossly all natural right and all reasonable interpretation of law, that it has generally been accounted among the most important benefits of that event to have restored a purer administration of criminal justice. But, though the memory of those who pronounced these decisions is stigmatized, their authority, so far from being abrogated, has influenced later and better men; and it is rather an unfortunate circumstance, that precedents which, from the character of the times when they occurred, would lose at present

* Foster, 198. He seems to concur in Hale's opinion, that words which being spoken will not amount to an overt act to make good an indictment for compassing the king's death, yet if reduced into writing, and published, will make such an overt act, "if the matters contained in them import such a compassing." Hale's Pleas of Crown, 118. But this is indefinitely expressed, the words marked as a quotation looking like a truism, and contrary to the first part of the sentence; and the case of Williams, under James I., which Hale cites in corroboration of this, will hardly be approved by any constitutional lawyer.

all respect, having been transfused into text-books, and formed perhaps the sole basis of subsequent decisions, are still in not a few points the invisible foundation of our law. No lawyer, I conceive, prosecuting for high treason in this age, would rely on the case of the duke of Norfolk under Elizabeth, or that of Williams under James I., or that of Benstead under Charles I.; but he would certainly not fail to dwell on the authorities of sir Edward Coke and sir Matthew Hale. Yet these eminent men, and especially the latter, aware that our law is mainly built on adjudged precedent, and not daring to reject that which they would not have themselves asserted, will be found to have rather timidly exercised their judgment in the construction of this statute, yielding a deference to former authority which we have transferred to their own.

These observations are particularly applicable to that class of cases so repugnant to the general understanding of mankind, and, I believe, of most lawyers, wherein trifling insurrections for the purpose of destroying brothels or meeting-houses have been held treasonable under the clause of levying war. Nor does there seem any ground for the defence which has been made for this construction, by taking a distinction, that although a rising to effect a partial end by force is only a riot, yet, where a general purpose of the kind is in view it becomes rebellion; and thus, though to pull down the enclosures in a single manor be not treason against the king, yet to destroy all enclosures throughout the kingdom would be an infringement of his sovereign power. For, however solid this distinction may be, yet in the class of cases to which I allude, this general purpose was neither attempted to be made out in evidence, nor rendered probable by the circumstances; nor was the distinction ever taken upon the several trials. A few apprentices rose in London in the reign of Charles II., and destroyed some brothels.* A mob of watermen and others, at the time of Sacheverell's impeachment, set on fire several dissenting meeting-houses.† Every thing like

* Hale, 134. State Trials, vi. 879. It is observable that Hale himself, as chief baron, differed from the other judges in this case.

† This is the well-known case of Damaree and Purchase, State Trials, xv. 520. Foster, 213. A rabble had attended Sacheverell from Westminster to his lodgings in the Temple. Some among them proposed to pull down the meeting-houses; a cry was raised, and several of these were destroyed. It ap-

a formal attack on the established government is so much excluded in these instances by the very nature of the offence and the means of the offenders, that it is impossible to withhold our reprobation from the original decision, upon which, with too much respect for unreasonable and unjust authority, the later cases have been established. These indeed still continue to be cited as law; but it is much to be doubted whether a conviction for treason will ever again be obtained, or even sought for, under similar circumstances. One reason indeed for this, were there no weight in any other, might suffice; the punishment of tumultuous risings, attended with violence, has been rendered capital by the riot act of George I. and other statutes; so that, in the present state of the law, it is generally more advantageous for the government to treat such an offence as felony than as treason.

It might for a moment be doubted, upon the statute of Edward VI., whether the two witnesses whom the act requires must not depose to the same overt acts of treason. But, as this would give an undue security to conspirators, so it is not necessarily implied by the expression; nor would it be indeed the most unwarrantable latitude that has been given to this branch of penal law, to maintain that two witnesses to any distinct acts comprised in the same indictment would satisfy the letter of this enactment. But a more wholesome distinction appears to have been taken before the revolution, and is established by the statute of William, that, although different overt acts may be proved by two witnesses, they must relate to the same species of treason, so that one witness to an alleged act of compassing the king's death cannot be conjoined with another deposing to an act of

Statute of William III.

peared to be their intention to pull down all within their reach. Upon this overt act of levying war the prisoners were convicted; some of the judges differing as to one of them, but merely on the application of the evidence to his case. Nothwithstanding this solemn decision, and the approbation with which sir Michael Foster has stamped it, some difficulty would arise in distinguishing this case, as reported, from many indictments under the riot act for mere felony; and especially from those of the Birmingham rioters in 1791, where the similarity of motives, though the mischief in the latter instance was far more extensive, would naturally have suggested the same species of prosecution as was adopted against Damaree and Purchase. It may be remarked that neither of these men was executed; which, notwithstanding the sarcastic observation of Foster, might possibly be owing to an opinion, which every one but a lawyer must have entertained, that their offence did not amount to treason.

levying war, in order to make up the required number.* As for the practice of courts of justice before the restoration, it was so much at variance with all principles, that few prisoners were allowed the benefit of this statute †; succeeding judges fortunately deviated more from their predecessors in the method of conducting trials than they have thought themselves at liberty to do in laying down rules of law.

Nothing had brought so much disgrace on the councils of government and on the administration of justice, nothing had more forcibly spoken the necessity of a great change, than the prosecutions for treason during the latter years of Charles II., and in truth during the whole course of our legal history. The statutes of Edward III. and Edward VI., almost set aside by sophistical constructions, required the corroboration of some more explicit law; and some peculiar securities were demanded for innocence against that conspiracy of the court with the prosecutor which is so much to be dreaded in all trials for political crimes. Hence the attainders of Russell, Sidney, Cornish, and Armstrong were reversed by the convention-parliament without opposition; and men attached to liberty and justice, whether of the whig or tory name, were anxious to prevent any future recurrence of those iniquitous proceedings, by which the popular frenzy at one time, the wickedness of the court at another, and in each instance with the co-operation of a servile bench of judges, had sullied the honour of English justice. A better tone of political sentiment had begun indeed to prevail, and the spirit of the people must ever be a more effectual security than the virtue of the judges; yet, even after the revolution, if no unjust or illegal convictions in cases of treason can be imputed to our tribunals, there was still not a little of that rudeness towards the prisoner, and manifestation of a desire to interpret all things to his prejudice, which had been more grossly displayed by the bench under Charles II. The jacobites, against whom the law now directed its terrors, as loudly complained of Treby and Pollexfen, as the whigs had of Scroggs and Jefferies, and weighed the convictions

* W. 3. c. 3. § 4. Foster, 257. † Foster, 234.

of Ashton and Anderton against those of Russell and Sidney.*

Ashton was a gentleman, who, in company with lord Preston, was seized in endeavouring to go over to France with an invitation from the jacobite party. The contempopary writers on that side, and some historians who incline to it, have represented his conviction as grounded upon insufficient, because only upon presumptive, evidence. It is true that in most of our earlier cases of treason, treasonable facts have been directly proved; whereas it was left to the jury in that of Ashton, whether they were satisfied of his acquaintance with the contents of certain papers taken on his person. There does not, however, seem to be any reason why presumptive inferences are to be rejected in charges of treason, or why they should be drawn with more hesitation than in other grave offences; and if this be admitted, there can be no doubt that the evidence against Ashton was such as is ordinarily reckoned conclusive. It is stronger than that offered for the prosecution against O'Quigley at Maidstone in 1798, a case of the closest resemblance; and yet I am not aware that the verdict in that instance was thought open to censure. No judge, however, in modern times, would question, much less reply upon, the prisoner, as to material points of his defence, as Holt and Pollexfen did in this trial; the practice of a neighbouring kingdom, which, in our more advanced sense of equity and candour, we are agreed to condemn.†

It is perhaps less easy to justify the conduct of chief justice Treby in the trial of Anderton for printing a treasonable pamphlet. The testimony came very short of satisfactory proof, according to the established rules of English law,

* "Would you have trials secured?" says the author of the Jacobite Principles vindicated. (Somers Tracts, 10. 526.) "It is the interest of all parties care should be taken about them, or all parties will suffer in their turns. Plunket, and Sidney, and Ashton were doubtless all murdered, though they were never so guilty of the crimes wherewith they were charged; the one tried twice, the other found guilty upon one evidence, and the last upon nothing but presumptive proof." Even the prostitute lawyer, sir Bartholomew Shower, had the assurance to complain of uncertainty in the law of treason. Id. 572. And Roger North, in his Examen, p. 411., labours hard to show that the evidence in Ashton's case was slighter than in Sidney's.

† State Trials, xii. 646. — See 668. and 799.

though by no means such as men in general would slight. It chiefly consisted of a comparison between the characters of a printed work found concealed in his lodgings and certain types belonging to his press; a comparison manifestly less admissible than that of hand-writing, which is always rejected, and indeed totally inconsistent with the rigour of English proof. Besides the common objections made to a comparison of hands, and which apply more forcibly to printed characters, it is manifest that types cast in the same font must always be exactly similar. But, on the other hand, it seems unreasonable absolutely to exclude, as our courts have done, the comparison of hand-writing as inadmissible evidence; a rule which is every day eluded by fresh rules, not much more rational in themselves, which have been invented to get rid of its inconvenience. There seems, however, much danger in the construction which draws printed libels, unconnected with any conspiracy, within the pale of treason, and especially the treason of compassing the king's death, unless where they directly tended to his assassination. No later authority can, as far as I remember, be adduced for the prosecution of any libel as treasonable, under the statute of Edward III. But the pamphlet for which Anderton was convicted was certainly full of the most audacious jacobitism, and might perhaps fall, by no unfair construction, within the charge of adhering to the king's enemies; since no one could be more so than James, whose design of invading the realm had been frequently avowed by himself.*

A bill for regulating trials upon charges of high treason passed the commons with slight resistance from the crown lawyers in 1691.† The lords introduced a provision in their own favour, that upon the trial of a peer in the court of the high steward, all such as were entitled to vote should be regularly summoned; it having been the practice to select twenty-three at the discretion of the crown. Those who wished to hinder the bill availed themselves of the jealousy

* State Trials, xii. 1245. Ralph, 420. Somers Tracts, x. 472. The jacobites took a very frivolous objection to the conviction of Anderton, that printing could not be treason within the statute of Edward III., because it was not invented for a century afterwards. According to this rule, it could not be treason to shoot the king with a pistol, or poison him with an American drug.

† Parl. Hist. v. 698.

which the commons in that age entertained of the upper house of parliament, and persuaded them to disagree with this just and reasonable amendment.* It fell to the ground therefore on this occasion; and, though more than once revived in subsequent sessions, the same difference between the two houses continued to be insuperable.† In the new parliament that met in 1695, the commons had the good sense to recede from an irrational jealousy. Notwithstanding the reluctance of the ministry, for which perhaps the very dangerous position of the king's government furnishes an apology, this excellent statute was enacted as an additional guarantee (in such bad times as might again occur) to those who are prominent in their country's cause, against the great danger of false accusers and iniquitous judges.‡ It provides that all persons indicted for high treason shall have a copy of their indictment delivered to them five days before their trial, a period extended by a subsequent act to ten days, and a copy of the panel of jurors two days before their trial; that they shall be allowed to have their witnesses examined on oath, and to make their defence by counsel. It clears up any doubt that could be pretended on the statute of Edward VI., by requiring two witnesses, either both to the same overt act, or the first to one, the second to another overt act of the same treason, (that is, the same kind of treason,) unless the party shall voluntarily confess the charge.§ It limits prosecutions for treason to the term of three years, except in the case of an attempted assassination on the king. It includes the contested provision for the trial of peers by all who have a right to sit and vote in parliament. A later statute, 7 Anne, c. 21., which may be mentioned here as the complement of the former, has added a peculiar privilege to the accused,

* Parl. Hist. v. 675.

† Id. 712. 737. Commons' Journal, Feb. 8. 1695.

‡ Parl. Hist. 965. Journal, 17th Feb. 1696. Stat. 7 W. 3. c. 3. Though the court opposed this bill, it was certainly favoured by the zealous whigs as much as by the opposite party.

§ When several persons of distinction were arrested on account of a jacobite conspiracy in 1690, there was but one witness against some of them. The judges were consulted whether they could be indicted for a high misdemeanour on this single testimony, as Hampden had been in 1685; the attorney-general Treby maintaining this to be lawful. Four of the judges were positively against this, two more doubtfully the same way, one altogether doubtful, and three in favour of it. The scheme was very properly abandoned; and at present, I suppose, nothing can be more established than the negative. Dalrymple, Append. 186.

hardly less material than any of the rest. Ten days before the trial, a list of the witnesses intended to be brought for proving the indictment, with their professions and places of abode, must be delivered to the prisoner, along with the copy of the indictment. The operation of this clause was suspended till after the death of the pretended prince of Wales.

Notwithstanding a hasty remark of Burnet, that the design of this bill seemed to be to make men as safe in all treasonable practices as possible, it ought to be considered a valuable accession to our constitutional law; and no part, I think, of either statute will be reckoned inexpedient, when we reflect upon the history of all nations, and more especially of our own. The history of all nations, and more especially of our own, in the fresh recollection of those who took a share in these acts, teaches us that false accusers are always encouraged by a bad government, and may easily deceive a good one. A prompt belief in the spies whom they perhaps necessarily employ, in the voluntary informers who dress up probable falsehoods, is so natural and constant in the offices of ministers, that the best are to be heard with suspicion when they bring forward such testimony. One instance, at least, had occurred since the revolution, of charges unquestionably false in their specific details, preferred against men of eminence by impostors who panted for the laurels of Oates and Turberville.* And, as men who are accused of conspiracy against a government are generally such as are beyond question disaffected to it, the indiscriminating temper of the prejudging people, from whom juries must be taken, is as much to be apprehended, when it happens to be favourable to authority, as that of the government itself; and requires as much the best securities, imperfect as the best are, which prudence and patriotism can furnish to innocence. That the prisoner's witnesses should be examined on oath will of course not be disputed, since by a subsequent statute that strange and unjust anomaly in our criminal law has been removed in all cases as well as in treason; but the judges had sometimes not been ashamed to point out to the jury, in derogation of the credit of those whom a prisoner called in his

* State Trials, xii. 1051.

behalf, that they were not speaking under the same sanction as those for the crown. It was not less reasonable that the defence should be conducted by counsel; since that excuse which is often made for denying the assistance of counsel on charges of felony, namely, the moderation of prosecutors and the humanity of the bench, could never be urged in those political accusations wherein the advocates for the prosecution contend with all their strength for victory; and the impartiality of the court is rather praised when it is found than relied upon beforehand.* Nor does there lie, perhaps, any sufficient objection even to that which many dislike, which is more questionable than the rest, the furnishing a list of the witnesses to the prisoner, when we set on the other side the danger of taking away innocent lives by the testimony of suborned and infamous men, and remember also that a guilty person can rarely be ignorant of those who will bear witness against him; or if he could, that he may always discover those who have been examined before the grand jury.

The subtlety of crown lawyers in drawing indictments for treason, and sometimes the willingness of judges to favour such prosecutions, have considerably eluded the chief difficulties which the several statutes appear to throw in their way. The government has at least had no reason to complain that the construction of those enactments has been too rigid. The overt acts laid in the indictment are expressed so generally that they give sometimes little insight into the particular circumstances to be adduced in evidence; and, though the act of William is positive that no evidence shall be given of any overt act not laid in the indictment, it has been held allowable, and is become the constant practice, to bring forward such evidence, not as substantive charges, but on the pretence

* The dexterity with which lord Shaftesbury (the author of the Characteristics), at that time in the house of commons, turned a momentary confusion which came upon him while speaking on this bill, into an argument for extending the aid of counsel to those who might so much more naturally be embarrassed on a trial for their lives, is well known. All well-informed writers ascribe this to Shaftesbury. But Johnson, in the Lives of the Poets, has, through inadvertence, as I believe, given lord Halifax (Montagu) the credit of it; and some have since followed him. As a complete refutation of this mistake, it is sufficient to say that Mr. Montagu *opposed* the bill. His name appears as a teller on two divisions, 31st Dec. 1691, and 18th Nov. 1692.

of its tending to prove certain other acts specially alleged. The disposition to extend a constructive interpretation to the statute of Edward III. has continued to increase; and was carried, especially by chief-justice Eyre in the trials of 1794, to a length at which we lose sight altogether of the plain meaning of words, and apparently much beyond what Pemberton, or even Jefferies, had reached. In the vast mass of circumstantial testimony which our modern trials for high treason display, it is sometimes difficult to discern whether the great principle of our law, requiring two witnesses to overt acts, has been adhered to; for certainly it is not adhered to, unless such witnesses depose to acts of the prisoner, from which an inference of his guilt is immediately deducible.* There can be no doubt that state prosecutions have long been conducted with an urbanity and exterior moderation unknown to the age of the Stuarts, or even to that of William; but this may by possibility be compatible with very partial wresting of the law, and the substitution of a sort of political reasoning for that strict interpretation of penal statutes which the subject has a right to demand. No confidence in the general integrity of a government, much less in that of its lawyers, least of all any belief in the guilt of an accused person, should beguile us to remit that vigilance which is peculiarly required in such circumstances.†

For this vigilance, and indeed for almost all that keeps up in us, permanently and effectually, the spirit of regard to liberty and the public good, we must look to the unshackled and independent energies of the press. In the reign of William III., and through the influence of the popular principle in our constitution, this finally became free. The licensing act, suffered to expire in 1679, was revived in 1685 for seven years. In 1692, it was continued till the end of the session of 1693. Several attempts were afterwards made to

* It was said by Scroggs and Jefferies, that if one witness prove that A. bought a knife, and another that he intended to kill the king with it, these are two witnesses within the statute of Edward VI. But this has been justly reprobated.

† Upon some of the topics touched in the foregoing pages, besides Hale and Foster, see Luders' Considerations on the Law of Treason in Levying War, and many remarks in Phillipps's State Trials; besides much that is scattered through the notes of Mr. Howell's great collection. Mr. Phillipps's work, however, was not published till after my own was written.

renew its operation, which the less courtly whigs combined with the tories and jacobites to defeat.* Both parties indeed employed the press with great diligence in this reign; but while one degenerated into malignant calumny and misrepresentation, the signal victory of liberal principles is manifestly due to the boldness and eloquence with which they were promulgated. Even during the existence of a censorship, a host of unlicensed publications, by the negligence or connivance of the officers employed to seize them, bore witness to the inefficacy of its restrictions. The bitterest invectives of jacobitism were circulated in the first four years after the revolution.†

Liberty of the press.

The liberty of the press consists, in a strict sense, merely in an exemption from the superintendence of a licenser. But it cannot be said to exist in any security, or sufficiently for its principal ends, where discussions of a political or religious nature, whether general or particular, are restrained by too narrow and severe limitations. The law of libel has always been indefinite; an evil probably beyond any complete remedy, but which evidently renders the liberty of free discussion rather more precarious in its exercise than might be wished. It appears to have been the received doctrine in Westminster-Hall before the revolution, that no man might publish a writing reflecting on the government, nor upon the character, or even capacity and fitness, of any one employed in it. Nothing having passed to change the law, the law remained as before. Hence in the case of Tutchin, it is laid down by Holt, that to possess the people with an ill opinion of the government, that is, of the ministry, is a libel. And the attorney-general, in his speech for the prosecution, urges that there can be no reflection on those that are in office under her majesty, but it must cast some reflection on the queen who employs them. Yet in this case the censure upon the administration, in the passages selected

* Commons' Journals, 9th Jan. and 11th Feb. 1694–95. A bill to the same effect sent down from the lords was thrown out, 17th April, 1695. Another bill was rejected on the second reading in 1697. Id. 3d April.

† Somers Tracts, passim. John Dunton the bookseller, in the History of his Life and Errors, hints that unlicensed books could be published by a douceur to Robert Stephens, the messenger of the press, whose business it was to inform against them.

for prosecution, was merely general, and without reference to any person, upon which the counsel for Tutchin vainly relied.*

It is manifest that such a doctrine was irreconcilable with the interests of any party out of power, whose best hope to regain it is commonly by prepossessing the nation with a bad opinion of their adversaries. Nor would it have been possible for any ministry to stop the torrent of a free press, under the secret guidance of a powerful faction, by a few indictments for libel. They found it generally more expedient and more agreeable to borrow weapons from the same armoury, and retaliate with unsparing invective and calumny. This was first practised (first, I mean, with the avowed countenance of government) by Swift in the Examiner, and some of his other writings. And both parties soon went such lengths in this warfare that it became tacitly understood that the public characters of statesmen, and the measures of administration, are the fair topics of pretty severe attack.† Less than this indeed would not have contented the political temper of the nation, gradually and without intermission becoming more democratical, and more capable, as well as more accustomed, to judge of its general interests, and of those to whom they were intrusted. The just limit between political and private censure has been far better drawn in these later times, licentious as we still may justly deem the press, than in an age when courts of justice had not deigned to acknowledge, as they do

* State Trials, xiv. 1103. 1128. Mr. Justice Powell told the Rev. Mr. Stephens, in passing sentence on him for a libel on Harley and Marlborough, that to traduce the queen's ministers was a reflection on the queen herself. It is said however that this and other prosecutions were generally blamed; for the public feeling was strong in favour of the liberty of the press. Boyer's Reign of Queen Anne, p. 286.

† [In a tract called the "Memorial of the State of England," 1705, (Somers Tracts, xii. 526.) written on the whig side, in answer to Drake's "Memorial of the Church of England," we find a vindication of the press, which had been attacked, at that time, by the tories: "If the whigs have their Observator, have not the tories their Rehearsal? The Review does not take more liberty than the Whipping Post, nor is he a wilder politician than the Mercury. And many will think it a meaner character for Ridpath to be Atwood's antagonist than to be author of the Flying Post." The reign of Anne was the era of *periodical* politics. Gutta cavat lapidem, non vi, sed sæpe cadendo. We well know how forcibly this line describes the action of the regular press. It did not begin to operate much before 1704 or 1705, when the whigs came into office, and the rejection of the occasional conformity bill blew up a flame in the opposite party. But even then it was confined to periodical papers, such as the Observator or Rehearsal; for the common newspapers were as yet hardly at all political. — 1845.]

at present, its theoretical liberty. No writer, except of the most broken reputation, would venture at this day on the malignant calumnies of Swift.

Law of libel.

Meanwhile the judges naturally adhered to their established doctrine; and, in prosecutions for political libels, were very little inclined to favour what they deemed the presumption, if not the licentiousness, of the press. They advanced a little farther than their predecessors; and, contrary to the practice both before and after the revolution, laid it down at length as an absolute principle, that falsehood, though always alleged in the indictment, was not essential to the guilt of the libel; refusing to admit its truth to be pleaded, or given in evidence, or even urged by way of mitigation of punishment.* But as the defendant could only be convicted by the verdict of a jury, and jurors both partook of the general sentiment in favour of free discussion, and might in certain cases have acquired some prepossessions as to the real truth of the supposed libel, which the court's refusal to enter upon it could not remove, they were often reluctant to find a verdict of guilty; and hence arose by degrees a sort of contention which sometimes showed itself upon trials, and divided both the profession of the law and the general public. The judges and lawyers, for the most part, maintained that the province of the jury was only to determine the fact of publication; and also whether what are called the innuendoes were properly filled up, that is, whether the libel meant that which it was alleged in the indictment to mean, not whether such meaning were criminal or innocent, a question of law which the court were exclusively competent

* Pemberton, as I have elsewhere observed, permitted evidence to be given as to the truth of an alleged libel in publishing that sir Edmondbury Godfrey had murdered himself. And what may be reckoned more important, in a trial of the famous Fuller on a similar charge, Holt repeatedly (not less than five times) offered to let him prove the truth if he could. State Trials, xiv. 534. But, on the trial of Franklin, in 1731, for publishing a libel in the Craftsman, lord Raymond positively refused to admit of any evidence to prove the matters to be true; and said he was only abiding by what had been formerly done in other cases of the like nature. Id. xvii. 659. [" To make it a libel," says Powell in the case of the seven bishops, " it must be false, it must be scandalous, and it must tend to sedition." Id. xii. 427. In 1 Lord Raymond, 486., we find a case where judgment was arrested on an indictment for a libel on persons " to the jurors unknown;" because they could not properly say that the matter was false and scandalous, when they did not know the persons of whom it was spoken, nor could they say that any one was defamed by it. — 1845.]

to decide. That the jury might acquit at their pleasure was undeniable; but it was asserted that they would do so in violation of their oaths and duty, if they should reject the opinion of the judge by whom they were to be guided as to the general law. Others of great name in our jurisprudence, and the majority of the public at large, conceiving that this would throw the liberty of the press altogether into the hands of the judges, maintained that the jury had a strict right to take the whole matter into their consideration, and determine the defendant's criminality or innocence according to the nature and circumstances of the publication. This controversy, which perhaps hardly arose within the period to which the present work relates, was settled by Mr. Fox's libel bill in 1792. It declares the right of the jury to find a general verdict upon the whole matter; and though, from causes easy to explain, it is not drawn in the most intelligible and consistent manner, was certainly designed to turn the defendant's intention, as it might be laudable or innocent, seditious or malignant, into a matter of fact for their enquiry and decision.

Religious toleration.

The revolution is justly entitled to honour as the era of religious, in a far greater degree than of civil liberty; the privileges of conscience having had no earlier magna charta and petition of right whereto they could appeal against encroachment. Civil, indeed, and religious liberty had appeared, not as twin sisters and co-heirs, but rather in jealous and selfish rivalry; it was in despite of the law, it was through infringement of the constitution, by the court's connivance, by the dispensing prerogative, by the declarations of indulgence under Charles and James, that some respite had been obtained from the tyranny which those who proclaimed their attachment to civil rights had always exercised against one class of separatists, and frequently against another.

At the time when the test law was enacted, chiefly with a view against popery, but seriously affecting the protestant non-conformists, it was the intention of the house of commons to afford relief to the latter by relaxing in some measure the strictness of the act of uniformity in favour of such ministers as might be induced to conform, and by granting

an indulgence of worship to those who should persist in their separation. This bill however dropped in that session. Several more attempts at an union were devised by worthy men of both parties in that reign, but with no success. It was the policy of the court to withstand a comprehension of dissenters; nor would the bishops admit of any concession worth the other's acceptance. The high-church party would not endure any mention of indulgence.* In the parliament

* See the pamphlets of that age, passim. One of these, entitled The Zealous and Impartial Protestant, 1681, the author of which, though well known, I cannot recollect, after much invective, says, "Liberty of conscience and toleration are things only to be talked of and pretended to by those that are under; but none like or think it reasonable that are in authority. 'Tis an instrument of mischief and dissettlement to be courted by those who would have change, but no way desirable by such as would be quiet, and have the government undisturbed. For it is not consistent with public peace and safety without a standing army; conventicles being eternal nurseries of sedition and rebellion." p. 30. "To strive for toleration," he says in another place, "is to contend against all government. It will come to this; whether there should be a government in the church or not? for if there be a government, there must be laws; if there be laws, there must be penalties annexed to the violation of those laws; otherwise the government is precarious and at every man's mercy; that is, it is none at all. . . . The constitution should be made firm, whether with any alterations or without them, and laws put in punctual vigorous execution. Till that is done all will signify nothing. The church hath lost all through remissness and non-execution of laws; and by the contrary course things must be reduced, or they never will. To what purpose are parliaments so concerned to prepare good laws, if the officers who are entrusted with the execution neglect that duty, and let them lie dead? This brings laws and government into contempt, and it were much better the laws were never made; by these the dissenters are provoked, and being not restrained by the exacting of the penalties, they are fiercer and more bent upon their own ways than they would be otherwise. But it may be said the execution of laws of conformity raiseth the cry of persecution; and will not that be scandalous? Not so scandalous as anarchy, schism, and eternal divisions and confusions both in church and state. Better that the unruly should clamour, than that the regular should groan, and all should be undone." p. 33. Another tract, "Short Defence of the Church and Clergy of England, 1679," declares for union (in his own way), but against a comprehension, and still more a toleration. "It is observable that whereas the best emperors have made the severest laws against all manner of sectaries, Julian the apostate, the most subtle and bitter enemy that Christianity ever had, was the man that set up this way of toleration." p. 87. Such was the temper of this odious faction. And at the time they were instigating the government to fresh severities, by which, I sincerely believe, they meant the pillory or the gallows (for nothing else was wanting), scarce a gaol in England was without non-conformist ministers. One can hardly avoid rejoicing that some of these men, after the revolution, experienced, not indeed the persecution, but the poverty they had been so eager to inflict on others.

The following passage from a very judicious tract on the other side, "Discourse of the Religion of England, 1667," may deserve to be extracted:—"Whether cogent reason speaks for this latitude, be it now considered. How momentous in the balance of this nation those protestants are which are dissatisfied, in the present ecclesiastical polity. They are every where spread through city and country; they make no small part of all ranks and sorts of men; by relations and commerce they are so woven into the nation's interest, that it is not easy to sever them without unravelling the whole. They are not excluded from the nobility,

of 1680, a bill to relieve protestant dissenters from the penalties of the 35th of Elizabeth, the most severe act in force against them, having passed both houses, was lost off the table of the house of lords, at the moment that the king came to give his assent; an artifice by which he evaded the odium of an explicit refusal.* Meanwhile the non-conforming ministers, and in many cases their followers, experienced a harassing persecution under the various penal laws that oppressed them; the judges, especially in the latter part of this reign, when some good magistrates were gone, and still more the justices of the peace, among whom a high-church ardour was prevalent, crowding the gaols with the pious confessors of puritanism.† Under so rigorous an administration of statute law, it was not unnatural to take the shelter offered by the declaration of indulgence; but the dissenters never departed from their ancient abhorrence of popery and arbitrary power, and embraced the terms of reconciliation and alliance which the church, in its distress, held out to them. A scheme of comprehension was framed under the auspices of archbishop Sancroft before the revolution. Upon the completion of the new settlement it was determined, with the apparent concurrence of the church, to grant an indulgence to separate conventicles, and at the same time, by enlarging the terms of conformity, to bring back those whose differences were not irreconcilable within the pale of the Anglican communion.

The act of toleration was passed with little difficulty, though not without murmurs of the bigoted churchmen.‡ It exempts from the penalties of existing statutes against separate conventicles, or absence from the established worship, such as should take the oath of allegiance, and subscribe the

among the gentry they are not a few; but none are of more importance than they in the trading part of the people and those that live by industry, upon whose hands the business of the nation lies much. It hath been noted that some who bear them no good will have said that the very air of corporations is infested with their contagion. And in whatsoever degree they are high or low, ordinarily for good understanding, steadiness and sobriety, they are not inferior to others of the same rank and quality; neither do they want the national courage of Englishmen." p. 23.

* Parl. Hist. iv. 1311. Ralph, 559.

† Baxter; Neal; Palmer's Non-conformist's Memorial.

‡ Parl. Hist. v. 263. Some of the tories wished to pass it only for seven years. The high-church pamphlets of the age grumble at the toleration.

declaration against popery, and such ministers of separate congregations as should subscribe the thirty-nine articles of the church of England, except three, and part of a fourth. It gives also an indulgence to quakers without this condition. Meeting-houses are required to be registered, and are protected from insult by a penalty. No part of this toleration is extended to papists, or to such as deny the Trinity. We may justly deem this act a very scanty measure of religious liberty; yet it proved more effectual through the lenient and liberal policy of the eighteenth century; the subscription to articles of faith, which soon became as obnoxious as that to matters of a more indifferent nature, having been practically dispensed with, though such a genuine toleration as Christianity and philosophy alike demand, had no place in our statute-book before the reign of George III.

Attempt at comprehension.

It was found more impracticable to overcome the prejudices which stood against any enlargement of the basis of the English church. The bill of comprehension, though nearly such as had been intended by the primate, and conformable to the plans so often in vain devised by the most wise and moderate churchmen, met with a very cold reception. Those among the clergy who disliked the new settlement of the crown (and they were by far the greater part) played upon the ignorance and apprehensions of the gentry. The king's suggestion in a speech from the throne, that means should be found to render all protestants capable of serving him in Ireland, as it looked towards a repeal or modification of the test act, gave offence to the zealous churchmen.* A clause proposed in the bill for changing the oaths of supremacy and allegiance, in order to take away the necessity of receiving the sacrament in the church, as a qualification for office, was rejected by a great majority of the lords, twelve whig peers protesting.† Though the bill of comprehension proposed to parliament went no farther than to leave a few scrupled ceremonies at discretion, and to admit presbyterian ministers into the church without pronouncing on the invalidity of their former

* Burnet. Parl. Hist. 184.

† Parl. Hist. 196.

ordination, it was mutilated in passing through the upper house; and the commons, after entertaining it for a time, substituted an address to the king, that he would call the house of convocation, "to be advised with in ecclesiastical matters."* It was of course necessary to follow this recommendation. But the lower house of convocation, as might be foreseen, threw every obstacle in the way of the king's enlarged policy. They chose a man as their prolocutor who had been forward in the worst conduct of the university of Oxford. They displayed in every thing a factious temper, which held the very names of concession and conciliation in abhorrence.† Meanwhile a commission of divines, appointed under the great seal, had made a revision of the liturgy, in order to eradicate every thing which could give a plausible ground of offence, as well as to render the service more perfect. Those of the high-church faction had soon seceded from this commission ‡; and its deliberations were doubtless the more honest and rational for their absence. But, as the complacence of parliament towards ecclesiastical authority had shown that no legislative measure could be forced against the resistance of the lower house of convocation, it was not thought expedient to lay before that ill-affected body the revised liturgy, which they would have employed as an engine of calumny against the bishops and the crown. The scheme of comprehension, therefore, fell absolutely and finally to the ground.§

A similar relaxation of the terms of conformity would, in the reign of Elizabeth, or even at the time of the Savoy conferences, have brought back so large a majority of dissenters that the separation of the remainder

Schism of the non-jurors.

* Parl. Hist. 212. 216.

† [The two houses of convocation differed about their address to the king, thanking him for his message about church reform. The lower house thought that proposed by the bishops too complimentary to the king and the revolution; one was at last agreed upon, omitting the panegyrical passages. See both in Wilkin's Concilia, iv. 620.—1845.]

‡ [Ralph, ii. 167. The words high and low church are said by Swift in the Examiner to have come in soon after the revolution. And probably they were not in common use before. But I find "high-church" named in a pamphlet of the reign of Charles II. It is in the Harleian Miscellany; but I have not got any more distinct reference.—1845.]

§ Burnet. Ralph. But a better account of what took place in the convocation and among the commissioners will be found in Kennet's Compl. Hist. 557, 558, &c.

could not have afforded any colour of alarm to the most jealous dignitary. Even now it is said that two thirds of the non-conformists would have embraced the terms of re-union. But the motives of dissent were already somewhat changed, and had come to turn less on the petty scruples of the elder puritans, and on the differences in ecclesiastical discipline, than on a dislike to all subscriptions of faith and compulsory uniformity. The dissenting ministers, accustomed to independence, and finding not unfrequently in the contributions of their disciples a better maintenance than court favour and private patronage have left for diligence and piety in the establishment, do not seem to have much regretted the fate of this measure. None of their friends, in the most favourable times, have ever made an attempt to renew it. There are indeed serious reasons why the boundaries of religious communion should be as widely extended as is consistent with its end and nature; and among these the hardship and detriment of excluding conscientious men from the ministry is not the least. Nor is it less evident that from time to time, according to the progress of knowledge and reason, to remove defects and errors from the public service of the church, even if they have not led to scandal or separation, is the bounden duty of its governors. But none of these considerations press much on the minds of statesmen; and it was not to be expected that any administration should prosecute a religious reform for its own sake, at the hazard of that tranquillity and exterior unity which is in general the sole end for which they would deem such a reform worth attempting. Nor could it be dissembled that, so long as the endowments of a national church are supposed to require a sort of politic organization within the commonwealth, and a busy spirit of faction for their security, it will be convenient for the governors of the state, whenever they find this spirit adverse to them, as it was at the revolution, to preserve the strength of the dissenting sects as a counterpoise to that dangerous influence, which in protestant churches, as well as that of Rome, has sometimes set up the interest of one order against that of the community. And though the church of England made a high vaunt of her loyalty, yet, as lord Shrewsbury told William of the tories in general, he must

remember that he was not their king; of which indeed he had abundant experience.

A still more material reason against any alteration in the public liturgy and ceremonial religion at that feverish crisis, unless with a much more decided concurrence of the nation than could be obtained, was the risk of nourishing the schism of the non-jurors. These men went off from the church on grounds merely political, or at most on the pretence that the civil power was incompetent to deprive bishops of their ecclesiastical jurisdiction; to which none among the laity, who did not adopt the same political tenets, were likely to pay attention. But the established liturgy was, as it is at present, in the eyes of the great majority, the distinguishing mark of the Anglican church, far more indeed than episcopal government, whereof so little is known by the mass of the people that its abolition, if we may utter such a paradox, would make no perceptible difference in their religion. Any change, though for the better, would offend those prejudices of education and habit, which it requires such a revolutionary commotion of the public mind as the sixteenth century witnessed, to subdue, and might fill the jacobite conventicles with adherents to the old church. It was already the policy of the non-juring clergy to hold themselves up in this respectable light, and to treat the Tillotsons and Burnets as equally schismatic in discipline and unsound in theology. Fortunately however they fell into the snare which the established church had avoided; and deviating, at least in their writings, from the received standard of Anglican orthodoxy, into what the people saw with most jealousy, a sort of approximation to the church of Rome, gave their opponents an advantage in controversy, and drew farther from that part of the clergy who did not much dislike their political creed. They were equally injudicious and neglectful of the signs of the times, when they promulgated such extravagant assertions of sacerdotal power as could not stand with the regal supremacy, or any subordination to the state. It was plain, from the writings of Leslie and other leaders of their party, that the mere restoration of the house of Stuart would not content them, without undoing all that had been enacted as to the

church from the time of Henry VIII.; and thus the charge of innovation came evidently home to themselves.*

The convention parliament would have acted a truly politic, as well as magnanimous, part in extending this boon, or rather this right, of religious liberty to the members of that unfortunate church, for whose sake the late king had lost his throne. It would have displayed to mankind that James had fallen, not as a catholic, nor for seeking to bestow toleration on catholics, but as a violator of the constitution. William, in all things superior to his subjects, knew that temporal, and especially military fidelity, would be in almost every instance proof against the seductions of bigotry. The Dutch armies have always been in a great measure composed of catholics; and many of that profession served under him in the invasion of England. His own judgment for the repeal of the penal laws had been declared even in the reign of James. The danger, if any, was now immensely diminished; and it appears in the highest degree probable that a genuine toleration of their worship, with no condition but the oath of allegiance, would have brought over the majority of that church to the protestant succession, so far at least as to engage in no schemes inimical to it. The wiser catholics would have perceived that, under a king of their own faith, or but suspected of an attachment to it, they must continue the objects of perpetual distrust to a protestant nation. They would have learned that conspiracy and jesuitical intrigue could but keep

* Leslie's Case of the Regale and Pontificate is a long, dull attempt to set up the sacerdotal order above all civil power, at least as to the exercise of its functions, and especially to get rid of the appointment of bishops by the crown, or, by parity of reasoning, of priests by laymen. He is indignant even at laymen choosing their chaplains, and thinks they ought to take them from the bishop; objecting also to the phrase, my chaplain, as if they were servants: "otherwise the expression is proper enough to say my chaplain, as I say my parish priest, my bishop, my king, or my God; which argues my being under their care and direction, and that I belong to them, not they to me." P. 182. [In another place he says, a man cannot serve two masters; therefore a peer should not have two chaplains.] It is full of enormous misrepresentation as to the English law. [Leslie, however, like many other controversialists, wrote impetuously and hastily for his immediate purpose. There is a great deal of contradiction between this "Case of the Regale and Pontificate," published in 1700 or 1701, and his "Case stated between the Churches of Rome and England," in 1713. In the latter, the whole reasoning is strictly protestant; and while in the Case of the Regale, he had set up the authority of the catholic church, as binding, not only to individuals, but to national churches, he here even asserts the right of private judgment, and denies that any general council ever did, or can exist.—1845.]

alive calumnious imputations, and diminish the respect which a generous people would naturally pay to their sincerity and their misfortune. Had the legislators of that age taken a still larger sweep, and abolished at once those tests and disabilities, which, once necessary bulwarks against an insidious court, were no longer demanded in the more republican model of our government, the jacobite cause would have suffered, I believe, a more deadly wound than penal statutes and double taxation were able to inflict. But this was beyond the philosophers, how much beyond the statesmen, of the time!

Laws against Roman Catholics.

The tories, in their malignant hatred of our illustrious monarch, turned his connivance at popery into a theme of reproach.* It was believed, and probably with truth, that he had made to his catholic allies promises of relaxing the penal laws; and the jacobite intriguers had the mortification to find that William had his party at Rome, as well as her exiled confessor of St. Germains. After the peace of Ryswick many priests came over, and showed themselves with such incautious publicity as alarmed the bigotry of the house of commons, and produced the disgraceful act of 1700 against the growth of popery.† The admitted aim of this statute was to expel the catholic proprietors of land, comprising many very ancient and wealthy families, by rendering it necessary for them to sell their estates. It first offers a reward of 100*l.* to any in-

* See Burnet (Oxf. iv. 409.) and lord Dartmouth's note.

† No opposition seems to have been made in the house of commons; but we have a protest from four peers against it. Burnet, though he offers some shameful arguments in favour of the bill, such as might justify any tyranny, admits that it contained some unreasonable severities, and that many were really adverse to it. A bill proposed in 1705, to render the late act against papists effective, was lost by 119 to 43 (Parl. Hist. vi. 514.); which shows that men were ashamed of what they had done. A proclamation, however, was issued in 1711, immediately after Guiscard's attempt to kill Mr. Harley, for enforcing the penal laws against Roman catholics, which was very scandalous, as tending to impute that crime to them. Boyer's Reign of Anne, p. 429. And in the reign of Geo. I. (1722) 100,000*l.* was levied by a particular act on the estates of papists and non-jurors. This was only carried by 188 to 172; sir Joseph Jekyll, and Mr. Onslow, afterwards speaker, opposing it, as well as lord Cowper in the other house. 9 G. 1. c. 18. Parl. Hist. viii. 51. 353. It was quite impossible that those who sincerely maintained the principles of toleration should long continue to make any exception; though the exception in this instance was wholly on political grounds, and not out of bigotry, it did not the less contravene all that Taylor and Locke had taught men to cherish.

former against a priest exercising his functions, and adjudges the penalty of perpetual imprisonment. It requires every person educated in the popish religion, or professing the same, within six months after he shall attain the age of eighteen years, to take the oaths of allegiance and supremacy, and subscribe the declaration set down in the act of Charles II. against transubstantiation and the worship of saints; in default of which he is incapacitated, not only to purchase, but to inherit or take lands under any devise or limitation. The next of kin being a protestant shall enjoy such lands during his life.* So unjust, so unprovoked a persecution is the disgrace of that parliament. But the spirit of liberty and tolerance was too strong for the tyranny of the law; and this statute was not executed according to its purpose. The catholic landholders neither renounced their religion, nor abandoned their inheritances. The judges put such constructions upon the clause of forfeiture as eluded its efficacy; and, I believe, there were scarce any instances of a loss of property under this law. It has been said, and I doubt not with justice, that the catholic gentry, during the greater part of the eighteenth century, were as a separated and half proscribed class among their equals, their civil exclusion hanging over them in the intercourse of general society†; but their notorious, though not unnatural, disaffection to the reigning family will account for much of this, and their religion was undoubtedly exercised with little disguise or apprehension. The laws were perhaps not much less severe and sanguinary than those which oppressed the protestants of France; but, in their actual administration, what a contrast between the government of George II. and Louis XV., between the gentleness of an English court of king's bench, and the ferocity of the parliaments of Aix and Thoulouse!

* 11 & 12 W. 3. c. 4. It is hardly necessary to add, that this act was repealed in 1779. [According to a paper printed by Dalrymple, vol. ii., Appendix, p. 12., the number of papists in England above the age of sixteen was but 13,856. This was not long after the revolution, though no precise date is given. The protestants, conformists and non-conformists, of the same age, are made to amount to 2,585,930. This would be not very far below the mark, as we know from other sources: but the number of catholics appears incredibly small.—1845.]

† Butler's Memoirs of Catholics, ii. 64.

The immediate settlement of the crown at the revolution extended only to the descendants of Anne and of William. The former was at that time pregnant, and became in a few months the mother of a son. Nothing therefore urged the convention-parliament to go any farther in limiting the succession. But the king, in order to secure the elector of Hanover to the grand alliance, was desirous to settle the reversion of the crown on his wife the princess Sophia and her posterity. A provision to this effect was inserted in the bill of rights by the house of lords. But the commons rejected the amendment with little opposition; not as Burnet idly insinuates, through the secret wish of a republican party (which never existed, or had no influence) to let the monarchy die a natural death, but from a just sense that the provision was unnecessary and might become inexpedient.* During the life of the young duke of Gloucester the course of succession appeared clear. But upon his untimely death in 1700, the manifest improbability that the limitations already established could subsist beyond the lives of the king and princess of Denmark made it highly convenient to preclude intrigue, and cut off the hopes of the jacobites, by a new settlement of the crown on a protestant line of princes.† Though the choice was truly free in the hands of parliament, and no pretext of absolute right could be advanced on any side, there was no question that the princess Sophia was the fittest object of the nation's preference. She was indeed very far removed from any hereditary title. Besides the pretended prince of Wales, and his sister, whose legitimacy no one disputed, there stood in her way the duchess of Savoy, daughter of Henrietta duchess of Orleans, and several of the Palatine family. These last had abjured the

Act of settlement.

* While the bill regulating the succession was in the house of commons, a proviso was offered by Mr. Godolphin, that nothing in this act is intended to be drawn into example or consequence hereafter, to prejudice the right of any protestant prince or princess in their hereditary succession to the imperial crown of those realms. This was much opposed by the whigs; both because it tended to let in the son of James II., if he should become a protestant, and for a more secret reason, that they did not like to recognise the continuance of any hereditary right. It was rejected by 179 to 125. Parl. Hist. v. 249. The lords' amendment in favour of the princess Sophia was lost without a division. Id. 339.

† [It is asserted by lord Dartmouth, in a note on Burnet, iv. 520., that some of the whigs had a project of bringing in the house of Hanover at once on the king's death. But no rational man could have thought of this.— 1845.]

reformed faith, of which their ancestors had been the strenuous assertors; but it seemed not improbable that some one might return to it; and, if all hereditary right of the ancient English royal line, the descendants of Henry VII., had not been extinguished, it would have been necessary to secure the succession of any prince; who should profess the protestant religion at the time when the existing limitations should come to an end.* According to the tenor and intention of the act of settlement, all prior claims of inheritance, save that of the issue of king William and the princess Anne, being set aside and annulled, the princess Sophia became the source of a new royal line.† The throne of England and Ireland, by virtue of the paramount will of parliament, stands entailed upon the heirs of her body, being protestants. In them the right is as truly hereditary as it ever was in the Plantagenets or the Tudors. But they derive it not from those ancient families. The blood indeed of Cerdic and of the Conqueror flows in the veins of his present majesty. Our Edwards and Henries illustrate the almost unrivalled splendour and antiquity of the house of Brunswic. But they have transmitted no more right to the allegiance of England than Boniface of Este or Henry the Lion. That rests wholly on the act of settlement, and resolves itself into the sovereignty of the legislature.

The majority of that house of commons which passed the bill of settlement consisted of those who having long opposed the administration of William, though with very different principles both as to the succession of the crown and its pre-

* The duchess of Savoy put in a very foolish protest against any thing that should be done to prejudice *her* right. Ralph, 924.

† [It might be urged against this, that the act of settlement *declares*, as well as enacts, the princess Sophia to be "next in succession, in the protestant line, to the imperial crown and dignity," &c. reciting also her descent from James I. But, if we take into consideration the public history of the transaction, and the necessity which was felt for a parliamentary settlement, we shall be led to think, that this was merely the assertion of a fact, and not a recognition of an existing right. This also seems to be the opinion of Blackstone, who treats the princess Sophia as a new *stirps* of the royal family. But it is probable that those who drew the bill meant to show the world, that we deviated as little as circumstances would admit from the hereditary line. The vote, in fact, of the convention-parliament in January, 1689, that the throne was then *vacant*, put an end, according to any legal analogies, to the supposition of a subsisting reversionary right. Nor do I conceive that many persons, conversant with our constitution, imagine any one to have a right to the crown, on the happily most improbable supposition of the extinction of our royal family. — *1845.*]

rogative, were now often called by the general name of tories. Some, no doubt, of these were adverse to a measure which precluded the restoration of the house of Stuart, even on the contingency that its heir might embrace the protestant religion.* But this party could not show itself very openly; and Harley, the new leader of the tories, zealously supported the entail of the crown on the princess Sophia. But it was determined to accompany this settlement with additional securities for the subject's liberty.† The bill of rights was reckoned hasty and defective; some matters of great importance had been omitted, and in the twelve years which had since elapsed, new abuses had called for new remedies. Eight articles were therefore inserted in the act of settlement, to take effect only from the commencement of the new limitation to the house of Hanover. Some of them, as will appear, sprung from a natural jealousy of this unknown and foreign line; some should strictly not have been postponed so long; but it is necessary to be content with what it is practicable to obtain. These articles are the following: —

Limitations of prerogative contained in it.

That whosoever shall hereafter come to the possession of this crown, shall join in communion with the church of England as by law established.

That in case the crown and imperial dignity of this realm shall hereafter come to any person, not being a native of this kingdom of England, this nation be not obliged to engage in any war for the defence of any dominions or territories which

* ["The whigs," says Bolingbroke, "had appeared zealous for the protestant succession, when king William proposed it after the death of the duke of Glocester. The tories voted for it then; and the acts that were judged necessary to secure it, some of them at least, were promoted by them. Yet were they not thought, nor did they affect, as the others did, to be thought extremely fond of it. King William did not come into this measure till *he found, upon trial, that there was no other safe and practicable*; and the tories had an air of coming into it for no other reason. Besides which, it is certain that there was at that time a much greater leaven of jacobitism in the tory camp, than at the time spoken of here." State of Parties at Accession of George I.—1845.]

† [It was resolved in a committee of the whole house, and agreed to by the house, that "for the preserving the peace and happiness of this kingdom and the security of the protestant religion by law established, it is absolutely necessary, a further declaration be made of the limitation and succession of the crown in the protestant line, after his majesty and the princess, and the heirs of their bodies respectively. Resolved, that farther provision be first made for security of the rights and liberties of the people." Commons' Journals, 2d March, 1700-1.—1845.]

do not belong to the crown of England, without the consent of parliament.

That no person who shall hereafter come to the possession of this crown, shall go out of the dominions of England, Scotland, or Ireland, without consent of parliament.

That from and after the time that the further limitation by this act shall take effect, all matters and things relating to the well governing of this kingdom, which are properly cognizable in the privy council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the privy council as shall advise and consent to the same.

That, after the said limitation shall take effect as aforesaid, no person born out of the kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging, (although he be naturalized or made a denizen — except such as are born of English parents,) shall be capable to be of the privy council, or a member of either house of parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments, from the crown, to himself, or to any other or others in trust for him.

That no person who has an office or place of profit under the king, or receives a pension from the crown, shall be capable of serving as a member of the house of commons.

That, after the said limitation shall take effect as aforesaid, judges' commissions be made quamdiu se bene gesserint, and their salaries ascertained and established; but, upon the address of both houses of parliament, it may be lawful to remove them.

That no pardon under the great seal of England be pleadable to an impeachment by the commons in parliament.*

The first of these provisions was well adapted to obviate the jealousy which the succession of a new dynasty, bred in a protestant church not altogether agreeing with our own, might excite in our susceptible nation. A similar apprehension of foreign government produced the second article, which so far limits the royal prerogative, that any minister

* 12 & 13 W. 3. c. 2.

who could be proved to have advised or abetted a declaration of war in the specified contingency would be criminally responsible to parliament.* The third article was repealed very soon after the accession of George I., whose frequent journeys to Hanover were an abuse of the graciousness with which the parliament consented to annul the restriction.†

A very remarkable alteration that had been silently wrought in the course of the executive government gave rise to the fourth of the remedial articles in the act of settlement. According to the original constitution of our monarchy, the king had his privy council composed of the great officers of state, and of such others as he should summon to it, bound by an oath of fidelity and secrecy, by whom all affairs of weight, whether as to domestic or exterior policy, were debated for the most part in his presence, and determined, subordinately of course to his pleasure, by the vote of the major part. It could not happen but that some councillors more eminent than the rest should form juntos or cabals, for more close and private management, or be selected as more confidential advisers of their sovereign; and the very name of a cabinet council as distinguished from the larger body, may be found as far back as the reign of Charles I. But the resolutions of the crown, whether as to foreign alliances or the issuing of proclamations and orders at home, or any other overt act of government, were not finally taken without the deliberation and assent of that body whom the law recognised as its sworn and notorious councillors. This was first broken in upon after the restoration, and especially after the fall of Clarendon, a strenuous assertor

Privy council superseded by a cabinet.

* It was frequently contended in the reign of George II. that subsidiary treaties for the defence of Hanover, or rather such as were covertly designed for that and no other purpose, as those with Russia and Hesse Cassel in 1755, were at least contrary to the spirit of the act of settlement. On the other hand it was justly answered that, although in case Hanover should be attacked on the ground of a German quarrel, unconnected with English politics, we were not bound to defend her; yet, if a power at war with England should think fit to consider that electorate as part of the king's dominions (which perhaps according to the law of nations might be done), our honour must require that it should be defended against such an attack. This is true; and yet it shows very forcibly that the separation of the two ought to have been insisted upon; since the present connexion engages Great Britain in a very disadvantageous mode of carrying on its wars, without any compensation of national wealth or honour; except indeed that of employing occasionally in its service a very brave and efficient body of troops.—1827.

† 1 G. 1. c. 51.

of the rights and dignity of the privy council. "The king," as he complains, "had in his nature so little reverence and esteem for antiquity, and did in truth so much contemn old orders, forms, and institutions, that the objection of novelty rather advanced than obstructed any proposition." * He wanted to be absolute on the French plan, for which both he and his brother, as the same historian tells us, had a great predilection, rather than obtain a power little less arbitrary, so far at least as private rights were concerned, on the system of his three predecessors. The delays and the decencies of a regular council, the continual hesitation of lawyers, were not suited to his temper, his talents, or his designs. And it must indeed be admitted that the privy council, even as it was then constituted, was too numerous for the practical administration of supreme power. Thus by degrees it became usual for the ministry or cabinet to obtain the king's final approbation of their measures, before they were laid, for a merely formal ratification, before the council.† It was one object of sir William Temple's short-lived scheme in 1679 to bring back the ancient course; the king pledging himself on the formation of his new privy council to act in all things by its advice.

Exclusion of placemen and pensioners from parliament.

During the reign of William, this distinction of the cabinet from the privy council, and the exclusion of the latter from all business of state, became more fully established.‡ This however produced a serious consequence as to the responsibility of the advisers of the crown; and at the very time when the controlling

* Life of Clarendon, 319. [It was not usual to have any privy councillors except great officers of state, and a few persons of high rank. This was rather relaxed after the restoration; but Clarendon opposed sir William Coventry's introduction into the council on this account. P. 565.—1845.]

† [Trenchard, in his Short History of Standing Armies, published about 1698, and again in 1731, says, "Formerly all matters of state and discretion were debated and resolved in the privy council, where every man subscribed his opinion, and was answerable for it. The late king Charles was the first who broke this most excellent part of our constitution, by settling a cabal or cabinet council, where all matters of consequence were debated and resolved, and then brought to the privy council to be confirmed." P. 9.—1845.]

‡ "The method is this," says a member in debate; "things are concerted in the cabinet, and then brought to the council; such a thing is resolved in the cabinet, and brought and put on them for their assent, without showing any of the reasons. That has not been the method of England. If this method be, you will never know who gives advice." Parl. Hist. v. 731. [In the Lords' house,

and chastising power of parliament was most effectually recognised, it was silently eluded by the concealment in which the objects of its inquiry could wrap themselves. Thus, in the instance of a treaty which the house of commons might deem mischievous and dishonourable, the chancellor setting the great seal to it would of course be responsible; but it is not so evident that the first lord of the treasury, or others more immediately advising the crown on the course of foreign policy, could be liable to impeachment with any prospect of success, for an act in which their participation could not be legally proved. I do not mean that evidence may not possibly be obtained which would affect the leaders of the cabinet, as in the instances of Oxford and Bolingbroke; but that, the cabinet itself having no legal existence, and its members being surely not amenable to punishment in their simple capacity of privy councillors, which they generally share, in modern times, with a great number even of their ad-

Jan. 1711, "the earl of Scarsdale proposed the following question: — That it appears by the earl of Sunderland's letter to Mr. Stanhope, that the design of an offensive war in Spain was approved and directed by the cabinet council." But the mover afterwards substituted the word "ministers" for "cabinet council," as better known. Lord Cowper said, they were both terms of an uncertain signification, and the latter unknown to our law. Some contended that ministers and cabinet council were synonymous, others that there might be a difference. Peterborough said, "he had heard a distinction between the cabinet council and the privy council; that the privy council were such as were thought to know every thing, and knew nothing, and those of the cabinet council thought nobody knew any thing but themselves." Parl. Hist. vi. 971.

At a meeting of the privy council, April 7. 1713, the peace of Utrecht was laid before them, but merely for form's sake, the treaty being signed by all the powers four days afterwards. Chief justice Parker, however, and lord Cholmondeley were said to have spoken against it. Id. 1192., from Swift's Journal.

If we may trust a party-writer at the beginning of Anne's reign, the archbishop of Canterbury was regularly a member of the cabinet council. Public Spirit of the Whigs, in Somers Tracts, ix. 22. But probably the fact was, that he occasionally was called to their meetings, as took place much later. Coxe's Memoirs of Walpole, i. 637. et alibi.

Lord Mansfield said in the house of lords, in 1775, Parl. Hist. xviii. 274., that he had been a cabinet minister part of the late reign and the whole of the present; but there was a nominal and an efficient cabinet; and a little before lord Rockingham's administration he had asked the king's leave not to act in the latter.—1845.]

In sir Humphrey Mackworth's [or perhaps Mr. Harley's] Vindication of the Rights of the Commons of England, 1701, Somers Tracts, xi. 276., the constitutional doctrine is thus laid down, according to the spirit of the recent act of settlement: — "As to the setting of the great seal of England to foreign alliances, the lord chancellor, or lord keeper for the time being, has a plain rule to follow; that is, humbly to inform the king that he cannot legally set the great seal of England to a matter of that consequence unless the same be first debated and resolved in council; which method being observed, the chancellor is safe, and the council answerable."— P. 293.

versaries, there is no tangible character to which responsibility is attached; nothing, except a signature or the setting of a seal, from which a bad minister need entertain any further apprehension than that of losing his post and reputation.* It may be that no absolute corrective is practicable for this apparent deficiency in our constitutional security; but it is expedient to keep it well in mind, because all ministers speak loudly of their responsibility, and are apt, upon faith of this imaginary guarantee, to obtain a previous confidence from parliament which they may in fact abuse with impunity. For should the bad success or detected guilt of their measures raise a popular cry against them, and censure or penalty be demanded by their opponents, they will infallibly shroud their persons in the dark recesses of the cabinet, and employ every art to shift off the burthen of individual liability.

William III., from the reservedness of his disposition as well as from the great superiority of his capacity for affairs to any of our former kings, was far less guided by any responsible councillors than the spirit of our constitution requires. In the business of the partition treaty, which, whether rightly or otherwise, the house of commons reckoned highly injurious to the public interest, he had not even consulted his cabinet; nor could any minister, except the earl of Portland and lord Somers, be proved to have had a concern in the transaction; for, though the house impeached lord Orford and lord Halifax, they were not in fact any farther parties to it than by being in the secret, and the former had shown his usual intractability by objecting to the whole measure. This was undoubtedly such a departure from sound constitutional usage as left parliament no control over the executive administration. It was

* This very delicate question as to the responsibility of the cabinet, or what is commonly called the ministry, *in solidum*, if I may use the expression, was canvassed in a remarkable discussion within our memory, on the introduction of the late chief justice of the king's bench into that select body; Mr. Fox strenuously denying the proposition, and lord Castlereagh, with others now living, maintaining it. Parl. Debates, A. D. 1806. I cannot possibly comprehend how an article of impeachment, for sitting as a cabinet minister could be drawn; nor do I conceive that a privy councillor has a right to resign his place at the board, or even to absent himself when summoned; so that it would be highly unjust and illegal to presume a participation in culpable measures from the mere circumstance of belonging to it. Even if notoriety be a ground, as has been sometimes contended, for impeachment, it cannot be sufficient for conviction.

endeavoured to restore the ancient principle by this provision in the act of settlement, that, after the accession of the house of Hanover, all resolutions as to government should be debated in the privy council, and signed by those present. But, whether it were that real objections were found to stand in the way of this article, or that ministers shrank back from so definite a responsibility, they procured its repeal a very few years afterwards.* The plans of government are discussed and determined in a cabinet council, forming indeed part of the larger body, but unknown to the law by any distinct character or special appointment. I conceive, though I have not the means of tracing the matter clearly, that this change has prodigiously augmented the direct authority of the secretaries of state, especially as to the interior department, who communicate the king's pleasure in the first instance to subordinate officers and magistrates, in cases which, down at least to the time of Charles I., would have been determined in council. But proclamations and orders still emanate, as the law requires, from the privy council; and on some rare occasions, even of late years, matters of domestic policy have been referred to their advice. It is generally understood, however, that no councillor is to attend, except when summoned†; so that, unnecessarily numerous as the council has become, these special meetings consist only of a few persons besides the actual ministers of the cabinet, and give the latter no apprehension of a formidable resistance. Yet there can be no reasonable doubt that every councillor is as much answerable for the measures adopted by his consent, and especially when ratified by his signature, as those who bear the name of ministers, and who have generally determined upon them before he is summoned.

The experience of William's partiality to Bentinck and Keppel, in the latter instance, not very consistent with the good sense and dignity of his character, led to a strong measure of precaution against the probable influence of foreigners

* 4 Anne, c. 8. 6 Anne, c. 7.

† This is the modern usage, but of its origin I cannot speak. On one remarkable occasion, while Anne was at the point of death, the dukes of Somerset and Argyle went down to the council-chamber without summons to take their seats; but it seems to have been intended as an unexpected manœuvre of policy.

under the new dynasty; the exclusion of all persons not born within the dominions of the British crown from every office of civil and military trust, and from both houses of parliament. No other country, as far as I recollect, has adopted so sweeping a disqualification; and it must, I think, be admitted that it goes a greater length than liberal policy can be said to warrant. But the narrow prejudices of George I. were well restrained by this provision from gratifying his corrupt and servile German favourites with lucrative offices.*

The next article is of far more importance; and would, had it continued in force, have perpetuated that struggle between the different parts of the legislature, especially the crown and house of commons, which the new limitations of the monarchy were intended to annihilate. The baneful system of rendering the parliament subservient to the administration, either by offices and pensions held at pleasure, or by more clandestine corruption, had not ceased with the house of Stuart. William, not long after his accession, fell into the worst part of this management, which it was most difficult to prevent; and, according to the practice of Charles's reign, induced by secret bribes the leaders of parliamentary opposition to betray their cause on particular questions. The tory patriot, sir Christopher Musgrave, trod in the steps of the whig patriot, sir Thomas Lee. A large expenditure appeared every year, under the head of secret service money; which was pretty well known, and sometimes proved, to be disposed of, in great part, among the members of both houses.† No

* It is provided by 1 G. 1. st. 2. c. 4. that no bill of naturalization shall be received without a clause disqualifying the party from sitting in parliament, &c. "for the better preserving the said clause in the said act entire and inviolate." This provision, which was rather supererogatory, was of course intended to show the determination of parliament not to be governed, ostensibly at least, by foreigners under their foreign master.

† Parl. Hist. 807. 840. Burnet says, p. 42., that sir John Trevor, a tory, first put the king on this method of corruption. Trevor himself was so venal that he received a present of 1000 guineas from the city of London, being then speaker of the commons, for his service in carrying a bill through the house; and, upon its discovery, was obliged to put the vote, that he had been guilty of a high crime and misdemeanour. This resolution being carried, he absented himself from the house, and was expelled. Parl. Hist. 900. Commons' Journals, 12th March, 1694–5. The duke of Leeds, that veteran of secret iniquity, was discovered about the same time to have taken bribes from the East India Company, and was impeached in consequence; I say discovered, for there seems little or no doubt of his guilt. The impeachment

check was put on the number or quality of placemen in the lower house. New offices were continually created, and at unreasonable salaries. Those who desire to see a regard to virtue and liberty in the parliament of England could not be insensible to the enormous mischief of this influence. If some apology might be offered for it in the precarious state of the revolution government, this did not take away the possibility of future danger, when the monarchy should have regained its usual stability. But in seeking for a remedy against the peculiar evil of the times, the party in opposition to the court during this reign, whose efforts at reformation were too frequently misdirected, either through faction or some sinister regards towards the deposed family, went into the preposterous extremity of banishing all servants of the crown from the house of commons. Whether the bill for free and impartial proceedings in parliament, which was rejected by a very small majority of the house of lords in 1693, and having in the next session passed through both houses, met with the king's negative, to the great disappointment and displeasure of the commons, was of this general nature, or excluded only certain specified officers of the crown, I am not able to determine; though the prudence and expediency of William's refusal must depend entirely upon that question.*

however was not prosecuted for want of evidence. Parl. Hist. 881. 911. 933. Guy, secretary of the treasury, another of Charles II.'s court, was expelled the house on a similar imputation. Id. 886. Lord Falkland was sent to the Tower for begging 2000*l.* of the king. Id. 841. A system of infamous peculation among the officers of government came to light through the inquisitive spirit of parliament in this reign; not that the nation was worse and more corrupt than under the Stuarts, but that a profligacy, which had been engendered and had flourished under their administration, was now dragged to light and punishment. Long sessions of parliament and a vigilant party-spirit exposed the evil, and have finally in a great measure removed it; though Burnet's remark is still not wholly obsolete. "The regard," says that honest bishop, "that is shown to the members of parliament among us, makes that few abuses can be inquired into or discovered."

* Parl. Hist. 748. 829. The house resolved, "that whoever advised the king not to give the royal assent to the act touching free and impartial proceedings in parliament, which was to redress a grievance, and take off a scandal upon the proceedings of the commons in parliament, is an enemy to their majesties and the kingdom." They laid a representation before the king, showing how few instances have been in former reigns of denying the royal assent to bills for redress of grievances, and the great grief of the commons "for his not having given the royal assent to several public bills, and particularly the bill touching free and impartial proceedings in parliament, which tended so much to the clearing the reputation of this house, after their having so freely voted to supply the public occasions." The king gave a

But in the act of settlement, the clause is quite without exception; and, if it had ever taken effect, no minister could have had a seat in the house of commons, to bring forward, explain, or defend the measures of the executive government. Such a separation and want of intelligence between the crown and parliament must either have destroyed the one, or degraded the other. The house of commons would either, in jealousy and passion, have armed the strength of the people to subvert the monarchy, or, losing that effective control over the appointment of ministers, which has sometimes gone near to their nomination, would have fallen almost into the condition of those states-general of ancient kingdoms, which have met only to be cajoled into subsidies, and give a passive consent to the propositions of the court. It is one of the greatest safeguards of our liberty, that eloquent and ambitious men, such as aspire to guide the councils of the crown, are from habit and use so connected with the houses of parliament, and derive from them so much of their renown and influence, that they lie under no temptation, nor could without insanity be prevailed upon, to diminish the authority and privileges of that assembly. No English statesman, since the revolution, can be liable to the very slightest suspicion of an aim, or even a wish, to establish absolute monarchy on the ruins of our constitution. Whatever else has been done, or designed to be done amiss, the rights of parliament have been out of danger. They have, whenever a man of powerful mind shall direct the cabinet, and none else can possibly be formidable, the strong security of his own interest, which no such man will desire to build on the caprice and intrigue of a court. And, as this immediate connexion of the advisers of the crown with the house of commons, so that they are, and ever profess themselves, as truly the servants of one as of the other, is a pledge for their loyalty to the entire legislature, as well as to their sovereign, (I mean, of course, as to the fundamental principles of our constitution,) so has it preserved for

courteous but evasive answer, as indeed it was natural to expect; but so great a flame was raised in the commons, that it was moved to address him for a further answer, which however there was still a sense of decorum sufficient to prevent.

Though the particular provisions of this bill do not appear, I think it probable that it went too far in excluding military as well as civil officers.

the commons their preponderating share in the executive administration, and elevated them in the eyes of foreign nations, till the monarchy itself has fallen comparatively into shade. The pulse of Europe beats according to the tone of our parliament; the counsels of our kings are there revealed, and by that kind of previous sanction which it has been customary to obtain, become, as it were, the resolutions of a senate; and we enjoy the individual pride and dignity which belong to republicans, with the steadiness and tranquillity which the supremacy of a single person has been supposed peculiarly to bestow.*

But, if the chief ministers of the crown are indispensably to be present in one or other house of parliament, it by no means follows that the doors should be thrown open to all those subaltern retainers, who, too low to have had any participation in the measures of government, come merely to earn their salaries by a sure and silent vote. Unless some limitation could be put on the number of such officers, they might become the majority of every parliament, especially if its duration were indefinite or very long. It was always the popular endeavour of the opposition, or, as it was usually denominated, the country party, to reduce the number of these dependants; and as constantly the whole strength of the court was exerted to keep them up. William, in truth, from his own errors, and from the disadvantage of the times, would not venture to confide in an unbiassed parliament. On the formation, however, of a new board of revenue, in 1694, for managing the stamp-duties, its members were incapacitated from sitting in the house of commons.† This, I believe, is

* [The tories introduced a clause, according to Burnet, into the oath of abjuration, to maintain the government by king, lords, and commons. This was rejected by the lords; and Burnet calls it "a barefaced republican notion, which was wont to be condemned as such, by the same persons who now pressed it." The lords and commons, he observes, are indeed part of the constitution and the legislative body, but not of the government. Vol. iv. p. 538. But speaker Onslow, coming half a century later, after the whig practice and theory had become established, sees little to object to in the phrase "government," which may be taken in a large sense. Burnet, however, as Ralph points out, has misrepresented the clause. The words were, "constitution and government by king, lords, and commons, as by law established:" which he conjectures to be rather levelled at "barefaced republican notions," than borrowed from them. Ralph, ii. 1018. Burnet's memory was too deceitful to be trusted without reference to books; yet he seems rarely to have made any.—1845.]

† 4 & 5 W. & M. c. 21.

the first instance of exclusion on account of employment; and a similar act was obtained in 1699, extending this disability to the commissioners and some other officers of excise.* But when the absolute exclusion of all civil and military officers by the act of settlement was found, on cool reflection, too impracticable to be maintained, and a revision of that article took place in the year 1706, the house of commons were still determined to preserve at least the principle of limitation, as to the number of placemen within their walls. They gave way indeed to the other house in a considerable degree, receding, with some unwillingness, from a clause specifying expressly the description of offices which should not create a disqualification, and consenting to an entire repeal of the original article.† But they established two provisions of great importance, which still continue the great securities against an overwhelming influence: first, that every member of the house of commons accepting an office under the crown, except a higher commission in the army, shall vacate his seat, and a new writ shall issue; secondly, that no person holding an office created since the 25th of October, 1705, shall be capable of being elected or re-elected at all. They excluded at the same time all such as held pensions during the pleasure of the crown; and, to check the multiplication of placemen, enacted, that no greater number of commissioners should be appointed to execute any office than had

* 11 & 12 W. 3. c. 2. § 50.

† The house of commons introduced into the act of security, as it was called, a long clause, carried on a division by 167 to 160, Jan. 24. 1706, enumerating various persons who should be eligible to parliament; the principal officers of state, the commissioners of treasury and admiralty, and a limited number of other placemen. The lords thought fit to repeal the whole prohibitory enactment. It was resolved in the commons, by a majority of 205 to 183, that they would not agree to this amendment. A conference accordingly took place, when the managers of the commons objected, Feb. 7., that a total repeal of that provision would admit such an unlimited number of officers to sit in their house, as might destroy the free and impartial proceedings in parliament, and endanger the liberties of the commons of England. Those on the lords' side gave their reasons to the contrary at great length, Feb. 11. The commons determined, Feb. 18., to insert the provision vacating the seat of a member accepting office; and resolved not to insist on their disagreements as to the main clause. Three protests were entered in the house of lords against inserting the word "repealed" in reference to the prohibitory clause, instead of "regulated and altered," all by tory peers. It is observable that, as the provision was not to take effect till the house of Hanover should succeed to the throne, the sticklers for it might be full as much influenced by their ill-will to that family as by their zeal for liberty.

been employed in its execution at some time before that parliament.* These restrictions ought to be rigorously and jealously maintained, and to receive a construction, in doubtful cases, according to their constitutional spirit; not as if they were of a penal nature towards individuals, an absurdity in which the careless and indulgent temper of modern times might sometimes acquiesce.†

Independence of judges.

It had been the practice of the Stuarts, especially in the last years of their dynasty, to dismiss judges, without seeking any other pretence, who showed any disposition to thwart government in political prosecutions. The general behaviour of the bench had covered it with infamy. Though the real security for an honest court of justice must be found in their responsibility to parliament and to public opinion, it was evident that their tenure in office must, in the first place, cease to be precarious, and their integrity rescued from the severe trial of forfeiting the emoluments upon which they subsisted. In the debates previous to the declaration of rights, we find that several speakers insisted on making the judges' commissions *quamdiu se bene gesserint*, that is, during life or good behaviour, instead of *durante placito*, at the discretion of the crown. The former, indeed, is said to have been the ancient course till the reign of James I. But this was omitted in the hasty and imperfect bill of rights. The commissions however of William's judges ran *quamdiu se bene gesserint*. But the king gave an unfortunate instance of his very injudicious tenacity of bad prerogatives, in refusing his assent, in 1692, to a bill that had passed both houses, for establishing this independence of the judges by law and confirming their salaries.† We owe this important provision to the act of settlement; not, as ignorance and adulation have perpetually asserted, to his late majesty George III. No judge can be dismissed from office, except in consequence of a conviction for some offence, or the

* 4 Anne, c. 8. 6 Anne, c. 7.

† This, it is to be observed, was written before the reform bill of 1832, which created a necessity, if any sort of balance is to be preserved in our constitution, of strengthening the executive power, and consequently dictated the expediency of relaxing many provisions which had been required in very different times.

‡ Burnet, 86. It was represented to the king, he says, by some of the judges themselves, that it was not fit they should be out of all dependence on the court.

address of both houses of parliament, which is tantamount to an act of the legislature.* It is always to be kept in mind that they are still accessible to the hope of further promotion, to the zeal of political attachment, to the flattery of princes and ministers; that the bias of their prejudices, as elderly and peaceable men, will, in a plurality of cases, be on the side of power; that they have very frequently been trained, as advocates, to vindicate every proceeding of the crown; from all which we should look on them with some little vigilance, and not come hastily to a conclusion that, because their commissions cannot be vacated by the crown's authority, they are wholly out of the reach of its influence. I would by no means be misinterpreted, as if the general conduct of our courts of justice since the revolution, and especially in later times, which in most respects have been the best times, were not deserving of that credit it has usually gained; but possibly it may have been more guided and kept straight than some are willing to acknowledge by the spirit of observation and censure which modifies and controls our whole government.

The last clause in the act of settlement, that a pardon under the great seal shall not be pleadable in bar of an impeachmen, requires no particular notice beyond what has been said on the subject in a former chapter.†

Oath of abjuration.

In the following session, a new parliament having been assembled, in which the tory faction had less influence than in the last, and Louis XIV. having, in the mean time, acknowledged the son of James as king of England, the natural resentment of this insult and breach of faith was shown in a more decided assertion of revolution principles than had hitherto been made. The pretended king was attainted of high treason; a measure absurd as a law, but politic as a denunciation of perpetual enmity.‡ It was made

* It was originally resolved that they should be removable on the address of either house, which was changed afterwards to both houses. Comm. Journ. 12th March, and 10th May.

† It was proposed in the lords, as a clause in the bill of rights, that pardons upon an impeachment should be void, but lost by 50 to 17; on which twelve peers, all whigs, entered a protest. Parl. Hist. 482.

‡ 13 W. 3. c. 3. The lords introduced an amendment into this bill, to attaint also Mary of Este, the late queen of James II. But the commons disagreed, on the ground that it might be of dangerous consequence to attaint any one by an amendment, in which case such due con-

high treason to correspond with him, or remit money for his service. And a still more vigorous measure was adopted, an oath to be taken, not only by all civil officers, but by all ecclesiastics, members of the universities, and schoolmasters, acknowledging William as lawful and rightful king, and denying any right or title in the pretended prince of Wales.* The tories, and especially lord Nottingham, had earnestly contended, in the beginning of the king's reign, against those words in the act of recognition, which asserted William and Mary to be rightfully and lawfully king and queen. They opposed the association at the time of the assassination-plot, on account of the same epithets, taking a distinction which satisfied the narrow understanding of Nottingham, and served as a subterfuge for more cunning men, between a king whom they were bound in all cases to obey and one whom they could style rightful and lawful. These expressions were in fact slightly modified on that occasion; yet fifteen peers and ninety-two commoners declined, at least for a time, to sign it. The present oath of abjuration therefore was a signal victory of the whigs who boasted of the revolution over the tories who excused it.† The renunciation of the hereditary right, for at this time few of the latter party believed in the young man's spuriousness, was complete and unequivocal. The dominant faction might enjoy perhaps a charitable pleasure in exposing many of their adversaries, and especially the high-church clergy, to the disgrace and remorse of perjury. Few or none however who had taken the oath of allegiance refused this additional cup of bitterness, though so much less defensible, according to the principles they had employed to vindicate their compliance in the former instance; so true it is that, in matters of conscience, the first scruple is the only one which it costs much to overcome. But the imposition of this test, as was evident in a few years, did not check the

sideration cannot be had, as the nature of an attainder requires. The lords, after a conference, gave way; but brought in a separate bill to attaint Mary of Este, which passed with a protest of the tory peers. Lords' Journals, Feb. 6. 12. 20. 1701–2.

* 13 W. 3. c. 6.

† Sixteen lords, including two bishops, Compton and Sprat, protested against the bill containing the abjuration oath. The first reason of their votes was afterwards expunged from the Journals by order of the house. Lords' Journals, 24th Feb., 3d March, 1701–2.

boldness, or diminish the numbers, of the Jacobites; and I must confess, that of all sophistry that weakens moral obligation, that is the most pardonable, which men employ to escape from this species of tyranny. The state may reasonably make an entire and heartfelt attachment to its authority the condition of civil trust; but nothing more than a promise of peaceable obedience can justly be exacted from those who ask only to obey in peace. There was a bad spirit abroad in the church, ambitious, factious, intolerant, calumnious; but this was not necessarily partaken by all its members, and many excellent men might deem themselves hardly dealt with in requiring their denial of an abstract proposition, which did not appear so totally false according to their notions of the English constitution and the church's doctrine.*

* Whiston mentions, that Mr. Baker, of St. John's, Cambridge, a worthy and learned man, as well as others of the college, had thoughts of taking the oath of allegiance on the death of king James; but the oath of abjuration coming out the next year, had such expressions as he still scrupled. Whiston's Memoirs. Biog. Brit. (Kippis's edition), art. Baker.

CHAPTER XVI.

ON THE STATE OF THE CONSTITUTION IN THE REIGNS OF ANNE, GEORGE I., AND GEORGE II.

Termination of Contest between the Crown and Parliament — Distinctive Principles of Whigs and Tories — Changes effected in these by Circumstances — Impeachment of Sacheverell displays them again — Revolutions in the Ministry under Anne — War of the Succession — Treaty of Peace broken off — Renewed again by the Tory Government — Arguments for and against the Treaty of Utrecht — The Negotiation mismanaged — Intrigues of the Jacobites — Some of the Ministers engage in them — Just Alarm for the Hanover Succession — Accession of George I. — Whigs come into Power — Great Disaffection in the Kingdom — Impeachment of Tory Ministers — Bill for Septennial Parliaments — Peerage Bill — Jacobitism among the Clergy — Convocation — its Encroachments — Hoadley — Convocation no longer suffered to sit — Infringements of the Toleration by Statutes under Anne — They are repealed by the Whigs — Principles of Toleration fully established — Banishment of Atterbury — Decline of the Jacobites — Prejudices against the reigning Family — Jealousy of the Crown — Changes in the Constitution whereon it was founded — Permanent military Force — Apprehensions from it — Establishment of Militia — Influence over Parliament by Places and Pensions — Attempts to restrain it — Place Bill of 1743 — Secret Corruption — Commitments for Breach of Privilege — of Members for Offences — of Strangers for Offences against Members — or for Offences against the House — Kentish Petition of 1701 — Dispute with Lords about Aylesbury Election — Proceedings against Mr. Murray in 1751 — Commitments for Offences unconnected with the House — Privileges of the House not controllable by Courts of Law — Danger of stretching this too far — Extension of Penal Laws — Diminution of Personal Authority of the Crown — Causes of this — Party Connexions — Influence of political Writings — Publication of Debates — Increased Influence of the middle Ranks.

THE act of settlement was the seal of our constitutional laws, the complement of the revolution itself and the bill of rights, the last great statute which restrains the power of the crown, and manifests, in any conspicuous degree, a jealousy of parliament in behalf of its own and the subject's privileges. The battle had been fought and gained; the statute-book, as it becomes more voluminous, is less interesting in the history of our constitution; the voice of petition, complaint, or remonstrance is seldom to be traced in the Journals; the crown in return

Termination of the contest between the crown and parliament.

desists altogether, not merely from the threatening or objurgatory tone of the Stuarts, but from that dissatisfaction sometimes apparent in the language of William; and the vessel seems riding in smooth water, moved by other impulses, and liable perhaps to other dangers, than those of the ocean-wave and the tempest. The reigns, accordingly, of Anne, George I., and George II., afford rather materials for dissertation, than consecutive facts for such a work as the present; and may be sketched in a single chapter, though by no means the least important, which the reader's study and reflection must enable him to fill up. Changes of an essential nature were in operation during the sixty years of these three reigns, as well as in that beyond the limits of this undertaking, which in length measures them all; some of them greatly enhancing the authority of the crown, or rather of the executive government, while others had so opposite a tendency, that philosophical speculators have not been uniform in determining on which side was the sway of the balance.

No clear understanding can be acquired of the political history of England without distinguishing, with some accuracy of definition, the two great parties of whig and tory. But this is not easy; because those denominations being sometimes applied to factions in the state, intent on their own aggrandizement, sometimes to the principles they entertained or professed, have become equivocal, and do by no means, at all periods and on all occasions, present the same sense; an ambiguity which has been increased by the lax and incorrect use of familiar language. We may consider the words, in the first instance, as expressive of a political theory or principle, applicable to the English government. They were originally employed at the time of the bill of exclusion, though the distinction of the parties they denote is evidently at least as old as the long parliament. Both of these parties, it is material to observe, agreed in the maintenance of the constitution; that is, in the administration of government by an hereditary sovereign, and in the concurrence of that sovereign with the two houses of parliament in legislation, as well as in those other institutions which have been reckoned most ancient and fundamental. A favourer of unlimited monarchy was not a tory, neither was

Distinctive principles of whigs and tories.

a republican a whig. Lord Clarendon was a tory, Hobbes was not; bishop Hoadley was a whig, Milton was not. But they differed mainly in this; that to a tory the constitution, inasmuch as it was the constitution, was an ultimate point, beyond which he never looked, and from which he thought it altogether impossible to swerve? whereas a whig deemed all forms of government subordinate to the public good, and therefore liable to change when they should cease to promote that object. Within those bounds which he, as well as his antagonist, meant not to transgress, and rejecting all unnecessary innovation, the whig had a natural tendency to political improvement, the tory an aversion to it. The one loved to descant on liberty and the rights of mankind, the other on the mischiefs of sedition and the rights of kings. Though both, as I have said, admitted a common principle, the maintenance of the constitution, yet this made the privileges of the subject, that the crown's prerogative, his peculiar care. Hence it seemed likely that, through passion and circumstance, the tory might aid in establishing despotism, or the whig in subverting monarchy. The former was generally hostile to the liberty of the press, and to freedom of inquiry, especially in religion; the latter their friend. The principle of the one, in short, was amelioration; of the other, conservation.

But the distinctive characters of whig and tory were less plainly seen, after the revolution and act of settlement, in relation to the crown, than to some other parts of our polity. The tory was ardently, and in the first place, the supporter of the church in as much pre-eminence and power as he could give it. For the church's sake, when both seemed as it were on one plank, he sacrificed his loyalty; for her he was always ready to persecute the catholic, and if the times permitted not to persecute, yet to restrain and discountenance, the non-conformist. He came unwillingly into the toleration, which the whig held up as one of the great trophies of the revolution. The whig spurned at the haughty language of the church, and treated the dissenters with moderation, or perhaps with favour. This distinction subsisted long after the two parties had shifted their ground as to civil liberty and royal power. Again, a predilection for the territorial aristocracy, and for a govern-

Changes effected in these by circumstances.

ment chiefly conducted by their influence, a jealousy of new men, of the mercantile interest, of the commonalty, never failed to mark the genuine tory. It has been common to speak of the whigs as an aristocratical faction. Doubtless the majority of the peerage from the revolution downwards to the death of George II. were of that denomination. But this is merely an instance wherein the party and the principle are to be distinguished. The natural bias of the aristocracy is towards the crown; but, except in most part of the reign of Anne, the crown might be reckoned with the whig party. No one who reflects on the motives which are likely to influence the judgment of classes in society, would hesitate to predict that an English house of lords would contain a larger proportion of men inclined to the tory principle than of the opposite school; and we do not find that experience contradicts this anticipation.

It will be obvious that I have given to each of these political principles a moral character; and have considered them as they would subsist in upright and conscientious men, not as we may find them "in the dregs of Romulus," suffocated by selfishness or distorted by faction. The whigs appear to have taken a far more comprehensive view of the nature and ends of civil society; their principle is more virtuous, more flexible to the variations of time and circumstance, more congenial to large and masculine intellects. But it may probably be no small advantage, that the two parties, or rather the sentiments which have been presumed to actuate them, should have been mingled, as we find them, in the complex mass of the English nation, whether the proportions may or not have been always such as we might desire. They bear some analogy to the two forces which retain the planetary bodies in their orbits; the annihilation of one would disperse them into chaos, that of the other would drag them to a centre. And, though I cannot reckon these old appellations by any means characteristic of our political factions in the nineteenth century, the names whig and tory are often well applied to individuals. Nor can it be otherwise; since they are founded not only on our laws and history, with which most have some acquaintance, but in the diversities of condition and of moral temperament generally subsisting among mankind.

It is however one thing to prefer the whig principle, another to justify, as an advocate, the party which bore that name. So far as they were guided by that principle, I hold them far more friendly to the great interests of the commonwealth than their adversaries. But, in truth, the peculiar circumstances of these four reigns after the revolution, the spirit of faction, prejudice, and animosity, above all, the desire of obtaining or retaining power, which, if it be ever sought as a means, is soon converted into an end, threw both parties very often into a false position, and gave to each the language and sentiments of the other; so that the two principles are rather to be traced in writings, and those not wholly of a temporary nature, than in the debates of parliament. In the reigns of William and Anne, the whigs, speaking of them generally as a great party, had preserved their original character unimpaired far more than their opponents. All that had passed in the former reign served to humble the tories, and to enfeeble their principle. The revolution itself, and the votes upon which it was founded, the bill of recognition in 1690, the repeal of the non-resisting test, the act of settlement, the oath of abjuration, were solemn adjudications, as it were, against their creed. They took away the old argument, that the letter of the law was on their side. If this indeed were all usurpation, the answer was ready; but those who did not care to make it, or by their submission put it out of their power, were compelled to sacrifice not a little of that which had entered into the definition of a tory. Yet even this had not a greater effect than that systematic jealousy and dislike of the administration, which made them encroach, according to ancient notions, and certainly their own, on the prerogative of William. They learned in this no unpleasing lesson to popular assemblies, to magnify their own privileges and the rights of the people. This tone was often assumed by the friends of the exiled family, and in them it was without any dereliction of their object. It was natural that a jacobite should use popular topics in order to thwart and subvert an usurping government. His faith was to the crown, but to the crown on a right head. In a tory who voluntarily submitted to the reigning prince, such an opposition to the prerogative was repugnant to the maxims of his creed, and

placed him, as I have said, in a false position. This is of course applicable to the reigns of George I. and II., and in a greater degree in proportion as the tory and jacobite were more separated than they had been perhaps under William.

The tories gave a striking proof how far they might be brought to abandon their theories, in supporting an address to the queen that she would invite the princess Sophia to take up her residence in England; a measure so unnatural as well as imprudent, that some have ascribed it to a subtlety of politics which I do not comprehend. But we need not, perhaps, look farther than to the blind rage of a party just discarded, who, out of pique towards their sovereign, made her more irreconcilably their enemy, and while they hoped to brand their opponents with inconsistency, forgot that the imputation would redound with tenfold force on themselves. The whigs justly resisted a proposal so little called for at that time; but it led to an act for the security of the succession, designating a regency in the event of the queen's decease, and providing that the actual parliament, or the last, if none were in being, should meet immediately, and continue for six months, unless dissolved by the successor.*

In the conduct of this party, generally speaking, we do not, I think, find any abandonment of the cause of liberty. The whigs appear to have been zealous for bills excluding placemen from the house, or limiting their numbers in it; and the abolition of the Scots privy council, an odious and despotic tribunal, was owing in a great measure to the authority of lord Somers.† In these measures however the tories generally co-operated; and it is certainly difficult in the history

* 4 Anne, c. 8. Parl. Hist. 457. et post. Burnet, 429.

† 6 Anne, c. 6. Parl. Hist. 613. Somerville, 296. Hardw. Papers, ii. 473. Cunningham attests the zeal of the whigs for abolishing the Scots privy council, though he is wrong in reckoning lord Cowper among them, whose name appears in the protest on the other side, ii. 185, &c. The distinction of old and modern whigs appeared again in this reign; the former professing, and in general feeling, a more steady attachment to the principles of civil liberty. Sir Peter King, sir Joseph Jekyll, Mr. Wortley, Mr. Hampden, and the historian himself, were of this description; and consequently did not always support Godolphin. P. 210, &c. Mr. Wortley brought in a bill, which passed the commons in 1710, for voting by ballot. It was opposed by Wharton and Godolphin in the lords, as dangerous to the constitution, and thrown out. Wortley, he says, went the next year to Venice, on purpose to inquire into the effects of the ballot, which prevailed universally in that republic. P. 285. I have since learned that no trace of such a bill can be found in the Journals; yet I think Cunningham must have had some foun-

of any nation, to separate the influence of sincere patriotism from that of animosity and thirst of power. But one memorable event in the reign of Anne gave an opportunity for bringing the two theories of government into collision, to the signal advantage of that which the whigs professed; I mean the impeachment of Dr. Sacheverell. Though, with a view to the interests of their ministry, this prosecution was very unadvised, and has been deservedly censured, it was of high importance in a constitutional light, and is not only the most authentic exposition, but the most authoritative ratification, of the principles upon which the revolution is to be defended.*

Impeachment of Sacheverell displays them again.

The charge against Sacheverell was, not for impugning what was done at the revolution, which he affected to vindicate, but for maintaining that it was not a case of resistance to the supreme power, and consequently no exception to his tenet of an unlimited passive obedience. The managers of the impeachment had, therefore, not only to prove that there was resistance in the revolution, which could not of course be sincerely disputed, but to assert the lawfulness, in great emergencies, or what is called in politics necessity, of taking arms against the law—a delicate matter to treat of at any

dation for his circumstantial assertion. The ballot, however, was probably meant to be *in* parliament, not, or not wholly, in elections.

[On searching the Journals, I find a bill "to prevent bribery, corruption, and other indecent practices, in electing of members to serve in parliament," ordered to be brought in, 17th Jan. 1708-9. Nothing further appears in this session; but in the next, a bill with the same title is brought in, 15th Feb. 1709-10, and read a second time Feb. 18th; but no more appears about it. Mr. Wortley's name does not appear among those who were ordered to bring in either of these bills.

I have also found in a short tract, entitled "A Patriot's Proposal to the People of England," 1705, a recommendation of election by ballot. It is highly democratical in its principle, but came a full century too soon. The proceedings of the House of Commons in the Aylesbury case seem to have produced it.

It seems, therefore, that I was mistaken in supposing the bill mentioned by Cunningham to have respected the mode of voting *in* parliament.—1845.]

* Parl. Hist. vi. 805. Burnet, 537. State Trials, xv. 1. It is said in Coxe's Life of Marlborough, iii. 141., that Marlborough and Somers were against this prosecution. This writer goes out of his way to make a false and impertinent remark on the managers of the impeachment, as giving encouragement by their speeches to licentiousness and sedition. Id. 166.

[Cunningham says that Marlborough was for prosecution at law, rather than impeachment; Somers against both, ii. 277.: Harley spoke against the impeachment, as unworthy of the house, but condemned Sacheverell's sermon as foolish, calling it a "circumgyration of incoherent words;" which, the historian says, some thought was the character of his own speech. Vol. ii. p. 285.—1845.]

time, and not least so by ministers of state and law officers of the crown, in the very presence, as they knew, of their sovereign.* We cannot praise too highly their speeches upon this charge; some shades, rather of discretion than discordance, may be perceptible; and we may distinguish the warmth of Lechmere, or the openness of Stanhope, from the caution of Walpole, who betrays more anxiety than his colleagues to give no offence in the highest quarter; but in every one the same fundamental principles of the whig creed, except on which indeed the impeachment could not rest, are unambiguously proclaimed. "Since we must give up our right to the laws and liberties of this kingdom," says sir Joseph Jekyll, "or, which is all one, be precarious in the enjoyment of them, and hold them only during pleasure, if this doctrine of unlimited non-resistance prevails, the commons have been content to undertake this prosecution."† — "The doctrine of unlimited, unconditional, passive obedience," says Mr. Walpole, "was first invented to support arbitrary and despotic power, and was never promoted or countenanced by any government that had not designs some time or other of making use of it."‡ And thus general Stanhope still more vigorously: "As to the doctrine itself of absolute non-resistance, it should seem needless to prove by arguments that it is inconsistent with the law of reason, with the law of nature, and with the prac-

* "The managers appointed by the house of commons," says an ardent jacobite, "behaved with all the insolence imaginable. In their discourse they boldly asserted, even in her majesty's presence, that, if the right to the crown was hereditary and indefeasible, the prince beyond seas, meaning the king, and not the queen, had the legal title to it, she having no claim thereto, but what she owed to the people; and that by the revolution principles, on which the constitution was founded and to which the laws of the land agreed, the people might turn out or lay aside their sovereigns as they saw cause. Though, no doubt of it, there was a great deal of truth in these assertions, it is easy to be believed that the queen was not well pleased to hear them maintained, even in her own presence and in so solemn a manner, before such a great concourse of her subjects. For, though princes do cherish these and the like doctrines, whilst they serve as the means to advance themselves to a crown, yet, being once possessed thereof, they have as little satisfaction in them as those who succeed by an hereditary unquestionable title." Lockhart Papers, i. 312.

It is probable enough that the last remark has its weight, and that the queen did not wholly like the speeches of some of the managers; and yet nothing can be more certain than that she owed her crown in the first instance, and the preservation of it at that very time, to those insolent doctrines which wounded her royal ear; and that the genuine loyalists would soon have lodged her in the Tower.

† State Trials, xv. 95.

‡ Id. 115.

tice of all ages and countries. Nor is it very material what the opinions of some particular divines, or even the doctrine generally preached in some particular reigns, may have been concerning it. It is sufficient for us to know what the practice of the church of England has been, when it found itself oppressed. And indeed one may appeal to the practice of all churches, of all states, and of all nations in the world, how they behaved themselves when they found their civil and religious constitutions invaded and oppressed by tyranny. I believe we may further venture to say, that there is not at this day subsisting any nation or government in the world, whose first original did not receive its foundation either from resistance or compact; and as to our purpose, it is equal if the latter be admitted. For wherever compact is admitted, there must be admitted likewise a right to defend the rights accruing by such compact. To argue the municipal laws of a country in this case is idle. Those laws were only made for the common course of things, and can never be understood to have been designed to defeat the end of all laws whatsoever; which would be the consequence of a nation's tamely submitting to a violation of all their divine and human rights."* Mr. Lechmere argues to the same purpose in yet stronger terms.†

But, if these managers for the commons were explicit in their assertion of the whig principle, the counsel for Sacheverell by no means unfurled the opposite banner with equal courage. In this was chiefly manifested the success of the former. His advocates had recourse to the petty chicane of arguing that he had laid down a general rule of obedience without mentioning its exceptions, that the revolution was a case of necessity, and that they fully approved what was done therein. They set up a distinction, which, though at that time perhaps novel, has sometimes since been adopted by tory writers; that resistance to the supreme power was indeed utterly illegal on any pretence whatever, but that the supreme power in this kingdom was the legislature, not the king; and that the revolution took effect by the concurrence of the lords and commons.‡ This is of itself a descent from the high

* State Trials, 127.

† Id. 61.

‡ State Trials, 196. 229. It is observed by Cunningham, p. 286., that Sacheverell's

ground of toryism, and would not have been held by the sincere bigots of that creed. Though specious, however, the argument is a sophism, and does not meet the case of the revolution. For, though the supreme power may be said to reside in the legislature, yet the prerogative within its due limits is just as much part of the constitution, and the question of resistance to lawful authority remains as before. Even if this resistance had been made by the two houses of parliament, it was but the case of the civil war, which had been explicitly condemned by more than one statute of Charles II. But, as Mr. Lechmere said in reply, it was undeniable that the lords and commons did not join in that resistance at the revolution as part of the legislative and supreme power, but as part of the collective body of the nation.* And sir John Holland had before observed, "that there was a resistance at the revolution was most plain, if taking up arms in Yorkshire, Nottinghamshire, Cheshire, and almost all the counties of England; if the desertion of a prince's own troops to an invading prince, and turning their arms against their sovereign, be resistance."† It might in fact have been asked whether the dukes of Leeds and Shrewsbury, then sitting in judgment on Sacheverell (and who afterwards voted him not guilty), might not have been convicted of treason, if the prince of Orange had failed of success?‡ The advocates indeed of the prisoner made so many concessions as amounted to an abandonment of all the general question. They relied chiefly on numerous passages in the homilies, and most approved writers of the Anglican church, asserting the duty of unbounded passive obedience. But the managers eluded

counsel, except Phipps, were ashamed of him; which is really not far from the case. "The doctor," says Lockhart, "employed sir Simon, afterwards lord Harcourt, and sir Constantine Phipps, as his counsel, who defended him the best way they could, though they were hard put to it to maintain the hereditary right and unlimited doctrine of non-resistance, and not condemn the revolution. And the truth on it is, these are so inconsistent with one another, that the chief arguments alleged in this and other parallel cases came to no more than this; that the revolution was an exception from the nature of government in general, and the constitution and laws of Britain in particular, which necessity in that particular case made expedient and lawful." Ibid.

* State Trials, 407.

† Id. 110.

‡ Cunningham says that the duke of Leeds spoke strongly in favour of the revolution, though he voted Sacheverell not guilty. P. 298. Lockhart observes, that he added success to necessity, as an essential point for rendering the revolution lawful.

these in their reply with decent respect.* The lords voted Sacheverell guilty by a majority of 67 to 59; several voting on each side rather according to their present faction than their own principles. They passed a slight sentence, interdicting him only from preaching for three years. This was deemed a sort of triumph by his adherents; but a severe punishment on one so insignificant would have been misplaced; and the sentence may be compared to the nominal damages sometimes given in a suit instituted for the trial of a great right.

Revolution in the ministry under Anne.

The shifting combinations of party in the reign of Anne, which affected the original distinctions of whig and tory, though generally known, must be shortly noticed. The queen, whose understanding and fitness for government were below mediocrity, had been attached to the tories, and bore an antipathy to her predecessor. Her first ministry, her first parliament, gave presage of a government to be wholly conducted by that party. But this prejudice was counteracted by the persuasions of that celebrated favourite, the wife of Marlborough, who, probably from some personal resentments, had thrown her influence into the scale of the whigs. The well-known records of their conversation and correspondence present a strange picture of good-natured feebleness on one side, and of ungrateful insolence on the other. But the interior of a court will rarely endure daylight. Though Godolphin and Marlborough, in whom the queen reposed her entire confidence, had been thought tories, they

* The homilies are so much more vehement against resistance than Sacheverell was, that it would have been awkward to pass a rigorous sentence on him. In fact, he or any other clergyman had a right to preach the homily against rebellion instead of a sermon. As to their laying down general rules without adverting to the exceptions, an apology which the managers set up for them, and it was just as good for Sacheverell; and the homilies expressly deny all possible exceptions. Tillotson had a plan of dropping these old compositions, which in some doctrinal points, as well as in the tenet of non-resistance, do not represent the sentiments of the modern church, though, in a general way, it subscribes to them. But the times were not ripe for this, or some other of that good prelate's designs. Wordsworth's Eccles. Biog. vol. vi. The quotations from the homilies and other approved works by Sacheverell's counsel are irresistible, and must have increased the party spirit of the clergy. "No conjuncture of circumstances whatever," says bishop Sanderson, "can make that expedient to be done at any time that is of itself, and in the kind, unlawful. For a man to take up arms offensive or defensive against a lawful sovereign, being a thing in its nature simply and de toto genere unlawful, may not be done by any man, at any time, in any case, upon any colour or pretence whatsoever." State Trials, 231.

became gradually alienated from that party, and communicated their own feelings to the queen. The house of commons very reasonably declined to make an hereditary grant to the latter out of the revenues of the post-office in 1702, when he had performed no extraordinary services; though they acceded to it without hesitation after the battle of Blenheim.* This gave some offence to Anne; and the chief tory leaders in the cabinet, Rochester, Nottingham, and Buckingham, displaying a reluctance to carry on the war with such vigour as Marlborough knew to be necessary, were soon removed from office. Their revengeful attack on the queen, in the address to invite the princess Sophia, made a return to power hopeless for several years. Anne however entertained a desire very natural to an English sovereign, yet in which none but a weak one will expect to succeed, of excluding chiefs of parties from her councils. Disgusted with the tories, she was loth to admit the whigs; and thus Godolphin's administration, from 1704 to 1708, was rather sullenly supported, sometimes indeed thwarted, by that party. Cowper was made chancellor against the queen's wishes†; but the junto, as it was called, of five eminent whig peers, Somers, Halifax, Wharton, Orford, and Sunderland, were kept out through the queen's dislike, and in some measure, no question, through Godolphin's jealousy. They forced themselves into the cabinet about 1708; and effected the dismissal of Harley and St. John, who, though not of the regular tory school in connexion or principle, had already gone along with that faction in the late reign, and were now reduced by their dismissal to unite with it.‡ The whig ministry of queen Anne, so often

* Parl. Hist. vi. 57. They did not scruple, however, to say what cost nothing but veracity and gratitude, that Marlborough had retrieved the honour of the nation. This was justly objected to, as reflecting on the late king, but carried by 180 to 80. Id. 58. Burnet.

† Coxe's Marlborough, i. 483. Mr. Smith was chosen speaker by 248 to 205, a slender majority; but some of the ministerial party seem to have thought him too much a whig. Id. 485. Parl. Hist. 450. The whig pamphleteers were long hostile to Marlborough.

‡ Burnet rather gently slides over these jealousies between Godolphin and the whig junto; and Tindal, his mere copyist, is not worth mentioning. But Cunningham's history, and still more the letters published in Coxe's Life of Marlborough, show better the state of party intrigues; which the Parliamentary History also illustrates, as well as many pamphlets of the time. Somerville has carefully compiled as much as was known when he wrote.

talked of, cannot in fact be said to have existed more than two years, from 1708 to 1710; her previous administration having been at first tory, and afterwards of a motley complexion, though depending for existence on the great whig interest which it in some degree proscribed. Every one knows that this ministry was precipitated from power through the favourite's abuse of her ascendancy, become at length intolerable to the most forbearing of queens and mistresses, conspiring with another intrigue of the bed-chamber, and the popular clamour against Sacheverell's impeachment.* It seems rather an humiliating proof of the sway which the feeblest prince enjoys even in a limited monarchy, that the fortunes of Europe should have been changed by nothing more noble than the insolence of one waiting woman and the cunning of another. It is true that this was effected by throwing the weight of the crown into the scale of a powerful faction; yet the house of Bourbon would probably not have reigned beyond the Pyrenees, but for Sarah and Abigail at queen Anne's toilet.†

* [If we may believe Swift, the queen had become alienated from the duchess of Marlborough as far back as her accession to the throne; the ascendant of the latter being what "her majesty had neither patience to bear nor spirit to subdue." Memoirs relating to the Change in the Queen's Ministry. But Coxe seems to refer the commencement of the coldness to 1706. Life of Marlborough, p. 151.—1845.]

† ["It is most certain, that when the queen first began to change her servants, it was not from a dislike of things but of persons, and those persons a very small number." Swift's Inquiry into the Behaviour of the Queen's last Ministry. Though this authority is not always trustworthy, I incline to credit what is here said, confirmed by his private letters to Stella at this time. "It was the issue," he goes on to inform us, "of Sacheverell's trial which encouraged her to proceed so far. She then determined to dissolve parliament, having previously only designed to turn out one family. The whigs on this resolved to resign, which she accepted unwillingly from Somers and Cowper, both of whom, especially the former, she esteemed as much as her nature was capable of." Her scheme was moderate and comprehensive, from which she never departed till near her death. She became very difficult to advise out of the opinion of having been too much directed. "So that few ministers had ever perhaps a harder game to play, between the jealousy and discontents of his [Oxford's] friends on one side, and the management of the queen's temper on the other." His friends were anxious for further changes, with which he was not unwilling to comply, had not the duchess of Somerset's influence been employed. The queen said, if she might not choose her own servants, she could not see what advantage she had got from the change of ministry; and so little was her heart set upon a tory administration, that many employments in court and country, and a great majority of all commissions, remained in the hands of the other party. She lost the government the vote on lord Nottingham's motion, and seemed so little displeased, that she gave her hand to Somerset (who had voted against the court) to lead her out. But during her illness, in the winter of 1713, the whigs were on the alert, which, he says, was so represented to her, that

War of the succession.

The object of the war, as it is commonly called, of the Grand Alliance, commenced in 1702, was, as expressed in an address of the house of commons, for preserving the liberties of Europe and reducing the exorbitant power of France.* The occupation of the Spanish dominions by the duke of Anjou, on the authority of the late king's will, was assigned as its justification, together with the acknowledgment of the pretended prince of Wales as successor to his father James. Charles, archduke of Austria, was recognised as king of Spain; and as early as 1705 the restoration of that monarchy to his house is declared in a speech from the throne to be not only safe and advantageous, but glorious to England.† Louis XIV. had perhaps at no time much hope of retaining for his grandson the whole inheritance he claimed; and on several occasions made overtures for negotiation, but such as indicated his design of rather sacrificing the detached possessions of Italy and the Netherlands than Spain itself and the Indies.‡ After the battle of Oudenarde, however, and the loss of Lille in the campaign of 1708, the exhausted state of France and discouragement of his court induced him to acquiesce in the cession of the Spanish monarchy as a basis of treaty. In the conferences of the Hague in 1709, he struggled for a time to preserve Naples and Sicily; but ultimately admitted the terms imposed by the allies, with the exception of the famous thirty-seventh article of the preliminaries, binding him to procure by force or persuasion the resignation of the Spanish crown by his grandson within two months. This proposition he declared to be both dishonourable and impracticable; and, the allies refusing to give way, the negotiation was broken off. It was renewed the next year at Gertruydenburg; but the same obstacle still proved insurmountable.§

"she laid aside all schemes of reconciling the two opposite interests, and entered on a firm resolution of adhering to the old English principles." This passage is to be considered with a view to what we learn from other quarters about the "old English principles;" which, whether Swift was aware of it or no, meant with many nothing less than the restoration of the house of Stuart.—1845.]

* Parl. Hist. vi. 4.

† Nov. 27. Parl. Hist. 477.

‡ Coxe's Marlborough, i. 453. ii. 110. Cunningham, ii. 52. 83.

§ Mémoires de Torcy, vol. ii. passim. Coxe's Marlborough, vol. iii. Bolingbroke's Letters on History, and Lord Walpole's Answer to them. Cunningham, Somerville, 840.

It has been the prevailing opinion in modern times that the English ministry, rather against the judgment of their allies of Holland, insisted upon a condition not indispensable to their security, and too ignominious for their fallen enemy to accept. Some may perhaps incline to think that, even had Philip of Anjou been suffered to reign in Naples, a possession rather honourable than important, the balance of power would not have been seriously affected, and the probability of durable peace been increased. This, however, it was not necessary to discuss. The main question is as to the power which the allies possessed of securing the Spanish monarchy for the archduke, if they had consented to waive the thirty-seventh article of the preliminaries. If indeed they could have been considered as a single potentate, it was doubtless possible, by means of keeping up great armies on the frontier, and by the delivery of cautionary towns, to have prevented the king of France from lending assistance to his grandson. But, self-interested and disunited as confederacies generally are, and as the grand alliance had long since become, this appeared a very dangerous course of policy, if Louis should be playing an underhand game against his engagements. And this it was not then unreasonable to suspect, even if we should believe, in despite of some plausible authorities, that he was really sincere in abandoning so favourite an interest. The obstinate adherence of Godolphin and Somers to the preliminaries may possibly have been erroneous; but it by no means deserves the reproach that has been unfairly bestowed on it; nor can the whigs be justly charged with protracting the war to enrich Marlborough, or to secure themselves in power.*

* The late biographer of Marlborough asserts that he was against breaking off the conferences in 1709, though clearly for insisting on the cession of Spain. (iii. 40.) Godolphin, Somers, and the whigs in general, expected Louis XIV. to yield the thirty-seventh article. Cowper, however, was always doubtful of this. Id. 176.

It is very hard to pronounce, as it appears to me, on the great problem of Louis's sincerity in this negotiation. No decisive evidence seems to have been brought on the contrary side. The most remarkable authority that way is a passage in the Mémoires of St. Phelipe, iii. 263., who certainly asserts that the king of France had, without the knowledge of any of his ministers, assured his grandson of a continued support. But the question returns as to St. Phelipe's means of knowing so important a secret. On the other hand, I cannot discover in the long correspondence between madame de Maintenon and the princesse des Ursins the least corroboration of these suspicions, but much to the contrary effect. Nor does Torcy drop a word, though writing when all was over, by which we should infer that the court of Versailles had any

Treaty of peace broken off.

The conferences at Gertruydenburg were broken off in July, 1710, because an absolute security for the evacuation of Spain by Philip appeared to be wanting; and within six months a fresh negotiation was secretly on foot, the basis of which was his retention of that kingdom. For the administration presided over by Godolphin had fallen meanwhile; new counsellors, a new parliament, new principles of government. The tories had from the beginning come very reluctantly into the schemes of the grand alliance; though no opposition to the war had ever been shown in parliament, it was very soon perceived that the majority of that denomination had their hearts bent on peace.* But instead of renewing the negotiation in concert with the allies (which indeed might have been impracticable), the new ministers fell upon the course of a clandestine arrangement, in exclusion of all the other powers, which led to the signature of preliminaries in September, 1711, and afterwards to the public congress of Utrecht, and the celebrated treaty named from that town. Its chief provisions are too well known to be repeated.

Renewed again by the tory government.

The arguments in favour of a treaty of pacification, which should abandon the great point of contest, and leave Philip in possession of Spain and America, were neither few nor

other hopes left in 1709, than what still lingered in their heart from the determined spirit of the Castilians themselves.

It appears by the Mémoires de Noailles, iii. 10. (edit. 1777) that Louis wrote to Philip, 26th Nov. 1708, hinting that he must reluctantly give him up, in answer to one wherein the latter had declared that he would not quit Spain while he had a drop of blood in his veins. And on the French ambassador at Madrid, Amelot, remonstrating against the abandonment of Spain, with an evident intimation that Philip could not support himself alone, the king of France answered that he must end the war at any price. 15th April, 1709. Id. 34. In the next year, after the battle of Saragosa, which seemed to turn the scale wholly against Philip, Noailles was sent to Madrid, in order to persuade that prince to abandon the contest. Id. 107. There were some in France who would even have accepted the thirty-seventh article, of whom madame de Maintenon seems to have been. P. 117. We may perhaps think that an explicit offer of Naples, on the part of the allies, would have changed the scene; nay, it seems as if Louis would have been content at this time with Sardinia and Sicily. P. 108.

* A contemporary historian of remarkable gravity observes: "It was strange to see how much the desire of French wine, and the dearness of it, alienated many men from the duke of Marlborough's friendship." Cunningham, ii. 220. The hard drinkers complained that they were poisoned by port; these formed almost a party; Dr. Aldrich, dean of Christchurch, surnamed the priest of Bacchus, Dr. Ratcliff, general Churchill, &c. "And all the bottle companions, many physicians, and great numbers of the lawyers and inferior clergy, and, in fine, the loose women too, were united together in the faction against the duke of Marlborough."

inconsiderable. 1. The kingdom had been impoverished by twenty years of uninterruptedly augmented taxation; the annual burthens being triple in amount of those paid before the revolution. Yet, amidst these sacrifices, we had the mortification of finding a debt rapidly increasing, whereof the mere interest far exceeded the ancient revenues of the crown, to be bequeathed, like an hereditary curse, to unborn ages.* Though the supplies had been raised with less difficulty than in the late reign, and the condition of trade was less unsatisfactory, the landed proprietors saw with indignation the silent transfer of their wealth to new men, and almost hated the glory that was brought by their own degradation.† Was it not to be feared that they might hate also the revolution, and the protestant succession that depended on it, when they tasted these fruits it had borne? Even the army had been recruited by violent means unknown to our constitution, yet such as the continual loss of men, with a population at the best stationary, had perhaps rendered necessary.‡

Arguments for and against the treaty of Utrecht.

2. The prospect of reducing Spain to the archduke's obedience was grown unfavourable. It was at best an odious work, and not very defensible on any maxims of national justice, to impose a sovereign on a great people in despite of their own repugnance, and what they deemed their loyal obligation. Heaven itself might shield their righteous cause, and baffle the selfish rapacity of human politics. But what was the state of the war at the close of 1710? The sur-

* [The national debt, 31st Dec. 1714, amounted, according to Chalmers, to 50,644,306*l.* Sinclair makes it 52,145,363*l.* But about half of this was temporary annuities. The whole expenses of the war are reckoned by the former writer at 65,853,799*l.* The interest of the debt was, as computed by Chalmers, 2,811,903*l.*; by Sinclair, 3,351,358*l.*—1845.]

† ["Power," says Swift, "which, according to the old maxim, was used to follow land, is now gone over to money; so that, if the war continue some years longer, a landed man will be little better than a farmer of a rack rent to the army and to the public funds." Examiner, No. 13, Oct. 1710.—1845.]

‡ A bill was attempted in 1704 to recruit the army by a forced conscription of men from each parish, but laid aside as unconstitutional. Boyer's Reign of Queen Anne, p. 123. It was tried again in 1707 with like success. P. 319. But it was resolved instead to bring in a bill for raising a sufficient number of troops out of such persons as have no lawful calling or employment. Stat. 4 Anne, c. 10. Parl. Hist. 335. The parish officers were thus enabled to press men for the land service; a method hardly more unconstitutional than the former, and liable to enormous abuses. The act was temporary, but renewed several times during the war. It was afterwards revived in 1757 (30 Geo. 2. c. 8.), but never, I believe, on any later occasion.

render of 7000 English under Stanhope at Brihuega had ruined the affairs of Charles, which in fact had at no time been truly prosperous, and confined him to the single province sincerely attached to him, Catalonia. As it was certain that Philip had spirit enough to continue the war, even if abandoned by his grandfather, and would have the support of almost the entire nation, what remained but to carry on a very doubtful contest for the subjugation of that extensive kingdom? In Flanders, no doubt, the genius of Marlborough kept still the ascendant; yet France had her Fabius in Villars; and the capture of three or four small fortresses in a whole campaign did not presage a rapid destruction of the enemy's power.

3. It was acknowledged that the near connexion of the monarchs on the thrones of France and Spain could not be desired for Europe. Yet the experience of ages had shown how little such ties of blood determined the policy of courts; a Bourbon on the throne of Spain could not but assert the honour, and even imbibe the prejudices, of his subjects; and as the two nations were in all things opposite, and must clash in their public interests, there was little reason to fear a subserviency in the cabinet of Madrid, which, even in that absolute monarchy, could not be displayed against the general sentiment.

4. The death of the emperor Joseph, and election of the archduke Charles in his room, which took place in the spring of 1711, changed in no small degree the circumstances of Europe. It was now a struggle to unite the Spanish and Austrian monarchies under one head. Even if England might have little interest to prevent this, could it be indifferent to the smaller states of Europe that a family not less ambitious and encroaching than that of Bourbon should be so enormously aggrandized? France had long been to us the only source of apprehension; but to some states, to Savoy, to Switzerland, to Venice, to the principalities of the empire, she might justly appear a very necessary bulwark against the aggressions of Austria. The alliance could not be expected to continue faithful and unanimous, after so important an alteration in the balance of power.

5. The advocates of peace and adherents of the new

ministry stimulated the national passions of England by vehement reproaches of the allies. They had thrown, it was contended, in despite of all treaties, an unreasonable proportion of expense upon a country not directly concerned in their quarrel, and rendered a negligent or criminal administration their dupes or accomplices. We were exhausting our blood and treasure to gain kingdoms for the house of Austria which insulted, and the best towns of Flanders for the States-General who cheated us. The barrier treaty of lord Townshend was so extravagant, that one might wonder at the presumption of Holland in suggesting its articles, much more at the folly of our government in acceding to them. It laid the foundation of endless dissatisfaction on the side of Austria, thus reduced to act as the vassal of a little republic in her own territories, and to keep up fortresses at her own expense, which others were to occupy. It might be anticipated that, at some time, a sovereign of that house would be found more sensible to ignominy than to danger, who would remove this badge of humiliation by dismantling the fortifications, which were thus to be defended. Whatever exaggeration might be in these clamours, they were sure to pass for undeniable truths with a people jealous of foreigners, and prone to believe itself imposed upon, from a consciousness of general ignorance and credulity.

These arguments were met by answers not less confident, though less successful at the moment, than they have been deemed convincing by the majority of politicians in later ages. It was denied that the resources of the kingdom were so much enfeebled; the supplies were still raised without difficulty; commerce had not declined; public credit stood high under the Godolphin ministry; and it was especially remarkable that the change of administration, notwithstanding the prospect of peace, was attended by a great fall in the price of stocks. France, on the other hand, was notoriously reduced to the utmost distress; and, though it were absurd to allege the misfortunes of our enemy by way of consolation for our own, yet the more exhausted of the two combatants was naturally that which ought to yield; and it was not for the honour of our free government that we should be outdone in magnanimous endurance of privations for the sake of the great in-

terests of ourselves and our posterity by the despotism we so boastfully scorned.* The king of France had now for half a century been pursuing a system of encroachment on the neighbouring states, which the weakness of the two branches of the Austrian house, and the perfidiousness of the Stuarts, not less than the valour of his troops and skill of his generals, had long rendered successful. The tide had turned for the first time in the present war; victories more splendid than were recorded in modern warfare had illustrated the English name. Were we spontaneously to relinquish these great advantages, and two years after Louis had himself consented to withdraw his forces from Spain, our own arms having been in the mean time still successful on the most important scene of the contest, to throw up the game in despair, and leave him far more the gainer at the termination of this calamitous war, than he had been after those triumphant campaigns which his vaunting medals commemorate? Spain of herself could not resist the confederates, even if united in support of Philip; which was denied as to the provinces composing the kingdom of Aragon, and certainly as to Catalonia; it was in Flanders that Castile was to be conquered; it was France that we were to overcome; and now that her iron barrier had been broken through, when Marlborough was preparing to pour his troops upon the defenceless plains of Picardy, could we doubt that Louis must in good earnest abandon the cause of his grandson, as he had already pledged himself in the conferences of Gertruydenburg?

2. It was easy to slight the influence which the ties of blood exert over kings. Doubtless they are often torn asunder by ambition or wounded pride. But it does not follow that they have no efficacy; and the practice of courts in cementing alliances by intermarriage seems to show that they are not reckoned indifferent. It might however be admitted that a king of Spain, such as she had been a hundred years before, would probably be led by the tendency of his ambition

* Every contemporary writer bears testimony to the exhaustion of France, rendered still more deplorable by the unfavourable season of 1709, which produced a famine. Madame de Maintenon's letters to the princess des Ursins are full of the public misery, which she did not soften, out of some vain hope that her inflexible correspondent might relent at length, and prevail on the king and queen of Spain to abandon their throne.

into a course of policy hostile to France. But that monarchy had long been declining; great rather in name and extent of dominion than intrinsic resources, she might perhaps rally for a short period under an enterprising minister; but with such inveterate abuses of government, and so little progressive energy among the people, she must gradually sink lower in the scale of Europe, till it might become the chief pride of her sovereigns that they were the younger branches of the house of Bourbon. To cherish this connexion would be the policy of the court of Versailles; there would result from it a dependent relation, an habitual subserviency of the weaker power, a family compact of perpetual union, always opposed to Great Britain. In distant ages, and after fresh combinations of the European commonwealth should have seemed almost to efface the recollection of Louis XIV. and the war of the succession, the Bourbons on the French throne might still claim a sort of primogenitary right to protect the dignity of the junior branch by interference with the affairs of Spain; and a late posterity of those who witnessed the peace of Utrecht might be entangled by its improvident concessions.

3. That the accession of Charles to the empire rendered his possession of the Spanish monarchy in some degree less desirable, need not be disputed; though it would not be easy to prove that it could endanger England, or even the smaller states, since it was agreed on all hands that he was to be master of Milan and Naples. But against this, perhaps imaginary, mischief the opponents of the treaty set the risk of seeing the crowns of France and Spain united on the head of Philip. In the years 1711 and 1712 the dauphin, the duke of Burgundy, and the duke of Berry were swept away. An infant stood alone between the king of Spain and the French succession. The latter was induced, with some unwillingness, to sign a renunciation of this contingent inheritance. But it was notoriously the doctrine of the French court that such renunciations were invalid; and the sufferings of Europe were chiefly due to this tenet of indefeasible royalty. It was very possible that Spain would never consent to this union, and that a fresh league of the great powers might be formed to prevent it; but, if we had the means of permanently sepa-

rating the two kingdoms in our hands, it was strange policy to leave open this door for a renewal of the quarrel.

The negotiation mismanaged.

But whatever judgment we may be disposed to form as to the political necessity of leaving Spain and America in the possession of Philip, it is impossible to justify the course of that negotiation which ended in the peace of Utrecht. It was at best a dangerous and inauspicious concession, demanding every compensation that could be devised, and which the circumstances of the war entitled us to require. France was still our formidable enemy; the ambition of Louis was still to be dreaded, his intrigues to be suspected. That an English minister should have thrown himself into the arms of this enemy at the first overture of negotiation; that he should have renounced advantages upon which he might have insisted; that he should have restored Lille, and almost attempted to procure the sacrifice of Tournay; that throughout the whole correspondence and in all personal interviews with Torcy he should have shown the triumphant queen of Great Britain more eager for peace than her vanquished adversary; that the two courts should have been virtually conspiring against those allies, without whom we had bound ourselves to enter on no treaty; that we should have withdrawn our troops in the midst of a campaign, and even seized upon the towns of our confederates while we left them exposed to be overcome by a superior force; that we should have first deceived those confederates by the most direct falsehood in denying our clandestine treaty, and then dictated to them its acceptance, are facts so disgraceful to Bolingbroke, and in somewhat a less degree to Oxford, that they can hardly be palliated by establishing the expediency of the treaty itself.*

Intrigues of the jacobites.

For several years after the treaty of Ryswick the intrigues of ambitious and discontented statesmen, and of a misled faction in favour of the exiled family, grew much colder; the old age of James and the infancy

* [Bolingbroke owns, in his Letters on the Study of History, Letter viii., that the peace of Utrecht was not what it should have been, and that France should have given up more; but singularly lays the blame of her not having done so on those who opposed the peace. It appears, on the contrary, from his correspondence, that the strength of this opposition at home was the only argument he used with Torcy to save Tournay and other places, as far as he cared to save them at all.—1845.]

of his son being alike incompatible with their success. The jacobites yielded a sort of provisional allegiance to the daughter of their king, deeming her, as it were, a regent in the heir's minority, and willing to defer the consideration of his claim till he should be competent to make it, or to acquiesce in her continuance upon the throne, if she could be induced to secure his reversion.* Meanwhile, under the name of tories and high-churchmen, they carried on a more dangerous war by sapping the bulwarks of the revolution settlement. The disaffected clergy poured forth sermons and libels, to impugn the principles of the whigs or traduce their characters. Twice a year especially, on the 30th of January and 29th of May, they took care that every stroke upon rebellion and usurpation should tell against the expulsion of the Stuarts and the Hanover succession. They inveighed against the dissenters and the toleration. They set up pretences of loyalty towards the queen, descanting sometimes on her hereditary right, in order to throw a slur on the settlement. They drew a transparent veil over their designs, which might screen them from prosecution, but could not impose, nor was meant to impose, on the reader. Among these the most distinguished was Leslie, author of a periodical sheet called the Rehearsal, printed weekly from 1704 to 1708; and as he, though a non-juror, and unquestionable jacobite, held only the same language as Sacheverell, and others who affected obedience to the government, we cannot much be deceived in assuming that their views were entirely the same.†

The court of St. Germains, in the first years of the queen, preserved a secret connexion with Godolphin and Marlborough, though justly distrustful of their sincerity; nor is it by any means clear that they made any strong professions.‡ Their evident determination to

Some of the ministers engage in them.

* It is evident from Macpherson's Papers, that all hopes of a present restoration in the reign of Anne were given up in England. They soon revived, however, as to Scotland, and grew stronger about the time of the union.

† The Rehearsal is not written in such a manner as to gain over many proselytes. The scheme of fighting against liberty with her own arms had not yet come into vogue; or rather Leslie was too mere a bigot to practise it. He is wholly for arbitrary power; but the common stuff of his journal is high-church notions of all descriptions. This could not win many in the reign of Anne.

‡ Macpherson, i. 608. If Carte's anec-

reduce the power of France, their approximation towards the whigs, the averseness of the duchess to jacobite principles, taught at length that unfortunate court how little it had to expect from such ancient friends. The Scotch Jacobites, on the other hand, were eager for the young king's immediate restoration; and their assurances finally produced his unsuccessful expedition to the coast in 1708.* This alarmed the queen, who at least had no thoughts of giving up any part of her dominions, and probably exasperated the two ministers.† Though Godolphin's partiality to the Stuart cause was always suspected, the proofs of his intercourse with their emissaries are not so strong as against Marlborough; who, so late as 1711, declared himself more positively than he seems hitherto to have done in favour of their restoration.‡ But the extreme selfishness and treachery of his character makes it difficult to believe that he had any further view than to secure himself in the event of a revolution which he judged probable. His interest, which was always his deity, did not lie in that direction; and his great sagacity must have perceived it.

Just alarm for the Hanover succession.

A more promising overture had by this time been made to the young claimant from an opposite quarter. Mr. Harley, about the end of 1710, sent the abbé Gaultier

dotes are true, which is very doubtful, Godolphin, after he was turned out, declared his concern at not having restored the king; that he thought Harley would do it, but by French assistance, which he did not intend; that the tories had always distressed him, and his administration had passed in a struggle with the whig junto. Id. 170. Somerville says, he was assured that Carte was reckoned credulous and ill-informed by the jacobites. P. 273. It seems indeed, by some passages in Macpherson's Papers, that the Stuart agents either kept up an intercourse with Godolphin, or pretended to do so. Vol. ii. 2. et post. But it is evident that they had no confidence in him.

It must be observed, however, that lord Dartmouth, in his notes on Burnet, repeatedly intimates that Godolphin's secret object in his ministry was the restoration of the house of Stuart, and that with this view he suffered the act of security in Scotland to pass, which raised such a clamour that he was forced to close with the whigs in order to save himself. It is said also by a very good authority, lord Hardwicke, (note on Burnet, Oxf. edit. v. 352.) that there was something not easy to be accounted for in the conduct of the ministry, preceding the attempt on Scotland in 1708; giving us to understand in the subsequent part of the note that Godolphin was suspected of connivance with it. And this is confirmed by Ker of Kersland, who directly charges the treasurer with extreme remissness, if not something worse. Memoirs, i. 54. See also Lockhart's Commentaries (in Lockhart Papers, i. 308.). Yet it seems almost impossible to suspect Godolphin of such treachery, not only towards the protestant succession, but his mistress herself.

* Macpherson, ii. 74. et post. Hooke's Negotiations. Lockhart's Commentaries. Ker of Kersland's Memoirs, i. 45. Burnet. Cunningham. Somerville.

† Burnet, 502.

‡ Macpherson, ii. 158. 228. 283. and see Somerville, 272.

to marshal Berwick (natural son of James II. by Marlborough's sister), with authority to treat about the restoration; Anne of course retaining the crown for her life, and securities being given for the national religion and liberties. The conclusion of peace was a necessary condition. The jacobites in the English parliament were directed in consequence to fall in with the court, which rendered it decidedly superior. Harley promised to send over in the next year a plan for carrying that design into effect. But neither at that time, nor during the remainder of the queen's life, did this dissembling minister take any further measures, though still in strict connexion with that party at home, and with the court of St. Germains.* It was necessary, he said, to proceed gently, to make the army their own, to avoid suspicions which would be fatal. It was manifest that the course of his administration was wholly inconsistent with his professions; the friends of the house of Stuart felt that he betrayed, though he did not delude them; but it was the misfortune of this minister, or rather the just and natural reward of crooked counsels, that those he meant to serve could neither believe in his friendship, nor forgive his appearances of enmity. It is doubtless not easy to pronounce on the real intentions of men so destitute of sincerity as Harley and Marlborough; but, in believing the former favourable to the protestant succession, which he had so eminently contributed to establish, we accede to the judgment of those contemporaries who were best able to form one, and especially of the very jacobites with whom he tampered. And this is so powerfully confirmed by most of his public measures, his averseness to the high tories, and their consequent hatred of him, his irreconcilable disagreement with those of his colleagues who looked most to St. Germains, his frequent attempts to renew a connexion with the whigs, his contempt of the jacobite creed of government, and the little prospect he could have had of retaining power on such a revolution, that, so far at least as may be presumed from what has hitherto become public, there seems no reason for counting the earl of Oxford among

* Memoirs of Berwick, 1778 (English translation). And compare Lockhart's Commentaries, p. 368. Macpherson, sub ann. 1712 and 1713, passim.

those from whom the house of Hanover had any enmity to apprehend.*

The Pretender, meanwhile, had friends in the tory government more sincere probably and zealous than Oxford. In the year 1712 lord Bolingbroke, the duke of Buckingham, president of the council, and the duke of Ormond, were engaged in this connexion.† The last of these being in the

* The pamphlets on Harley's side, and probably written under his inspection, for at least the first year after his elevation to power, such as one entitled "Faults on both Sides," ascribed to Richard Harley, his relation, (Somers Tracts, xii. 678.) "Spectator's Address to the Whigs on Occasion of the Stabbing Mr. Harley," or the "Secret History of the October Club," 1711 (I believe by De Foe), seem to have for their object to reconcile as many of the whigs as possible to his administration, and to display his aversion to the violent tories. There can be no doubt that his first project was to have excluded the more acrimonious whigs, such as Wharton and Sunderland, as well as the duke of Marlborough and his wife, and coalesced with Cowper and Somers, both of whom were also in favour of the queen. But the steadiness of the whig party, and their resentment of his duplicity, forced him into the opposite quarters, though he never lost sight of his schemes for reconciliation.

The dissembling nature of this unfortunate statesman rendered his designs suspected. The whigs, at least in 1713, in their correspondence with the court of Hanover, speak of him as entirely in the jacobite interest. Macpherson, ii. 472. 509. Cunningham, who is not on the whole unfavourable to Harley, says, that "men of all parties agreed in concluding that his designs were in the Pretender's favour. And it is certain that he affected to have it thought so." P. 303. Lockhart also bears witness to the reliance placed on him by the jacobites, and argues with some plausibility (p. 377.) that the duke of Hamilton's appointment as ambassador to France, in 1712, must have been designed to further their object; though he believed that the death of that nobleman, in a duel with lord Mohun, just as he was setting out for Paris, put a stop to the scheme, and "questions if it was ever heartily re-assumed by lord Oxford."—"This I know, that his lordship, regretting to a friend of mine the duke's death, next day after it happened, told him that it disordered all their schemes, seeing Great Britain did not afford a person capable to discharge the trust which was committed to his grace, which sure was somewhat very extraordinary; and what other than the king's restoration could there be of so very great importance, or require such dexterity in managing, is not easy to imagine. And indeed it is more than probable that before his lordship could pitch upon one he might depend on in such weighty matters, the discord and division which happened betwixt him and the other ministers of state diverted or suspended his design of serving the king." Lockhart's Commentaries, p. 410. But there is more reason to doubt whether this design to serve the king ever existed.

† If we may trust to a book printed in 1717, with the title, "Minutes of Monsieur Mesnager's Negotiations with the Court of England towards the Close of the last Reign, written by himself," that agent of the French cabinet entered into an arrangement with Bolingbroke in March, 1712, about the Pretender. It was agreed that Louis should ostensibly abandon him, but should not be obliged, in case of the queen's death, not to use endeavours for his restoration. Lady Masham was wholly for this; but owned "the rage and irreconcilable aversion of the greatest part of the common people to her (the queen's) brother was grown to a height." But I must confess that, although Macpherson has extracted the above passage, and a more judicious writer, Somerville, quotes the book freely as genuine, (Hist. of Anne, p. 581, &c.) I found in reading it what seemed to me the strongest grounds of suspicion. It is printed in England, without a word of

command of the army, little glory as that brought him, might become an important auxiliary. Harcourt, the chancellor, though the proofs are not, I believe, so direct, has always been reckoned in the same interest. Several of the leading Scots peers, with little disguise, avowed their adherence to it; especially the duke of Hamilton, who, luckily perhaps

preface to explain how such important secrets came to be divulged, or by what means the book was brought before the world; the correct information as to English customs and persons frequently betrays a native pen; the truth it contains, as to jacobite intrigues, might have transpired from other sources, and in the main was pretty well suspected, as the Report of the Secret Committee on the Impeachments in 1715 shows; so that, upon the whole, I cannot but reckon it a forgery in order to injure the tory leaders. [In a note on Swift's works, vol. xxv. p. 37. (1779), it is said, on the authority of Savage, that "no such book was ever printed in the French tongue, from which it is impudently said to be translated as Mesnager's Negotiations." And, on reference to Savage's poem, entitled False Historians, I find this couplet:—

"Some usurp names — an English garreteer,
From minutes forg'd, is Monsieur Mesnager."

I think that the book has been ascribed to Defoe.—1845.]

But however this may be, we find Bolingbroke in correspondence with the Stuart agents in the latter part of 1712. Macpherson, 366. And his own correspondence with lord Strafford shows his dread and dislike of Hanover. (Bol. Corr. ii. 487. et alibi.) The duke of Buckingham wrote to St. Germains in July that year, with strong expressions of his attachment to the cause, and pressing the necessity of the prince's conversion to the protestant religion. Macpherson, 327. Ormond is mentioned in the duke of Berwick's letters as in correspondence with him; and Lockhart says there was no reason to make the least question of his affection to the king, whose friends were consequently well pleased at his appointment to succeed Marlborough in the command of the army, and thought it portended some good designs in favour of him. Id. 376.

Of Ormond's sincerity in this cause there can indeed be little doubt; but there is almost as much reason to suspect that of Bolingbroke as of Oxford; except that, having more rashness and less principle, he was better fitted for so dangerous a counter-revolution. But in reality he had a perfect contempt for the Stuart and tory notions of government, and would doubtless have served the house of Hanover with more pleasure, if his prospects in that quarter had been more favourable. It appears that in the session of 1714, when he had become lord of the ascendant, he disappointed the zealous royalists by his delays as much as his more cautious rival had done before. Lockhart, 470. This writer repeatedly asserts that a majority of the house of commons, both in the parliament of 1710 and that of 1713, wanted only the least encouragement from the court to have brought about the repeal of the act of settlement. But I think this very doubtful; and I am quite convinced that the nation would not have acquiesced in it. Lockhart is sanguine, and ignorant of England.

It must be admitted that part of the cabinet were steady to the protestant succession. Lord Dartmouth, lord Powlett, lord Trevor, and the bishop of London were certainly so; nor can there be any reasonable doubt, as I conceive, of the duke of Shrewsbury. On the other side, besides Ormond, Harcourt, and Bolingbroke, were the duke of Buckingham, sir William Wyndham, and probably Mr. Bromley. [The impression which Bolingbroke's letter to sir William Wyndham leaves on the mind, is, that, having no steady principle of action, he had been all along fluctuating between Hanover and St. Germains, according to the prospect he saw of standing well with one or the other, and in a great degree, according to the politics of Oxford, being determined to take the opposite line. But he had never been able to penetrate a more dissembling spirit than his own. This letter, as is well known, though written in 1717, was not published till after Bolingbroke's death.—1845.]

for the kingdom, lost his life in a duel, at the moment when he was setting out on an embassy to France. The rage expressed by that faction at his death betrays the hopes they had entertained from him. A strong phalanx of tory members, called the October Club, though by no means entirely jacobite, were chiefly influenced by those who were such. In the new parliament of 1713, the queen's precarious health excited the Stuart partisans to press forward with more zeal. The masque was more than half drawn aside; and, vainly urging the ministry to fulfil their promises while yet in time, they cursed the insidious cunning of Harley and the selfish cowardice of the queen. Upon her they had for some years relied. Lady Masham, the bosom favourite, was entirely theirs; and every word, every look of the sovereign, had been anxiously observed, in the hope of some indication that she would take the road which affection and conscience, as they fondly argued, must dictate. But, whatever may have been the sentiments of Anne, her secret was never divulged, nor is there, as I apprehend, however positively the contrary is sometimes asserted, any decisive evidence whence we may infer that she even intended her brother's restoration.* The

* It is said that the duke of Leeds, who was now in the Stuart interest, had sounded her in 1711, but with no success in discovering her intention. Macpherson, 212. The duke of Buckingham pretended, in the above-mentioned letter to St. Germains, June, 1712, that he had often pressed the queen on the subject of her brother's restoration, but could get no other answer than, "You see he does not make the least step to oblige me;" or, "He may thank himself for it: he knows I always loved him better than the other." Id. 328. This alludes to the Pretender's pertinacity, as the writer thought it, in adhering to his religion; and it may be very questionable, whether he had ever such conversation with the queen at all. But, if he had, it does not lead to the supposition, that under all circumstances she meditated his restoration. If the book under the name of Mesnager is genuine, which I much doubt, Mrs. Masham had never been able to elicit any thing decisive of her majesty's inclinations; nor do any of the Stuart correspondents in Macpherson pretend to know her intentions with certainty. The following passage in Lockhart seems rather more to the purpose: — On his coming to parliament in 1710, with a "high monarchical address," which he had procured from the county of Edinburgh, "the queen told me, though I had almost always opposed her measures, she did not doubt of my affection to her person, and hoped I would not concur in the design against Mrs. Masham, or for bringing over the prince of Hanover. At first I was somewhat surprised, but recovering myself, I assured her I should never be accessary to the imposing any hardship or affront upon her; and as for the prince of Hanover, her majesty might judge from the address I had read, that I should not be acceptable to my constituents if I gave my consent for bringing over any of that family, either now or at any time hereafter. At that she smiled, and I withdrew; and then she said to the duke (Hamilton), she believed I was an honest man and a fair dealer; and the duke replied, he could assure her I liked her majesty and all her father's bairns."

weakest of mankind have generally an instinct of self-preservation which leads them right, and perhaps more than stronger minds possess; and Anne could scarcely help perceiving that her own deposition from the throne would be the natural consequence of once admitting the reversionary right of one whose claim was equally good to the possession. The assertors of hereditary descent could acquiesce in her usurpation no longer than they found it necessary for their object; if her life should be protracted to an ordinary duration, it was almost certain that Scotland first, and afterwards England, would be wrested from her impotent grasp. Yet, though I believe the queen to have been sensible of this, it is impossible to pronounce with certainty that either through pique against the house of Hanover, or inability to resist her own councillors, she might not have come into the scheme of altering the succession.

But, if neither the queen nor her lord treasurer were inclined to take that vigorous course which one party demanded, they at least did enough to raise just alarm in the other; and it seems strange to deny that the protestant succession was in danger. As lord Oxford's ascendancy diminished, the signs of impending revolution became less equivocal. Adherents of the house of Stuart were placed in civil and military trust; an Irish agent of the Pretender was received in the character of envoy from the court of Spain; the most audacious manifestations of disaffection were overlooked.* Several even in

P. 317. It appears in subsequent parts of this book, that Lockhart and his friends were confident of the queen's inclinations in the last year of her life, though not of her resolution.

The truth seems to be, that Anne was very dissembling, as Swift repeatedly says in his private letters, and as feeble and timid persons in high station generally are; that she hated the house of Hanover, and in some measure feared them; but that she had no regard for the Pretender (for it is really absurd to talk like Somerville of natural affection under all the circumstances), and feared him a great deal more than the other; that she had however some scruples about his right, which were counterbalanced by her attachment to the church of England; consequently, that she was wavering among opposite impulses, but with a predominating timidity which would have probably kept her from any change.

* The duchess of Gordon, in June, 1711, sent a silver medal to the faculty of advocates at Edinburgh, with a head on one side, and the inscription, Cujus est; on the other, the British isles, with the word Reddite. The dean of faculty, Dundas of Arniston, presented this medal; and there seems reason to believe that a majority of the advocates voted for its reception. Somerville, p. 452. Bolingbroke, in writing on the subject to a friend, it must be owned, speaks of the proceeding with due disapprobation. Bolingbroke Correspondence, i. 343. No measures however were taken to mark the court's displeasure.

"Nothing is more certain," says Bo-

parliament spoke with contempt and aversion of the house of Hanover.* It was surely not unreasonable in the whig party to meet these assaults of the enemy with something beyond the ordinary weapons of an opposition. They affected no apprehensions that it was absurd to entertain. Those of the opposite faction, who wished well to the protestant interest, and were called Hanoverian tories, came over to their side, and joined them on motions that the succession was in danger.† No one hardly, who either hoped or dreaded the consequences, had any doubts upon this score; and it is only a few moderns who have assumed the privilege of setting

lingbroke, in his letter to sir William Wyndham, perhaps the finest of his writings, "than this truth, that there was at that time *no formed design* in the party, whatever views some particular men might have, against his majesty's accession to the throne." P. 22. This is in effect to confess a great deal; and in other parts of the same letter, he makes admissions of the same kind: though he says that he and other tories had determined, before the queen's death, to have no connexion with the Pretender, on account of his religious bigotry, P. 111.

* Lockhart gives us a speech of sir William Whitelock in 1714, bitterly inveighing against the elector of Hanover, who, he hoped, would never come to the crown. Some of the whigs cried out on this that he should be brought to the bar; when Whitelock said he would not recede an inch; he hoped the queen would outlive that prince, and in comparison to her he did not value all the princes of Germany one farthing. P. 469. Swift, in "Some Free Thoughts upon the present State of Affairs," 1714, speaks with much contempt of the house of Hanover and its sovereign; and suggests, in derision, that the infant son of the electoral prince might be invited to take up his residence in England. He pretends in this tract, as in all his writings, to deny entirely that there was the least tendency towards jacobitism, either in any one of the ministry, or even any eminent individual out of it; but with so impudent a disregard to truth, that I am not perfectly convinced of his own innocence as to that intrigue. Thus, in his Inquiry into the Behaviour of the Queen's last Ministry, he says, "I remember, during the late treaty of peace, discoursing at several times with some very eminent persons of the opposite side with whom I had long acquaintance. I asked them seriously, whether they or any of their friends did in earnest believe, or suspect the queen or the ministry to have any favourable regards towards the Pretender? They all confessed for themselves, that they believed nothing of the matter," &c. He then tells us that he had the curiosity to ask almost every person in great employment, whether they knew or had heard of any one particular man, except professed nonjurors, that discovered the least inclination towards the Pretender; and the whole number they could muster up did not amount to above five or six; among whom one was a certain old lord, lately dead, and one a private gentleman, of little consequence and of a broken fortune, &c. (Vol. xv. p. 94. edit. 12mo. 1765.) This acute observer of mankind well knew that lying is frequently successful in the ratio of its effrontery and extravagance. There are however some passages in this tract, as in others written by Swift, in relation to that time, which serve to illustrate the obscure machinations of those famous last years of the queen.

† On a motion in the house of lords that the protestant succession was in danger, April 5. 1714, the ministry had only a majority of 76 to 69, several bishops and other tories voting against them. Parl. Hist. vi. 1334. Even in the commons the division was but 256 to 208. Id. 1347.

aside the persuasion of contemporaries upon a subject which contemporaries were best able to understand.* Are we then to censure the whigs for urging on the elector of Hanover, who, by a strange apathy or indifference, seemed negligent of the great prize reserved for him, or is the bold step of demanding a writ of summons for the electoral prince as duke of Cambridge to pass for a factious insult on the queen, because, in her imbecility, she was leaving the crown to be snatched at by the first comer, even if she were not, as they suspected, in some conspiracy to bestow it on a proscribed heir?† I am much inclined to believe that the great majority of the nation were in favour of the protestant succession; but, if the princes of the house of Brunswic had seemed to retire from the contest, it might have been impracticable to resist a predominant faction in the council and in parliament; especially if the son of James, listening to the remonstrances

* Somerville has a separate dissertation on the danger of the protestant succession, intended to prove that it was in no danger at all, except through the violence of the whigs in exasperating the queen. It is true that Lockhart's Commentaries were not published at this time; but he had Macpherson before him, and the Memoirs of Berwick, and even gave credit to the authenticity of Mesnager, which I do not. But this sensible, and on the whole impartial writer, had contracted an excessive prejudice against the whigs of that period as a party, though he seems to adopt their principles. His dissertation is a laboured attempt to explain away the most evident facts, and to deny what no one of either party at that time would probably have in private denied.

† The queen was very ill about the close of 1713; in fact it became evident, as it had long been apprehended, that she could not live much longer. The Hanoverians, both whigs and tories, urged that the electoral prince should be sent for; it was thought that whichever of the competitors should have the start upon her death would succeed in securing the crown. Macpherson, 385. 546. 557. et alibi. Can there be a more complete justification of this measure, which Somerville and the tory writers treat as disrespectful to the queen? The Hanoverian envoy, Schutz, demanded the writ for the electoral prince without his master's orders; but it was done with the advice of all the whig leaders, Id. 592., and with the sanction of the electress Sophia, who died immediately after. "All who are for Hanover believe the coming of the electoral prince to be advantageous; all those against it are frightened at it." Id. 596. It was doubtless a critical moment; and the court of Hanover might be excused for pausing in the choice of dangers, as the step must make the queen decidedly their enemy. She was greatly offended, and forbad the Hanoverian minister to appear at court. Indeed she wrote to the elector, on May 19., expressing her disapprobation of the prince's coming over to England, and "her determination to oppose a project so contrary to her royal authority, however fatal the consequences may be." Id. 621. Oxford and Bolingbroke intimate the same. Id. 593., and see Bolingbroke Correspondence, iv. 512., a very strong passage. The measure was given up, whether from unwillingness on the part of George to make the queen irreconcilable, or, as is at least equally probable, out of jealousy of his son. The former certainly disappointed his adherents by more apparent apathy than their ardour required; which will not be surprising, when we reflect that, even upon the throne, he seemed to care very little about it. Macpherson, sub ann. 1714. passim.

of his English adherents, could have been induced to renounce a faith which, in the eyes of too many, was the sole pretext for his exclusion*, and was at least almost the only one which could have been publicly maintained with much success consistently with the general principles of our constitution.†

Accession of George I.

The queen's death, which came at last perhaps rather more quickly than was foreseen, broke for ever the fair prospects of her family. George I., unknown and absent, was proclaimed without a single murmur, as if the crown had passed in the most regular descent. But this was a momentary calm. The jacobite party, recovering from the first consternation, availed itself of its usual arms, and of those with which the new king supplied it. Many of the tories who would have acquiesced in the act of settlement, seem to have looked on a leading share in the administration as belonging of right to what was called the church party, and complained of the formation of a ministry on the whig principle. In later times also, it has been not uncommon to censure George I. for governing, as it is called, by a faction. Nothing can be more unreasonable than this reproach. Was he to select those as his advisers, who had been, as we know and as he believed, in a conspiracy with his competitor? Was lord Oxford, even if the king thought him faithful, capable of uniting with any

Whigs come into power.

* He was strongly pressed by his English adherents to declare himself a protestant. He wrote a very good answer. Macpherson, 436. Madame de Maintenon says, some catholics urged him to the same course, "par une politique poussée un peu trop loin." Lettres à la Princesse des Ursins, ii. 428. [See also Bolingbroke's Letter to sir W. Wyndham: "I cannot forget, nor you either, what passed when, a little before the death of the queen, letters were conveyed from the Chevalier to several persons, to myself among others. In the letter to me, the article of religion was so awkwardly handled, that he made the principal motive of the confidence we ought to have in him to consist in his firm resolution to adhere to popery. The effect which this epistle had on me was the same which it had on those tories to whom I communicated it at that time — it made us resolve to have nothing to do with him." It seems to have been a sine quâ non with the tory leaders that the Pretender should become a protestant. But others thought this an unreasonable demand. He would not even directly engage to secure the churches of England and Ireland, if we may believe Bolingbroke. Id.—1845.]

† [The whigs relied upon the army, in case of a struggle. Somerville, 565. Swift, in his Free Thoughts on the present State of Affairs, written in the spring of 1714, speaks with indignation of the disaffection of the guards towards the queen; taking care, at the same time, to deny the least inclination on the part of the ministry towards a change of succession.—1845.]

public men, hated as he was on each side? Were not the tories as truly a faction as their adversaries, and as intolerant during their own power.* Was there not, above all, a danger that, if some of one denomination were drawn by pique and disappointment into the ranks of the jacobites, the whigs, on the other hand, so ungratefully and perfidiously recompensed for their arduous services to the house of Hanover, might think all royalty irreconcilable with the principles of freedom, and raise up a republican party, of which the scattered elements were sufficiently discernible in the nation? † The exclusion indeed of the whigs would have been so monstrous both in honour and policy, that the censure has generally fallen on their alleged monopoly of public offices. But the mischiefs of a disunited, hybrid ministry had been sufficiently manifest in the two last reigns; nor could George, a stranger to his people and their constitution, have undertaken without ruin that most difficult task of balancing parties and persons, to which the great mind of William had proved unequal. Nor is it true that the tories, as such, were proscribed; those who chose to serve the court met with court favour; and in the very outset the few men of sufficient eminence, who had testified their attachment to the succession, received equitable rewards; but, most happily for himself and the kingdom, most reasonably according to the principles on which alone his throne could rest, the first prince of the house of Brunswic gave a decisive preponderance in his favour to Walpole and Townshend above Harcourt and Bolingbroke.

* The rage of the tory party against the queen and lord Oxford for retaining whigs in office is notorious from Swift's private letters, and many other authorities. And Bolingbroke, in his letter to sir William Wyndham, very fairly owns their intention "to fill the employments of the kingdom, down to the meanest, with tories."—"We imagined," he proceeds, "that such measures, joined to the advantages of our numbers and our property, would secure us against all attempts during her reign; and that we should soon become too considerable not to make our terms in all events which might happen afterwards; concerning which, to speak truly, I believe few or none of us had any very settled resolution." P. 11. It is rather amusing to observe that those who called themselves the tory or church party, seem to have fancied they had a natural right to power and profit, so that an injury was done them when these rewards went another way; and I am not sure that something of the same prejudice has not been perceptible in times a good deal later.

† Though no republican party, as I have elsewhere observed, could with any propriety be said to exist, it is easy to perceive that a certain degree of provocation from the crown might have brought one together in no slight force. These two propositions are perfectly compatible.

Great disaffection in the kingdom.

The strong symptoms of disaffection which broke out in a few months after the king's accession, and which can be ascribed to no grievance, unless the formation of a whig ministry was to be termed one, prove the taint of the late times to have been deep seated and extensive.* The clergy, in many instances, perverted, by political sermons, their influence over the people, who, while they trusted that from those fountains they could draw the living waters of truth, became the dupes of factious lies and sophistry. Thus encouraged, the heir of the Stuarts landed in Scotland; and the spirit of that people being in a great measure jacobite, and very generally averse to the union, he met with such success as, had their independence subsisted, would probably have established him on the throne. But Scotland was now doomed to wait on the fortunes of her more powerful ally; and, on his invasion of England, the noisy partisans of hereditary right discredited their faction by its cowardice. Few rose in arms to support the rebellion, compared with

* This is well put by bishop Willis, in his speech on the bill against Atterbury, Parl. Hist. viii. 305. In a pamphlet, entitled English Advice to the Freeholders (Somers Tracts, xiii. 521.), ascribed to Atterbury himself, a most virulent attack is made on the government, merely because what he calls the church party had been thrown out of office. "Among all who call themselves whigs," he says, "and are of any consideration as such, name me the man I cannot prove to be an inveterate enemy to the church of England; and I will be a convert that instant to their cause." It must be owned perhaps that the whig ministry might better have avoided some reflections on the late times in the addresses of both houses; and still more, some not very constitutional recommendations to the electors, in the proclamation calling the new parliament in 1714. Parl. Hist. vi. 44. 50. "Never was prince more universally well received by subjects than his present majesty on his arrival; and never was less done by a prince to create a change in people's affections. But so it is, a very observable change hath happened. Evil infusions were spread on the one hand; and, it may be, there was too great a stoicism or contempt of popularity on the other." Argument to prove the Affections of the People of England to be the best Security for the Government, p. 11. (1716.) This is the pamphlet written to recommend lenity towards the rebels, which Addison has answered in the Freeholder. It is invidious, and perhaps secretly jacobite. Bolingbroke observes, in the letter already quoted, that the Pretender's journey from Bar, in 1714, was a mere farce, no party being ready to receive him; but "the menaces of the whigs, backed by some very rash declarations [those of the king], and little circumstances of humour, which frequently offend more than real injuries, and by the entire change of all persons in employment, blew up the coals." P. 34. Then, he owns, the tories looked to Bar. "The violence of the whigs forced them into the arms of the Pretender." It is to be remarked on all this, that, by Bolingbroke's own account, the tories, if they had no "formed design" or "settled resolution" that way, were not very determined in their repugnance before the queen's death; and that the chief violence of which they complained was, that George chose to employ his friends rather than his enemies.

those who desired its success, and did not blush to see the gallant savages of the Highlands shed their blood that a supine herd of priests and country gentlemen might enjoy the victory. The severity of the new government after the rebellion has been often blamed; but I know not whether, according to the usual rules of policy, it can be proved that the execution of two peers and thirty other persons, taken with arms in flagrant rebellion, was an unwarrantable excess of punishment. There seems a latent insinuation in those who have argued on the other side, as if the jacobite rebellion, being founded on an opinion of right, was more excusable than an ordinary treason—a proposition which it would not have been quite safe for the reigning dynasty to acknowledge. Clemency, however, is the standing policy of constitutional governments, as severity is of despotism; and, if the ministers of George I. might have extended it to part of the inferior sufferers (for surely those of higher rank were the first to be selected) with safety to their master, they would have done well in sparing him the odium that attends all political punishments.*

Impeachment of tory ministers.

It will be admitted on all hands, at the present day, that the charge of high treason in the impeachments against Oxford and Bolingbroke was an intemperate excess of resentment at their scandalous dereliction of the public honour and interest. The danger of a sanguinary revenge inflamed by party spirit is so tremendous that the worst of men ought perhaps to escape rather than suffer by a retrospective, or, what is no better, a constructive extension of the law. The particular charge of treason was, that in the negotiation for peace they had endeavoured to procure the city of Tournay for the king of France; which

* The trials after this rebellion were not conducted with quite that appearance of impartiality which we now exact from judges. Chief baron Montagu reprimanded a jury for acquitting some persons indicted for treason; and Tindal, an historian very strongly on the court side, admits that the dying speeches of some of the sufferers made an impression on the people, so as to increase rather than lessen the number of jacobites. Continuation of Rapin, p. 501. (folio edit.) There seems however, upon the whole, to have been greater and less necessary severity after the rebellion in 1745; and upon this latter occasion it is impossible not to reprobate the execution of Mr. Ratcliffe (brother of that earl of Derwentwater who had lost his head in 1716), after an absence of thirty years from his country, to the sovereign of which he had never professed allegiance, nor could owe any, except by the fiction of our law.

was maintained to be an adhering to the queen's enemies within the statute of Edward III.* But, as this construction could hardly be brought within the spirit of that law, and the motive was certainly not treasonable or rebellious, it would have been incomparably more constitutional to treat so gross a breach of duty as a misdemeanour of the highest kind. This angry temper of the commons led ultimately to the abandonment of the whole impeachment against lord Oxford; the upper house, though it had committed Oxford to the Tower, which seemed to prejudge the question as to the treasonable character of the imputed offence, having two years afterwards resolved that the charge of treason should be first determined, before they would enter on the articles of less importance; a decision with which the commons were so ill satisfied that they declined to go forward with the prosecution. The resolution of the peers was hardly conformable to precedent, to analogy, or to the dignity of the house of commons, nor will it perhaps be deemed binding on any future occasion; but the ministers prudently suffered themselves to be beaten, rather than aggravate the fever of the people by a prosecution so full of delicate and hazardous questions.†

One of these questions, and by no means the least important, would doubtless have arisen upon a mode of defence alleged by the earl of Oxford in the house, when the articles of impeachment were brought up. "My lords," he said, "if ministers of state, acting by the immediate commands of their sovereign, are afterwards to be made accountable for their proceedings, it may, one day or other, be the case of all

* Parl. Hist. 73. It was carried against Oxford, by 247 to 127, sir Joseph Jekyll strongly opposing it, though he had said before (Id. 67.) that they had more than sufficient evidence against Bolingbroke on the statute of Edward III. A motion was made in the lords, to consult the judges whether the articles amounted to treason, but lost by 84 to 52. Id. 154. Lord Cowper on this occasion challenged all the lawyers in England to disprove that proposition. The proposal of reference to the judges was perhaps premature; but the house must surely have done this before their final sentence, or shown themselves more passionate than in the case of lord Strafford.

† Parl. Hist. vii. 486. The division was 88 to 56. There was a schism in the whig party at this time; yet I should suppose the ministers might have prevented this defeat, if they had been anxious to do so. It seems, however, by a letter in Coxe's Memoirs of Walpole, vol. ii. p. 123., that the government were for dropping the charge of treason against Oxford, "it being very certain that there is not sufficient evidence to convict him of that crime," but for pressing those of misdemeanour.

the members of this august assembly."* It was indeed undeniable that the queen had been very desirous of peace, and a party, as it were, to all the counsels that tended to it. Though it was made a charge against the impeached lords, that the instructions to sign the secret preliminaries of 1711 with M. Mesnager, the French envoy, were not under the great seal, nor countersigned by any minister, they were certainly under the queen's signet, and had all the authority of her personal command. This must have brought on the yet unsettled and very delicate question of ministerial responsibility in matters where the sovereign has interposed his own command; a question better reserved, it might then appear, for the loose generalities of debate than to be determined with the precision of criminal law. Each party, in fact, had in its turn made use of the queen's personal authority as a shield; the whigs availed themselves of it to parry the attack made on their ministry, after its fall, for an alleged mismanagement of the war in Spain before the battle of Almanza†; and the modern constitutional theory was by no means so established in public opinion as to bear the rude brunt of a legal argument. Anne herself, like all her predecessors, kept in her own hands the reins of power; jealous, as such feeble characters usually are, of those in whom she was forced to confide (especially after the ungrateful return of the duchess of

* Parl. Hist. vii. 105.

† Parl. Hist. vi. 972. Burnet, 560., makes some observations on the vote passed on this occasion, censuring the late ministers for advising an offensive war in Spain. "A resolution in council is only the sovereign's act, who upon hearing his councillors deliver their opinions, forms his own resolution; a councillor may indeed be liable to censure for what he may say at that board; but the resolution taken there has been hitherto treated with a silent respect; but by that precedent it will be hereafter subject to a parliamentary inquiry." Speaker Onslow justly remarks that these general and indefinite sentiments are liable to much exception, and that the bishop did not try them by his whig principles. The first instance where I find the responsibility of some one for every act of the crown strongly laid down is in a speech of the duke of Argyle, in 1739. Parl. Hist. ix. 1138. "It is true," he says, "the nature of our constitution requires that public acts should be issued out in his majesty's name; but for all that, my lords, he is not the author of them." [But, in a much earlier debate, Jan. 12. 1711, the earl of Rochester said, "For several years they had been told that the queen was to answer for every thing; but he hoped that time was over; that according to the fundamental constitution of this kingdom the ministers are accountable for all, and therefore he hoped nobody would — nay, nobody durst, name the queen in this debate." Parl. Hist. vi. 472. So much does the occasional advantage of urging an argument in debate lead men to speak against their own principles, for nothing could be more repugnant to those of the high tories, who reckoned Rochester their chief, than such a theory of the constitution as he here advances. — 1845.]

Marlborough for the most affectionate condescension), and obstinate in her judgment, from the very consciousness of its weakness, she took a share in all business, frequently presided in meetings of the cabinet, and sometimes gave directions without their advice.* The defence set up by lord Oxford would undoubtedly not be tolerated at present, if alleged in direct terms, by either house of parliament; however it may sometimes be deemed a sufficient apology for a minister, by those whose bias is towards a compliance with power, to insinuate that he must either obey against his conscience, or resign against his will.

Bill for septennial parliaments.

Upon this prevalent disaffection, and the general dangers of the established government, was founded that measure so frequently arraigned in later times, the substitution of septennial for triennial parliaments.† The ministry deemed it too perilous for their master, certainly for themselves, to encounter a general election in 1717; but the arguments adduced for the alteration, as it was meant to be permanent, were drawn from its permanent expediency. Nothing can be more extravagant than what is sometimes confidently pretended by the ignorant, that the legislature exceeded its rights by this enactment; or, if that cannot legally be advanced, that it at least violated the trust of the people, and broke in upon the ancient constitution. The law for triennial parliaments was of little more than twenty years' continuance.

* "Lord Bolingbroke used to say that the restraining orders to the duke of Ormond were proposed in the cabinet council, in the queen's presence, by the earl of Oxford, who had not communicated his intention to the rest of the ministers; and that lord Bolingbroke was on the point of giving his opinion against it, when the queen, without suffering the matter to be debated, directed these orders to be sent, and broke up the council. This story was told by the late lord Bolingbroke to my father." Note by lord Hardwicke on Burnet. (Oxf. edit. vi. 119.) The noble annotator has given us the same anecdote in the Hardwicke State Papers, ii. 482.; but with this variance, that lord Bolingbroke there ascribes the orders to the queen herself, though he conjectured them to have proceeded from lord Oxford. [This fact is mentioned by Bolingbroke himself, in the Letters on the Study of History. Bolingbroke's Works, vol. iv. p. 129. — 1845.]

† ["Septennial parliaments were at first a direct usurpation of the rights of the people; for by the same authority that one parliament prolonged their own power to seven years, they might have continued it to twice seven, or, like the parliament of 1641, have made it perpetual." Priestley on Government, 1771, p. 20. Similar assertions were common, grounded on the ignorant assumption that the Septennial Act prolonged the original duration of parliament, whereas it in fact only limited, though less than the Triennial Act which it repealed, the old prerogative of the crown to keep the same parliament during the life of the reigning king. — 1845.]

It was an experiment, which, as was argued, had proved unsuccessful; it was subject, like every other law, to be repealed entirely, or to be modified at discretion.* As a question of constitutional expediency, the septennial bill was doubtless open at the time to one serious objection. Every one admitted that a parliament subsisting indefinitely during a king's life, but exposed at all times to be dissolved at his pleasure, would become far too little independent of the people, and far too much so upon the crown. But, if the period of its continuance should thus be extended from three to seven years, the natural course of encroachment, or some momentous circumstances like the present, might lead to fresh prolongations, and gradually to an entire repeal of what had been thought so important a safeguard of its purity. Time has happily put an end to apprehensions, which are not on that account to be reckoned unreasonable.†

Many attempts have been made to obtain a return to triennial parliaments; the most considerable of which was in 1733, when the powerful talents of Walpole and his opponents were arrayed on this great question. It has been less debated in modern times than some others connected with parliamentary reformation. So long indeed as the sacred duties of choosing the representatives of a free nation shall be perpetually disgraced by tumultuary excess, or, what is far worse, by gross corruption and ruinous profusion, (evils which no effectual pains are taken to redress, and which some apparently desire to perpetuate, were it only to throw discredit upon the popular part of the constitution,) it would be evidently inexpedient to curtail the present duration of parliament. But, even independently of this not insuperable objection, it may well be doubted whether triennial elections would make much perceptible difference in the course of government, and whether that difference would on the whole be beneficial. It will

* [The whole tory party, according to Bolingbroke, had become avowedly jacobite by the summer of 1715. He lays this as far as he can on the impeachments of himself and others. But though these measures were too violent, and calculated to exasperate a fallen party, we have abundant proofs of the increase of jacobitism in the preceding year. — 1845.]

† Parl. Hist. vii. 292. The apprehension that parliament, having taken this step, might go on still farther to protract its own duration, was not quite idle. We find from Coxe's Memoirs of Walpole, ii. 217., that in 1720, when the first septennial house of commons had nearly run its term, there was a project of once more prolonging its life.

be found, I believe, on a retrospect of the last hundred years, that the house of commons would have acted, in the main, on the same principles, had the elections been more frequent; and certainly the effects of a dissolution, when it has occurred in the regular order, have seldom been very important. It is also to be considered, whether an assembly which so much takes to itself the character of a deliberative council on all matters of policy, ought to follow with the precision of a weather-glass the unstable prejudices of the multitude. There are many who look too exclusively at the functions of parliament, as the protector of civil liberty against the crown; functions, it is true, most important, yet not more indispensable than those of steering a firm course in domestic and external affairs, with a circumspectness and providence for the future, which no wholly democratical government has ever yet displayed. It is by a middle position between an oligarchical senate, and a popular assembly, that the house of commons is best preserved both in its dignity and usefulness, subject indeed to swerve towards either character by that continual variation of forces which act upon the vast machine of our commonwealth. But what seems more important than the usual term of duration, is that this should be permitted to take its course, except in cases where some great change of national policy may perhaps justify its abridgement. The crown would obtain a very serious advantage over the house of commons, if it should become an ordinary thing to dissolve parliament for some petty ministerial interest, or to avert some unpalatable resolution. Custom appears to have established, and with some convenience, the substitution of six for seven years as the natural life of a house of commons; but an habitual irregularity in this respect might lead in time to consequences that most men would deprecate. And it may here be permitted to express a hope that the necessary dissolution of parliament within six months of a demise of the crown will not long be thought congenial to the spirit of our modern government.

Peerage bill.

A far more unanimous sentence has been pronounced by posterity upon another great constitutional question, that arose under George I. Lord Sunderland persuaded the king to renounce his important prerogative of

making peers; and a bill was supported by the ministry, limiting the house of lords, after the creation of a very few more, to its actual numbers. The Scots were to have twenty-five hereditary, instead of sixteen elective, members of the house; a provision neither easily reconciled to the union, nor required by the general tenor of the bill. This measure was carried with no difficulty through the upper house, whose interests were so manifestly concerned in it. But a similar motive, concurring with the efforts of a powerful malecontent party, caused its rejection by the commons.* It was justly thought a proof of the king's ignorance or indifference in every thing that concerned his English crown, that he should have consented to so momentous a sacrifice: and Sunderland was reproached for so audacious an endeavour to strengthen his private faction at the expense of the fundamental laws of the monarchy. Those who maintained the expediency of limiting the peerage, had recourse to uncertain theories as to the ancient constitution, and denied this prerogative to have been originally vested in the crown. A more plausible argument was derived from the abuse, as it was then generally accounted, of creating at once twelve peers in the late reign, for the sole end of establishing a majority for the court; a resource which would be always at the command of successive factions, till the British nobility might become as numerous and venal as that of some European states. It was argued that there was a fallacy in concluding the collective power of the house of lords to be augmented by its limitation, though every single peer would evidently become of more weight in the kingdom; that the wealth of the whole body must bear a less proportion to that of the nation, and would possibly not exceed that of the lower house, while on the other hand it might be indefinitely multiplied by fresh creations; that the crown would lose one great engine of corrupt influence over the commons, which could never be truly independent, while its principal members were looking on it as a stepping-stone to hereditary honours.†

* Parl. Hist. vii. 589.

† The arguments on this side are urged by Addison, in the Old Whig; and by the author of a tract, entitled Six Questions Stated and Answered.

Though these reasonings however are not destitute of considerable weight, and the unlimited prerogative of augmenting the peerage is liable to such abuses, at least in theory, as might overthrow our form of government; while, in the opinion of some, whether erroneous or not, it has actually been exerted with too little discretion, the arguments against any legal limitation seem more decisive. The crown has been carefully restrained by statutes, and by the responsibility of its advisers; the commons, if they transgress their boundaries, are annihilated by a proclamation; but against the ambition, or what is much more likely, the perverse haughtiness of the aristocracy, the constitution has not furnished such direct securities. And, as this would be prodigiously enhanced by a consciousness of their power, and by a sense of self-importance which every peer would derive from it after the limitation of their numbers, it might break out in pretensions very galling to the people, and in an oppressive extension of privileges which were already sufficiently obnoxious and arbitrary. It is true that the resource of subduing an aristocratical faction by the creation of new peers could never be constitutionally employed, except in the case of a nearly equal balance; but it might usefully hang over the heads of the whole body, and deter them from any gross excesses of faction or oligarchical spirit. The nature of our government requires a general harmony between the two houses of parliament; and indeed any systematic opposition between them would of necessity bring on the subordination of one to the other in too marked a manner; nor had there been wanting within the memory of man, several instances of such jealous and even hostile sentiments as could only be allayed by the inconvenient remedies of a prorogation or a dissolution. These animosities were likely to revive with more bitterness, when the country gentlemen and leaders of the commons should come to look on the nobility as a class into which they could not enter, and the latter should forget more and more, in their inaccessible dignity, the near approach of that gentry to themselves in respectability of birth and extent of possessions.*

* The speeches of Walpole and others, in the Parliamentary Debates, contain the whole force of the arguments against the peerage bill. Steele, in the Plebeian,

These innovations on the part of the new government were maintained on the score of its unsettled state, and want of hold on the national sentiment. It may seem a reproach to the house of Hanover that, connected as it ought to have been with the names most dear to English hearts, the protestant religion and civil liberty, it should have been driven to try the resources of tyranny, and to demand more authority, to exercise more control, than had been necessary for the worst of their predecessors. Much of this disaffection was owing to the cold reserve of George I., ignorant of the language, alien from the prejudices of his people, and continually absent in his electoral dominions, to which he seemed to sacrifice the nation's interest and the security of his own crown. It is certain that the acquisition of the duchies of Bremen and Verden for Hanover in 1716* exposed Great Britain to a very serious danger, by provoking the king of Sweden to join in a league for the restoration of the Pretender.† It might have been impossible (such was the precariousness of our revolution settlement), to have made the abdication of the electorate a condition of the house of Brunswic's succession; but the consequences of that connexion, though much exaggerated

opposed his old friend and co-adjutor, Addison, who has been thought by Johnson to have forgotten a little in party and controversy their ancient friendship.

Lord Sunderland held out, by way of inducements to the bill, that the lords would part with scandalum magnatum, and permit the commons to administer an oath; and that the king would give up the prerogative of pardoning after an impeachment. Coxe's Walpole, ii. 172. Mere trifles, in comparison with the innovations projected.

* [These duchies had been conquered from Sweden by Denmark, who ceded them to George I., as elector of Hanover, though they had never been resigned by Charles XII. This is not consonant to the usage of nations, and at least was an act of hostility in George I. against a power who had not injured him. Yet Townshend affected to defend it, as beneficial to English interests; though the contrary is most evident, as it provoked Charles to espouse the Pretender's cause. Coxe's Walpole, vol. i. p. 87. — 1845.]

† The letter's in Coxe's Memoirs of Walpole, vol. ii. abundantly show the German nationality, the impolicy and neglect of his duties, the rapacity and petty selfishness of George I. The whigs were much dissatisfied; but fear of losing their places made them his slaves. Nothing can be more demonstrable than that the king's character was the main cause of preserving jacobitism, as that of his competitor was of weakening it.

The habeas corpus was several times suspended in this reign, as it had been in that of William. Though the perpetual conspiracies of the jacobites afforded a sufficient apology for this measure, it was invidiously held up as inconsistent with a government which professed to stand on the principles of liberty. Parl. Hist. v. 153. 267. 604.; vii. 276.; viii. 38. But some of these suspensions were too long, especially the last, from October 1722 to October 1723. Sir Joseph Jekyll, with his usual zeal for liberty, moved to reduce the time to six months.

by the factious and disaffected, were in various manners detrimental to English interests during these two reigns; and not the least, in that they estranged the affections of the people from sovereigns whom they regarded as still foreign.* The tory and jacobite factions, as I have observed, were powerful in the church. This had been the case ever since the revolution. The avowed non-jurors were busy with the press; and poured forth, especially during the encouragement they received in part of Anne's reign, a multitude of pamphlets, sometimes argumentative, more often virulently libellous. Their idle cry that the church was in danger, which both houses in 1704 thought fit to deny by a formal vote, alarmed a senseless multitude. Those who took the oaths were frequently known partisans of the exiled family; and those who affected to disclaim that cause, defended the new settlement with such timid or faithless arms as served only to give a triumph to the adversary.† About the end of William's reign grew up the distinction of high and low churchmen; the first distinguished by great pretensions to sacerdotal power, both spiritual and temporal, by a repugnance to toleration, and by a firm adherence to the tory principle in the state; the latter by the opposite characteristics. These were pitched against each other in the two houses of convocation, an assembly which virtually ceased to exist under George I.

Jacobitism among the clergy.

The convocation of the province of Canterbury (for that of York seems never to have been important) is summoned by the archbishop's writ, under the king's direction, along with every parliament, to which it bears ana-

Convocation.

* [The regent duke of Orleans not only assisted the Pretender in his invasion of Scotland in 1715, but was concerned in the scheme of Charles XII. to restore him by arms in the next year, as appears by a despatch from the Baron de Besenval, French envoy at Warsaw, dated Feb. 2. 1716, which is printed from the Dépôt des Affaires Etrangères, in Mém. de Besenval (his descendant), vol. i. p. 102. So much was Voltaire mistaken in his assertion that the Regent, having discovered this intrigue through his spies, communicated it to George I. It was his own plot, though he soon afterwards allied himself to England, a remnant of the policy of 1715. But Sunderland and Stanhope, though too obsequious to their master's German views, had the merit of bringing over Dubois to a steady regard for the house of Hanover, which influenced the court of Versailles for many years. — 1845.]

† [The practice of using a collect before the sermon, instead of the form prescribed by the 55th canon, seems to have originated with the jacobite clergy, to avoid praying for the king. It is prohibited by a royal proclamation of Dec. 11. 1714. Hist. Reg. i. 78. — 1845.]

logy both in its constituent parts and in its primary functions. It consists (since the reformation) of the suffragan bishops, forming the upper house; of the deans, archdeacons, a proctor or proxy for each chapter, and two from each diocese, elected by the parochial clergy, who together constitute the lower house. In this assembly subsidies were granted, and ecclesiastical canons enacted. In a few instances under Henry VIII. and Elizabeth, they were consulted as to momentous questions affecting the national religion; the supremacy of the former was approved in 1533, the articles of faith were confirmed in 1562, by the convocation. But their power to enact fresh canons without the king's licence, was expressly taken away by a statute of Henry VIII.; and even subject to this condition, is limited by several later acts of parliament, (such as the acts of the uniformity under Elizabeth and Charles II., that confirming, and therefore rendering unalterable, the thirty-nine articles, those relating to non-residence and other church matters,) and still more perhaps by the doctrine gradually established in Westminster Hall, that new ecclesiastical canons are not binding on the laity, so greatly that it will ever be impossible to exercise it in any effectual manner. The convocation accordingly, with the exception of 1603, when they established some regulations, and of 1640 (an unfortunate precedent), when they attempted some more, had little business but to grant subsidies, which however were from the time of Henry VIII. always confirmed by an act of parliament; an intimation, no doubt, that the legislature did not wholly acquiesce in their power even of binding the clergy in a matter of property. This practice of ecclesiastical taxation was discontinued in 1664; at a time when the authority and pre-eminence of the church stood very high, so that it could not then have seemed the abandonment of an important privilege. From this time the clergy have been taxed at the same rate and in the same manner with the laity.*

* Parl. Hist. iv. 310. "It was first settled by a verbal agreement between archbishop Sheldon and the lord chancellor Clarendon, and tacitly given into by the clergy in general as a great ease to them in taxations. The first public act of any kind relating to it was an act of parliament in 1665, by which the clergy were, in common with the laity charged with the tax given in that act, and were discharged from the payment of the subsidies they had granted before

It was the natural consequence of this cessation of all business, that the convocation, after a few formalities, either adjourned itself or was prorogued by a royal writ; nor had it ever, with the few exceptions above noticed, sat for more than a few days, till its supply could be voted. But, about the time of the revolution, the party most adverse to the new order sedulously propagated a doctrine that the convocation ought to be advised with upon all questions affecting the

in convocation; but in this act of parliament of 1665 there is an express saving of the right of the clergy to tax themselves in convocation, if they think fit; but that has been never done since, nor attempted, as I know of, and the clergy have been constantly from that time charged with the laity in all public aids to the crown by the house of commons. In consequence of this (but from what period I cannot say), without the intervention of any particular law for it, except what I shall mention presently, the clergy (who are not lords of parliament), have assumed, and without any objection enjoyed, the privilege of voting in the election of members of the house of commons, in virtue of their ecclesiastical freeholds. This has constantly been practised from the time it first began; there are two acts of parliament which suppose it to be now a right. The acts are 10 Anne, c. 23.; 18 Geo. II. c. 18. Gibson, bishop of London, said to me, that this (the taxation of the clergy out of convocation) was the greatest alteration in the constitution ever made without an express law." Speaker Onslow's note on Burnet (Oxf. edit. iv. 508.)

[In respect to this taxation of the clergy by parliament, and not by convocation, it is to be remembered, that by far the greater part of modern taxes, being indirect, must necessarily fall on them in common with the laity. The convocation, like the parliament, were wont to grant tenths and fifteenths at fixed rates, supposed to arise from movable property. These being wholly disused from 1665 inclusive, other modes of taxation have supplied their place. But the clergy are charged to the land-tax for their benefices, and to the window-tax for their parsonages; as well as to occasional income-taxes. Exclusive of these, it does not appear that any imposts can be said to fall on them, from which they could have been exempt, by retaining the right of convocation. They have not been losers in any manner by the alteration. The position of speaker Onslow, that the clergy have enjoyed the privilege of voting at county elections in virtue of their ecclesiastical freeholds, only since their separate taxation has been discontinued, may be questioned: proofs of its exercise, as far as I remember, can be traced higher. In a conference between the two houses of parliament in 1671, on the subject of the lords' right to *alter* a money bill, it is said "the clergy have a right to tax themselves, and it is part of the privilege of their estate. Doth the upper convocation house alter what the lower grant? Or do the lords or commons ever abate any part of their gift? Yet they have a power to reject the whole. But, if abatement should be made, it would insensibly go to a raising, and deprive the clergy of their ancient right to tax themselves." Hatsell's Precedents, iii. 390. Thus we perceive that the change alleged to have taken place in 1665 was only *de facto*, and that the ancient practice of taxation by the convocation was not understood to be abrogated. The essential change was made by the introduction of new methods of raising money. In 1665, the sum of 2,477,000*l.* was granted, to be raised in three years, by an assessment in each county, on real and personal property of all kinds; but the old rates of subsidy are not mentioned in this or in any later tax-bill. Probably the arrangement with archbishop Sheldon was founded on the practical difficulty of ascertaining the proportion which the grant of the clergy ought to bear to the whole in the new mode of assessment. See Statutes of the Realm, 16 & 17 Car. II. c. 1.—1845.]

church, and ought even to watch over its interests as the parliament did over those of the kingdom.* The commons had so far encouraged this faction as to refer to the convocation the great question of a reform in the liturgy for the sake of comprehension, as has been mentioned in the last chapter; and thus put a stop to the king's design. It was not suffered to sit much during the rest of that reign, to the great discontent of its ambitious leaders. The most celebrated of these, Atterbury, published a book, entitled the Rights and Privileges of an English Convocation, in answer to one by Wake, afterwards archbishop of Canterbury. The speciousness of the former, sprinkled with competent learning on the subject, a graceful style, and an artful employment of topics, might easily delude, at least the willing reader. Nothing indeed could, on reflection, appear more inconclusive than Atterbury's arguments. Were we even to admit the perfect analogy of a convocation to a parliament, it could not be doubted that the king may, legally speaking, prorogue the latter at his pleasure; and that, if neither money were required to be granted nor laws to be enacted, a session would be very short. The church had by prescription a right to be summoned in convocation; but no prescription could be set up for its longer continuance than the crown thought expedient; and it was too much to expect that William III. was to gratify his half-avowed enemies with a privilege of remonstrance and interposition they had never enjoyed. In the year 1701 the lower house of convocation pretended to a right of adjourning to a different day from that fixed by the upper, and consequently of holding separate sessions. They set up other unprecedented claims to independence, which were checked by a prorogation.† Their aim

Its encroachments.

* The first authority I have observed for this pretension is an address of the house of lords, Nov. 19. 1675, to the throne, for the frequent meeting of the convocation, and that they do make to the king such representations as may be for the safety of the religion established. Lords' Journals. This address was renewed February 22. 1677. But what took place in consequence I am not apprised. It shows however some degree of dissatisfaction on the part of the bishops, who must be presumed to have set forward these addresses, at the virtual annihilation of their synod, which naturally followed from its relinquishment of self-taxation.

† Kennet, 799. 842. Burnet, 280. This assembly had been suffered to sit, probably, in consequence of the tory maxims which the ministry of that year professed.

was in all respects to assimilate themselves to the house of commons, and thus both to set up the convocation itself as an assembly collateral to parliament, and in the main independent of it, and to maintain their co-ordinate power and equality in synodical dignity to the prelates' house. The succeeding reign however began under tory auspices; and the convocation was in more activity for some years than at any former period. The lower house of that assembly still distinguished itself by the most factious spirit, and especially by insolence towards the bishops, who passed in general for whigs, and whom, while pretending to assert the divine rights of episcopacy, they laboured to deprive of that pre-eminence in the Anglican synod which the ecclesiastical constitution of the kingdom had bestowed on them.* None was more prominent in their debates than Atterbury himself, whom, in the zenith of tory influence, at the close of her reign, the queen reluctantly promoted to the see of Rochester.

Hoadley.

The new government at first permitted the convocation to hold its sittings. But they soon excited a flame which consumed themselves by an attack on Hoadley, bishop of Bangor, who had preached a sermon abounding with those principles concerning religious liberty, of which he had long been the courageous and powerful assertor.† The lower house of convocation thought fit to denounce, through the report of a committee, the dangerous tenets of this discourse, and of a work not long before published by the bishop. A long and celebrated war of pens instantly commenced, known by the name of the Bangorian controversy; managed, perhaps on both sides, with all the chicanery of polemical writers, and disgusting both from its tediousness, and from the manifest unwillingness of the disputants to speak ingenuously what they meant.‡ But, as the principles of Hoadley

* Wilkins's Concilia, iv. Burnet, passim. Boyer's Life of Queen Anne, 225. Somerville, 82. 124.

† The lower house of convocation, in the late reign, among their other vagaries, had requested "that some synodical notice might be taken of the dishonour done to the church by a sermon preached by Mr. Benjamin Hoadley, at St. Lawrence Jewry, Sept. 29. 1705, containing positions contrary to the doctrine of the church, expressed in the first and second parts of the homily against disobedience and wilful rebellion." Wilkins, iv. 634.

‡ These qualities are so apparent, that after turning over some forty or fifty tracts, and consuming a good many hours on the Bangorian controversy, I should find some difficulty in stating with precision the propositions in dispute. It is however evident that a dislike, not perhaps exactly to the house of Brunswic,

and his advocates appeared, in the main, little else than those of protestantism and toleration, the sentence of the laity, in the temper that was then gaining ground as to ecclesiastical subjects, was soon pronounced in their favour; and the high-church party discredited themselves by an opposition to what now pass for the incontrovertible truisms of religious liberty. In the ferment of that age, it was expedient for the state to scatter a little dust over the angry insects; the convocation was accordingly prorogued in 1717, and has never again sat for any business.* Those who are imbued with high notions of sacerdotal power have sometimes deplored this extinction of the Anglican great council; and though its necessity, as I have already observed, cannot possibly be defended as an ancient part of the constitution, there are not wanting specious arguments for the expediency of such a synod. It might be urged that the church, considered only as an integral member of the commonwealth, and the greatest corporation within it, might justly claim that right of managing its own affairs which belongs to every other association; that the argument from abuse is not sufficient, and is rejected with indignation when applied, as historically it might be, to representative governments and to civil liberty; that in the present state of things, no reformation even of secondary importance can be effected without difficulty, nor any looked for in greater matters, both from the indifference

Convocation no longer suffered to sit.

but to the tenor of George I.'s administration, and to Hoadley himself, as an eminent advocate for it, who had been rewarded accordingly, was at the bottom a leading motive with most of the church party; some of whom, such as Hare, though originally of a whig connexion, might have had disappointments to exasperate them.

There was nothing whatever in Hoadley's sermon injurious to the established endowments and privileges, nor to the discipline and government, of the English church, even in theory. If this had been the case, he might be reproached with some inconsistency in becoming so large a partaker of her honours and emoluments. He even admitted the usefulness of censures for open immoralities, though denying all church authority to oblige any one to external communion, or to pass any sentence which should determine the condition of men with respect to the favour or displeasure of God. Hoadley's Works, ii. 465. 493. Another great question in this controversy was that of religious liberty, as a civil right, which the convocation explicitly denied. And another related to the much debated exercise of private judgment in religion, which, as one party meant virtually to take away, so the other perhaps unreasonably exaggerated. Some other disputes arose in the course of the combat, particularly the delicate problem of the value of sincerity as a plea for material errors.

* Tindal, 539.

of the legislature, and the reluctance of the clergy to admit its interposition.

It is answered to these suggestions, that we must take experience when we possess it, rather than analogy, for our guide; that ecclesiastical assemblies have in all ages and countries been mischievous, where they have been powerful, which that of our wealthy and numerous clergy must always be; that if, notwithstanding, the convocation could be brought under the management of the state (which by the nature of its component parts might seem not unlikely), it must lead to the promotion of servile men, and the exclusion of merit still more than at present; that the severe remark of Clarendon, who observes that of all mankind none form so bad an estimate of human affairs as churchmen, is abundantly confirmed by experience; that the representation of the church in the house of lords is sufficient for the protection of its interests; that the clergy have an influence which no other corporation enjoys over the bulk of the nation, and may abuse it for the purposes of undue ascendancy, unjust restraint, or factious ambition; that the hope of any real good in reformation of the church by its own assemblies, to whatever sort of reform we may look, is utterly chimerical; finally, that as the laws now stand, which few would incline to alter, the ratification of parliament must be indispensable for any material change. It seems to admit of no doubt that these reasonings ought much to outweigh those on the opposite side.

Infringements of the toleration by statutes under Anne.

In the last four years of the queen's reign, some inroads had been made on the toleration granted to dissenters, whom the high-church party held in abhorrence. They had for a long time inveighed against what was called occasional conformity, or the compliance of dissenters with the provisions of the test act in order merely to qualify themselves for holding office, or entering into corporations. Nothing could, in the eyes of sensible men, be more advantageous to the church, if a re-union of those who had separated from it were advantageous, than this practice. Admitting even that the motive was self-interested, has an established government, in church or state, any better ally than the self-interestedness of mankind? Was it not what a presbyterian or independent minister would de-

nounce as a base and worldly sacrifice? and if so, was not the interest of the Anglican clergy exactly in an inverse proportion to this? Any one competent to judge of human affairs would predict, what has turned out to be the case, that when the barrier was once taken down for the sake of convenience, it would not be raised again for conscience; that the most latitudinarian theory, the most lukewarm dispositions in religion, must be prodigiously favourable to the reigning sect; and that the dissenting clergy, though they might retain, or even extend, their influence over the multitude, would gradually lose it with those classes who could be affected by the test. But, even if the tory faction had been cool-headed enough for such reflections, it has, unfortunately, been sometimes less the aim of the clergy to reconcile those who differ from them than to keep them in a state of dishonour and depression. Hence, in the first parliament of Anne, a bill to prevent occasional conformity more than once passed the commons; and, on its being rejected by the lords, a great majority of William's bishops voting against the measure, an attempt was made to send it up again in a very reprehensible manner, tacked, as it was called, to a grant of money; so that, according to the pretension of the commons in respect to such bills, the upper house must either refuse the supply, or consent to what they disapproved.* This however having miscarried, and the next parliament being of better principles, nothing farther was done till 1711, when lord Nottingham, a vehement high-churchman, having united with the whigs against the treaty of peace, they were injudicious enough to gratify him by concurring in a bill to prevent occasional conformity.† This was followed up by the ministry in a more decisive attack on the toleration, an act for preventing the growth of schism, which extended and confirmed one of Charles II., enforcing on all schoolmasters, and even on all teachers in private families, a declaration of conformity to the established church, to be made before the bishop, from whom a licence for exercising that profession was also to be obtained.‡ It is impossible to doubt for an instant, that if the

* Parl. Hist. vi. 362.

† 10 Anne, c. 2.

‡ 12 Anne, c. 7. Parl. Hist. vi. 1349. The schism act, according to Lockhart, was promoted by Bolingbroke, in order to gratify the high tories, and to put lord

queen's life had preserved the tory government for a few years, every vestige of the toleration would have been effaced.

These statutes, records of their adversaries' power, the whigs, now lords of the ascendant, determined to abrogate. The dissenters were unanimously zealous for the house of Hanover and for the ministry; the church of very doubtful loyalty to the crown, and still less affection to the whig name. In the session of 1719, accordingly, the act against occasional conformity, and that restraining education, were repealed.* It had been the intention to have also repealed the test act; but the disunion then prevailing among the whigs had caused so formidable an opposition even to the former measures, that it was found necessary to abandon that project. Walpole, more cautious and moderate than the ministry of 1719, perceived the advantage of reconciling the church as far as possible to the royal family and to his own government; and it seems to have been an article in the tacit compromise with the bishops, who were not backward in exerting their influence for the crown, that he should make no attempt to abrogate the laws which gave a monopoly of power to the Anglican communion. We may presume also that the prelates undertook not to obstruct the acts of indemnity passed from time to time in favour of those who had not duly qualified themselves for the offices they held; and which, after some time becoming regular, have in effect thrown open the gates to protestant dissenters, though still subject to be closed by either house of parliament, if any jealousies should induce them to refuse their assent to this annual enactment.†

They are repealed by the whigs.

Oxford under the necessity of declaring himself one way or other. "Though the earl of Oxford voted for it himself, he concurred with those who endeavoured to restrain some parts which they reckoned too severe; and his friends in both houses, particularly his brother, Auditor Harley, spoke and voted against it very earnestly." P. 462.

* 5 Geo. I. c. 4. The whigs out of power, among whom was Walpole, factiously and inconsistently opposed the repeal of the schism act, so that it passed with much difficulty. Parl. Hist. vii. 569.

† The first act of this kind appears to have been in 1727. 1 Geo. II. c. 23. It was repeated next year, intermitted the next, and afterwards renewed in every year of that reign except the fifth, the seventeenth, the twenty-second, the twenty-third, the twenty-sixth, and the thirtieth. Whether these occasional interruptions were intended to prevent the non-conformists from relying upon it, or were caused by some accidental circumstance, must be left to conjecture. I believe that the renewal has been regular every year since the accession of George III.

Meanwhile the principles of religious liberty, in all senses of the word, gained strength by this eager controversy, naturally pleasing as they are to the proud independence of the English character, and congenial to those of civil freedom, which both parties, tory as much as whig, had now learned sedulously to maintain. The nonjuring and high-church factions among the clergy produced few eminent men; and lost credit, not more by the folly of their notions than by their general want of scholarship and disregard of their duties. The university of Oxford was tainted to the core with jacobite prejudices; but it must be added that it never stood so low in respectability as a place of education.* The government, on the other hand, was studious to promote distinguished men; and doubtless the hierarchy in the first sixty years of the eighteenth century might very advantageously be compared, in point of conspicuous ability, with that of an equal period that ensued. The maxims of persecution were silently abandoned, as well as its practice; Warburton, and others of less name, taught those of toleration with as much boldness as Hoadley, but without some of his more invidious tenets; the more popular writers took a liberal tone; the names of Locke and Montesquieu acquired immense authority; the courts of justice discounte-

Principles of toleration fully established.

It is to be remembered, that the present work was first published before the repeal of the test act in 1828.

* We find in Gutch's Collectanea Curiosa, vol. i. p. 53., a plan, ascribed to lord chancellor Macclesfield, for taking away the election of heads of colleges from the fellows, and vesting the nomination in the great officers of state, in order to cure the disaffection and want of discipline which was justly complained of. This remedy would have been perhaps the substitution of a permanent for a temporary evil. It appears also that archbishop Wake wanted to have had a bill, in 1716, for asserting the royal supremacy, and better regulating the clergy of the two universities (Coxe's Walpole, ii. 122.); but I do not know that the precise nature of this is any where mentioned. I can scarcely quote Amherst's Terræ Filius as authority; it is a very clever, though rather libellous, invective against the university of Oxford at that time; but from internal evidence, as well as the confirmation which better authorities afford it, I have no doubt that it contains much truth.

Those who have looked much at the ephemeral literature of these two reigns must be aware of many publications fixing the charge of prevalent disaffection on this university, down to the death of George II.; and Dr. King, the famous jacobite master of St. Mary Hall, admits that some were left to reproach him for apostasy in going to court on the accession of the late king in 1760. The general reader will remember the Isis, by Mason, and the triumph of Isis, by Warton; the one a severe invective, the other an indignant vindication: but in this instance, notwithstanding the advantages which satire is supposed to have over panegyric, we must award the laurel to the worst cause, and, what is more extraordinary, to the worse poet.

nanced any endeavour to revive oppressive statutes; and, not long after the end of George the Second's reign, it was adjudged in the house of lords, upon the broadest principles of toleration laid down by lord Mansfield, that nonconformity with the established church is recognized by the law, and not an offence at which it connives.

Banishment of Atterbury.

Atterbury, bishop of Rochester, the most distinguished of the party denominated high-church, became the victim of his restless character and implacable disaffection to the house of Hanover. The pretended king, for some years after his competitor's accession, had fair hopes from different powers of Europe, — France, Sweden, Russia, Spain, Austria, — (each of whom, in its turn, was ready to make use of this instrument,) and from the powerful faction who panted for his restoration. This was unquestionably very numerous; though we have not as yet the means of fixing with certainty on more than comparatively a small number of names. But a conspiracy for an invasion from Spain and a simultaneous rising was detected in 1722, which implicated three or four peers, and among them the bishop of Rochester.* The evidence, however, though tolerably convincing, being insufficient for a verdict at law, it was thought expedient to pass a bill of pains and penalties against this prelate, as well as others against two of his accomplices. The proof, besides many corroborating circumstances, consisted in three letters relative to the conspiracy, supposed to be written by his secretary Kelly, and appearing to be dictated by the bishop. He was deprived of his see, and banished the kingdom for life.† This met with strong

* Layer, who suffered on account of this plot, had accused several peers, among others lord Cowper, who complained to the house of the publication of his name; and indeed, though he was at that time strongly in opposition to the court, the charge seems wholly incredible. Lord Strafford however was probably guilty; lords North and Orrery certainly so. Parl. Hist. viii. 203. There is even ground to suspect that Sunderland, to use Tindal's words, "in the latter part of his life, had entered into correspondencies and designs, which would have been fatal to himself or to the public." P. 657. This is mentioned by Coxe, i. 165.; and certainly confirmed by Lockhart, ii. 68. 70. But the reader will hardly give credit to such a story as Horace Walpole has told, that he coolly consulted sir Robert, his political rival, as to the part they should take on the king's death. Lord Orford's Works, iv. 287.

† State Trials, xvi. 324. Parl. Hist. viii. 195. et post. Most of the bishops voted against their restless brother; and Willis, bishop of Salisbury, made a very good but rather too acrimonious a speech on the bill. Id. 298. Hoadley, who was no orator, published two letters in the

opposition, not limited to the enemies of the royal family, and is open to the same objection as the attainder of sir John Fenwick; the danger of setting aside those precious securities against a wicked government which the law of treason has furnished. As a vigorous assertion of the state's authority over the church we may commend the policy of Atterbury's deprivation; but perhaps this was ill purchased by a mischievous precedent. It is however the last act of a violent nature in any important matter, which can be charged against the English legislature.

Decline of the jacobites.

No extensive conspiracy of the jacobite faction seems ever to have been in agitation after the fall of Atterbury. The Pretender had his emissaries perpetually alert; and it is understood that an enormous mass of letters from his English friends is in existence*; but very few had the courage, or rather folly, to plunge into so desperate a course as rebellion. Walpole's prudent and vigilant administration, without transgressing the boundaries of that free constitution for which alone the house of Brunswic had been preferred, kept in check the disaffected. He wisely sought the friendship of cardinal Fleury, aware that no other power in Europe than France could effectually assist the banished family. After his own fall and the death of Fleury, new combinations of foreign policy arose; his successors returned to the Austrian connexion; a war with France broke out; the grandson of James II. became master, for a moment, of Scotland, and even advanced to the centre of

newspaper, signed Britannicus, in answer to Atterbury's defence; which, after all that had passed, he might better have spared. Atterbury's own speech is certainly below his fame, especially the peroration. Id. 267.

No one, I presume, will affect to doubt the reality of Atterbury's connexions with the Stuart family, either before his attainder or during his exile. The proofs of the latter were published by lord Hailes in 1768, and may be found also in Nicholls's edition of Atterbury's Correspondence, i. 148. Additional evidence is furnished by the Lockhart Papers, vol. ii. passim.

* The Stuart papers obtained lately from Rome, and now in his majesty's possession, are said to furnish copious evidence of the jacobite intrigues, and to affect some persons not hitherto suspected. We have reason to hope that they will not be long withheld from the public, every motive for concealment being wholly at an end. 1827. Lord Mahon has communicated some information from these papers, in his history of England; but the number of persons engaged in connexion with the Pretender is rather less than had been expected. 1841.

It is said that there were not less than fifty jacobites in the parliament of 1728. Coxe, ii. 294.

this peaceful and unprotected kingdom. But this was hardly more ignominious to the government than to the jacobites themselves; none of them joined the standard of their pretended sovereign; and the rebellion of 1745 was conclusive, by its own temporary success, against the possibility of his restoration.* From this time the government, even when in search of pretexts for alarm, could hardly affect to dread a name grown so contemptible as that of the Stuart party. It survived however for the rest of the reign of George II. in those magnanimous compotations, which had always been the best evidence of its courage and fidelity.

Prejudices against the reigning family.

Though the jacobite party had set before its eyes an object most dangerous to the public tranquillity, and which, could it have been attained, would have brought on again the contention of the seventeenth century; though, in taking oaths to a government against which they were in conspiracy, they showed a systematic disregard of obligation, and were as little mindful of allegiance, in the years 1715 and 1745, to the prince they owned in their hearts, as they had been to him whom they had professed to acknowledge, it ought to be admitted that they were rendered more numerous and formidable than was necessary by the faults of the reigning kings or of their ministers. They

* The tories, it is observed in the MS. journal of Mr. Yorke (second earl of Hardwicke), showed no sign of affection to the government at the time when the invasion was expected in 1743, but treated it all with indifference. Parl. Hist. xiii. 668. In fact a disgraceful apathy pervaded the nation; and according to a letter from Mr. Fox to Mr. Winnington in 1745, which I only quote from recollection, it seemed perfectly uncertain, from this general passiveness, whether the revolution might not be suddenly brought about. Yet very few comparatively, I am persuaded, had the slightest attachment or prejudice in favour of the house of Stuart; but the continual absence from England, and the Hanoverian predilections of the two Georges, the feebleness, and factiousness of their administration, and of public men in general, and an indefinite opinion of misgovernment, raised through the press, though certainly without oppression or arbitrary acts, had gradually alienated the mass of the nation. But this would not lead men to expose their lives and fortunes; and hence the people of England, a thing almost incredible, lay quiet and nearly unconcerned, while the little army of Highlanders came every day nearer to the capital. It is absurd, however, to suppose that they could have been really successful by marching onward; though their defeat might have been more glorious at Finchley than at Culloden. 1827.—I should not have used, of course, the word absurd, if lord Mahon's History had been published, in which that acute and impartial writer inclines to the opinion of Charles Edward's probable success. I am still, however, persuaded that either the duke of Cumberland must have overtaken him before he reached London, or that his small army would have been beaten by the ing.—1842.

were not latterly actuated for the most part (perhaps with very few exceptions) by the slavish principles of indefeasible right, much less by those of despotic power.* They had been so long in opposition to the court, they had so often spoken the language of liberty, that we may justly believe them to have been its friends. It was the policy of Walpole to keep alive the strongest prejudice in the mind of George II., obstinately retentive of prejudice, as such narrow and passionate minds always are, against the whole body of the tories. They were ill received at court, and generally excluded, not only from those departments of office which the dominant party have a right to keep in their power, but from the commission of the peace, and every other subordinate trust.† This illiberal and selfish course retained many, no doubt, in the Pretender's camp, who must have perceived both the improbability of his restoration, and the difficulty of reconciling it with the safety of our constitution. He was indeed, as well as his son, far less worthy of respect than the contemporary Brunswic kings: without absolutely wanting capacity or courage, he gave the most undeniable evidence of his legitimacy by constantly resisting the counsels of wise men, and yielding to those of priests‡; Jealousy of the crown.

* [Even in 1715 this was not the case with the jacobite aristocracy. "When you were first driven into this interest," says Bolingbroke to sir W. Wyndham, "I may appeal to you for the notion which the party had. You thought of restoring him by the strength of the tories, and of opposing a tory king to a whig king. You took him up as the instrument of your revenge and of your ambition. You looked on him as your creature, and never once doubted of making what terms you pleased with him. This is so true that the same language is still held to the catechumens in jacobitism. Were the contrary to be avowed even now, the party in England would soon disunite. Instead of making the Pretender their tool, they are his. Instead of having in view to restore him on their own terms, they are labouring to do it without any terms; that is, to speak properly, they are ready to receive him on his," &c. This was written in 1717, and seems to indicate that the real jacobite spirit of hereditary right was very strong among the people. And this continued through the reign of George I., as I should infer from the press. But Bolingbroke himself had great influence in subduing it afterwards, and, though of course not obliterated, we trace it less and less down to the extinction of the jacobite party in the last years of George II. Leslie's writings would have been received with scorn by the young jacobites of 1750. Church mobs were frequent in 1715; but we scarcely, I think, find much of them afterwards. In London, and the chief towns, the populace were chiefly whig. — 1845.]

† See Parl. Hist. xiii. 1244.; and other proofs might be brought from the same work, as well as from miscellaneous authorities of the age of George II.

‡ [Bolingbroke's character of James is not wholly to be trusted. "He is naturally inclined to believe the worst, which I take to be a certain mark of a mean spirit and a wicked soul; at least I am sure that

while his son, the fugitive of Culloden, despised and deserted by his own party, insulted by the court of France, lost with the advance of years even the respect and compassion which wait on unceasing misfortune, the last sad inheritance of the house of Stuart.* But they were little known in England,

the contrary quality, when it is not due to weakness of understanding, is the fruit of a generous temper and an honest heart. Prone to judge ill of all mankind, he will rarely be seduced by his credulity; but I never knew a man so capable of being the bubble of his distrust and jealousy." Letter to sir W. Wyndham. Thus Bolingbroke, under the sting of his impetuous passions, threw away the scabbard when he quarrelled with the house of Stuart, as he had done with the whigs at home. But James was not a man altogether without capacity: his private letters are well and sensibly written. Like his father, he had a narrow and obstinate, but not a weak, understanding. His son, Charles Edward, appears to me inferior to him in this respect, as well as in his moral principle. —1845.]

* See in the Lockhart Papers, ii. 565., a curious relation of Charles Edward's behaviour in refusing to quit France after the peace of Aix-la-Chapelle. It was so insolent and absurd that the government was provoked to arrest him at the opera, and literally to order him to be bound hand and foot; an outrage which even his preposterous conduct could hardly excuse.

Dr. King was in correspondence with this prince for some years after the latter's foolish, though courageous, visit to London in September, 1750; which he left again in five days, on finding himself deceived by some sanguine friends. King says he was wholly ignorant of our history and constitution. "I never heard him express any noble or benevolent sentiment, the certain indications of a great soul and good heart; or discover any sorrow or compassion for the misfortune of so many worthy men who had suffered in his cause." Anecdotes of his own Times, p. 201. He goes on to charge him with love of money and other faults. But his great folly in keeping a mistress, Mrs. Walkinshaw, whose sister was housekeeper at Leicester House, alarmed the jacobites. "These were all men of fortune and distinction, and many of them persons of the first quality, who attached themselves to the P. as to a person who they imagined might be made the instrument of saving their country. They were sensible that by Walpole's administration the English government was become a system of corruption: and that Walpole's successors, who pursued his plan without any of his abilities, had reduced us to such a deplorable situation that our commercial interest was sinking, our colonies in danger of being lost, and Great Britain, which, if her powers were properly exerted, as they were afterwards in Mr. Pitt's administration, was able to give laws to other nations, was become the contempt of all Europe." P. 208. This is in truth the secret of the continuance of jacobitism. But possibly that party were not sorry to find a pretext for breaking off so hopeless a connexion, which they seem to have done about 1755. Mr. Pitt's great successes reconciled them to the administration; and his liberal conduct brought back those who had been disgusted by an exclusive policy. On the accession of a new king they flocked to St. James's; and probably scarcely one person of the rank of a gentleman, south of the Tweed, was found to dispute the right of the house of Brunswic after 1760. Dr. King himself, it may be observed, laughs at the old passive obedience doctrine (page 193.); so far was he from being a jacobite of that school.

A few nonjuring congregations lingered on far into the reign of George III., presided over by the successors of some bishops whom Lloyd of Norwich, the last of those deprived at the revolution, had consecrated in order to keep up the schism. A list of these is given in D'Oyly's Life of Sancroft, vol. ii. p. 34., whence it would appear that the last of them died in 1779. I can trace the line a little farther: a bishop of that separation, named Cartwright, resided at Shrewsbury in 1793, carrying on the business of a surgeon. State Trials, xxiii. 1073. I have heard of

and from unknown princes men are prone to hope much: if some could anticipate a redress of every evil from Frederic Prince of Wales, whom they might discover to be destitute of respectable qualities, it cannot be wondered at that others might draw equally flattering prognostics from the accession of Charles Edward. It is almost certain that, if either the claimant or his son had embraced the protestant religion, and had also manifested any superior strength of mind, the German prejudices of the reigning family would have cost them the throne, as they did the people's affections. Jacobitism, in the great majority, was one modification of the spirit of liberty burning strongly in the nation at this period. It gave a rallying point to that indefinite discontent, which is excited by an ill opinion of rulers, and to that disinterested, though ignorant patriotism which boils up in youthful minds. The government in possession was hated, not as usurped, but as corrupt; the banished line was demanded, not so much because it was legitimate, but because it was the fancied means of redressing grievances and regenerating the constitution. Such notions were doubtless absurd; but it is undeniable that they were common, and had been so almost from the revolution. I speak only, it will be observed, of the English jacobites; in Scotland the sentiments of loyalty and national pride had a vital energy, and the Highland chieftains gave their blood, as freely as their southern allies did their wine, for the cause of their ancient kings.*

similar congregations in the west of England still later. He had however become a very loyal subject to king George: a singular proof of that tenacity of life by which religious sects, after dwindling down through neglect, excel frogs and tortoises; and that, even when they have become almost equally cold-blooded! [A late publication, Lathbury's History of the Nonjurors, gives several names of nonjuring bishops, down to the close of the century; though it does not absolutely follow, that all who frequented their congregations would have refused the oath of allegiance. Of such strict jacobites, there were, as I have said, but few left south of the Tweed after the accession of George III. Still some there may have been, unknown by name, in the middling ranks; and Mr. Lathbury has quoted jacobite pamphlets as late as 1759, and probably the authors of these did not renounce their opinions in the next year. One or two writers in this strain have met my observation rather later. The last is in 1774, when an absurd letter against the revolution having been inadvertently admitted into the Morning Chronicle and Public Advertiser, Mr. Fox, with less good nature than belonged to him, induced the house of commons to direct a prosecution of the printers by the attorney-general; and they were sentenced to three months' imprisonment. Parl. Hist. xvii. 1054. Annual Register, 1774. p. 164.—1845.]

* [Lord Mahon printed in 1842, but only for the Roxburghe club, some extracts from despatches (in the State Paper Office) of the British envoy at

No one can have looked in the most cursory manner at the political writings of these two reigns, or at the debates of parliament, without being struck by the continual predictions that our liberties were on the point of extinguishment, or at least by apprehensions of their being endangered. It might seem that little or nothing had been gained by the revolution, and by the substitution of an elective dynasty. This doubtless it was the interest of the Stuart party to maintain or insinuate; and, in the conflict of factions, those who, with far opposite views, had separated from the court, seemed to lend them aid. The declamatory exaggerations of that able and ambitious body of men who co-operated against the ministry of sir Robert Walpole have long been rejected; and perhaps in the usual reflux of popular opinion, his domestic administration (for in foreign policy his views, so far as he was permitted to act upon them, appear to have been uniformly judicious,) has obtained of late rather an undue degree of favour. I have already observed that, for the sake of his own ascendancy in the cabinet, he kept up unnecessarily the distinctions of the whig and tory parties, and thus impaired the stability of the royal house, which it was his chief care to support. And, though his government was so far from any thing oppressive or arbitrary that, considered either relatively to any former times, or to the extensive disaffection known to subsist, it was uncommonly moderate; yet, feeling or feigning alarm at the jacobite intrigues on the one hand, at the democratic tone of public sentiment and of popular writings on the other, he laboured to preserve a more narrow and

Florence, containing information, from time to time, as to the motions and behaviour of Charles Edward. Were it not for the difficulty under which our minister at that court must generally labour, to find any materials for a letter to the secretary of state, we might feel some wonder at the gravity with which sir Horace Mann seems to treat the table-talk and occasional journies of the poor old exile, even down to 1786. It may be said, that his excessive folly might render him capable of any enterprise, however extravagant, as long as he had bodily strength left; and that he is supposed to have kept up some connexion with the Irish priesthood to the end of his life, so as to recommend bishops to the court of Rome. But though sir Horace Mann, in a letter of the date Nov. 11. 1783, is "every day more convinced that something of importance is carrying on between the court of France and the Pretender, and has reason to suspect that the latter either has a connexion with the king of Sweden, or is endeavouring to gain his friendship," he soon after discovers that this important matter was only an application to France for a pension, which Gustavus III., then in Italy, would, out of compassion have been glad to promote.—1845.]

oligarchical spirit than was congenial to so great and brave a people, and trusted not enough, as indeed is the general fault of ministers, to the sway of good sense and honesty over disinterested minds. But, as he never had a complete influence over his master, and knew that those who opposed him had little else in view than to seize the reins of power and manage them worse, his deviations from the straight course are more pardonable.

The clamorous invectives of this opposition, combined with the subsequent dereliction of avowed principles by many among them when in power, contributed more than any thing else in our history to cast obloquy and suspicion, or even ridicule, on the name and occupation of patriots. Men of sordid and venal characters always rejoice to generalise so convenient a maxim as the non-existence of public virtue. It may not however be improbable, that many of those who took a part in this long contention, were less insincere than it has been the fashion to believe, though led too far at the moment by their own passions, as well as by the necessity of colouring highly a picture meant for the multitude, and reduced afterwards to the usual compromises and concessions, without which power in this country is ever unattainable. But waving a topic too generally historical for the present chapter, it will be worth while to consider what sort of ground there might be for some prevalent subjects of declamation; and whether the power of government had not, in several respects, been a good deal enhanced since the beginning of the century. By the power of government I mean not so much the personal authority of the sovereign as that of his ministers, acting perhaps without his directions; which, since the reign of William, is to be distinguished, if we look at it analytically, from the monarchy itself.

I. The most striking acquisition of power by the crown in the new model of government, if I may use such an expression, is the permanence of a regular military force. The reader cannot need to be reminded that no army existed before the civil war, that the guards in the reign of Charles II. were about 5000 men, that in the breathing-time between the peace of Ryswick and the war of the Spanish succession, the commons could not be brought to

Changes in the constitution whereon it was founded.

keep up more than 7000 troops. Nothing could be more repugnant to the national prejudices than a standing army. The tories, partly from regard to the ancient usage of the constitution, partly, no doubt, from a factious or disaffected spirit, were unanimous in protesting against it. The most disinterested and zealous lovers of liberty came with great suspicion and reluctance into what seemed so perilous an innovation. But the court, after the accession of the house of Hanover, had many reasons for insisting upon so great an augmentation of its power and security. It is remarkable to perceive by what stealthy advances this came on. Two long wars had rendered the army a profession for men in the higher and middling classes, and familiarised the nation to their dress and rank; it had achieved great honour for itself and the English name; and in the nature of mankind the patriotism of glory is too often an overmatch for that of liberty. The two kings were fond of warlike policy, the second of war itself; their schemes, and those of their ministers, demanded an imposing attitude in negotiation, which an army, it was thought, could best give; the cabinet was for many years entangled in alliances, shifting sometimes rapidly, but in each combination liable to produce the interruption of peace. In the new system which rendered the houses of parliament partakers in the executive administration, they were drawn themselves into the approbation of every successive measure, either on the propositions of ministers, or, as often happens more indirectly, but hardly less effectually, by passing a negative on those of their opponents. The number of troops for which a vote was annually demanded, after some variations, in the first years of George I., was, during the whole administration of sir Robert Walpole, except when the state of Europe excited some apprehension of disturbance, rather more than 17,000 men, independent of those on the Irish establishment, but including the garrisons of Minorca and Gibraltar. And this continued with little alteration to be our standing army in time of peace during the eighteenth century.

Permanent military force.

This army was always understood to be kept on foot, as it is still expressed in the preamble of every mutiny-bill, for better preserving the balance of power in

Apprehensions from it.

Europe. The commons would not for an instant admit that it was necessary as a permanent force, in order to maintain the government at home. There can be no question however that the court saw its advantage in this light; and I am not perfectly sure that some of the multiplied negotiations on the continent in that age were not intended as a pretext for keeping up the army, or at least as a means of exciting alarm for the security of the established government. In fact, there would have been rebellions in the time of George I., not only in Scotland, which perhaps could not otherwise have been preserved, but in many parts of the kingdom, had the parliament adhered with too pertinacious bigotry to their ancient maxims. Yet these had such influence that it was long before the army was admitted by every one to be perpetual; and I do not know that it has ever been recognised as such in our statutes. Mr. Pulteney, so late as 1732, a man neither disaffected nor democratical, and whose views extended no farther than a change of hands, declared that he "always had been, and always would be, against a standing army of any kind; it was to him a terrible thing, whether under the denomination of parliamentary or any other. A standing army is still a standing army, whatever name it be called by; they are a body of men distinct from the body of the people; they are governed by different laws; blind obedience and an entire submission to the orders of their commanding officer is their only principle. The nations around us are already enslaved, and have been enslaved by those very means; by means of their standing armies they have every one lost their liberties; it is indeed impossible that the liberties of the people can be preserved in any country where a numerous standing army is kept up."*

This wholesome jealousy, though it did not prevent what was indeed for many reasons not to be dispensed with, the establishment of a regular force, kept it within bounds which possibly the administration, if left to itself, would have gladly overleaped. A clause in the mutiny-bill, first inserted in 1718, enabling courts martial to punish mutiny and desertion with death, which had hitherto been only cognizable as

* Parl. Hist. viii. 904.

capital offences by the civil magistrate, was carried by a very small majority in both houses.* An act was passed in 1735, directing that no troops should come within two miles of any place, except the capital or a garrisoned town, during an election†; and on some occasions, both the commons and the courts of justice showed that they had not forgotten the maxims of their ancestors as to the supremacy of the civil power.‡ A more important measure was projected by men of independent principles, at once to secure the kingdom against attack, invaded as it had been by rebels in 1745, and thrown into the most ignominious panic on the rumours of a French armament in 1756, to take away the pretext for a large standing force, and perhaps to furnish a guarantee against any evil purposes to which in future times it might be subservient, by the establishment of a national militia, under the sole authority, indeed of the crown, but commanded by gentlemen of sufficient estates, and not liable, except in war, to be marched out of its proper county. This favourite plan, with some reluctance on the part of the government, was adopted in 1757.§ But though, during the long periods of hostilities which have unfortuately ensued, this embodied force has doubtless placed the kingdom in a more respectable state of security, it has not much contributed to diminish the number of our regular forces; and, from some defects in its constitution, arising out of too great attention to our ancient local divisions, and of too indiscriminate a dispensation with personal service, which has filled the ranks with the refuse of the community, the militia has grown unpopular and burthensome, rather considered of late by the government as a means of recruiting the army than as worthy

Establishment of militia.

* Parl. Hist. vii. 536.

† 8 Geo. 2. c. 30. Parl. Hist. viii. 883.

‡ The military having been called in to quell an alleged riot at Westminster election in 1741, it was resolved, Dec. 22., "that the presence of a regular body of armed soldiers at an election of members to serve in parliament is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." The persons concerned in this, having been ordered to attend the house, received on their knees a very severe reprimand from the speaker. Parl. Hist. ix. 326. Upon some occasion, the circumstances of which I do not recollect, chief justice Willes uttered some laudable sentiments as to the subordination of military power.

§ Lord Hardwicke threw out the militia bill in 1756, thinking some of its clauses rather too republican, and, in fact, being adverse to the scheme. Parl. Hist. xv. 704. H. Walpole's Memoirs, ii. 45. Coxe's Memoirs of Lord Walpole, 450.

of preservation in itself, and accordingly thrown aside in time of peace; so that the person who acquired great popularity as the author of this institution, lived to see it worn out and gone to decay, and the principles, above all, upon which he had brought it forward, just enough remembered to be turned into ridicule. Yet the success of that magnificent organization which, in our own time, has been established in France, is sufficient to evince the possibility of a national militia; and we know with what spirit such a force was kept up for some years in this country, under the name of volunteers and yeomanry, on its only real basis, that of property, and in such local distribution as convenience pointed out.

Nothing could be more idle, at any time since the revolution, than to suppose that the regular army would pull the speaker out of his chair, or in any manner be employed to confirm a despotic power in the crown. Such power, I think, could never have been the waking dream of either king or minister. But as the slightest inroads upon private rights and liberties are to be guarded against in any nation that deserves to be called free, we should always keep in mind not only that the military power is subordinate to the civil, but, as this subordination must cease where the former is frequently employed, that it should never be called upon in aid of the peace without sufficient cause. Nothing would more break down this notion of the law's supremacy than the perpetual interference of those who are really governed by another law; for the doctrine of some judges, that the soldier, being still a citizen, acts only in preservation of the public peace, as another citizen is bound to do, must be felt as a sophism, even by those who cannot find an answer to it. And, even in slight circumstances, it is not conformable to the principles of our government to make that vain display of military authority which disgusts us so much in some continental kingdoms. But, not to dwell on this, it is more to our immediate purpose that the executive power has acquired such a coadjutor in the regular army that it can, in no probable emergency, have much to apprehend from popular sedition. The increased facilities of transport, and several improvements in military art and science, which will occur to the reader, have in later times greatly enhanced this advantage.

II. It must be apparent to every one that since the restoration, and especially since the revolution, an immense power has been thrown into the scale of both houses of parliament, though practically in more frequent exercise by the lower, in consequence of their annual session during several months, and of their almost unlimited rights of investigation, discussion, and advice. But, if the crown should by any means become secure of an ascendancy in this assembly, it is evident that, although the prerogative, technically speaking, might be diminished, the power might be the same, or even possibly more efficacious; and that this result must be proportioned to the degree and security of such an ascendancy. A parliament absolutely, and in all conceivable circumstances, under the control of the sovereign, whether through intimidation or corrupt subservience, could not, without absurdity, be deemed a co-ordinate power, or, indeed, in any sense, a restraint upon his will. This is, however, an extreme supposition, which no man, unless both grossly factious and ignorant, will ever pretend to have been realised. But, as it would equally contradict notorious truth to assert that every vote has been disinterested and independent, the degree of influence which ought to be permitted, or which has at any time existed, becomes one of the most important subjects in our constitutional policy.

Influence over parliament by places and pensions.

I have mentioned in the last chapter both the provisions inserted in the act of settlement, with the design of excluding altogether the possessors of public office from the house of commons, and the modifications of them by several acts of the queen. These were deemed by the country party so inadequate to restrain the dependents of power from overspreading the benches of the commons that perpetual attempts were made to carry the exclusive principle to a far greater length. In the two next reigns, if we can trust to the uncontradicted language of debate, or even to the descriptions of individuals in the lists of each parliament, we must conclude that a very undue proportion of dependents on the favour of government were made its censors and councillors. There was still, however, so much left of an independent spirit, that bills for restricting the number of placemen, or excluding pensioners, met always with countenance; they

Attempts to restrain it.

were sometimes rejected by very slight majorities; and, after a time, sir Robert Walpole found it expedient to reserve his opposition for the surer field of the other house.* After his fall, it was imputed with some justice to his successors, that they shrunk in power from the bold reformation which they had so frequently endeavoured; the king was indignantly averse to all retrenchment of his power, and they wanted probably both the inclination and the influence to cut off all corruption. Yet we owe to this ministry the place-bill of 1743, which, derided as it was at the time, seems to have had a considerable effect; excluding a great number of inferior officers from the house of commons, which has never since contained so revolting a list of court-deputies as it did in the age of Walpole.† Place-bill of 1743.

But while this acknowledged influence of lucrative office might be presumed to operate on many staunch adherents of the actual administration, there was always a strong suspicion, or rather a general certainty, of absolute corruption. The proofs in single instances could never perhaps be established; which, of course, is not surprising. But no one seriously called in question the reality of a systematic distribution of money by the crown to the representatives of the people; nor did the corrupters themselves, in whom the crime seems always to be deemed less Secret corruption.

* By the act of 6 Anne, c. 7. all persons holding pensions from the crown during pleasure were made incapable of sitting in the house of commons; which was extended by 1 Geo. 1. c. 56., to those who held them for any term of years. But the difficulty was to ascertain the fact; the government refusing information. Mr. Sandys accordingly proposed a bill in 1730, by which every member of the commons was to take an oath that he did not hold any such pension, and that, in case of accepting one, he would disclose it to the house within fourteen days. This was carried by a small majority through the commons, but rejected in the other house; which happened again in 1734 and in 1740. Parl. Hist. viii. 789.; ix. 369.; xi. 510. The king, in an angry note to lord Townshend, on the first occasion, calls it "this villanous bill." Coxe's Walpole, ii. 537. 673. A bill of the same gentleman to limit the number of placemen in the house had so far worse success, that it did not reach the Serbonian bog. Parl. Hist. xi. 328. Bishop Sherlock made a speech against the prevention of corrupt practices by the pension bill, which, whether justly or not, excited much indignation, and even gave rise to the proposal of a bill for putting an end to the translation of bishops. Id. viii. 847.

† 25 Geo. 2. c. 22. The king came very reluctantly into this measure: in the preceding session of 1742, Sandys, now become chancellor of the exchequer, had opposed it, though originally his own; alleging in no very parliamentary manner, that the new ministry had not yet been able to remove his majesty's prejudices. Parl. Hist. xii. 896.

heinous, disguise it in private.* It is true that the appropriation of supplies, and the established course of the exchequer, render the greatest part of the public revenue secure from misapplication; but, under the head of secret service money, a very large sum was annually expended without account, and some other parts of the civil list were equally free from all public examination.† The committee of secrecy appointed after the resignation of sir Robert Walpole endeavoured to elicit some distinct evidence of this misapplication; but the obscurity natural to such transactions, and the guilty collusion of subaltern accomplices, who shrouded themselves in the protection of the law, defeated every hope of punishment, or even personal disgrace.‡ This practice of direct bribery continued, beyond doubt, long afterwards, and is generally supposed to have ceased about the termination of the American war.

There is hardly any doctrine with respect to our government more in fashion, than that a considerable influence of the crown (meaning of course a corrupt influence) in both houses of parliament, and especially in the commons, has been rendered indispensable by the vast enhancement of their own power over the public administration. It is doubtless most expedient that many servants of the crown should be also servants of the people; and no man who values the constitution would separate the functions of ministers of state

* Mr. Fox declared to the duke of Newcastle, when the office of secretary of state, and what was called the management of the house of commons, was offered to him, "that he never desired to touch a penny of the secret service money, or to know the disposition of it, farther than was necessary to *enable him to speak to the members without being ridiculous.*" Dodington's Diary, 15th March, 1754. H. Walpole confirms this in nearly the same words. Mem. of Last Ten Years, i. 332.

† In Coxe's Memoirs of Sir R. Walpole, iii. 609., we have the draught, by that minister, of an intended vindication of himself after his retirement from office, in order to show the impossibility of misapplying public money, which, however, he does not show; and his elaborate account of the method by which payments are made out of the exchequer, though valuable in some respects, seems rather intended to lead aside the unpractised reader.

‡ This secret committee were checked at every step for want of sufficient powers. It is absurd to assert, like Mr. Coxe, that they advanced accusations which they could not prove, when the means of proof were withheld. Scrope and Paxton, the one secretary, the other solicitor, to the treasury, being examined about very large sums traced to their hands, and other matters, refused to answer questions that might criminate themselves; and a bill to indemnify evidence was lost in the upper house. Parl. Hist. xii. 625. et post.

from those of legislators. The glory that waits on wisdom and eloquence in the senate, should always be the great prize of an English statesman, and his high road to the sovereign's favour. But the maxim that private vices are public benefits is as sophistical as it is disgusting; and it is self-evident, both that the expectation of a clandestine recompense, or what in effect is the same thing, of a lucrative office, cannot be the motive of an upright man in his vote, and that if an entire parliament should be composed of such venal spirits, there would be an end of all control upon the crown. There is no real cause to apprehend that a virtuous and enlightened government would find difficulty in resting upon the reputation justly due to it; especially when we throw into the scale that species of influence which must ever subsist, the sentiment of respect and loyalty to a sovereign, of friendship and gratitude to a minister, of habitual confidence in those intrusted with power, of averseness to confusion and untried change, which have in fact more extensive operation than any sordid motives, and which must almost always render them unnecessary.

III. The co-operation of both houses of parliament with the executive government enabled the latter to convert to its own purpose what had often in former times been employed against it, the power of inflicting punishment for breach of privilege. But as the subject of parliamentary privilege is of no slight importance, it will be convenient on this occasion to bring the whole before the reader in as concise a summary as possible, distinguishing the power, as it relates to offences committed by members of either house, or against them singly, or the houses of parliament collectively, or against the government and the public. Commitments for breach of privilege—

1. It has been the constant practice of the house of commons to repress disorderly or indecent behaviour by a censure delivered through the speaker. Instances of this are even noticed in the journals under Edward VI. and Mary; and it is in fact essential to the regular proceedings of any assembly. In the former reign they also committed one of their members to the Tower. But in the famous case of Arthur Hall in 1581, they established the first precedent of punishing one of their own body for a printed libel of members for offences—

derogatory to them as a part of the legislature; and they inflicted the threefold penalty of imprisonment, fine, and expulsion.* From this time forth it was understood to be the law and usage of parliament, that the commons might commit to prison any one of their members for misconduct in the house, or relating to it.† The right of imposing a fine was very rarely asserted after the instance of Hall. But that of expulsion, no earlier precedent whereof has been recorded, became as indubitable as frequent and unquestioned usage could render it. It was carried to a great excess by the long parliament, and again in the year 1680. These, however, were times of extreme violence; and the prevailing faction had an apology in the designs of the court, which required an energy beyond the law to counteract them. The offences too, which the whigs thus punished in 1680, were in their effect against the power and even existence of parliament. The privilege was far more unwarrantably exerted by the opposite party in 1714, against sir Richard Steele, expelled the house for writing the Crisis, a pamphlet reflecting on the ministry. This was, perhaps, the first instance wherein the house of commons so identified itself with the executive administration, independently of the sovereign's person, as to consider itself libelled by those who impugned its measures.‡

In a few instances an attempt was made to carry this farther, by declaring the party incapable of sitting in parliament. It is hardly necessary to remark that upon this rested the celebrated question of the Middlesex election in 1769. If a few precedents, and those not before the year 1680, were to determine all controversies of constitutional law, it is plain enough from the journals that the house have assumed the

* See vol. i. pp. 267, 268.

† [In the case of Mr. Manley, committed Nov. 9. 1696, for saying in the debate on sir John Fenwick's attainder, that it would not be the first time people have repented of making their court to the government at the hazard of the liberties of the people, the speaker issued his warrant to the lieutenant of the Tower to receive him. Commons' Journals. It will be remembered, that in 1810, on the committal of sir F. Burdett, the governor of the Tower required the speaker's warrant to be backed by the secretary of state; with which the commons thought fit to put up, though it cut at the root of the privilege of imprisoning *proprio jure*.—1845.]

‡ Parl. Hist. vi. 1265. Walpole says, in speaking for Steele, "the liberty of the press is unrestrained; how then shall a part of the legislature dare to punish that as a crime, which is not declared to be so by any law framed by the whole?"

power of incapacitation. But as such an authority is highly dangerous and unnecessary for any good purpose, and as, according to all legal rules, so extraordinary a power could not be supported except by a sort of prescription which cannot be shown, the final resolution of the house of commons, which condemned the votes passed in times of great excitement, appears far more consonant to just principles.

of strangers for offences against members.

2. The power of each house of parliament over those who do not belong to it is of a more extensive consideration, and has lain open, in some respects, to more doubt than that over its own members. It has been exercised, in the first place, very frequently, and from an early period, in order to protect the members personally, and in their properties, from any thing which has been construed to interfere with the discharge of their functions. Every obstruction in these duties, by assaulting, challenging, insulting any single representative of the commons, has from the middle of the sixteenth century downwards, that is, from the beginning of their regular journals, been justly deemed a breach of privilege, and an offence against the whole body. It has been punished generally by commitment, either to the custody of the house's officer, the serjeant-at-arms, or to the king's prison. This summary proceeding is usually defended by a technical analogy to what are called attachments for contempt, by which every court of record is entitled to punish by imprisonment, if not also by fine, any obstruction to its acts or contumacious resistance of them. But it tended also to raise the dignity of parliament in the eyes of the people, at times when the government, and even the courts of justice, were not greatly inclined to regard it; and has been also a necessary safeguard against the insolence of power. The majority are bound to respect, and indeed have respected, the rights of every member, however obnoxious to them, on all questions of privilege. Even in the case most likely to occur in the present age, that of libels, which by no unreasonable stretch come under the head of obstructions, it would be unjust that a patriotic legislator, exposed to calumny for his zeal in the public cause, should be necessarily driven to a troublesome and uncertain process at law, when the offence so manifestly affects the real interests of parliament and the

nation. The application of this principle must of course require a discreet temper, which was not perhaps always observed in former times, especially in the reign of William III. Instances at least of punishment for breach of privilege by personal reflections are never so common as in the journals of that turbulent period.

or for offences against the house.

The most usual mode however of incurring the animadversion of the house was by molestations in regard to property. It was the most ancient privilege of the commons to be free from all legal process, during the term of the session and for forty days before and after, except on charges of treason, felony, or breach of the peace. I have elsewhere mentioned the great case of Ferrers, under Henry VIII., wherein the house first, as far as we know, exerted the power of committing to prison those who had been concerned in arresting one of its members; and have shown that, after some little intermission, this became their recognized and customary right. Numberless instances occur of its exercise. It was not only a breach of privilege to serve any sort of process upon them, but to put them under the necessity of seeking redress at law for any civil injury. Thus abundant cases are found in the journals, where persons have been committed to prison for entering on the estates of members, carrying away timber, lopping trees, digging coal, fishing in their waters. Their servants, and even their tenants, if the trespass were such as to affect the landlord's property, had the same protection.* The grievance of so unparalleled an immunity must have been notorious, since it not only suspended at least the redress of creditors, but enabled rapacious men to establish in some measure unjust claims in respect of property; the alleged trespasses being generally founded on some disputed right. An act however was passed, rendering the members of both houses liable to civil suits during the prorogation of parliament.† But they long continued to avenge the private injuries, real or pretended, of their members. On a complaint of breach of privilege by trespassing on a fishery

* The instances are so numerous, that to select a few would perhaps give an inadequate notion of the vast extension which privilege received. In fact, hardly any thing could be done disagreeable to a member, of which he might not inform the house and cause it to be punished.

† 12 Will. 3. c. 3.

(Jan. 25. 1768), they heard evidence on both sides, and determined that no breach of privilege had been committed; thus indirectly taking on them the decision of a freehold right. A few days after they came to a resolution, "that in case of any complaint of a breach of privilege, hereafter to be made by any member of this house, if the house shall adjudge there is no ground for such complaint, the house will order satisfaction to the person complained of for his costs and expenses incurred by reason of such complaint."* But little opportunity was given to try the effect of this resolution, an act having passed in two years afterwards, which has altogether taken away the exemption from legal process, except as to the immunity from personal arrest, which still continues to be the privilege of both houses of parliament.†

3. A more important class of offences against privilege is of such as affect either house of parliament collectively. In the reign of Elizabeth we have an instance of one committed for disrespectful words against the commons. A few others, either for words spoken or published libels, occur in the reign of Charles I. even before the long parliament; but those of 1641 can have little weight as precedents, and we may say nearly the same of the unjustifiable proceedings in 1680. Even since the revolution, we find too many proofs of encroaching pride or intemperate passion, to which a numerous assembly is always prone, and which the prevalent doctrine of the house's absolute power in matters of privilege has not contributed much to restrain. The most remarkable may be briefly noticed.

The commons of 1701, wherein a tory spirit was strongly predominant, by what were deemed its factious delays in voting supplies, and in seconding the measures of the king for the security of Europe, had exasperated all those who saw the nation's safety in vigorous preparations for war, and provoked at last the lords to the most angry resolution which

* Journals, 11th Feb. It had been originally proposed, that the member making the complaint should pay the party's costs and expenses; which was amended, I presume, in consequence of some doubt as to the power of the house to enforce it.

† 10 G. 3. c. 50.

one house of parliament in a matter not affecting its privileges has ever recorded against the other.* The grand jury of Kent, and other freeholders of the county, presented accordingly a petition on the 8th of May, 1701, imploring them to turn their loyal addresses into bills of supply (the only phrase in the whole petition that could be construed into disrespect), and to enable his majesty to assist his allies before it should be too late. The tory faction was wrought to fury by this honest remonstrance. They voted that the petition was scandalous, insolent, and seditious, tending to destroy the constitution of parliament, and to subvert the established government of this realm; and ordered that Mr. Colepepper, who had been most forward in presenting the petition, and all others concerned in it, should be taken into custody of the serjeant.† Though no attempt was made on this occasion to call the authority of the house into question by habeas corpus or other legal remedy, it was discussed in pamphlets and in general conversation, with little advantage

Kentish petition of 1701.

* Resolved, That whatever ill consequences may arise from the so long deferring the supplies for the year's service, are to be attributed to the fatal counsel of putting off the meeting of a parliament so long, and to unnecessary delays of the house of commons. Lords' Journals, 23d June, 1701. The commons had previously come to a vote, that all the ill consequences which may at this time attend the delay of the supplies granted by the commons for the preserving the public peace, and maintaining the balance of Europe, are to be imputed to those who, to procure an indemnity for their own enormous crimes, have used their utmost endeavours to make a breach between the two houses. Commons' Journals, 20th June.

† Journals, 8th May. Parl. Hist. v. 1250. Ralph, 947. This historian, who generally affects to take the popular side, inveighs against this petition, because the tories had a majority in the commons. His partiality, arising out of a dislike to the king, is very manifest throughout the second volume. He is forced to admit afterwards, that the house disgusted the people by their votes on this occasion. P. 976. [Colepepper having escaped from the custody of the serjeant, the house of commons addressed the king, to cause him to be apprehended; upon which he surrendered himself. In the next parliament, which met 30th Dec. 1701, he had been a candidate for Maidstone, and, another being returned, petitioned the house, who, having resolved first in favour of the opposite party, proceeded to vote Colepepper guilty of "scandalous, villainous, and groundless reflections upon the late house of commons;" and, having committed him to Newgate, directed the attorney-general to prosecute him for the said offences. Parl. Hist. v. 1339. Ralph, 1015. Colepepper gave way to this crushing pressure, and having not long afterwards (Parl. Hist. vi. 95.) petitioned the house, and acknowledged himself at the bar sorry for the scandalous and seditious practices by him acted against the honour and privileges of that house, &c., they addressed the queen to stop proceedings against him. But a resolution was passed, 16th Feb. 1702, at the same time with others directed against Colepepper, That it is the undoubted right of the people of England to petition or address *the king*, for the calling, sitting, or dissolving of parliaments, or for the redressing of grievances. Parl. Hist. v. 1340.—1845.]

to a power so arbitrary, and so evidently abused in the immediate instance.*

* History of the Kentish Petition. Somers Tracts, xi. 242. Legion's Paper. Id. 264. Vindication of the Rights of the Commons (either by Harley or sir Humphrey Mackworth). Id. 276. This contains in many respects constitutional principles; but the author holds very strong language about the right of petitioning. After quoting the statute of Charles II. against tumults on pretence of presenting petitions, he says: "By this statute it may be observed, that not only the number of persons is restrained, but the occasion also for which they may petition; which is for the alteration of matters established in church or state, for want whereof some inconvenience may arise to that county from which the petition shall be brought. For it is plain by the express words and meaning of that statute that the grievance or matter of the petition must arise in the same county as the petition itself. They may indeed petition the king for a parliament to redress their grievances; and they may petition that parliament to make one law that is advantageous, and repeal another that is prejudicial to the trade or interest of that county; but they have no power by this statute, nor by the constitution of the English government, to direct the parliament in the general proceedings concerning the whole kingdom; for the law declares that a general consultation of all the wise representatives of parliament is more for the safety of England than the hasty advice of a number of petitioners of a private county, of a grand jury, or of a few justices of the peace, who seldom have a true state of the case represented to them." P. 313.

These are certainly what must appear in the present day very strange limitations of the subject's right to petition either house of parliament. But it is really true that such a right was not generally recognised, nor frequently exercised, in so large an extent as is now held unquestionable. We may search whole volumes of the journals, while the most animating topics were in discussion, without finding a single instance of such an interposition of the constituent with the representative body. In this particular case of the Kentish petition, the words in the resolution, that it tended to destroy the constitution of parliament and subvert the established government, could be founded on no pretence but its unusual interference with the counsels of the legislature. With this exception, I am not aware (stating this, however, with some diffidence) of any merely political petition before the Septennial bill in 1717, against which several were presented from corporate towns; one of which was rejected on account of language that the house thought indecent; and as to these it may be observed, that towns returning members to parliament had a particular concern in the measure before the house. They relate, however, no doubt, to general policy, and seem to establish a popular principle which stood on little authority. I do not of course include the petitions to the long parliament in 1640, nor one addressed to the Convention, in 1689, from the inhabitants of London and Westminster, pressing their declaration of William and Mary; both in times too critical to furnish regular precedents. [It may be mentioned, however, that, a few months after the revolution, the city of London added to a petition to have their ancient right of choosing their sheriffs restored to them, a prayer, that the king might be enabled to make use of the service of all his protestant subjects; that is, that the test might be abrogated. Parl. Hist. v. 359. It was carried by 174 to 147 that this petition should be read.—1845.] But as the popular principles of government grew more established, the right of petitioning on general grounds seems to have been better recognised; and instances may be found, during the administration of sir Robert Walpole, though still by no means frequent. Parl. Hist. xii. 119. [In the South Sea crisis, 1721, many petitions were presented, praying for justice on the directors. Parl. Hist. vii. 763.—1845.] The city of London presented a petition against the bill for naturalization of the Jews, in 1753, as being derogatory to the Christian religion as well as detrimental to trade. Id. xiv. 1417. It caused however some animadversion; for Mr. Northey, in the debate next session on the proposal to repeal this bill, alluding to this very petition, and to the comments Mr. Pelham made

Dispute with lords about Aylesbury election.

A very few years after this high exercise of authority, it was called forth in another case, still more remarkable and even less warrantable. The house of commons had an undoubted right of determining all disputed returns to the writ of election, and consequently of judging upon the right of every vote. But, as the house could not pretend that it had given this right, or that it was not, like any other franchise, vested in the possessor by a legal title, no pretext of reason or analogy could be set up, for denying that it might also come, in an indirect manner at least, before a court of justice, and be judged by the common principles of law. One Ashby, however, a burgess of Aylesbury, having sued the returning officer for refusing his vote; and three judges of the king's bench, against the opinion of chief-justice Holt, having determined for different reasons that it did not lie, a writ of error was brought in the house of lords, when the judgment was reversed. The house of commons took this up indignantly, and passed various resolutions, asserting their exclusive right

on it, as "so like the famous Kentish petition, that if they had been treated in the same manner it would have been what they deserved," observes in reply, that the "right of petitioning either the king or the parliament in a decent and submissive manner, and without any riotous appearance, against any thing they think may affect their religion and liberties, will never, I hope, be taken from the subject." Id. xv. 149.; see also 376. And it is very remarkable that notwithstanding the violent clamour excited by that unfortunate statute, no petitions for its repeal are to be found in the journals. They are equally silent with regard to the marriage act, another topic of popular obloquy. Some petitions appear to have been presented against the bill for naturalization of foreign protestants; but probably on the ground of its injurious effect on the parties themselves. The great multiplication of petitions on matters wholly unconnected with particular interests cannot, I believe, be traced higher than those for the abolition of the slave trade in 1787; though a few were presented for reform about the end of the American war, which would undoubtedly have been rejected with indignation in any earlier stage of our constitution. It may be remarked also that petitions against bills imposing duties are not received, probably on the principle that they are intended for the general interests, though affecting the parties who thus complain of them. Hatsell, iii. 200.

The convocation of public meetings for the debate of political questions, as preparatory to such addresses or petitions, is still less according to the practice and precedents of our ancestors; nor does it appear that the sheriffs or other magistrates are more invested with a right of convening or presiding in assemblies of this nature than any other persons; though within the bounds of the public peace, it would not perhaps be contended that they have ever been unlawful. But that their origin can be distinctly traced higher than the year 1769, I am not prepared to assert. It will of course be understood, that this note is merely historical, and without reference to the expediency of that change in our constitutional theory which it illustrates.

to take cognizance of all matters relating to the election of their members. The lords repelled these by contrary resolutions: That by the known laws of this kingdom, every person having a right to give his vote, and being wilfully denied by the officer who ought to receive it, may maintain an action against such officer to recover damage for the injury; That the contrary assertion is destructive of the property of the subject, and tends to encourage corruption and partiality in returning officers; That the declaring persons guilty of breach of privilege for prosecuting such actions, or for soliciting and pleading in them, is a manifest assuming a power to control the law, and hinder the course of justice, and subject the property of Englishmen to the arbitrary votes of the house of commons. They ordered a copy of these resolutions to be sent to all the sheriffs, and to be communicated by them to all the boroughs in their respective counties.

A prorogation soon afterwards followed, but served only to give breathing time to the exasperated parties; for it must be observed, that though a sense of dignity and privilege no doubt swelled the majorities in each house, the question was very much involved in the general whig and tory course of politics. But Ashby, during the recess, having proceeded to execution on his judgment, and some other actions having been brought against the returning officer of Aylesbury, the commons again took it up, and committed the parties to Newgate. They moved the court of king's bench for a habeas corpus; upon the return to which, the judges, except Holt, thought themselves not warranted to set them at liberty against the commitment of the house.* It was threatened to bring this by writ of error before the lords; and, in the disposition of that assembly, it seems probable that they would have inflicted a severe wound on the privileges of the lower house, which must in all probability have turned out a sort of suicide upon their own. But the commons interposed by resolving to commit to prison the counsel and agents concerned in prosecuting the habeas corpus, and by addressing the queen not to grant a writ of error. The queen properly

* State Trials, xiv. 849.

answered, that as this matter, relating to the course of judicial proceedings, was of the highest consequence, she thought it necessary to weigh very carefully what she should do. The lords came to some important resolutions: That neither house of parliament hath any power by any vote or declaration to create to themselves any new privilege that is not warranted by the known laws and customs of parliament; That the house of commons, in committing to Newgate certain persons for prosecuting an action at law, upon pretence that their so doing was contrary to a declaration, a contempt of the jurisdiction, and a breach of the privileges of that house, have assumed to themselves alone a legislative power, by pretending to attribute the force of law to their declaration, have claimed a jurisdiction not warranted by the constitution, and have assumed a new privilege, to which they can show no title by the law and custom of parliament; and have thereby, as far as in them lies, subjected the rights of Englishmen, and the freedom of their persons, to the arbitrary votes of the house of commons; That every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right to a writ of habeas corpus, in order to obtain his liberty by the due course of law; That for the house of commons to punish any person for assisting a prisoner to procure such a writ is an attempt of dangerous consequence, and a breach of the statutes provided for the liberty of the subject; That a writ of error is not of grace but of right, and ought not to be denied to the subject when duly applied for, though at the request of either house of parliament.

These vigorous resolutions produced a conference between the houses, which was managed with more temper than might have been expected from the tone taken on both sides. But, neither of them receding in the slightest degree, the lords addressed the queen, requesting her to issue the writs of error demanded upon the refusal of the king's bench to discharge the parties committed by the house of commons. The queen answered the same day that she should have granted the writs of error desired by them, but finding an absolute necessity of putting an immediate end to the session, she was sensible there could have been no further proceeding upon them. The meaning of this could only be, that by a pro-

rogation all commitments by order of the lower house of parliament are determined, so that the parties could stand in no need of a habeas corpus. But a great constitutional question was thus wholly eluded.*

We may reckon the proceedings against Mr. Alexander Murray, in 1751, among the instances wherein the house of commons has been hurried by passion to an undue violence. This gentleman had been active in a contested Westminster election, on an anti-ministerial and perhaps jacobite interest. In the course of an inquiry before the house, founded on a petition against the return, the high-bailiff named Mr. Murray as having insulted him in the execution of his duty. The house resolved to hear Murray by counsel in his defence, and the high-bailiff also by counsel in support of the charge, and ordered the former to give bail for his appearance from time to time. These, especially the last, were innovations on the practice of parliament, and were justly opposed by the more cool-headed men. After hearing witnesses on both sides, it was resolved that Murray should be committed to Newgate, and should receive this sentence upon his knees. This command he steadily refused to obey, and thus drew on himself a storm of wrath at such insolence and audacity. But the times were no more, when the commons could inflict whippings and pillories on the refractory; and they were forced to content themselves with ordering that no person should be admitted to him in prison, which, on account of his ill health, they soon afterwards relaxed. The public voice is never favourable to such arbitrary exertions of mere power: at the expiration of the session, Mr. Murray, thus grown from an intriguing jacobite into a confessor of popular liberty, was attended home by a sort of triumphal procession amidst the applause of the people. In the next session he was again committed on the same charge; a proceeding extremely violent and arbitrary.†

Proceedings against Mr. Murray in 1751.

It has been always deemed a most important and essential

* Parl. Hist. vi. 225. et post. State Trials, xiv. 695. et post. Walpole's Memoirs of the last Ten Years of George II., i. 15. et post.

† Parl. Hist. xiv. 888. et post, 1063.

privilege of the houses of parliament, that they may punish in this summary manner by commitment all those who disobey their orders to attend as witnesses, or for any purposes of their constitutional duties. No inquiry could go forward before the house at large or its committees, without this power to enforce obedience; especially when the information is to be extracted from public officers against the secret wishes of the court. It is equally necessary (or rather more so, since evidence not being on oath in the lower house, there can be no punishment in the course of law,) that the contumacy or prevarication of witnesses should incur a similar penalty. No man would seek to take away this authority from parliament, unless he is either very ignorant of what has occurred in other times and his own, or is a slave in the fetters of some general theory.

Commitments for offences unconnected with the house.

But far less can be advanced for several exertions of power on record in the journals, which under the name of privilege must be reckoned by impartial men irregularities and encroachments, capable only at some periods of a kind of apology from the unsettled state of the constitution. The commons began, in the famous or infamous case of Floyd, to arrogate a power of animadverting upon political offences, which was then wrested from them by the upper house. But in the first parliament of Charles I. they committed Montagu (afterwards the noted semi-popish bishop) to the serjeant on account of a published book containing doctrines they did not approve.* For this was evidently the main point, though he was also charged with reviling two persons who had petitioned the house, which bore a distant resemblance to a contempt. In the long parliament, even from its commencement, every boundary was swept away; it was sufficient to have displeased the majority by act or word; but no precedents can be derived from a crisis of force struggling against force. If we descend to the reign of William III., it will be easy to discover instances of commitments, laudable in their purpose, but of such doubtful legality and dangerous consequence that no regard to the motive should induce us to justify the prece-

* Journals, vii. 9th July, 1725.

dent. Graham and Burton, the solicitors of the treasury in all the worst state prosecutions under Charles and James, and Jenner, a baron of the exchequer, were committed to the Tower by the council immediately after the king's proclamation, with an intention of proceeding criminally against them. Some months afterwards, the suspension of the habeas corpus, which had taken place by bill, having ceased, they moved the king's bench to admit them to bail; but the house of commons took this up, and, after a report of a committee as to precedents, put them in custody of the serjeant-at-arms.* On complaints of abuses in victualling the navy, the commissioners of that department were sent for in the serjeant's custody, and only released on bail ten days afterwards.† But, without minutely considering the questionable instances of privilege that we may regret to find, I will select one wherein the house of commons appear to have gone far beyond either the reasonable or customary limits of privilege, and that with very little pretext of public necessity. In the reign of George I., a newspaper called Mist's Journal was notorious as the organ of the jacobite faction. A passage full of the most impudent longings for the Pretender's restoration having been laid before the house, it was resolved, May 28. 1721, "That the said paper is a false, malicious, scandalous, infamous, and traitorous libel, tending to alienate the affections of his majesty's subjects, and to excite the people to sedition and rebellion, with an intention to subvert the present happy establishment, and to introduce popery and arbitrary power." They went on after this resolution to commit the printer Mist to Newgate, and to address the king that the authors and publishers of the libel might be prosecuted.‡ It is to be observed that no violation of privilege either was, or indeed could be alleged as the ground of this commitment; which seems to imply that the house conceived itself to be invested with a general power, at least in all political misdemeanours.

I have not observed any case more recent than this of Mist, wherein any one has been committed on a charge which could not possibly be interpreted as a contempt of the

* Commons' Journals, 25th Oct. 1689. † Id. 5th Dec.
‡ Parl. Hist. vii. 803.

house, or a breach of its privilege. It became, however, the practice, without previously addressing the king, to direct a prosecution by the attorney-general for offences of a public nature, which the commons had learned in the course of any inquiry, or which had been formally laid before them.* This seems to have been introduced about the beginning of the reign of Anne, and is undoubtedly a far more constitutional course than that of arbitrary punishment by over-straining their privilege. In some instances, libels have been publicly burned by the order of one or other house of parliament.

I have principally adverted to the powers exerted by the lower house of parliament, in punishing those guilty of violating their privileges. It will, of course, be understood that the lords are at least equal in authority. In some respects indeed they have gone beyond. I do not mean that they would be supposed at present to have cognizance of any offence whatever, upon which the commons could not animadvert. Notwithstanding what they claimed in the case of Floyd, the subsequent denial by the commons, and abandonment by themselves, of any original jurisdiction, must stand in the way of their assuming such authority over misdemeanours, more extensively at least than the commons, as has been shown, have in some instances exercised it. But, while the latter have, with very few exceptions, and none since the restoration, contented themselves with commitment during the session, the lords have sometimes imposed fines, and, on some occasions in the reign of George II., as well as later, have adjudged parties to imprisonment for a certain time. In one instance, so late as that reign, they sentenced a man to the pillory; and this had been done several times before. The judgments, however, of earlier ages give far less credit to the jurisdiction than they take from it. Besides the ever-memorable case of Floyd, one John Blount, about the same time (27th Nov. 1621), was sentenced by the lords to imprisonment and hard labour in Bridewell during life.†

* Lords' Journals, 10th Jan. 1702. Parl. Hist. vi. 21.

† Hargrave's Juridical Arguments, vol. i. p. 1, &c. [In 1677, the lords having committed one Dr. Cary, for sending to the press a libel, asserting the illegality of the late prorogation, it was taken up warmly by the opposition commoners, on the ground that offences against the government could not be prosecuted in parliament. Nothing, however, was done by the house; so that the lords gained a victory. Parl. Hist. iv. 837.—1845.]

It may surprise those who have heard of the happy balance of the English constitution, of the responsibility of every man to the law, and of the security of the subject from all unlimited power, especially as to personal freedom, that this power of awarding punishment at discretion of the houses of parliament is generally reputed to be universal and uncontrollable. This indeed was by no means received at the time when the most violent usurpations under the name of privilege were first made; the power was questioned by the royalist party who became its victims, and, among others, by the gallant Welshman, judge Jenkins, whom the long parliament had shut up in the Tower. But it has been several times brought into discussion before the ordinary tribunals; and the result has been, that if the power of parliament is not unlimited in right, there is at least no remedy provided against its excesses.

Privileges of the house not controllable by courts of law.

The house of lords in 1677 committed to the Tower four peers, among whom was the earl of Shaftesbury, for a high contempt; that is, for calling in question, during a debate, the legal continuance of parliament after a prorogation of more than twelve months. Shaftesbury moved the court of king's bench to release him upon a writ of habeas corpus. But the judges were unanimously of opinion, that they had no jurisdiction to inquire into a commitment by the lords of one of their body, or to discharge the party during the session, even though there might be, as appears to have been the case, such technical informality on the face of the commitment, as would be sufficient in an ordinary case to set it aside.*

Lord Shaftesbury was at this time in vehement opposition to the court. Without insinuating that this had any effect upon the judges, it is certain that a few years afterwards they were less inclined to magnify the privileges of parliament. Some who had been committed, very wantonly and oppressively, by the commons in 1680, under the name of abhorrers, brought actions for false imprisonment against Topham, the serjeant-at-arms. In one of these he put in what is called a plea to the jurisdiction, denying the competence of the court

* State Trials, vi. 1369. 1 Modern Reports, 159.

of king's bench, inasmuch as the alleged trespass had been done by order of the knights, citizens, and burgesses of parliament. But the judges overruled this plea, and ordered him to plead in bar to the action. We do not find that Topham complied with this; at least judgments appear to have passed against him in these actions.* The commons, after the revolution, entered on the subject, and summoned two of the late judges, Pemberton and Jones, to their bar. Pemberton answered that he remembered little of the case; but if the defendant should plead that he did arrest the plaintiff by order of the house, and should plead that to the jurisdiction of the king's bench, he thought, with submission, he could satisfy the house that such a plea ought to be overruled, and that he took the law to be so very clearly. The house pressed for his reasons, which he rather declined to give. But on a subsequent day he fully admitted that the order of the house was sufficient to take any one into custody, but that it ought to be pleaded in bar, and not to the jurisdiction, which would be of no detriment to the party, nor affect his substantial defence. It did not appear however that he had given any intimation from the bench of so favourable a leaning towards the rights of parliament; and his present language might not uncharitably be ascribed to the change of times. The house resolved that the orders and proceedings of this house being pleaded to the jurisdiction of the court of king's bench, ought not to be overruled; that the judges had been guilty of a breach of privilege, and should be taken into custody.†

I have already mentioned that, in the course of the controversy between the two houses on the case of Ashby and White, the commons had sent some persons to Newgate for suing the returning officer of Aylesbury in defiance of their resolutions; and that, on their application to the king's bench to be discharged on their habeas corpus, the majority of the judges had refused it. Three judges, Powis, Gould, and Powell, held that the courts of Westminster Hall could have no power to judge of the commitments of the houses of parliament; that they had no means of knowing what were the

* State Trials, xii. 822. T. Jones, Reports, 208.

† Journals, 10th, 12th, 19th July, 1689.

privileges of the commons, and consequently could not know their boundaries; that the law and custom of parliament stood on its own basis, and was not to be decided by the general rules of law; that no one had ever been discharged from such a commitment, which was an argument that it could not be done. Holt, the chief-justice, on the other hand, maintained that no privilege of parliament could destroy a man's right, such as that of bringing an action for a civil injury; that neither house of parliament could separately dispose of the liberty and property of the people, which could only be done by the whole legislature; that the judges were bound to take notice of the customs of parliament, because they are part of the law of the land, and might as well be learned as any other part of the law. "It is the law," he said, "that gives the queen her prerogative; it is the law gives jurisdiction to the house of lords, as it is the law limits the jurisdiction of the house of commons." The eight other judges having been consulted, though not judicially, are stated to have gone along with the majority of the court, in holding that a commitment by either house of parliament was not cognizable at law. But from some of the resolutions of the lords on this occasion which I have quoted above, it may seem probable that, if a writ of error had been ever heard before them, they would have leaned to the doctrine of Holt, unless indeed withheld by the reflection that a similar principle might easily be extended to themselves.*

It does not appear that any commitment for breach of privilege was disputed until the year 1751; when Mr. Alexander Murray, of whom mention has been made, caused himself to be brought before the court of king's bench on a habeas corpus. But the judges were unanimous in refusing to discharge him. "The house of commons," said Mr. Justice Wright, "is a high court, and it is agreed on all hands that they have power to judge of their own privileges; it need not appear to us what the contempt is for; if it did appear, we could not judge thereof."—"This court," said Mr. Justice Denison, "has no jurisdiction in the present case. We granted the habeas corpus, not knowing what the commitment

* State Trials, xiv. 849.

was; but now it appears to be for a contempt of the privileges of the house of commons. What the privileges of either house are we do not know; nor need they tell us what the contempt was, because we cannot judge of it; for I must call this court inferior to the commons with respect to judging of their privileges, and contempts against them." Mr. Justice Foster agreed with the two others, that the house could commit for a contempt, which, he said, Holt had never denied in such a case as this before them.* It would be unnecessary to produce later cases which have occurred since the reign of George II., and elicited still stronger expressions from the judges of their incapacity to take cognizance of what may be done by the houses of parliament.

Danger of stretching this too far.

Notwithstanding such imposing authorities, there have not been wanting some who have thought that the doctrine of uncontrollable privilege is both eminently dangerous in a free country, and repugnant to the analogy of our constitution. The manly language of lord Holt has seemed to rest on better principles of public utility, and even perhaps of positive law.† It is not however to be inferred that the right of either house of parliament to commit persons, even not of their own body, to prison, for contempts or breaches of privilege, ought to be called in question. In some cases this authority is as beneficial, and even indispensable, as it is ancient and established. Nor do I by any means pretend that if the warrant of commitment merely recites the party to have been guilty of a contempt or breach of privilege, the truth of such allegation could be examined upon a return to a writ of habeas corpus, any more than in an ordinary case of felony. Whatever injustice may thus be

* State Trials, viii. 30.

† This is very elaborately and dispassionately argued by Mr. Hargrave in his Juridical Arguments, above cited; also vol. ii. p. 183. "I understand it," he says, "to be clearly part of the law and custom of parliament that each house of parliament may inquire into and imprison for breaches of privilege." But this he thinks to be limited by law; and after allowing it clearly in cases of obstruction, arrest, assault, &c. on members, admits also that "the judicative power as to writing, speaking, or publishing, of gross reflections upon the whole parliament or upon either house, though perhaps originally questionable, seems now of too long a standing and of too much frequency in practice to be well counteracted." But after mentioning the opinions of the judges in Crosby's case, Mr. H. observes: "I am myself far from being convinced that commitment for contempts by a house of parliament, or by the highest court of judicature in Westminster Hall, either ought to be, or are thus wholly privileged from all examination and appeal."

done cannot have redress by any legal means; because the house of commons (or the lords, as it may be) are the fit judges of the fact, and must be presumed to have determined it according to right. But it is a more doubtful question, whether, if they should pronounce an offence to be a breach of privilege, as in the case of the Aylesbury men, which a court of justice should perceive to be clearly none, or if they should commit a man on a charge of misdemeanour, and for no breach of privilege at all, as in the case of Mist the printer, such excesses of jurisdiction might not legally be restrained by the judges. If the resolutions of the lords in the business of Ashby and White are constitutional and true, neither house of parliament can create to itself any new privilege; a proposition surely so consonant to the rules of English law, which require prescription or statute as the basis for every right, that few will dispute it; and it must be still less lawful to exercise a jurisdiction over misdemeanours, by committing a party who would regularly be only held to bail on such a charge. Of this I am very certain, that if Mist, in the year 1721, had applied for his discharge on a habeas corpus, it would have been far more difficult to have opposed it on the score of precedent or of constitutional right, than it was for the attorney-general of Charles I., nearly one hundred years before, to resist the famous arguments of Selden and Littleton, in the case of the Buckinghamshire gentlemen committed by the council. If a few scattered acts of power can make such precedents as a court of justice must take as its rule, I am sure the decision, neither in this case nor in that of ship-money, was so unconstitutional as we usually suppose: it was by dwelling on all authorities in favour of liberty, and by setting aside those which made against it, that our ancestors overthrew the claims of unbounded prerogative. Nor is this parallel less striking when we look at the tone of implicit obedience, respect, and confidence with which the judges of the eighteenth century have spoken of the houses of parliament, as if their sphere were too low for the cognizance of such a transcendent authority.* The same language, almost

* Mr. Justice Gould, in Crosby's case, as reported by Wilson, observes: "It is true this court did, in the instance alluded to by the counsel at the bar (Wilkes's case, 2 Wilson, 151.), determine upon the privilege of parliament in

to the words, was heard from the lips of the Hydes and Berkeleys in the preceding age, in reference to the king and to the privy council. But as, when the spirit of the government was almost wholly monarchical, so since it has turned chiefly to an aristocracy, the courts of justice have been swayed towards the predominant influence; not, in general, by any undue motives, but because it is natural for them to support power, to shun offence, and to shelter themselves behind precedent. They have also sometimes had in view the analogy of parliamentary commitments to their own power of attachment for contempt, which they hold to be equally uncontrollable; a doctrine by no means so dangerous to the subject's liberty, but liable also to no trifling objections.*

The consequences of this utter irresponsibility in each of the two houses will appear still more serious, when we advert to the unlimited power of punishment which it draws with it. The commons indeed do not pretend to imprison beyond the session; but the lords have imposed fines and definite imprisonment; and attempts to resist these have been unsuccessful.† If the matter is to rest upon precedent, or upon what overrides precedent itself, the absolute failure of jurisdiction in the ordinary courts, there seems nothing (decency and discretion excepted) to prevent their repeating the sentences of James I.'s reign, whipping, branding, hard labour for life. Nay, they might order the usher of the black rod to take a man from their bar, and hang him up in the lobby. Such things would not be done, and, being done, would not be endured; but it is much that any sworn ministers of the law

the case of a libel; but then that privilege was promulged and known; it existed in records and law-books, and was allowed by parliament itself. But *even in that case we now know that we were mistaken; for the house of commons have since determined, that privilege does not extend to matters of libel.*" It appears, therefore, that Mr. Justice Gould thought a declaration of the house of commons was better authority than a decision of the court of common pleas, as to a privilege which, as he says, existed in records and law-books.

* "I am far from subscribing to all the latitude of the doctrine of attachments for contempts of the king's courts of Westminster, especially the king's bench, as it is sometimes stated, and it has been sometimes practised." Hargrave, ii. 213.

"The principle upon which attachments issue for libels on courts is of a more enlarged and important nature: it is *to keep a blaze of glory around them*, and to deter people from attempting to render them contemptible in the eyes of the people." Wilmot's Opinions and Judgments, p. 270. Yet the king, who seems as much entitled to this blaze of glory as his judges, is driven to the verdict of a jury before the most libellous insult on him can be punished.

† Hargrave, ubi supra.

should, even by indefinite language, have countenanced the legal possibility of tyrannous power in England. The temper of government itself, in modern times, has generally been mild; and this is probably the best ground of confidence in the discretion of parliament; but popular, that is, numerous bodies, are always prone to excess, both from the reciprocal influences of their passions, and the consciousness of irresponsibility; for which reasons a democracy, that is, the absolute government of the majority, is in general the most tyrannical of any. Public opinion, it is true, in this country, imposes a considerable restraint; yet this check is somewhat less powerful in that branch of the legislature which has gone the farthest in chastising breaches of privilege. I would not be understood however to point at any more recent discussions on this subject; were it not, indeed, beyond the limits prescribed to me, it might be shown that the house of commons, in asserting its jurisdiction, has receded from much of the arbitrary power which it once arrogated, and which some have been disposed to bestow upon it.*

* [This important topic of parliamentary privilege has been fully discussed, since the first publication of the present volumes, in the well-known proceedings to which the action, Stockdale v. Hansard, gave rise. In trying this case, lord Denman told the jury, that the order of the house of commons was not a justification for any man to publish a private libel. In consequence of this decision, the house of commons resolved, May 30. 1837, That, by the law and privilege of parliament, this house has the sole and exclusive jurisdiction to determine upon the existence and extent of its privileges, and that the institution or prosecution of any action, suit, or other proceeding, for the purpose of bringing them into discussion or decision, before any court or tribunal elsewhere than in parliament, is a high breach of such privilege, and renders all parties concerned therein amenable to its just displeasure, and to the punishment consequent thereon. And, That for any court or tribunal to assume to decide upon matters of privilege inconsistent with the determination of either house of parliament, is contrary to the law of parliament, and is a breach and contempt of the privileges of parliament.

Of these resolutions, which, as is obvious, go far beyond what the particular case of Stockdale required, it has been well said, in an excellent pamphlet, by Mr. Pemberton Leigh, which really exhausts the subject, and was never so much as tolerably answered, that "The question now is, whether each house of parliament has exclusive authority to decide upon the existence and extent of its own privileges, to pronounce at its pleasure upon the breach of those privileges, to bind by its declaration of law all the queen's subjects, between whom in a court of justice a question as to privilege may arise, and to punish at its discretion all persons, suitors, attornies, counsel, and judges, who may be concerned in bringing those privileges into discussion in a court of justice directly or indirectly." Pemberton's Letter to Lord Langdale. P. 4.—1837.

In the debates which ensued in the house of commons, those who contended for unlimited privilege fell under two classes; such as availed themselves of the opinions of the eleven judges who dissented from Holt, in Ashby v. White, and of some later dicta; and such as, apparently indifferent to what courts of justice may have held, rested upon some

IV. It is commonly and justly said that civil liberty is not only consistent with, but in its terms implies, the restrictive limitations of natural liberty which are imposed by law. But, as these are not the less real limitations of liberty, it can hardly be maintained that the subject's condition is not impaired by very numerous restraints upon his will, even without reference to their expediency. The price may be well paid; but it is still a price that it costs some sacrifice to pay. Our statutes have been growing in bulk and multiplicity with the regular session of parliament, and with the new system of government; all abounding with prohibitions and penalties, which every man is presumed to know, but which no man, the judges themselves included, can really know with much exactness. We literally walk amidst the snares and pitfalls of the law. The very doctrine of the more rigid casuists, that men are bound in conscience to observe all the laws of their country, has become impracticable through their complexity and inconvenience; and most of us are content to shift off their penalties in the *mala prohibita* with as little scruple as some feel in risking those of graver offences. But what more peculiarly belongs to the present subject is the systematic encroachment upon ancient constitutional principles, which has for a long time been made through new enactments, proceeding from the crown, chiefly in respect to the revenue.* These may be traced indeed in the

paramount sovereignty of the houses of parliament, some uncontrollable right of exercising discretionary power for the public good, analogous to what was once supposed to be vested in the crown. If we but substitute prerogative of the crown for privileges of parliament in the resolutions of 1837, we may ask whether, in the worst times of the Tudors and Stuarts, such a doctrine was ever laid down in express terms by any grave authority. With these there could be no argument; the others had certainly as much right to cite legal authorities in their favour as their opponents.

The commitment of the sheriffs of London, in 1840, for executing a writ of the queen's bench, is recent in our remembrance; as well as that the immediate question was set at rest by a statute, 3 & 4 Vict. c. 9.; which legalizes publications under the authority of either house of parliament, leaving, by a special proviso, their privileges as before. But the main dispute between arbitrary and limited power is by no means determined; and, while great confidence may be placed in the caution which commonly distinguishes the leaders of parties, there will always be found many who, possessing individually a small fraction of despotic power, will not abandon it on any principle of respecting public liberty. It is observable, though easily to be accounted for, and conformable to what occurred in the long parliament, that, among the most strenuous asserters of unmeasured privilege, are generally found many, not celebrated for any peculiar sympathy with the laws, the crown, and the constitution.—1845.]

* This effect of continual new statutes

statute-book, at least as high as the restoration, and really began in the arbitrary times of revolution which preceded it. They have however been gradually extended along with the public burthens, and as the severity of these has prompted fresh artifices of evasion. It would be curious, but not within the scope of this work, to analyze our immense fiscal law, and to trace the history of its innovations. These consist, partly in taking away the cognizance of offences against the revenue from juries, whose partiality in such cases there was in truth much reason to apprehend, and vesting it either in commissioners of the revenue itself or in magistrates; partly in anomalous and somewhat arbitrary powers with regard to the collection; partly in deviations from the established rules of pleading and evidence, by throwing on the accused party in fiscal causes the burthen of proving his innocence, or by superseding the necessity of rigorous proof as to matters wherein it is ordinarily required; and partly in shielding the officers of the crown, as far as possible, from their responsibility for illegal actions, by permitting special circumstances of justification to be given in evidence without being pleaded, or by throwing impediments of various kinds in the way of the prosecutor, or by subjecting him to unusual costs in the event of defeat.

Extension of penal laws.

These restraints upon personal liberty, and what is worse, these endeavours, as they seem, to prevent the fair administration of justice between the crown and the

is well pointed out in a speech ascribed to sir William Wyndham, in 1734: — "The learned gentleman spoke (he says) of the prerogative of the crown, and asked us if it had lately been extended beyond the bounds prescribed to it by law. Sir, I will not say that there have been lately any attempts to extend it beyond the bounds prescribed by law; but I will say that these bounds have been of late so vastly enlarged that there seems to be no great occasion for any such attempt. What are the many penal laws made within these forty years, but so many extensions of the prerogative of the crown, and as many diminutions of the liberty of the subject? And whatever the necessity was that brought us into the enacting of such laws, it was a fatal necessity; it has greatly added to the power of the crown, and particular care ought to be taken not to throw any more weight into that scale." Parl. Hist. ix. 463.

Among the modern statutes which have strengthened the hands of the executive power, we should mention the riot act, 1 Geo. 1. stat. 2. c. 5., whereby all persons tumultuously assembled to the disturbance of the public peace, and not dispersing within one hour after proclamation made by a single magistrate, are made guilty of a capital felony. I am by no means controverting the expediency of this law; but, especially when combined with the prompt aid of a military force, it is surely a compensation for much that may seem to have been thrown into the popular scale.

subject, have in general, more especially in modern times, excited little regard as they have passed through the houses of parliament. A sad necessity has over-ruled the maxims of ancient law; nor is it my business to censure our fiscal code, but to point out that it is to be counted as a set-off against the advantages of the revolution, and has in fact diminished the freedom and justice which we claim for our polity. And, that its provisions have sometimes gone so far as to give alarm to not very susceptible minds, may be shown from a remarkable debate in the year 1737. A bill having been brought in by the ministers to prevent smuggling, which contained some unusual clauses, it was strongly opposed, among other peers, by lord chancellor Talbot, himself, of course, in the cabinet, and by lord Hardwicke, then chief-justice, a regularly bred crown-lawyer, and in his whole life disposed to hold very high the authority of government. They objected to a clause subjecting any three persons travelling with arms, to the penalty of transportation, on proof by two witnesses that their intention was to assist in the clandestine landing, or carrying away prohibited or uncustomed goods. "We have in our laws," said one of the opposing lords, "no such thing as a crime by implication, nor can a malicious intention ever be proved by witnesses. Facts only are admitted to be proved, and from those facts the judge and jury are to determine with what intention they were committed; but no judge or jury can ever, by our laws, suppose, much less determine, that an action, in itself innocent or indifferent, was attended with a criminal and malicious intention. Another security for our liberties is, that no subject can be imprisoned unless some felonious and high crime be sworn against him. This, with respect to private men, is the very foundation stone of all our liberties; and, if we remove it, if we but knock off a corner, we may probably overturn the whole fabric. A third guard for our liberties is that right which every subject has, not only to provide himself with arms proper for his defence, but to accustom himself to the use of those arms, and to travel with them whenever he has a mind." But the clause in question, it was contended, was repugnant to all the maxims of free government. No presumption of a crime could be drawn

from the mere wearing of arms, an act not only innocent, but highly commendable; and therefore the admitting of witnesses to prove that any of these men were armed, in order to assist in smuggling, would be the admitting of witnesses to prove an intention, which was inconsistent with the whole tenor of our laws.* They objected to another provision subjecting a party against whom information should be given that he intended to assist in smuggling, to imprisonment without bail, though the offence itself were in its nature bailable; to another, which made informations for assault upon officers of the revenue triable in any county of England; and to a yet more startling protection thrown round the same favoured class, that the magistrates should be bound to admit them to bail on charges of killing or wounding any one in the execution of their duty. The bill itself was carried by no great majority; and the provisions subsist at this day, or perhaps have received a further extension.

It will thus appear to every man who takes a comprehensive view of our constitutional history, that the executive government, though shorn of its lustre, has not lost so much of its real efficacy by the consequences of the revolution as is often supposed; at least, that with a regular army to put down insurrection, and an influence sufficient to obtain fresh statutes of restriction, if such should ever be deemed necessary, it is not exposed, in the ordinary course of affairs, to any serious hazard. But we must here distinguish the executive government, using that word in its largest sense, from the crown itself, or the personal authority of the sovereign. This is a matter of rather delicate inquiry, but too material to be passed by.

The real power of the prince, in the most despotic monarchy, must have its limits from nature, and bear some proportion to his courage, his activity, and his intellect. The tyrants of the East become puppets or slaves of their vizirs; or it turns to a game of cunning, wherein the winner is he who shall succeed in tying the bowstring round the other's neck. After some

Diminution of personal authority of the crown.

* 9 Geo. 2. c. 35. sect. 10. 13. Parl. Hist. ix. 1229. I quote this as I find it; but probably the expressions are not quite correct; for the reasoning is not so.

ages of feeble monarchs, the titular royalty is found wholly separated from the power of command, and glides on to posterity in its languid channel, till some usurper or conqueror stops up the stream for ever. In the civilized kingdoms of Europe, those very institutions which secure the permanence of royal families, and afford them a guarantee against manifest subjection to a minister, take generally out of the hands of the sovereign the practical government of his people. Unless his capacities are above the level of ordinary kings, he must repose on the wisdom and diligence of the statesmen he employs, with the sacrifice, perhaps, of his own prepossessions in policy, and against the bent of his personal affections. The power of a king of England is not to be compared with an ideal absoluteness, but with that which could be enjoyed in the actual state of society by the same person in a less bounded monarchy.

Causes of this.

The descendants of William the Conqueror on the English throne, down to the end of the seventeenth century, have been a good deal above the average in those qualities which enable, or at least induce, kings to take on themselves a large share of the public administration; as will appear by comparing their line with that of the house of Capet, or perhaps most others during an equal period. Without going farther back, we know that Henry VII., Henry VIII., Elizabeth, the four kings of the house of Stuart, though not always with as much ability as diligence, were the master-movers of their own policy, not very susceptible of advice, and always sufficiently acquainted with the details of government to act without it. This was eminently the case also with William III., who was truly his own minister, and much better fitted for that office than those who served him. The king, according to our constitution, is supposed to be present in council, and was in fact usually, or very frequently, present, so long as the council remained as a deliberative body for matters of domestic and foreign policy. But, when a junto or cabinet came to supersede that ancient and responsible body, the king himself ceased to preside, and received their advice separately, according to their respective functions of treasurer, secretary, or chancellor, or that of the whole cabinet through one of its leading members. This change however was gradual; for

cabinet councils were sometimes held in the presence of William and Anne; to which other councillors, not strictly of that select number, were occasionally summoned.

But on the accession of the house of Hanover, this personal superintendence of the sovereign necessarily came to an end. The fact is hardly credible that, George I. being incapable of speaking English, as sir Robert Walpole was of conversing in French, the monarch and his minister held discourse with each other in Latin.* It is impossible that, with so defective a means of communication, (for Walpole, though by no means an illiterate man, cannot be supposed to have spoken readily a language very little familiar in this country,) George could have obtained much insight into his domestic affairs, or been much acquainted with the characters of his subjects. We know, in truth, that he nearly abandoned the consideration of both, and trusted his ministers with the entire management of this kingdom, content to employ its great name for the promotion of his electoral interests. This continued in a less degree to be the case with his son, who, though better acquainted with the language and circumstances of Great Britain, and more jealous of his prerogative, was conscious of his incapacity to determine on matters of domestic government, and reserved almost his whole attention for the politics of Germany.

Party connexions.

The broad distinctions of party contributed to weaken the real supremacy of the sovereign. It had been usual before the revolution, and in the two succeeding reigns, to select ministers individually at discretion; and, though some might hold themselves at liberty to decline office, it was by no means deemed a point of honour and fidelity to do so. Hence men in the possession of high posts had no strong bond of union, and frequently took opposite sides on public measures of no light moment. The queen particularly was always loth to discard a servant on account of his vote in parliament; a conduct generous perhaps, but feeble, inconvenient, when carried to such excess, in our con-

* Coxe's Walpole, i. 296. H. Walpole's Works, iv. 476. The former, however, seems to rest on H. Walpole's verbal communication, whose want of accuracy, or veracity, or both, is so palpable that no great stress can be laid on his testimony. But I believe that the fact of George I. and his minister conversing in Latin may be proved on other authority.

stitution, and in effect holding out a reward to ingratitude and treachery. But the whigs having come exclusively into office under the line of Hanover, (which, as I have elsewhere observed, was inevitable,) formed a sort of phalanx, which the crown was not always able to break, and which never could have been broken, but for that internal force of repulsion by which personal cupidity and ambition are ever tending to separate the elements of factions. It became the point of honour among public men to fight uniformly under the same banner, though not perhaps for the same cause; if indeed there was any cause really fought for, but the advancement of a party. In this preference of certain denominations, or of certain leaders, to the real principles which ought to be the basis of political consistency, there was an evident deviation from the true standard of public virtue; but the ignominy attached to the dereliction of friends for the sake of emolument, though it was every day incurred, must have tended gradually to purify the general character of parliament. Meanwhile the crown lost all that party attachments gained; a truth indisputable on reflection, though while the crown and the party in power act in the same direction, the relative efficiency of the two forces is not immediately estimated. It was seen, however, very manifestly in the year 1746; when, after long bickering between the Pelhams and lord Granville, the king's favourite minister, the former, in conjunction with a majority of the cabinet, threw up their offices, and compelled the king, after an abortive effort at a new administration, to sacrifice his favourite, and replace those in power whom he could not exclude from it. The same took place in a later period of his reign, when after many struggles he submitted to the ascendancy of Mr. Pitt.*

* H. Walpole's Memoirs of the last Ten Years. Lord Waldegrave's Memoirs. In this well-written little book, the character of George II. in reference to his constitutional position, is thus delicately drawn: "He has more knowledge of foreign affairs than most of his ministers, and has good general notions of the constitution, strength, and interest of this country; but, being past thirty when the Hanover succession took place, and having since experienced the violence of party, the injustice of popular clamour, the corruption of parliaments, and the selfish motives of pretended patriots, it is not surprising that he should have contracted some prejudices in favour of those governments where the royal authority is under less restraint. Yet prudence has so far prevailed over these prejudices, that they have never influenced his conduct. On the contrary, many laws have been enacted in favour of public liberty; and in the course of a long

It seems difficult for any king of England, however conscientiously observant of the lawful rights of his subjects, and of the limitations they impose on his prerogative, to rest always very content with this practical condition of the monarchy. The choice of his councillors, the conduct of government, are intrusted, he will be told, by the constitution to his sole pleasure. Yet both as to the one and the other he finds a perpetual disposition to restrain his exercise of power; and, though it is easy to demonstrate that the public good is far better promoted by the virtual control of parliament and the nation over the whole executive government than by adhering to the letter of the constitution, it is not to be expected that the argument will be conclusive to a royal understanding. Hence, he may be tempted to play rather a petty game, and endeavour to regain, by intrigue and insincerity, that power of acting by his own will, which he thinks unfairly wrested from him. A king of England, in the calculations of politics, is little more than one among the public men of the day; taller indeed, like Saul or Agamemnon, by the head and shoulders, and therefore with no slight advantages in the scramble; but not a match for the many, unless he can bring some dexterity to second his strength, and make the best of the self-interest and animosities of those with whom he has

reign there has not been a single attempt to extend the prerogative of the crown beyond its proper limits. He has as much personal bravery as any man, though his political courage seems somewhat problematical; however, it is a fault on the right side; for had he always been as firm and undaunted in the closet as he showed himself at Oudenarde and Dettingen, he might not have proved quite so good a king in this limited monarchy." P. 5. This was written in 1757.

The real tories, those I mean who adhered to the principles expressed by that name, thought the constitutional prerogative of the crown impaired by a conspiracy of its servants. Their notions are expressed in some Letters on the English Nation, published about 1756, under the name of Battista Angeloni, by Dr. Shebbeare, once a jacobite, and still so bitter an enemy of William III. and George I. that he stood in the pillory, not long afterwards, for a libel on those princes (among other things); on which Horace Walpole justly animadverts, as a stretch of the law by lord Mansfield destructive of all historical truth. Memoirs of the last Ten Years, ii. 328 Shebbeare, however, was afterwards pensioned, along with Johnson, by Lord Bute, and at the time when these letters were written, may possibly have been in the Leicester-house interest. Certain it is, that the self-interested cabal who belonged to that little court endeavoured too successfully to persuade its chief and her son, that the crown was reduced to a state of vassalage, from which it ought to be emancipated; and the government of the duke of Newcastle, as strong in party connexion as it was contemptible in ability and reputation, afforded them no bad argument. The consequences are well known, but do not enter into the plan of this work.

to deal. And of this there will generally be so much, that in the long run he will be found to succeed in the greater part of his desires. Thus George I. and George II., in whom the personal authority seems to have been at the lowest point it has ever reached, drew their ministers, not always willingly, into that course of continental politics which was supposed to serve the purposes of Hanover far better than of England. It is well known that the Walpoles and the Pelhams condemned in private this excessive predilection of their masters for their native country, which alone could endanger their English throne.* Yet after the two latter brothers had inveighed against lord Granville, and driven him out of power for seconding the king's pertinacity in continuing the war of 1743, they went on themselves in the same track for at least two years, to the imminent hazard of losing for ever

* Many proofs of this occur in the correspondence published by Mr. Coxe. Thus Horace Walpole writing to his brother sir Robert, in 1739, says: "King William had no other object but the liberties and balance of Europe; but, good God! what is the case now? I will tell you in confidence; little, low, partial, electoral notions are able to stop or confound the best-conducted project for the public." Memoirs of sir R. Walpole, iii. 535. The Walpoles had, some years before, disapproved the policy of lord Townshend on account of his favouring the king's Hanoverian prejudices. Id. i. 334. And, in the preceding reign, both these whig leaders were extremely disgusted with the Germanism and continual absence of George I., Id. ii. 116. 297.; though first Townshend, and afterwards Walpole, according to the necessity, or supposed necessity, which controls statesmen, (that is, the fear of losing their places,) became in appearance the passive instruments of royal pleasure.

It is now however known that George II. had been induced by Walpole to come into a scheme, by which Hanover, after his decease, was to be separated from England. It stands on the indisputable authority of speaker Onslow. "A little while before sir Robert Walpole's fall, (and as a popular act to save himself, for he went very unwillingly out of his offices and power,) he took me one day aside, and said, 'What will you say, speaker, if this hand of mine shall bring a message from the king to the house of commons, declaring his consent to having any of his family, after his death, to be made, by act of parliament, incapable of inheriting and enjoying the crown, and possessing the electoral dominions at the same time?' My answer was, 'Sir, it will be as a message from heaven.' He replied, 'It will be done.' But it was not done; and I have good reason to believe, it would have been opposed, and rejected at that time, because it came from him, and by the means of those who had always been most clamorous for it; and thus perhaps the opportunity was lost: when will it come again? It was said that the prince at that juncture would have consented to it, if he could have had the credit and popularity of the measure, and that some of his friends were to have moved it in parliament, but that the design at St. James's prevented it. Notwithstanding all this, I have had some thoughts that neither court ever really intended the thing itself; but that it came on and went off, by a jealousy of each other in it, and that both were equally pleased that it did so, from an equal fondness (very natural) for their own native country." Notes on Burnet. (iv. 490. Oxf. edit.) This story has been told before, but not in such a manner as to preclude doubt of its authenticity.

the Low Countries and Holland, if the French government, so indiscriminately charged with ambition, had not displayed extraordinary moderation at the treaty of Aix la Chapelle. The twelve years that ensued gave more abundant proofs of the submissiveness with which the schemes of George II. for the good of Hanover were received by his ministers, though not by his people; but the most striking instance of all is the abandonment by Mr. Pitt himself of all his former professions in pouring troops into Germany. I do not inquire whether a sense of national honour might not render some of these measures justifiable, though none of them were advantageous; but it is certain that the strong bent of the king's partiality forced them on against the repugnance of most statesmen, as well as of the great majority in parliament and out of it.

Comparatively however with the state of prerogative before the revolution, we can hardly dispute that there has been a systematic diminution of the reigning prince's control, which, though it may be compensated or concealed in ordinary times by the general influence of the executive administration, is of material importance in a constitutional light. Independently of other consequences which might be pointed out as probable or contingent, it affords a real security against endeavours by the crown to subvert or essentially impair the other parts of our government. For, though a king may believe himself and his posterity to be interested in obtaining arbitrary power, it is far less likely that a minister should desire to do so — I mean arbitrary, not in relation to temporary or partial abridgements of the subject's liberty, but to such projects as Charles I. and James II. attempted to execute. What indeed might be effected by a king, at once able, active, popular, and ambitious, should such ever unfortunately appear in this country, it is not easy to predict; certainly his reign would be dangerous, on one side or other, to the present balance of the constitution. But against this contingent evil, or the far more probable encroachments of ministers, which, though not going the full length of despotic power, might slowly undermine and contract the rights of the people, no positive statutes can be devised so effectual as the vigilance of the people themselves and their increased means of knowing and estimating the measures of their government.

Influence of political writings.

The publication of regular newspapers, not merely designed for the communication of intelligence, but for the discussion of political topics, may be referred to the latter part of the reign of Anne, when they obtained great circulation, and became the accredited organs of different factions.* The tory ministers were annoyed at the vivacity of the press both in periodical and other writings, which led to a stamp-duty, intended chiefly to diminish their number, and was nearly producing more pernicious restrictions, such as renewing the licensing-act, or compelling authors to acknowledge their names.† These however did not take place, and the government more honourably coped with their adversaries in the same warfare; nor with Swift and Bolingbroke on their side, could they require, except indeed through the badness of their cause, any aid from the arm of power.‡

In a single hour, these two great masters of language were changed from advocates of the crown to tribunes of the people; both more distinguished as writers in this altered scene of their fortunes, and certainly among the first political combatants with the weapons of the press whom the world has ever known. Bolingbroke's influence was of course greater in England; and, with all the signal faults of his public character, with all the factiousness which dictated most of his writings, and the indefinite declamation or shallow reasoning which they frequently display, they have merits not always sufficiently acknowledged. He seems first to have made the tories reject their old tenets of exalted prerogative and hereditary right, and scorn the high-church theo-

* Upon examination of the valuable series of newspapers in the British Museum, I find very little expression of political feelings till 1710, after the trial of Sacheverell, and change of ministry. The Daily Courant and Postman then begin to attack the jacobites, and the Post-boy the dissenters. But these newspapers were less important than the periodical sheets, such as the Examiner and Medley, which were solely devoted to party controversy.

† A bill was brought in for this purpose in 1712, which Swift, in his History of the Last Four Years, who never printed any thing with his name, naturally blames. It miscarried, probably on account of this provision. Parl. Hist. vi. 1141. But the queen, on opening the session, in April, 1713, recommended some new law to check the licentiousness of the press. Id. 1173. Nothing however was done in consequence.

‡ Bolingbroke's letter to the Examiner, in 1710, excited so much attention that it was answered by lord Cowper, then chancellor, in a letter to the Tatler. Somers Tracts, xiii. 75.; where sir Walter Scott justly observes, that the fact of two such statesmen becoming the correspondents of periodical publications shows the influence they must have acquired over the public mind.

ries which they had maintained under William and Anne. His Dissertation on Parties, and Letters on the History of England, are in fact written on Whig principles (if I know what is meant by that name), in their general tendency; however a politician, who had always some particular end in view, may have fallen into several inconsistencies.* The same character is due to the Craftsman, and to most of the temporary pamphlets directed against sir Robert Walpole. They teemed, it is true, with exaggerated declamations on the side of liberty; but that was the side they took; it was to generous prejudices they appealed, nor did they ever advert to the times before the revolution but with contempt or abhorrence. Libels there were indeed of a different class, proceeding from the jacobite school; but these obtained little regard; the jacobites themselves, or such as affected to be so, having more frequently espoused that cause from a sense of dissatisfaction with the conduct of the reigning family than from much regard to the pretensions of the other. Upon the whole matter it must be evident to every person who is at all conversant with the publications of George II.'s reign, with the poems, the novels, the essays, and almost all the literature of the time, that what are called the popular or liberal doctrines of government were decidedly prevalent. The supporters themselves of the Walpole and Pelham administrations, though professedly whigs, and tenacious of revolution principles, made complaints, both in parliament and in pamphlets, of the democratical spirit, the insubordination to authority, the tendency to republican sentiments, which they alleged to have gained ground among the people. It is certain that the tone of popular opinion gave some countenance to these assertions, though much exaggerated, in order to create alarm in the aristocratical classes, and furnish arguments against redress of abuses.

The two houses of parliament are supposed to deliberate with closed doors. It is always competent for any one member to insist that strangers be excluded; Publication of debates.

* ["A king of Great Britain," he says in his seventh Letter on the History of England, "is that supreme magistrate who has a negative voice in the legislature." This was in 1731. Nothing can be more unlike the original tone of toryism.—1845.]

not on any special ground, but by merely enforcing the standing order for that purpose. It has been several times resolved, that it is a high breach of privilege to publish any speeches or proceedings of the commons * ; though they have since directed their own votes and resolutions to be printed. Many persons have been punished by commitment for this offence ; and it is still highly irregular, in any debate, to allude to the reports in newspapers, except for the purpose of animadverting on the breach of privilege.† Notwithstanding this pretended strictness, notices of the more interesting discussions were frequently made public ; and entire speeches were sometimes circulated by those who had sought popularity in delivering them. After the accession of George I. we find a pretty regular account of debates in an annual publication, Boyer's Historical Register, which was continued to the year 1737. They were afterwards published monthly, and much more at length, in the London and the Gentleman's Magazines ; the latter, as is well known, improved by the pen of Johnson, yet not so as to lose by any means the leading scope of the arguments. It follows of course that the restriction upon the presence of strangers had been almost entirely dispensed with. A transparent veil was thrown over this innovation by disguising the names of the speakers, or more commonly by printing only initial and final letters. This ridiculous affectation of concealment was

* [The first instance seems to be Dec. 27th, 1694, when it is resolved, that no news letter writers do, in their letters or other papers which they disperse, presume to intermeddle with the debates or other proceedings of this house. Journals.—1845.]

† It was resolved, nem. con., Feb. 26th, 1729, That it is an indignity to, and a breach of the privilege of, this house, for any person to presume to give, in written or printed newspapers, any account or minutes of the debates, or other proceedings of this house, or of any committee thereof; and that upon discovery of the authors, &c. this house will proceed against the offenders with the utmost severity. Parl. Hist. viii. 683. There are former resolutions to the same effect. The speaker having himself brought the subject under consideration some years afterwards, in 1738, the resolution was repeated in nearly the same words, but after a debate wherein, though no one undertook to defend the practice, the danger of impairing the liberty of the press was more insisted upon than would formerly have been usual; and sir Robert Walpole took credit to himself, justly enough, for respecting it more than his predecessors. Id. x. 800. Coxe's Walpole, i. 572. Edward Cave, the well-known editor of the Gentleman's Magazine, and the publisher of another Magazine, was brought to the bar, April 30th, 1747, for publishing the house's debates ; when the former denied that he retained any person in pay to make the speeches, and after expressing his contrition was discharged on payment of fees. Id. xiv. 57.

extended to many other words in political writings, and had not wholly ceased in the American war.

It is almost impossible to over-rate the value of this regular publication of proceedings in parliament, carried as it has been in our own time to nearly as great copiousness and accuracy as is probably attainable. It tends manifestly and powerfully to keep within bounds the supineness and negligence, the partiality and corruption, to which every parliament, either from the nature of its composition or the frailty of mankind, must more or less be liable. Perhaps the constitution would not have stood so long, or rather would have stood like an useless and untenanted mansion, if this unlawful means had not kept up a perpetual intercourse, a reciprocity of influence between the parliament and the people. A stream of fresh air, boisterous perhaps sometimes as the winds of the north, yet as healthy and invigorating, flows in to renovate the stagnant atmosphere, and to prevent that *malaria*, which self-interest and oligarchical exclusiveness are always tending to generate. Nor has its importance been less perceptible in affording the means of vindicating the measures of government, and securing to them, when just and reasonable, the approbation of the majority among the middle ranks, whose weight in the scale has been gradually increasing during the last and present centuries.

Increased influence of the middle ranks.

This augmentation of the democratical influence, using that term as applied to the commercial and industrious classes in contradistinction to the territorial aristocracy, was the slow but certain effect of accumulated wealth and diffused knowledge, acting however on the traditional notions of freedom and equality which had ever prevailed in the English people. The nation, exhausted by the long wars of William and Anne, recovered strength in thirty years of peace that ensued; and in that period, especially under the prudent rule of Walpole, the seeds of our commercial greatness were gradually ripened. It was evidently the most prosperous season that England had ever experienced; and the progression, though slow, being uniform, the reign perhaps of George II. might not disadvantageously be compared, for the real happiness of the community, with that more brilliant but uncertain and oscillatory condition which

has ensued. A distinguished writer has observed that the labourer's wages have never, at least for many ages, commanded so large a portion of subsistence as in this part of the eighteenth century.* The public debt, though it excited alarms from its magnitude, at which we are now accustomed to smile, and though too little care was taken for redeeming it, did not press very heavily on the nation; as the low rate of interest evinces, the government securities at three per cent. having generally stood above par. In the war of 1743, which from the selfish practice of relying wholly on loans did not much retard the immediate advance of the country, and still more after the peace of Aix la Chapelle, a striking increase of wealth became perceptible.† This was shown in one circumstance directly affecting the character of the constitution. The smaller boroughs, which had been from the earliest time under the command of neighbouring peers and gentlemen, or sometimes of the crown, were attempted by rich capitalists, with no other connexion or recommendation than one which is generally sufficient.‡ This appears to have been first observed in the general elections of 1747 and 1754§; and though the prevalence of bribery is attested by the statute book, and the journals of parliament from the revolution, it seems not to have broken down all flood-gates till near the

* Malthus, Principles of Political Economy (1820), p. 279.

† Macpherson (or Anderson), Hist. of Commerce. Chalmers's Estimate of Strength of Great Britain. Sinclair's Hist. of Revenue, *cum multis aliis.*

‡ [The practice of *treating* at elections, not with the view of obtaining votes, but as joyous hospitality, though carried to a ruinous extent, began with the country gentlemen themselves, and is complained of soon after the restoration. Perhaps it was not older, at least so as to attract notice. Evelyn tells us of a county election which cost 2000*l.* in mere eating and drinking. The treating act, 7 W. 3. c. 4., is very stringent in its provisions, and has dispossessed many of their seats on petition. Bribery came from a different quarter. Swift speaks, in the Examiner, of "influencing distant boroughs by powerful motives from the city."—1845.]

§ Tindal, apud Parl. Hist. xiv. 66. I have read the same in other books, but know not at present where to search for the passages. Hogarth's pictures of the election are evidence to the corruption in his time, so also are some of Smollett's novels. Addison, Swift, and Pope would not have neglected to lash this vice if it had been glaring in their age; which shows that the change took place about the time I have mentioned. [This is not quite accurately stated; both the election of strangers by boroughs, and its natural concomitant, bribery, had begun to excite complaint by their increasing frequency, as early as the reign of George I., and led to the act rendering elections void, and inflicting severe penalties, for bribery, in 1728. But still it is true that in the general election of 1747 much more of it took place than ever before.—1845.]

end of the reign of George II. But the sale of seats in parliament, like any other transferable property, is never mentioned in any book that I remember to have seen of an earlier date than 1760. We may dispense therefore with the inquiry in what manner this extraordinary traffic has affected the constitution, observing only that its influence must have tended to counteract that of the territorial aristocracy, which is still sufficiently predominant. The country gentlemen, who claimed to themselves a character of more independence and patriotism than could be found in any other class, had long endeavoured to protect their ascendancy by excluding the rest of the community from parliament. This was the principle of the bill, which, after being frequently attempted, passed into a law during the tory administration of Anne, requiring every member of the commons, except those for the universities, to possess, as a qualification for his seat, a landed estate, above all incumbrances, of 300*l.* a year.* By a later act of George II., with which it was thought expedient, by the government of the day, to gratify the landed interest, this property must be stated on oath by every member on taking his seat, and, if required, at his election.† The law is however notoriously evaded; and though much might be urged in favour of rendering a competent income the condition of eligibility, few would be found at present to maintain that the freehold qualification is not required both unconstitutionally, according to the ancient theory of representation, and absurdly, according to the present state of property in England. But I am again admonished, as I have frequently been in writing these last pages, to break off from subjects that might carry me too far away from the business of this history; and, content with compiling and selecting the records of the past, to shun the difficult and ambitious office of judging the present, or of speculating upon the future.

* 9 Anne, c. 5. A bill for this purpose had passed the commons in 1696; the city of London and several other places petitioning against it. Journals, Nov. 21, &c. The house refused to let some of these petitions be read; I suppose on the ground that they related to a matter of general policy. These towns, however, had a very fair pretext for alleging that they were interested; and in fact a rider was added to the bill, that any merchant might serve for a place where he should be himself a voter, on making oath that he was worth 5000*l.* Id. Dec. 19.

† 33 G. 2. c. 20.

CHAPTER XVII.

ON THE CONSTITUTION OF SCOTLAND.

Early State of Scotland — Introduction of Feudal System — Scots Parliament — Power of the Aristocracy — Royal Influence in Parliament — Judicial Power — Court of Session — Reformation — Power of the Presbyterian Clergy — Their Attempts at Independence on the State — Andrew Melville — Success of James VI. in restraining them — Establishment of Episcopacy — Innovations of Charles I. — Arbitrary Government — Civil War — Tyrannical Government of Charles II. — Reign of James VII. — Revolution, and Establishment of Presbytery — Reign of William III. — Act of Security — Union — Gradual Decline of Jacobitism.

IT is not very profitable to inquire into the constitutional antiquities of a country, which furnishes no authentic historian, nor laws, nor charters, to guide our research, as is the case with Scotland before the twelfth century. The latest and most laborious of her antiquaries appears to have proved that her institutions were wholly Celtic until that era, and greatly similar to those of Ireland.* A total, though probably gradual, change must therefore have taken place in the next age, brought about by means which have not been satisfactorily explained. The crown became strictly hereditary, the governors of districts took the appellation of earls, the whole kingdom was subjected to a feudal tenure, the Anglo-Norman laws, tribunals, local and municipal magistracies were introduced as far as the royal influence could prevail; above all, a surprising number of families, chiefly Norman, but some of Saxon or Flemish descent, settled upon estates granted by the kings of Scotland, and became the founders of its aristocracy. It was, as truly as some time afterwards in Ireland, the encroachment of a Gothic and feudal polity upon the inferior civilisation of the Celts, though accomplished with far less resistance, and not quite so slowly. Yet the Highland tribes long adhered to their ancient

Early state of Scotland.

Introduction of feudal system.

* Chalmers's Caledonia, vol. i. passim.

usages; nor did the laws of English origin obtain in some other districts, two or three centuries after their establishment on both sides of the Forth.*

It became almost a necessary consequence from this adoption of the feudal system, and assimilation to the English institutions, that the kings of Scotland would have their general council or parliament upon nearly the same model as that of the Anglo-Norman sovereigns they so studiously imitated. If the statutes ascribed to William the Lion, contemporary with our Henry II., are genuine, they were enacted, as we should expect to find, with the concurrence of the bishops, abbots, barons, and other good men (probi homines) of the land; meaning doubtless the inferior tenants in capite.† These laws indeed are questionable, and there is a great want of unequivocal records till almost the end of the thirteenth century. The representatives of boroughs are first distinctly mentioned in 1326, under Robert I.; though some have been of opinion that vestiges of their appearance in parliament may be traced higher; but they are not enumerated among the classes present in one held in 1315.‡ In the ensuing reign of David II., the three estates of the realm are expressly mentioned as the legislative advisers of the crown.§ Scots parliament.

A Scots parliament resembled an English one in the mode of convocation, in the ranks that composed it, in the enacting powers of the king, and the necessary consent of the three estates; but differed in several very important respects. No freeholders, except tenants in capite, had ever any right of suffrage; which may, not improbably, have been in some measure owing to the want of that Anglo-Saxon institution, the county-court. These feudal tenants of the crown came in person to parliament, as they did in England till the reign of Henry III., and sat together with the prelates and barons in one chamber. A prince arose in Scotland in the first part of the fifteenth century, resembling the English Justinian in his politic regard to strengthening his own prerogative and to

* Id. 500. et post. Dalrymple's Annals of Scotland, 28. 30, &c.

† Chalmers, 741. Wight's Law of Election in Scotland, 28.

‡ Id. 25. Dalrymple's Annals, i. 139. 235. 283.; ii. 55. 116. Chalmers, 743. Wight thinks they might perhaps only have had a voice in the imposition of taxes.

§ Dalrymple, ii. 241. Wight, 26.

maintaining public order. It was enacted by a law of James I., in 1427, that the smaller barons and free tenants "need not to come to parliament, so that of every sheriffdom there be sent two or more wise men, chosen at the head court," to represent the rest. These were to elect a speaker, through whom they were to communicate with the king and other estates.* This was evidently designed as an assimilation to the English house of commons. But the statute not being imperative, no regard was paid to this permission; and it is not till 1587 that we find the representation of the Scots counties finally established by law; though one important object of James's policy was never attained, the different estates of parliament having always voted promiscuously, as the spiritual and temporal lords in England.

Power of the aristocracy.

But no distinction between the national councils of the two kingdoms was more essential than what appears to have been introduced into the Scots parliament under David II. In the year 1367 a parliament having met at Scone, a committee was chosen by the three estates, who seem to have had full powers delegated to them, the others returning home on account of the advanced season. The same was done in one held next year, without any assigned pretext. But in 1369 this committee was chosen only to prepare all matters determinable in parliament, or fit to be therein treated for the decision of the three estates on the last day but one of the session.† The former scheme appeared possibly, even to those careless and unwilling legislators, too complete an abandonment of their function. But even modified as it was in 1369, it tended to devolve the whole business of parliament on this elective committee, subsequently known by the appellation of lords of the articles. It came at last to be the general practice, though some exceptions to this rule may be found, that nothing was laid before parliament without their previous recommendation; and there seems reason to think that in the first parliament of James I., in 1424, such full powers were delegated to the committee as had been granted before in 1367 and 1368,

* Statutes of Scotland, 1427. Pinkerton's History of Scotland, i. 120. Wight, 30.

† Dalrymple, ii. 261. Stuart on Public Law of Scotland, 344. Robertson's History of Scotland, i. 84.

and that the three estates never met again to sanction their resolutions.* The preparatory committee is not uniformly mentioned in the preamble of statutes made during the reign of this prince and his two next successors; but there may be no reason to infer from thence that it was not appointed. From the reign of James IV. the lords of articles are regularly named in the records of every parliament.†

It is said that a Scots parliament, about the middle of the fifteenth century, consisted of near one hundred and ninety persons.‡ We do not find however that more than half this number usually attended. A list of those present in 1472 gives but fourteen bishops and abbots, twenty-two earls and barons, thirty-four lairds or lesser tenants in capite, and eight deputies of boroughs.§ The royal boroughs entitled to be represented in parliament were above thirty; but it was a common usage to choose the deputies of other towns as their proxies.‖ The great object with them, as well as with the lesser barons, was to save the cost and trouble of attendance. It appears indeed that they formed rather an insignificant portion of the legislative body. They are not named as consenting parties in several of the statutes of James III.; and it seems that on some occasions they had not been summoned to parliament, for an act was passed in 1504, "that the commissaries and headsmen of the burghs be warned when taxes or constitutions are given, to have their advice therein, as one of the three estates of the

* Wight, 62. 65.

† Id. 69. [A remarkable proof of the trust vested in the lords of articles will be found in the Scots Statutes, vol. ii. p. 340., which is not noticed by Pinkerton. Power was given to the lords of articles, after a prorogation of parliament in 1535, "to make acts, statutes, and constitutions for good rule, justice, and policy, conform to the articles to be given by the king's grace, and as shall please any other to give and present to them. And whatever they ordain or statute, to have the same form, strength, and effect as if the same were made and statute by all the three estates being personally present. And if any greater matter occurs, that please his grace to have the greatest of his prelates and barons counsel, he shall advertise them thereof, by his special writings, to convene such day and place as he shall think most expedient." These lords of articles even granted a tax.—1845.]

‡ Pinkerton, i. 373.

§ Id. 360. [In 1478, we find 24 spiritual, and 32 temporal lords, with 22 tenants in capite, or lairds, and 201 commissioners of burghs. This was unusually numerous. But, as Robertson observes, in the reign of James III., public indignation brought to parliament many lesser barons and burgesses who were wont to stay away in peaceable times. Hist. of Scotland, i. 246.—1845.]

‖ Id. 372.

realm." * This however is an express recognition of their right, though it might have been set aside by an irregular exercise of power.

Royal influence in parliament.

It was a natural result from the constitution of a Scots parliament, together with the general state of society in that kingdom, that its efforts were almost uniformly directed to augment and invigorate the royal authority. Their statutes afford a remarkable contrast to those of England in the absence of provisions against the exorbitancies of prerogative.† Robertson has observed that the kings of Scotland, from the time at least of James I., acted upon a steady system of repressing the aristocracy; and though this has been called too refined a supposition, and attempts have been made to explain otherwise their conduct, it seems strange to deny the operation of a motive so natural, and so readily to be inferred from their measures. The causes so well pointed out by this historian, and some that might be added; the defensible nature of great part of the country; the extensive possessions of some powerful families; the influence of feudal tenure and Celtic clanship; the hereditary jurisdictions, hardly controlled, even in theory, by the supreme tribunals of the crown; the custom of entering into bonds of association for mutual defence; the frequent minorities of the reigning princes; the necessary abandonment of any strict regard to monarchical supremacy, during

* Pinkerton, ii. 53.

† In a statute of James II. (1440) "the three estates conclude, *that it is speedful* that our sovereign lord the king ride throughout the realm incontinent as shall be seen to the council where any rebellion, slaughter, burning, robbery, outrage, or theft has happened," &c. Statutes of Scotland, ii. 32. Pinkerton (i. 192.), leaving out the words in italics, has argued on false premises. "In this singular decree we find the legislative body regarding the king in the modern light of a chief magistrate, bound equally with the meanest subject to obedience to the laws," &c. It is evident that the estates spoke in this instance as councillors, not as legislators. This is merely an oversight of a very well-informed historian, who is by no means in the trammels of any political theory.

A remarkable expression, however, is found in a statute of the same king, in 1450; which enacts that any man rising in war against the king, or receiving such as have committed treason, or holding houses against the king, or assaulting castles or places where the king's power shall happen to be, *without the consent of the three estates*, shall be punished as a traitor. Pinkerton, i. 213. I am inclined to think that the legislators had in view the possible recurrence of what had very lately happened, that an ambitious cabal might get the king's person into their power. The peculiar circumstances of Scotland are to be taken into account when we consider these statutes, which are not to be looked at as mere insulated texts.

the struggle for independence against England; the election of one great nobleman to the crown and its devolution upon another; the residence of the two first of the Stuart name in their own remote domains; the want of any such effective counterpoise to the aristocracy as the sovereigns of England possessed in its yeomanry and commercial towns; all these together placed the kings of Scotland in a situation which neither for their own nor their people's interest they could be expected to endure. But an impatience of submitting to the insolent and encroaching temper of their nobles drove James I. (before whose time no settled scheme of reviving the royal authority seems to have been conceived) and his two next descendants into some courses which, though excused or extenuated by the difficulties of their position, were rather too precipitate and violent, and redounded at least to their own destruction. The reign of James IV., from his accession in 1488 to his unhappy death at Flodden, in 1513, was the first of tolerable prosperity; the crown having by this time obtained no inconsiderable strength, and the course of law being somewhat more established, though the aristocracy were abundantly capable of withstanding any material encroachment upon their privileges.

Though subsidies were of course occasionally demanded, yet from the poverty of the realm, and the extensive domains which the crown retained, they were much less frequent than in England, and thus one principal source of difference was removed; nor do we read of any opposition in parliament to what the lords of articles thought fit to propound. Those who disliked the government stood aloof from such meetings, where the sovereign was in his vigour, and had sometimes crushed a leader of faction by a sudden stroke of power; confident that they could better frustrate the execution of laws than their enactment, and that questions of right and privilege could never be tried so advantageously as in the field. Hence it is, as I have already observed, that we must not look to the statute-book of Scotland for many limitations of monarchy. Even in one of James II., which enacts that none of the royal domains shall for the future be alienated, and that the king and his successors shall be sworn to observe

this law, it may be conjectured that a provision rather derogatory in semblance to the king's dignity was introduced by his own suggestion, as an additional security against the importunate solicitations of the aristocracy whom the statute was designed to restrain.* The next reign was the struggle of an imprudent, and, as far as his means extended, despotic prince, against the spirit of his subjects. In a parliament of 1487, we find almost a solitary instance of a statute that appears to have been directed against some illegal proceedings of the government. It is provided that all civil suits shall be determined by the ordinary judges, and not before the king's council.† James III. was killed the next year in attempting to oppose an extensive combination of the rebellious nobility. In the reign of James IV., the influence of the aristocracy shows itself rather more in legislation; and two peculiarities deserve notice, in which, as it is said, the legislative authority of a Scots parliament was far higher than that of our own. They were not only often consulted about peace or war, which in some instances was the case in England, but, at least in the sixteenth century, their approbation seems to have been necessary.‡ This, though not consonant to our modern notions, was certainly no more than the genius of the feudal system and the character of a great deliberative council might lead us to expect; but a more remarkable singularity was, that what had been propounded by the lords of articles, and received the ratification of the three estates, did not require the king's consent to give it complete validity. Such at least is said to have been the Scots constitution in the time of James VI.; though we may demand very full proof of such an anomaly, which the language of their statutes, expressive of the king's enacting power, by no means leads us to infer.§

Judicial power.

The kings of Scotland had always their aula or curia regis, claiming a supreme judicial authority, at least in some causes, though it might be difficult to determine its boundaries, or how far they were respected. They had also bailiffs to administer justice in their own domains, and sheriffs in every county for the same purpose,

* Pinkerton, i. 234.
† Statutes of Scotland, ii. 177.
‡ Pinkerton, ii. 266.
§ Pinkerton, ii. 400. Laing, iii. 32.

wherever grants of regality did not exclude their jurisdiction. These regalities were hereditary and territorial; they extended to the infliction of capital punishment; the lord possessing them might reclaim or repledge (as it was called, from the surety he was obliged to give that he would himself do justice) any one of his vassals who was accused before another jurisdiction. The barons, who also had cognizance of most capital offences, and the royal boroughs, enjoyed the same privilege. An appeal lay, in civil suits, from the baron's court to that of the sheriff or lord of regality, and ultimately to the parliament, or to a certain number of persons, to whom it delegated its authority.* This appellant jurisdiction of parliament, as well as that of the king's privy council, which was original, came, by a series of provisions from the year 1425 to 1532, into the hands of a supreme tribunal thus gradually constituted in its present form, the court of session. It was composed of fifteen judges, half of whom, besides the president, were at first churchmen, and soon established an entire subordination of the local courts in all civil suits. But it possessed no competence in criminal proceedings; the hereditary jurisdictions remained unaffected for some ages, though the king's two justiciaries, replaced afterwards by a court of six judges, went their circuits even through those counties wherein charters of regality had been granted. Two remarkable innovations seem to have accompanied, or to have been not far removed in time from, the first formation of the court of session; the discontinuance of juries in civil causes, and the adoption of so many principles from the Roman law as have given the jurisprudence of Scotland a very different character from our own.† Court of session.

In the reign of James V. it might appear probable that by the influence of laws favourable to public order, better enforced through the council and court of session than before, by the final subjugation of the house of Douglas and of the earls of Ross in the North, and some slight increase of wealth in the towns, conspiring with the general tendency of the

* Kaims's Law Tracts. Pinkerton, i. 158. et alibi. Stuart on Public Law of Scotland.

† Kaims's Law Tracts. Pinkerton's Hist. of Scotland, i. 117. 237. 388.; ii. 313. Robertson, i. 43. Stuart on Law of Scotland.

sixteenth century throughout Europe, the feudal spirit would be weakened and kept under in Scotland, or display itself only in a parliamentary resistance to what might become in its turn dangerous, the encroachments of arbitrary power. But immediately afterwards a new and unexpected impulse was given; religious zeal, so blended with the ancient spirit of aristocratic independence that the two motives are scarcely distinguishable, swept before it in the first whirlwind almost every vestige of the royal sovereignty. The Roman catholic religion was abolished with the forms indeed of a parliament, but of a parliament not summoned by the crown, and by acts that obtained not its assent. The Scots church had been immensely rich; its riches had led, as every where else, to neglect of duties and dissoluteness of life; and these vices had met with their usual punishment in the people's hatred.* The reformed doctrines gained a more rapid and general ascendancy than in England, and were accompanied with a more strenuous and uncompromising enthusiasm. It is probable that no sovereign retaining a strong attachment to the ancient creed would long have been permitted to reign; and Mary is entitled to every presumption, in the great controversy that belongs to her name, that can reasonably be founded on this admission. But, without deviating into that long and intricate discussion, it may be given as the probable result of fair inquiry, that to impeach the characters of most of her adversaries would be a far easier task than to exonerate her own.†

Reformation.

* Robertson, i. 149. M'Crie's Life of Knox, p. 15. At least one half of the wealth of Scotland was in the hands or the clergy, chiefly of a few individuals. Ibid. [Robertson thinks that James V. favoured the clergy as a counterpoise to the aristocracy, which may account for the eagerness of the latter, generally, in the reformation. Hist. of Scotland, i. 68.—1845.]

† I have read a good deal on this celebrated controversy; but, where so much is disputed, it is not easy to form an opinion on every point. But, upon the whole, I think there are only two hypotheses that can be advanced with any colour of reason. The first is, that the murder of Darnley was projected by Bothwell, Maitland, and some others, without the queen's express knowledge, but with a reliance on her passion for the former, which would lead her both to shelter him from punishment, and to raise him to her bed; and that, in both respects, this expectation was fully realised by a criminal connivance at the escape of one whom she must believe to have been concerned in her husband's death, and by a still more infamous marriage with him. This, it appears to me, is a conclusion that may be drawn by reasoning on admitted facts, according to the common rules of presumptive evidence. The second supposition is, that she had given a previous consent to the assassination. This is rendered probable by several cir-

The history of Scotland from the reformation assumes a character, not only unlike that of preceding times, but to which there is no parallel in modern ages. It became a contest, not between the crown and the feudal aristocracy as before, nor between the assertors of prerogative and of privilege, as in England, nor between the possessors of established power and those who deemed themselves oppressed by it, as is the usual source of civil discord, but between the temporal and spiritual authorities, the crown and the church; that in general supported by the legislature, this sustained by the voice of the people. Nothing of this kind, at least in any thing like so great a degree, has occurred in other protestant countries; the Anglican church being, in its original constitution, bound up with the state as one of its component parts, but subordinate to the whole; and the ecclesiastical order in the kingdoms and commonwealths of the continent being either destitute of temporal authority or at least subject to the civil magistrate's supremacy.

Power of the presbyterian clergy.

Knox, the founder of the Scots reformation, and those who concurred with him, both adhered to the theological system of Calvin and to the scheme of polity he had introduced at Geneva, with such modifications as became necessary from the greater scale on which it was to be practised. Each parish had its minister, lay-elder, and deacon, who held their kirk-session for spiritual jurisdiction and other purposes; each ecclesiastical province its synod of

Their attempts at independence on the state.

cumstances, and especially by the famous letters and sonnets, the genuineness of which has been so warmly disputed. I must confess that they seem to me authentic, and that Mr. Laing's dissertation on the murder of Darnley has rendered Mary's innocence, even as to participation in that crime, an untenable proposition. No one of any weight, I believe, has asserted it since his time, except Dr. Lingard, who manages the evidence with his usual adroitness, but by admitting the general authenticity of the letters, qualified by a mere conjecture of interpolation, has given up what his predecessors deemed the very key of the citadel.

I shall dismiss a subject so foreign to my purpose, with remarking a fallacy which affects almost the whole argument of Mary's most strenuous advocates. They seem to fancy that, if the earls of Murray and Morton, and secretary Maitland of Lethington, can be proved to have been concerned in Darnley's murder, the queen herself is at once absolved. But it is generally agreed that Maitland was one of those who conspired with Bothwell for this purpose; and Morton, if he were not absolutely consenting, was by his own acknowledgment at his execution apprised of the conspiracy. With respect to Murray indeed there is not a shadow of evidence, nor had he any probable motive to second Bothwell's schemes; but, even if his participation were presumed, it would not alter in the slightest degree the proofs as to the queen.

ministers and delegated elders presided over by a superintendent; but the supreme power resided in the general assembly of the Scots' church, constituted of all ministers of parishes, with an admixture of delegated laymen, to which appeals from inferior judicatories lay, and by whose determinations or canons the whole were bound. The superintendents had such a degree of episcopal authority as seems implied in their name, but concurrently with the parochial ministers, and in subordination to the general assembly; the number of these was designed to be ten, but only five were appointed.* This form of church polity was set up in 1560; but according to the irregular state of things at that time in Scotland, though fully admitted and acted upon, it had only the authority of the church, with no confirmation of parliament; which seems to have been the first step of the former towards the independency it came to usurp. Meanwhile it was agreed that the Roman catholic prelates, including the regulars, should enjoy two thirds of their revenues, as well as their rank and seats in parliament; the remaining third being given to the crown, out of which stipends should be allotted to the protestant clergy. Whatever violence may be imputed to the authors of the Scots reformation, this arrangement seems to display a moderation which we should vainly seek in our own. The new church was however but inadequately provided for; and perhaps we may attribute some part of her subsequent contumacy and encroachment on the state to the exasperation occasioned by the latter's parsimony, or rather rapaciousness, in the distribution of ecclesiastical estates.†

It was doubtless intended by the planners of a presbyterian model, that the bishoprics should be extinguished by the death of the possessors, and their revenues be converted, partly to the maintenance of the clergy, partly to other public interests. But it suited better the men in power to keep up

* Spottiswood's Church History, 152. M'Crie's Life of Knox, ii. 6. Life of Melville, i. 143. Robertson's History of Scotland. Cook's History of the Reformation in Scotland. These three modern writers leave, apparently, little to require as to this important period of history; the first with an intenseness of sympathy, that enhances our interest, though it may not always command our approbation; the two last with a cooler and more philosophical impartiality.

† M'Crie's Life of Knox, ii. 197. et alibi. Cook, iii. 308. According to Robertson, i. 291., the whole revenue of the protestant church, at least in Mary's reign, was about 24,000 pounds Scots, which seems almost incredible.

the old appellations for their own benefit. As the catholic prelates died away, they were replaced by protestant ministers, on private compacts to alienate the principal part of the revenues to those through whom they were appointed. After some hesitation, a convention of the church, in 1572, agreed to recognise these bishops, until the king's majority and a final settlement by the legislature, and to permit them a certain portion of jurisdiction, though not greater than that of the superintendent, and equally subordinate to the general assembly. They were not consecrated; nor would the slightest distinction of order have been endured by the church. Yet even this moderated episcopacy gave offence to ardent men, led by Andrew Melville, the second name to Knox in the ecclesiastical history of Scotland; and, notwithstanding their engagement to leave things as they were till the determination of parliament, the general assembly soon began to restrain the bishops by their own authority, and finally to enjoin them, under pain of excommunication, to lay down an office which they voted to be destitute of warrant from the word of God, and injurious to the church. Some of the bishops submitted to this decree; others, as might be expected, stood out in defence of their dignity, and were supported both by the king and by all who conceived that the supreme power of Scotland, in establishing and endowing the church, had not constituted a society independent of the commonwealth. A series of acts in 1584, at a time when the court had obtained a temporary ascendant, seemed to restore the episcopal government in almost its pristine lustre. But the popular voice was loud against episcopacy; the prelates were discredited by their simoniacal alienations of church-revenues, and by their connexion with the court; the king was tempted to annex most of their lands to the crown by an act of parliament in 1587; Adamson, archbishop of St. Andrews, who had led the episcopal party, was driven to a humiliating retractation before the general assembly; and, in 1592, the sanction of the legislature was for the first time obtained to the whole scheme of presbyterian polity; and the laws of 1584 were for the most part abrogated.

Andrew Melville.

The school of Knox, if so we may call the early presbyterian ministers of Scotland, was full of men breathing their

master's spirit; acute in disputation, eloquent in discourse, learned beyond what their successors have been, and intensely zealous in the cause of reformation. They wielded the people at will; who, except in the Highlands, threw off almost with unanimity the old religion, and took alarm at the slightest indication of its revival. Their system of local and general assemblies infused, together with the forms of a republic, its energy and impatience of exterior control, combined with the concentration and unity of purpose that belongs to the most vigorous government. It must be confessed that the unsettled state of the kingdom, the faults and weakness of the regents Lennox and Morton, the inauspicious beginning of James's personal administration under the sway of unworthy favourites, the real perils of the reformed church, gave no slight pretext for the clergy's interference with civil policy. Not merely in their representative assemblies, but in the pulpits, they perpetually remonstrated, in no guarded language, against the misgovernment of the court, and even the personal indiscretions of the king. This they pretended to claim as a privilege beyond the restraint of law. Andrew Melville having been summoned before the council in 1584, to give an account of some seditious language alleged to have been used by him in the pulpit, declined its jurisdiction on the ground that he was only responsible, in the first instance, to his presbytery for words so spoken, of which the king and council could not judge without violating the immunities of the church. Precedents for such an immunity it would not have been difficult to find; but they must have been sought in the archives of the enemy. It was rather early for the new republic to emulate the despotism she had overthrown. Such, however, is the uniformity with which the same passions operate on bodies of men in similar circumstances; and so greedily do those, whose birth has placed them far beneath the possession of power, intoxicate themselves with its unacustomed enjoyments. It has been urged in defence of Melville, that he only denied the competence of a secular tribunal in the first instance; and that, after the ecclesiastical forum had pronounced on the spiritual offence, it was not disputed that the civil magistrate might vindicate his own authority.* But not

* M'Crie's Life of Melville, i. 287. 296. It is impossible to think without respect of this most powerful writer, before whom there are few living contro-

to mention that Melville's claim, as I understand it, was to be judged by his presbytery in the first instance, and ultimately by the general assembly, from which, according to the presbyterian theory, no appeal lay to a civil court; it is manifest that the government would have come to a very disadvantageous conflict with a man, to whose defence the ecclesiastical judicature had already pledged itself. For in the temper of those times it was easy to foresee the determination of a synod or presbytery.

James however and his councillors were not so feeble as to endure this open renewal of those extravagant pretensions which Rome had taught her priesthood to assert. Melville fled to England; and a parliament that met the same year sustained the supremacy of the civil power with that violence and dangerous latitude of expression so frequent in the Scots statute-book. It was made treason to decline the jurisdiction of the king or council in any matter, to seek the diminution of the power of any of the three estates of parliament, which struck at all that had been done against episcopacy, to utter, or to conceal, when heard from others in sermons or familiar discourse, any false or slanderous speeches to the reproach of the king, his council, or their proceedings, or to the dishonour of his parents and progenitors, or to meddle in the affairs of state. It was forbidden to treat or consult on any matter of state, civil or ecclesiastical, without the king's express command; thus rendering the general assembly for its chief purposes, if not its existence, altogether dependent on the crown. Such laws not only annihilated the pretended immunities of the church, but went very far to set up that tyranny, which the Stuarts afterwards exercised in Scotland till their expulsion. These were in part repealed, so far as affected the church, in 1592; but the crown retained the exclusive right of convening its general assembly, to which the presbyterian hierarchy still gives but an evasive and reluctant obedience.*

Success of James VI. in restraining them.

These bold demagogues were not long in availing themselves of the advantages which they had obtained in the parliament

versialists that would not tremble; but his presbyterian Hildebrandism is a little remarkable in this age.

* M'Crie's Life of Melville. Robertson. Spottiswood.

of 1592, and through the troubled state of the realm. They began again to intermeddle with public affairs, the administration of which was sufficiently open to censure. This licence brought on a new crisis in 1596. Black, one of the ministers of St. Andrews, inveighing against the government from the pulpit, painted the king and queen, as well as their council, in the darkest colours, as dissembling enemies to religion. James, incensed at this attack, caused him to be summoned before the privy-council. The clergy decided to make common cause with the accused. The council of the church, a standing committee lately appointed by the general assembly, enjoined Black to decline the jurisdiction. The king by proclamation directed the members of this council to retire to their several parishes. They resolved, instead of submitting, that since they were convened by the warrant of Christ, in a most needful and dangerous time, to see unto the good of the church, they should obey God rather than man. The king offered to stop the proceedings, if they would but declare that they did not decline the civil jurisdiction absolutely, but only in the particular case, as being one of slander, and consequently of ecclesiastical competence. For Black had asserted before the council, that speeches delivered in the pulpits, although alleged to be treasonable, could not be judged by the king, until the church had first taken cognizance thereof. But these ecclesiastics, in the full spirit of the thirteenth century, determined by a majority not to recede from their plea. Their contest with the court soon excited the populace of Edinburgh, and gave rise to a tumult, which, whether dangerous or not to the king, was what no government could pass over without utter loss of authority.

It was in church assemblies alone that James found opposition. His parliament, as had invariably been the case in Scotland, went readily into all that was proposed to them; nor can we doubt that the gentry must for the most part have revolted from these insolent usurpations of the ecclesiastical order. It was ordained in parliament, that every minister should declare his submission to the king's jurisdiction in all matters civil and criminal; that no ecclesiastical judicatory should meet without the king's consent, and that a magistrate might commit to prison any minister reflecting in his sermons

on the king's conduct. He had next recourse to an instrument of power more successful frequently than intimidation, and generally successful in conjunction with it; gaining over the members of the general assembly, some by promises, some by exciting jealousies, till they surrendered no small portion of what had passed for the privileges of the church. The crown obtained by their concession, which then seemed almost necessary to confirm what the legislature had enacted, the right of convoking assemblies, and of nominating ministers in the principal towns. James followed up this victory by a still more important blow. It was enacted that fifty-one ministers, on being nominated by the king to titular bishoprics and other prelacies, might sit in parliament as representatives of the church. This seemed justly alarming to the opposite party; nor could the general assembly be brought to acquiesce without such very considerable restrictions upon these suspicious commissioners, by which name they prevailed to have them called, as might in some measure afford security against the revival of that episcopal domination, towards which the endeavours of the crown were plainly directed. But the king paid little regard to these regulations; and thus the name and parliamentary station of bishops, though without their spiritual functions, were restored in Scotland after only six years from their abolition.*

Establishment of episcopacy.

A king like James, not less conceited of his wisdom than full of the dignity of his station, could not avoid contracting that insuperable aversion to the Scots presbytery, which he expressed in his Basilicon Doron, before his accession to the English throne, and more vehemently on all occasions afterwards. He found a very different race of churchmen,

* Spottiswood. Robertson. M'Crie. [In the 55th canon, passed by the convocation at London in 1603, the clergy are directed to bid the people to "pray for Christ's holy catholic church, that is, for the whole congregation of christian people dispersed throughout the whole world, and especially for the churches of England, *Scot'and*, and Ireland." A learned writer reckons this among the canons, the observance of which is *impossible*. Cardwell's Synodalia, preface, p. xxviii. By this singular word he of course means that it ought not to be done; and in fact I never heard the church of Scotland so distinguished, except once, by a Master of the Temple (Rennell). But it has evidently escaped Dr. Cardwell's recollection, that the church of Scotland was, properly speaking, as much presbyterian in 1603 as at present.—1845.]

well trained in the supple school of courtly conformity, and emulous flatterers both of his power and his wisdom. The ministers of Edinburgh had been used to pray that God would turn his heart: Whitgift, at the conference of Hampton Court, falling on his knees, exclaimed, that he doubted not his majesty spoke by the special grace of God. It was impossible that he should not redouble his endeavours to introduce so convenient a system of ecclesiastical government into his native kingdom. He began, accordingly, to prevent the meetings of the general assembly by continued prorogations. Some hardy presbyterians ventured to assemble by their own authority; which the lawyers construed into treason. The bishops were restored by parliament, in 1606, to a part of their revenues; the act annexing these to the crown being repealed. They were appointed by an ecclesiastical convention, more subservient to the crown than formerly, to be perpetual moderators of provincial synods. The clergy still gave way with reluctance; but the crown had an irresistible ascendancy in parliament; and in 1610 the episcopal system was thoroughly established. The powers of ordination, as well as jurisdiction, were solely vested in the prelates; a court of high commission was created on the English model; and, though the general assembly of the church still continued, it was merely as a shadow, and almost mockery, of its original importance. The bishops now repaired to England for consecration; a ceremony deemed essential in the new school that now predominated in the Anglican church; and this gave a final blow to the polity in which the Scottish reformation had been founded.* With far more questionable prudence, James, some years afterwards, forced upon the people of Scotland what were called the five articles of Perth, reluctantly adopted by a general assembly held there in 1617. These were matters of ceremony, such as the posture of kneeling in the eucharist, the right of confirmation, and the observance of certain holidays; but enough to alarm a nation fanatically abhorrent of every approximation to the Roman worship, and already incensed by what they deemed the corruption and degradation of their church.†

* M'Crie's Life of Melville, ii. 378. Laing's Hist. of Scotland, iii. 20. 35. 42. 62.
† Laing, 74. 89.

That church, if indeed it preserved its identity, was wholly changed in character; and became as much distinguished in its episcopal form by servility and corruption as during its presbyterian democracy by faction and turbulence. The bishops at its head, many of them abhorred by their own countrymen as apostates and despised for their vices, looked for protection to the sister church of England in its pride and triumph. It had long been the favourite project of the court, as it naturally was of the Anglican prelates, to assimilate in all respects the two establishments. That of Scotland still wanted one essential characteristic, a regular liturgy. But in preparing what was called the service book, the English model was not closely followed; the variations having all a tendency towards the Romish worship. It is far more probable that Laud intended these to prepare the way for a similar change in England, than that, as some have surmised, the Scots bishops, from a notion of independence, chose thus to distinguish their own ritual. What were the consequences of this unhappy innovation, attempted with that ignorance of mankind which kings and priests, when left to their own guidance, usually display, it is here needless to mention. In its ultimate results, it preserved the liberties and overthrew the monarchy of England. In its more immediate effects, it gave rise to the national covenant of Scotland; a solemn pledge of unity and perseverance in a great public cause, long since devised when the Spanish armada threatened the liberties and religion of all Britain, but now directed against the domestic enemies of both. The episcopal government had no friends, even among those who served the king. To him it was dear by the sincerest conviction, and by its connexion with absolute power, still more close and direct than in England. But he had reduced himself to a condition where it was necessary to sacrifice his authority in the smaller kingdom, if he would hope to preserve it in the greater; and in this view he consented, in the parliament of 1641, to restore the presbyterian discipline of the Scots church; an offence against his conscience (for such his prejudices led him to consider it) which he deeply afterwards repented, when he discovered how absolutely it had failed of serving his interests.

Innovations of Charles I.

In the great struggle with Charles against episcopacy, the encroachments of arbitrary rule, for the sake of which, in a great measure, he valued that form of church polity, were not overlooked; and the parliament of 1641 procured some essential improvements in the civil constitution of Scotland. Triennial sessions of the legislature, and other salutary reformations, were borrowed from their friends and coadjutors in England. But what was still more important, was the abolition of that destructive control over the legislature, which the crown had obtained through the lords of articles. These had doubtless been originally nominated by the several estates in parliament, solely to expedite the management of business, and relieve the entire body from attention to it. But, as early as 1561, we find a practice established, that the spiritual lords should choose the temporal, generally eight in number, who were to sit on this committee, and conversely; the burgesses still electing their own. To these it became usual to add some of the officers of state; and in 1617 it was established that eight of them should be on the list. Charles procured, without authority of parliament, a further innovation in 1633. The bishops chose eight peers, the peers eight bishops; and these appointed sixteen commissioners of shires and boroughs. Thus the whole power was devolved upon the bishops, the slaves and sycophants of the crown. The parliament itself met only on two days, the first and last of their pretended session, the one time in order to choose the lords of articles, the other to ratify what they proposed.* So monstrous an anomaly could not long subsist in a high-spirited nation. This improvident assumption of power by low-born and odious men precipitated their downfal, and made the destruction of the hierarchy appear the necessary guarantee for parliamentary independence, and the ascendant of the aristocracy. But, lest the court might, in some other form, regain this preliminary or initiative voice in legislation, which the experience of many governments has shown to be the surest method of keeping supreme authority in their hands, it was enacted in 1641, that each estate might choose

* Wight, 69. et post.

lords of articles or not, at its discretion; but that all propositions should in the first instance be submitted to the whole parliament, by whom such only as should be thought fitting might be referred to the committee of articles for consideration.

This parliament, however, neglected to abolish one of the most odious engines that tyranny ever devised against public virtue, the Scots law of treason. It had been enacted by a statute of James I. in 1424, that all leasing-makers, and tellers of what might engender discord between the king and his people, should forfeit life and goods.* This act was renewed under James II., and confirmed in 1540.† It was aimed at the factious aristocracy, who perpetually excited the people by invidious reproaches against the king's administration. But in 1584, a new antagonist to the crown having appeared in the presbyterian pulpits, it was determined to silence opposition by giving the statute of leasing-making, as it was denominated, a more sweeping operation. Its penalties were accordingly extended to such as should "utter untrue or slanderous speeches, to the disdain, reproach, and contempt of his highness, his parents and progenitors, or should meddle in the affairs of his highness or his estate." The "hearers and not reporters thereof" were subjected to the same punishment. It may be remarked that these Scots statutes are worded with a latitude never found in England, even in the worst times of Henry VIII. Lord Balmerino, who had opposed the court in the parliament of 1633, retained in his possession a copy of an apology intended to have been presented by himself and other peers in their exculpation, but from which they had desisted, in apprehension of the king's displeasure. This was obtained clandestinely, and in breach of confidence, by some of his enemies; and he was indicted on the statute of leasing-making, as having concealed a slander against his majesty's government. A jury was returned with gross partiality; yet so outrageous was the attempted violation of justice that Balmerino was only convicted by a majority of eight against seven. For in Scots juries a simple majority

Arbitrary government.

* Statutes of Scotland, vol. ii. p. 8. † Statutes of Scotland, p. 360. Pinkerton, i. 115. Laing, iii. 117.

was sufficient, as it is still in all cases except treason. It was not thought expedient to carry this sentence into execution; but the kingdom could never pardon its government so infamous a stretch of power.* The statute itself however seems not to have shared the same odium: we do not find any effort made for its repeal; and the ruling party in 1641, unfortunately, did not scruple to make use of its sanguinary provisions against their own adversaries.†

The conviction of Balmerino is hardly more repugnant to justice than some other cases in the long reign of James VI. Eight years after the execution of the earl of Gowrie and his brother, one Sprot, a notary, having indiscreetly mentioned that he was in possession of letters, written by a person since dead, which evinced his participation in that mysterious conspiracy, was put to death for concealing them.‡ Thomas Ross suffered, in 1618, the punishment of treason for publishing at Oxford a blasphemous libel, as the indictment calls it, against the Scots nation.§ I know not what he could have said worse than what their sentence against him enabled others to say, that, amidst a great vaunt of christianity and civilization, they took away men's lives by such statutes, and such constructions of them, as could only be paralleled in the annals of the worst tyrants. By an act of 1584, the privy council were empowered to examine an accused party on oath; and, if he declined to answer any question, it was held denial of their jurisdiction, and amounted to a conviction of treason. This was experienced by two jesuits, Crighton and Ogilvy in 1610 and 1615, the latter of whom was executed.‖ One of the statutes upon which he was

* Laing, ibid.

† Arnot's Criminal Trials, p. 122.

‡ The Gowrie conspiracy is well known to be one of the most difficult problems in history. Arnot has given a very good account of it, p. 20., and shown its truth, which could not reasonably be questioned, whatever motive we may assign for it. He has laid stress on Logan's letters, which appear to have been unaccountably slighted by some writers. I have long had a suspicion, founded on these letters, that the earl of Bothwell, a daring man of desperate fortunes, was in some manner concerned in the plot, of which the earl of Gowrie and his brother were the instruments.

§ Arnot's Criminal Trials, p. 70.

‖ Arnot, pp. 67. 329.; State Trials, ii. 884. The prisoner was told that he was not charged for saying mass, nor for seducing the people to popery, nor for any thing that concerned his conscience; but for declining the king's authority, and maintaining treasonable opinions, as the statutes libelled on made it treason not to answer the king or his council in any matter which should be demanded.

It was one of the most monstrous iniquities of a monstrous jurisprudence, the

indicted contained the singular absurdity of "annulling and rescinding every thing done, or hereafter to be done, in prejudice of the royal prerogative, in any time bygone or to come."

It was perhaps impossible that Scotland should remain indifferent in the great quarrel of the sister kingdom. But having set her heart upon two things incompatible in themselves from the outset, according to the circumstances of England, and both of them ultimately impracticable, the continuance of Charles on the throne and the establishment of a presbyterian church, she fell into a long course of disaster and ignominy, till she held the name of a free constitution at the will of a conqueror. Of the three most conspicuous among her nobility in this period, each died by the hand of the executioner; but the resemblance is in nothing besides; and the characters of Hamilton, Montrose, and Argyle are not less contrasted than the factions of which they were the leaders. Humbled and broken down, the people looked to the re-establishment of Charles II. on the throne of his fathers, though brought about by the sternest minister of Cromwell's tyranny, not only as the augury of prosperous days, but as the obliteration of public dishonour. Civil war.

They were miserably deceived in every hope. Thirty infamous years consummated the misfortunes and degradation of Scotland. Her factions have always been more sanguinary, her rulers more oppressive, her sense of justice and humanity less active, or at least shown less in public acts, than can be charged against England. The parliament of 1661, influenced by wicked statesmen and lawyers, left far behind the royalist commons of London; and rescinded as null the entire acts of 1641, on the absurd pretext that the late king had passed them through force. The Scots constitution fell back at once to a state little better than despotism. The lords of articles were revived, according to the same form of election as under Charles I. A few years afterwards the duke of Lauderdale Tyrannical government of Charles II.

Scots criminal law, to debar a prisoner from any defence inconsistent with the indictment; that is, he might deny a fact, but was not permitted to assert that, being true, it did not warrant the conclusion of guilt. Arnot, 354.

obtained the consent of parliament to an act, that whatever the king and council should order respecting all ecclesiastical matters, meetings, and persons, should have the force of law. A militia, or rather army, of 22,000 men, was established, to march wherever the council should appoint, and the honour and safety of the king require. Fines to the amount of 85,000*l.*, an enormous sum in that kingdom, were imposed on the covenanters. The earl of Argyle brought to the scaffold by an outrageous sentence, his son sentenced to lose his life on such a construction of the ancient law against leasing-making as no man engaged in political affairs could be sure to escape, the worst system of constitutional laws administered by the worst men, left no alternative but implicit obedience or desperate rebellion.

The presbyterian church of course fell by the act which annulled the parliament wherein it had been established. Episcopacy revived, but not as it had once existed in Scotland; the jurisdiction of the bishops became unlimited; the general assemblies, so dear to the people, were laid aside.* The new prelates were odious as apostates, and soon gained a still more indelible title to popular hatred as persecutors. Three hundred and fifty of the presbyterian clergy (more than one third of the whole number) were ejected from their benefices.† Then began the preaching in conventicles, and the secession of the excited and exasperated multitude from the churches; and then ensued the ecclesiastical commission with its inquisitorial vigilance, its fines and corporal penalties, and the free quarters of the soldiery, with all that can be implied in that word. Then came the fruitless insurrection, and the fanatical assurance of success, and the certain discomfiture by a disciplined force, and the consternation of defeat, and the unbounded cruelties of the conqueror. And this went on with perpetual aggravation, or very rare intervals, through the reign of Charles; the tyranny of Lauderdale far exceeding that of Middleton, as his own fell short of

* Laing, iv. 20. Kirkton, p. 141. "Whoso shall compare," he says, "this set of bishops with the old bishops established in the year 1612, shall find that these were but a sort of pigmies compared with our new bishops."

† Laing, iv. 32. Kirkton says 300. P. 149. These were what were called the young ministers, those who had entered the church since 1649. They might have kept their cures by acknowledging the authority of bishops.

the duke of York's. No part, I believe, of modern history for so long a period, can be compared for the wickedness of government to the Scots administration of this reign. In proportion as the laws grew more rigorous against the presbyterian worship, its followers evinced more steadiness; driven from their conventicles, they resorted sometimes by night to the fields, the woods, the mountains; and, as the troops were continually employed to disperse them, they came with arms which they were often obliged to use; and thus the hour, the place, the circumstance, deepened every impression, and bound up their faith with indissoluble associations. The same causes produced a dark fanaticism, which believed the revenge of its own wrongs to be the execution of divine justice; and, as this acquired new strength by every successive aggravation of tyranny, it is literally possible that a continuance of the Stuart government might have led to something very like an extermination of the people in the western counties of Scotland. In the year 1676 letters of intercommuning were published; a writ forbidding all persons to hold intercourse with the parties put under its ban, or to furnish them with any necessary of life on pain of being reputed guilty of the same crime. But seven years afterwards, when the Cameronian rebellion had assumed a dangerous character, a proclamation was issued against all who had ever harboured or communed with rebels; courts were appointed to be held for their trial as traitors, which were to continue for the next three years. Those who accepted the test, a declaration of passive obedience repugnant to the conscience of the presbyterians and imposed for that reason in 1681, were excused from these penalties; and in this way they were eluded.

The enormities of this detestable government are far too numerous, even in species, to be enumerated in this slight sketch; and of course most instances of cruelty have not been recorded. The privy-council was accustomed to extort confessions by torture; that grim divan of bishops, lawyers, and peers sucking in the groans of each undaunted enthusiast, in hope that some imperfect avowal might lead to the sacrifice of other victims, or at least warrant the execution of the present. It is said that the duke of York, whose con-

duct in Scotland tends to efface those sentiments of pity and respect which other parts of his life might excite, used to assist himself on these occasions.* One Mitchell having been induced, by a promise that his life should be spared, to confess an attempt to assassinate Sharp the primate, was brought to trial some years afterwards; when four lords of the council deposed on oath that no such assurance had been given him; and Sharp insisted upon his execution. The vengeance ultimately taken on this infamous apostate and persecutor, though doubtless in violation of what is justly reckoned an universal rule of morality, ought at least not to weaken our abhorrence of the man himself.

The test above mentioned was imposed by parliament in 1681, and contained, among other things, an engagement never to attempt any alteration of government in church or state. The earl of Argyle, son of him who had perished by an unjust sentence, and himself once before attainted by another, though at that time restored by the king, was still destined to illustrate the house of Campbell by a second martyrdom. He refused to subscribe the test without the reasonable explanation that he would not bind himself from attempting, in his station, any improvement in church or state. This exposed him to an accusation of leasing-making (the old mystery of iniquity in Scots law) and of treason. He was found guilty through the astonishing audacity of the crown lawyers and servility of the judges and jury. It is not perhaps certain that his immediate execution would have ensued; but no man ever trusted securely to the mercies of the Stuarts, and Argyle escaped in disguise by the aid of his daughter-in-law. The council proposed that this lady should be publicly whipped; but there was an excess of atrocity in the Scots on the court side, which no Englishman could reach; and the duke of York felt as a gentleman upon such a suggestion.† The earl of Argyle was brought to the scaffold a few years afterwards on this old sentence; but after his unfortunate rebellion, which of course would have legally justified his execution.

The Cameronians, a party rendered wild and fanatical

* Laing, iv. 116.

† Life of James II., i. 710.

through intolerable oppression, published a declaration, wherein, after renouncing their allegiance to Charles, and expressing their abhorrence of murder on the score of religion, they announced their determination of retaliating, according to their power, on such privy-councillors, officers in command, or others, as should continue to seek their blood. The fate of Sharp was thus before the eyes of all who emulated his crimes; and in terror the council ordered, that whoever refused to disown this declaration on oath, should be put to death in the presence of two witnesses. Every officer, every soldier, was thus intrusted with the privilege of massacre; the unarmed, the women and children, fell indiscriminately by the sword: and besides the distinct testimonies that remain of atrocious cruelty, there exist in that kingdom a deep traditional horror, the record, as it were, of that confused mass of crime and misery which has left no other memorial.*

A parliament summoned by James on his accession, with an intimation from the throne that they were assembled not only to express their own duty, but to set an example of compliance to England, gave, without the least opposition, the required proofs of loyalty. They acknowledged the king's absolute power, declared their abhorrence of any principle derogatory to it, professed an unreserved obedience in all cases, bestowed a large revenue for life. They enhanced the penalties against sectaries; a refusal to give evidence against traitors or other delinquents was made equivalent to a conviction of the same offence; it was capital to preach even in houses, or to hear preachers in the fields. The persecution raged with still greater fury in the first part of this reign. But the same repugnance of the episcopal party to the king's schemes for his own religion, which led to his remarkable change of policy in England, produced similar effects in Scotland. He had attempted to obtain from parliament a repeal of the penal laws and the test; but, though an extreme servility or a general intimidation made the nobility acquiesce in his propositions, and two of the bishops were gained over, yet the commissioners

Reign of James VII.

* Cloud of Witnesses, passim. De Kirkton. Laing. Scott's notes in Minstrelsy of Scottish Border, &c. &c. Woe's Hist. of Church of Scotland.

of shires and boroughs, who voting promiscuously in the house, had, when united, a majority over the peers, so firmly resisted every encroachment of popery, that it was necessary to try other methods than those of parliamentary enactment. After the dissolution the dispensing power was brought into play; the privy council forbade the execution of the laws against the catholics; several of that religion were introduced to its board; the royal boroughs were deprived of their privileges, the king assuming the nomination of their chief magistrates, so as to throw the elections wholly into the hands of the crown. A declaration of indulgence, emanating from the king's absolute prerogative, relaxed the severity of the laws against presbyterian conventicles, and, annulling the oath of supremacy and the test of 1681, substituted for them an oath of allegiance, acknowledging his power to be unlimited. He promised, at the same time, that "he would use no force nor invincible necessity against any man on account of his persuasion, or the protestant religion, nor would deprive the possessors of lands formerly belonging to the church." A very intelligible hint that the protestant religion was to exist only by this gracious sufferance.

Revolution and establishment of presbytery.

The oppressed presbyterians gained some respite by this indulgence, though instances of executions under the sanguinary statutes of the late reign are found as late as the beginning of 1688. But the memory of their sufferings was indelible; they accepted, but with no gratitude, the insidious mercy of a tyrant they abhorred. The Scots conspiracy with the prince of Orange went forward simultaneously with that of England; it included several of the council, from personal jealousy, dislike of the king's proceedings as to religion, or anxiety to secure an indemnity they had little deserved in the approaching crisis. The people rose in different parts; the Scots nobility and gentry in London presented an address to the prince of Orange, requesting him to call a convention of the estates; and this irregular summons was universally obeyed.

The king was not without friends in this convention; but the whigs had from every cause a decided preponderance, England had led the way; William was on his throne; the royal government at home was wholly dissolved; and, after

enumerating in fifteen articles the breaches committed on the constitution, the estates came to a resolution: "That James VII., being a professed papist, did assume the royal power, and acted as king, without ever taking the oath required by law, and had, by the advice of evil and wicked councillors, invaded the fundamental constitution of the kingdom, and altered it from a legal limited monarchy to an arbitrary despotic power, and hath exerted the same to the subversion of the protestant religion, and the violation of the laws and liberties of the kingdom, whereby he hath forfaulted (forfeited) his right to the crown, and the throne has become vacant." It was evident that the English vote of a constructive abdication, having been partly grounded on the king's flight, could not without still greater violence be applied to Scotland; and consequently the bolder denomination of forfeiture was necessarily employed to express the penalty of his mis-government. There was, in fact, a very striking difference in the circumstances of the two kingdoms. In the one, there had been illegal acts and unjustifiable severities; but it was, at first sight, no very strong case for national resistance, which stood rather on a calculation of expediency than an instinct of self-preservation or an impulse of indignant revenge. But in the other, it had been a tyranny, dark as that of the most barbarous ages; despotism, which in England was scarcely in blossom, had borne its bitter and poisonous fruits: no word of slighter import than forfeiture could be chosen to denote the national rejection of the Stuart line.

A declaration and claim of rights was drawn up, as in England, together with the resolution that the crown be tendered to William and Mary, and descend afterwards in conformity with the limitations enacted in the sister kingdom. This declaration excluded papists from the throne, and asserted the illegality of proclamations to dispense with statutes, of the inflicting capital punishment without jury, of imprisonment without special cause or delay of trial, of exacting enormous fines, of nominating the magistrates in boroughs and several other violent proceedings in the two last reigns. These articles the convention challenged as their undoubted right, against which no declaration or precedent

Reign of William III.

ought to operate. They reserved some other important grievances to be redressed in parliament. Upon this occasion, a noble fire of liberty shone forth to the honour of Scotland, amidst those scenes of turbulent faction or servile corruption which the annals of her parliament so perpetually display. They seemed emulous of English freedom, and proud to place their own imperfect commonwealth on as firm a basis.

One great alteration in the state of Scotland was almost necessarily involved in the fall of the Stuarts. Their most conspicuous object had been the maintenance of the episcopal church; the line was drawn far more closely than in England; in that church were the court's friends, out of it were its opponents. Above all, the people were out of it, and in a revolution brought about by the people, their voice could not be slighted. It was one of the articles accordingly in the declaration of rights, that prelacy and precedence in ecclesiastical office were repugnant to the genius of a nation reformed by presbyters, and an unsupportable grievance which ought to be abolished. William, there is reason to believe, had offered to preserve the bishops, in return for their support in the convention. But this, not more happily for Scotland than for himself and his successors, they refused to give. No compromise, or even acknowledged toleration, was practicable in that country between two exasperated factions; but, if oppression was necessary, it was at least not on the majority that it ought to fall. But besides this, there was as clear a case of forfeiture in the Scots episcopal church as in the royal family of Stuart. The main controversy between the episcopal and presbyterian churches was one of historical inquiry, not perhaps capable of decisive solution; it was at least one, as to which the bulk of mankind are absolutely incapable of forming a rational judgment for themselves. But, mingled up as it had always been, and most of all in Scotland, with faction, with revolution, with power and emolument, with courage and devotion, and fear, and hate, and revenge, this dispute drew along with it the most glowing emotions of the heart, and the question became utterly out of the province of argument. It was very possible that episcopacy might be of apostolical institution; but for this

institution houses had been burned and fields laid waste, and the gospel had been preached in wildernesses, and its ministers had been shot in their prayers, and husbands had been murdered before their wives, and virgins had been defiled, and many had died by the executioner, and by massacre, and in imprisonment, and in exile and slavery, and women had been tied to stakes on the sea-shore till the tide rose to overflow them, and some had been tortured and mutilated; it was a religion of the boots and the thumb-screw, which a good man must be very cool-blooded indeed if he did not hate and reject from the hands which offered it. For, after all, it is much more certain that the Supreme Being abhors cruelty and persecution, than that he has set up bishops to have a superiority over presbyters.

It was however a serious problem at that time, whether the presbyterian church, so proud and stubborn as she had formerly shown herself, could be brought under a necessary subordination to the civil magistrate, and whether the more fanatical part of it, whom Cargill and Cameron had led on, would fall again into the ranks of social life. But here experience victoriously confuted these plausible apprehensions. It was soon perceived that the insanity of fanaticism subsides of itself, unless purposely heightened by persecution. The fiercer spirit of the sectaries was allayed by degrees; and, though vestiges of it may probably still be perceptible by observers, it has never, in a political sense, led to dangerous effects. The church of Scotland, in her general assemblies, preserves the forms, and affects the language, of the sixteenth century; but the Erastianism, against which she inveighs, secretly controls and paralyses her vaunted liberties; and she cannot but acknowledge that the supremacy of the legislature is like the collar of the watch-dog, the price of food and shelter, and the condition upon which alone a religious society can be endowed and established by any prudent commonwealth.* The judicious admixture of laymen in these

* The practice observed in summoning or dissolving the great national assembly of the church of Scotland, which, according to the presbyterian theory, can only be done by its own authority, is rather amusing: "The moderator dissolves the assembly in the name of the Lord Jesus Christ, the head of the church; and, by the same authority, appoints another to meet on a certain day of the ensuing year. The lord high commissioner then dissolves the assembly in the name of the king, and appoints another to meet on the same day." Arnot's Hist. of Edinburgh, p. 269.

assemblies, and, in a far greater degree, the perpetual intercourse with England, which has put an end to every thing like sectarian bigotry, and even exclusive communion, in the higher and middling classes, are the principal causes of that remarkable moderation which for many years has characterized the successors of Knox and Melville. [1827.]

The convention of estates was turned by an act of its own into a parliament, and continued to sit during the king's reign. This, which was rather contrary to the spirit of a representative government than to the Scots constitution, might be justified by the very unquiet state of the kingdom and the intrigues of the jacobites. Many excellent statutes were enacted in this parliament, besides the provisions included in the declaration of rights; twenty-six members were added to the representation of the counties, the tyrannous acts of the two last reigns were repealed, the unjust attainders were reversed, the lords of articles were abolished. After some years, an act was obtained against wrongous imprisonment, still more effectual perhaps in some respects than that of the habeas corpus in England. The prisoner is to be released on bail within twenty-four hours on application to a judge, unless committed on a capital charge; and in that case must be brought to trial within sixty days. A judge refusing to give full effect to the act is declared incapable of public trust.

Notwithstanding these great improvements in the constitution, and the cessation of religious tyranny, the Scots are not accustomed to look back on the reign of William with much complacency. The regeneration was far from perfect; the court of session continued to be corrupt and partial; severe and illegal proceedings might sometimes be imputed to the council; and in one lamentable instance, the massacre of the Macdonalds in Glencoe, the deliberate crime of some statesmen tarnished not slightly the bright fame of their deceived master: though it was not for the adherents of the house of Stuart, under whom so many deeds of more extensive slaughter had been perpetrated, to fill Europe with their invectives against this military execution.* The episcopal

* The king's instructions by no means warrant the execution, especially with all its circumstances of cruelty, but they contain one unfortunate sentence: "If

clergy, driven out injuriously by the populace from their livings, were permitted after a certain time to hold them again in some instances under certain conditions; but William, perhaps almost the only consistent friend of toleration in his kingdoms, at least among public men, lost by this indulgence the affection of one party, without in the slightest degree conciliating the other.* The true cause, however, of the prevalent disaffection at this period was the condition of Scotland, an ancient, independent kingdom, inhabited by a proud, high-spirited people, relatively to another kingdom, which they had long regarded with enmity, still with jealousy;

Maclean [sic], of Glencoe, and that tribe can be well separated from the rest, it will be a proper vindication of the public justice to extirpate that seat of thieves." This was written, it is to be remembered, while they were exposed to the penalties of the law for the rebellion. But the massacre would never have been perpetrated, if lord Breadalbane and the master of Stair, two of the worst men in Scotland, had not used the foulest arts to effect it. It is an apparently great reproach to the government of William, that they escaped with impunity; but political necessity bears down justice and honour. Laing, iv. 246. Carstares' State Papers.

* Those who took the oaths were allowed to continue in their churches without compliance with the presbyterian discipline, and many more who not only refused the oaths but prayed openly for James and his family. Carstares, p. 40. But in 1693 an act for settling the peace and quiet of the church ordains, that no person be admitted or continued to be a minister or preacher unless he have taken the oath of allegiance, and subscribed the assurance that he held the king to be de facto et de jure, and also the confession of faith; and that he owns and acknowledges presbyterian church-government to be the only government of this church, and that he will submit thereto and concur therewith, and will never endeavour, directly or indirectly, the prejudice or subversion thereof. Id. 715. Laing, iv. 255.

This act seems not to have been strictly insisted upon; and the episcopal clergy, though their advocates did not forget to raise a cry of persecution, which was believed in England, are said to have been treated with singular favour. De Foe challenges them to show any one minister that ever was deposed for not acknowledging the church, if at the same time he offered to acknowledge the government and take the oaths; and says they have been often challenged on this head. Hist. of Church of Scotland, p. 319. In fact, a statute was passed in 1695, which confirmed all ministers who would qualify themselves by taking the oaths: and no less than 116 (according to Laing, iv. 259.) did so continue; nay, De Foe reckons 165 at the time of the union. P. 320.

The rigid presbyterians inveighed against any toleration, as much as they did against the king's authority over their own church. But the government paid little attention to their bigotry; besides the abovementioned episcopal clergymen, those who seceded from the church, though universally jacobites, and most dangerously so, were indulged with meeting-houses in all towns; and by an act of the queen, 10 Anne, c. 7., obtained a full toleration, on condition of praying for the royal family, with which they never complied. It was thought necessary to put them under some fresh restrictions in 1748, their zeal for the Pretender being notorious and universal, by an act 21 Geo. 2. c. 34.; which has very properly been repealed after the motive for it had wholly ceased, and even at first was not reconcilable with the general principles of religious liberty.

but to which, in despite of their theoretical equality, they were kept in subordination by an insurmountable necessity. The union of the two crowns had withdrawn their sovereign and his court; yet their government had been national, and on the whole with no great intermixture of English influence. Many reasons however might be given for a more complete incorporation, which had been the favourite project of James I., and was discussed, at least on the part of Scotland, by commissioners appointed in 1670. That treaty failed of making any progress; the terms proposed being such as the English parliament would never have accepted. At the revolution a similar plan was just hinted, and abandoned. Meanwhile, the new character that the English government had assumed rendered it more difficult to preserve the actual connexion. A king of both countries, especially by origin more allied to the weaker, might maintain some impartiality in his behaviour towards each of them. But, if they were to be ruled, in effect, nearly as two republics; that is, if the power of their parliaments should be so much enhanced as ultimately to determine the principal measures of state (which was at least the case in England), no one who saw their mutual jealousy, rising on one side to the highest exasperation, could fail to anticipate that some great revolution must be at hand; and that an union, neither federal nor legislative, but possessing every inconvenience of both, could not long be endured. The well-known business of the Darien company must have undeceived every rational man who dreamed of any alternative but incorporation or separation. The Scots parliament took care to bring on the crisis by the act of security in 1704. It was enacted that, on the queen's death without issue, the estates should meet to name a successor of the royal line, and a protestant; but that this should not be the same person who would succeed to the crown of England, unless during her majesty's reign conditions should be established to secure from English influence the honour and independence of the kingdom, the authority of parliament, the religion, trade, and liberty of the nation. This was explained to mean a free intercourse with the plantations, and the benefits of the navigation act. The prerogative of declaring peace and war was to be subjected for ever to the

approbation of parliament, lest at any future time these conditions should be revoked.

Those who obtained the act of security were partly of the jacobite faction, who saw in it the hope of restoring at least Scotland to the banished heir; partly of a very different description, whigs in principle, and determined enemies of the Pretender, but attached to their country, jealous of the English court, and determined to settle a legislative union on such terms as became an independent state. Such an union was now seen in England to be indispensable; the treaty was soon afterwards begun, and, after a long discussion of the terms between the commissioners of both kingdoms, the incorporation took effect on the 1st of May, 1707. It is provided by the articles of this treaty, confirmed by the parliaments, that the succession of the united kingdom shall remain to the princess Sophia, and the heirs of her body, being protestants; that all privileges of trade shall belong equally to both nations; that there shall be one great seal, and the same coin, weights, and measures; that the episcopal and presbyterian churches of England and Scotland shall be for ever established, as essential and fundamental parts of the union; that the united kingdom shall be represented by one and the same parliament, to be called the parliament of Great Britain; that the number of peers for Scotland shall be sixteen, to be elected for every parliament by the whole body, and the number of representatives of the commons forty-five, two thirds of whom to be chosen by the counties, and one third by the boroughs; that the crown be restrained from creating any new peers of Scotland; that both parts of the united kingdom shall be subject to the same duties of excise, and the same customs on export and import; but that, when England raises two millions by a land-tax, 48,000*l.* shall be raised in Scotland, and in like proportion.

Act of security.

Union.

It has not been unusual for Scotsmen, even in modern times, while they cannot but acknowledge the expediency of an union, and the blessings which they have reaped from it, to speak of its conditions as less favourable than their ancestors ought to have claimed. For this however there does not seem much reason. The ratio of population would in-

deed have given Scotland about one eighth of the legislative body, instead of something less than one twelfth; but no government except the merest democracy is settled on the sole basis of numbers; and if the comparison of wealth and of public contributions was to be admitted, it may be thought that a country, which stipulated for itself to pay less than one fortieth of direct taxation, was not entitled to a much greater share of the representation than it obtained. Combining the two ratios of population and property, there seems little objection to this part of the union; and in general it may be observed of the articles of that treaty, what often occurs with compacts intended to oblige future ages, that they have rather tended to throw obstacles in the way of reformations for the substantial benefit of Scotland, than to protect her against encroachment and usurpation.

This however could not be securely anticipated in the reign of Anne; and, no doubt, the measure was an experiment of such hazard that every lover of his country must have consented in trembling, or revolted from it with disgust. No past experience of history was favourable to the absorption of a lesser state (at least where the government partook so much of the republican form) in one of superior power and ancient rivalry. The representation of Scotland in the united legislature was too feeble to give any thing like security against the English prejudices and animosities, if they should continue or revive. The church was exposed to the most apparent perils, brought thus within the power of a legislature so frequently influenced by one which held her not as a sister, but rather a bastard usurper of a sister's inheritance; and, though her permanence was guaranteed by the treaty, yet it was hard to say how far the legal competence of parliament might hereafter be deemed to extend, or at least how far she might be abridged of her privileges, and impaired in her dignity.* If very few of these mischiefs have resulted

* Archbishop Tenison said, in the debates on the union, he thought the narrow notions of all churches had been their ruin, and that he believed the church of Scotland to be as true a protestant church as the church of England, though he could not say it was as perfect. Carstares, 759. This sort of language was encouraging; but the exclusive doctrine, or jus divinum, was sure to retain many advocates, and has always done so. Fortunately for Great Britain, it has not had the slightest effect on the laity in modern times. [1827.]

from the union, it has doubtless been owing to the prudence of our government, and chiefly to the general sense of right, and the diminution both of national and religious bigotry during the last century. But it is always to be kept in mind, as the best justification of those who came into so great a sacrifice of natural patriotism, that they gave up no excellent form of polity, that the Scots constitution had never produced the people's happiness, that their parliament was bad in its composition, and in practice little else than a factious and venal aristocracy; that they had before them the alternatives of their present condition, with the prospect of unceasing discontent, half suppressed by unceasing corruption, or of a more honourable, but very precarious, separation of the two kingdoms, the renewal of national wars and border-feuds, at a cost the poorer of the two could never endure, and at a hazard of ultimate conquest, which, with all her pride and bravery, the experience of the last generation had shown to be no impossible term of the contest.

The union closes the story of the Scots constitution. From its own nature, not more than from the gross prostitution with which a majority had sold themselves to the surrender of their own legislative existence, it was long odious to both parties in Scotland. An attempt to dissolve it by the authority of the united parliament itself was made in a very few years, and not very decently supported by the whigs against the queen's last ministry. But, after the accession of the house of Hanover, the jacobite party displayed such strength in Scotland, that to maintain the union was evidently indispensable for the reigning family. That party comprised a large proportion of the superior classes, and nearly the whole of the episcopal church, which, though fallen, was for some years considerable in numbers. The national prejudices ran in favour of their ancient stock of kings, conspiring with the sentiment of dishonour attached to the union itself, and jealousy of some innovations which a legislature they were unwilling to recognise thought fit to introduce. It is certain that jacobitism, in England little more, after the reign of George I., than an empty word, the vehicle of indefinite dissatisfaction in those who were never ready to encounter peril or sacrifice advantage for its affected

Gradual decline of jacobitism.

principle, subsisted in Scotland as a vivid emotion of loyalty, a generous promptitude to act or suffer in its cause; and, even when all hope was extinct, clung to the recollections of the past, long after the very name was only known by tradition, and every feeling connected with it had been wholly effaced to the south of the Tweed. It is believed that some persons in that country kept up an intercourse with Charles Edward as their sovereign till his decease in 1787. They had given, forty years before, abundant testimonies of their activity to serve him. That rebellion is, in more respects than one, disgraceful to the British government; but it furnished an opportunity for a wise measure to prevent its recurrence, and to break down in some degree the aristocratical ascendancy, by abolishing the hereditary jurisdictions which, according to the genius of the feudal system, were exercised by territorial proprietors under royal charter or prescription.

CHAPTER XVIII.

ON THE CONSTITUTION OF IRELAND.

Ancient State of Ireland — Its Kingdoms and Chieftainships — Law of Tanistry and Gavel-kind — Rude State of Society — Invasion of Henry II. — Acquisitions of English Barons — Forms of English Constitution established — Exclusion of native Irish from them — Degeneracy of English Settlers — Parliament of Ireland — Disorderly State of the Island — The Irish regain Part of their Territories — English Law confined to the Pale — Poyning's Law — Royal Authority revives under Henry VIII. — Resistance of Irish to Act of Supremacy — Protestant Church established by Elizabeth — Effects of this Measure — Rebellions of her Reign — Opposition in Parliament — Arbitrary Proceedings of Sir Henry Sidney — James I. — Laws against Catholics enforced — English Law established throughout Ireland — Settlements of English in Munster, Ulster, and other Parts — Injustice attending them — Constitution of Irish Parliament — Charles I. promises Graces to the Irish — Does not confirm them — Administration of Strafford — Rebellion of 1641 *— Subjugation of Irish by Cromwell — Restoration of Charles II. — Act of Settlement — Hopes of Catholics under Charles and James — War of* 1689, *and final Reduction of Ireland — Penal Laws against Catholics — Dependence of Irish on English Parliament — Growth of a patriotic Party in* 1753.

THE antiquities of Irish history, imperfectly recorded, and rendered more obscure by controversy, seem hardly to belong to our present subject. But the political order or state of society among that people at the period of Henry II.'s invasion must be distinctly apprehended and kept in mind, before we can pass a judgment upon, or even understand, the course of succeeding events, and the policy of the English government in relation to that island.

Ancient state of Ireland.

It can hardly be necessary to mention (the idle traditions of a derivation from Spain having long been exploded) that the Irish are descended from one of those Celtic tribes which occupied Gaul and Britain some centuries before the Christian era. Their language, however, is so far dissimilar from that spoken in Wales, though evidently of the same root, as to render it probable that the emigration, whether from this island or from Armorica, was in a remote age; while its close resemblance to that of the Scottish Highlanders, which hardly

can be called another dialect, as unequivocally demonstrates a nearer affinity of the two nations. It seems to be generally believed, though the antiquaries are far from unanimous, that the Irish are the parent tribe, and planted their colony in Scotland since the commencement of our era.

About the end of the eighth century, some of those swarms of Scandinavian descent which were poured out in such unceasing and irresistible multitudes on France and Britain, began to settle on the coasts of Ireland. These colonists were known by the name of Ostmen, or men from the east, as in France they were called Normans from their northern origin. They occupied the sea-coast from Antrim easterly round to Limerick; and by them the principal cities of Ireland were built. They waged war for some time against the aboriginal Irish in the interior; but, though better acquainted with the arts of civilized life, their inferiority in numbers caused them to fail at length in this contention; and the piratical invasions from their brethren in Norway becoming less frequent in the eleventh and twelfth centuries, they had fallen into a state of dependence on the native princes.

Its kingdoms and chieftainships.

The island was divided into five provincial kingdoms, Leinster, Munster, Ulster, Connaught, and Meath; one of whose sovereigns was chosen king of Ireland in some general meeting, probably of the nobility or smaller chieftains and of the prelates. But there seems to be no clear tradition as to the character of this national assembly, though some maintain it to have been triennially held. The monarch of the island had tributes from the inferior kings, and a certain supremacy, especially in the defence of the country against invasion; but the constitution was of a federal nature, and each was independent in ruling his people, or in making war on his neighbours. Below the kings were the chieftains of different septs or families, perhaps in one or two degrees of subordination, bearing a relation, which may be loosely called feudal, to each other and to the crown.*

These chieftainships, and perhaps even the kingdoms them-

* Sir James Ware's Antiquities of Ireland. Leland's Hist. of Ireland; Introduction. Ledwich's Dissertations.

selves, though not partible, followed a very different rule of succession from that of primogeniture. They were subject to the law of tanistry, of which the principle is defined to be, that the demesne lands and dignity of chieftainship descended to the eldest and most worthy of the same blood; these epithets not being used, we may suppose, synonymously, but in order to indicate that the preference given to seniority was to be controlled by a due regard to desert. No better mode, it is evident, of providing for a perpetual supply of those civil quarrels, in which the Irish are supposed to place so much of their enjoyment, could have been devised. Yet, as these grew sometimes a little too frequent, it was not unusual to elect a tanist, or reversionary successor, in the lifetime of the reigning chief, as has been the practice of more civilized nations. An infant was never allowed to hold the sceptre of an Irish kingdom, but was necessarily postponed to his uncle or other kinsman of mature age; as was the case also in England, even after the consolidation of the Anglo-Saxon monarchy.* Law of tanistry.

The land-owners, who did not belong to the noble class, bore the same name as their chieftain, and were presumed to be of the same lineage. But they held their estates by a very different and an extraordinary tenure, that of Irish gavel-kind. On the decease of a proprietor, instead of an equal partition among his children, as in the gavel-kind of English law, the chief of the sept, according to the generally received explanation, made, or was entitled to make, a fresh division of all the lands within his district; allotting to the heirs of the deceased a portion of the integral territory along with the other members of the tribe. It seems impossible to conceive that these partitions were renewed on every death of one of the sept. But they are asserted to have at least taken place so frequently as to produce a continual change of possession. The policy of this custom doubtless sprung from too jealous a solicitude as to the excessive inequality of wealth, and from the habit of looking on the tribe and gavel-kind.

* Iid. Auct.: also Davis's Reports, 29., and his "Discovery of the true Causes why Ireland was never entirely subdued till his Majesty's happy Reign," 169. Sir John Davis, author of the philosophical poem, Γνῶθι Σεαυτὸν, was chief justice of Ireland under James I. The tract just quoted is well known as a concise and luminous exposition of the history of that country from the English invasion.

as one family of occupants, not wholly divested of its original right by the necessary allotment of lands to particular cultivators. It bore some degree of analogy to the institution of the year of jubilee in the Mosaic code, and, what may be thought more immediate, was almost exactly similar to the rule of succession which is laid down in the ancient laws of Wales.*

Rude state of society.

In the territories of each sept, judges called Brehons, and taken out of certain families, sat with primeval simplicity upon turfen benches in some conspicuous situation, to determine controversies. Their usages are almost wholly unknown; for what have been published as fragments of the Brehon law seem open to great suspicion of having at least been interpolated.† It is notorious that, according to the custom of many states in the infancy of civilization, the Irish admitted the composition or fine for murder, instead of capital punishment; and this was divided, as in other countries, between the kindred of the slain and the judge.

In the twelfth century it is evident that the Irish nation

* Ware. Leland. Ledwich. Davis's Discovery, ibid. Reports, 49. It is remarkable that Davis seems to have been aware of an analogy between the custom of Ireland and Wales, and yet that he only quotes the statute of Rutland, 12 Edw. I., which by itself does not prove it. It is however proved, if I understand the passage, by one of the Leges Walliæ, published by Wotton, p. 139. A gavel or partition was made on the death of every member of a family for three generations, after which none could be enforced. But these parceners were to be all in the same degree; so that nephews could not compel their uncle to a partition, but must wait till his death, when they were to be put on an equality with their cousins; and this, I suppose, is meant by the expression in the statute of Rutland, "quod hæreditates remaneant partibiles inter *consimiles hæredes*."

† Leland seems to favour the authenticity of the supposed Brehon laws published by Vallancey. Introduction, 29. The style is said to be very distinguishable from the Irish of the twelfth or thirteenth century, and the laws themselves to have no allusion to the settlement of foreigners in Ireland, or to coined money; whence some ascribe them to the eighth century. On the other hand, Ledwich proves that some parts must be later than the tenth century. Dissertations, i. 270. And others hold them to be not older than the thirteenth. Campbell's Historical Sketch of Ireland, 41. It is also maintained that they are very unfaithfully translated. But, when we find the Anglo-Saxon and Norman usages, relief, aid, wardship, trial by jury (and that unanimous), and a sort of correspondence in the ranks of society with those of England (which all we read elsewhere of the ancient Irish seems to contradict), it is impossible to resist the suspicion that they are either extremely interpolated, or were compiled in a late age, and among some of the septs who had most intercourse with the English. We know that the degenerate colonists, such as the earls of Desmond, adopted the Brehon law in their territories; but this would probably be with some admixture of that to which they had been used.

had made far less progress in the road of improvement than any other of Europe in circumstances of climate and position so little unfavourable. They had no arts that deserve the name, nor any commerce; their best line of sea-coast being occupied by the Norwegians. They had no fortified towns, nor any houses or castles of stone; the first having been erected at Tuam a very few years before the invasion of Henry.* Their conversion to Christianity indeed, and the multitude of cathedral and conventual churches erected throughout the island, had been the cause, and probably the sole cause, of the rise of some cities, or villages with that name, such as Armagh, Cashel, and Trim. But neither the chiefs nor the people loved to be confined within their precincts, and chose rather to dwell in scattered cabins amidst the free solitude of bogs and mountains.† As we might expect, their qualities were such as belong to man by his original nature, and which he displays in all parts of the globe where the state of society is inartificial: they were gay, generous, hospitable, ardent in attachment and hate, credulous of falsehood, prone to anger and violence, generally crafty and cruel. With these very general attributes of a barbarous people, the Irish character was distinguished by a peculiar vivacity of imagination, an enthusiasm and impetuosity of passion, and a more than ordinary bias towards a submissive and superstitious spirit in religion.

This spirit may justly be traced in a great measure to the virtues and piety of the early preachers of the gospel in that country. Their influence, though at this remote age, and with our imperfect knowledge, it may hardly be distinguish-

* "The first pile of lime and stone that ever was in Ireland was the castle of Tuam, built in 1161 by Roderic O'Connor, the monarch." Introduction to Cox's History of Ireland. I do not find that any later writer controverts this, so far as the aboriginal Irish are concerned; but doubtless the Norwegian Ostmen had stone churches, and it used to be thought that some at least of the famous round towers so common in Ireland were erected by them, though several antiquaries have lately contended for a much earlier origin of these mysterious structures. See Ledwich's Dissertations, vii. 143.; and the book called Grose's Antiquities of Ireland, also written by Ledwich. Piles of stone without mortar are not included in Cox's expression. In fact, the Irish had very few stone houses, or even regular villages and towns, before the time of James I. Davis, 170.

† ["I dare boldly say, that never any particular person, from the conquest till the reign of James I., did build any stone or brick house for his private habitation, but such as have lately obtained estates according to the course of the law of England." Davis.—1845.]

able amidst the licentiousness and ferocity of a rude people, was necessarily directed to counteract those vices, and cannot have failed to mitigate and compensate their evil. In the seventh and eighth centuries, while a total ignorance seemed to overspread the face of Europe, the monasteries and schools of Ireland preserved, in the best manner they could, such learning as had survived the revolutions of the Roman world. But the learning of monasteries had never much efficacy in dispelling the ignorance of the laity; and indeed, even in them, it had decayed long before the twelfth century. The clergy were respected and numerous, the bishops alone amounting at one time to no less than three hundred*; and it has been maintained by our most learned writers, that they were wholly independent of the see of Rome till, a little before the English invasion, one of their primates thought fit to solicit the pall from thence on his consecration, according to the discipline long practised in other western churches.

It will be readily perceived that the government of Ireland must have been almost entirely aristocratical, and, though not strictly feudal, not very unlike that of the feudal confederacies in France during the ninth and tenth centuries. It was perhaps still more oppressive. The ancient condition of the common people of Ireland, says sir James Ware, was very little different from slavery.† Unless we believe this condition to have been greatly deteriorated under the rule of their native chieftains after the English settlement, for which there seems no good reason, we must give little credit to the fanciful pictures of prosperity and happiness in that period of aboriginal independence, which the Irish, in their discontent with later times, have been apt to draw. They had, no doubt, like all other nations, good and wise princes, as well as tyrants and usurpers. But we find by their annals that, out of two hundred ancient kings, of whom some brief memorials are recorded, not more than thirty came to a natural death‡; while, for the later period, the oppression of the Irish chieftains, and of those degenerate English who trod in their steps, and emulated the vices they should have restrained, is the one constant theme of history. Their exactions kept the peasants

* Ledwich, i. 395.
† Antiquities of Ireland, ii. 76.
‡ Ledwich, i. 260.

in hopeless poverty, their tyranny in perpetual fear. The chief claimed a right of taking from his tenants provisions for his own use at discretion, or of sojourning in their houses. This was called coshery, and is somewhat analogous to the royal prerogative of purveyance. A still more terrible oppression was the quartering of the lords' soldiers on the people, sometimes mitigated by a composition, called by the Irish bonaght.* For the perpetual warfare of these petty chieftains had given rise to the employment of mercenary troops, partly natives, partly from Scotland, known by the uncouth names of Kerns and Gallowglasses, who proved the scourge of Ireland down to its final subjugation by Elizabeth.

This unusually backward condition of society furnished but an inauspicious presage for the future. Yet we may be led by the analogy of other countries to think it probable that, if Ireland had not tempted the cupidity of her neighbours, there would have arisen in the course of time some Egbert or Harold Harfager to consolidate the provincial kingdoms into one hereditary monarchy; which, by the adoption of better laws, the increase of commerce, and a frequent intercourse with the chief courts of Europe, might have taken as respectable a station as that of Scotland in the commonwealth of Christendom. If the two islands had afterwards become incorporated through intermarriage of their sovereigns, as would very likely have taken place, it might have been on such conditions of equality as Ireland, till lately, has never known; and certainly without that long tragedy of crime and misfortune which her annals unfold.

The reduction of Ireland, at least in name, under the dominion of Henry II. was not achieved by his own efforts. He had little share in it, beyond receiving the homage of Irish princes, and granting charters to his English nobility. Strongbow, Lacy, Fitz-Stephen, were the real conquerors, through whom alone any portion of Irish territory was gained by arms or treaty; and, as they began the enterprise without the king, they carried it on also for themselves, deeming their swords a better security than his charters. This ought to be kept in mind, as revealing the

Invasion of Henry II.

* Ware, ii. 74. Davis's Discovery, 174. Spenser's State of Ireland, 390.

secret of the English government over Ireland, and furnishing a justification for what has the appearance of a negligent abandonment of its authority. The few barons, and other adventurers, who, by dint of forces hired by themselves, and, in some instances, by conventions with the Irish, settled their armed colonies in the island, thought they had done much for Henry II. in causing his name to be acknowledged, his administration to be established in Dublin, and in holding their lands by his grant. They claimed in their turn, according to the practice of all nations and the principles of equity, that those who had borne the heat of the battle should enjoy the spoil without molestation. Hence, the enormous grants of Henry and his successors, though so often censured for impolicy, were probably what they could not have retained in their own hands; and, though not perhaps absolutely stipulated as the price of titular sovereignty, were something very like it.* But what is to be censured, and what at all hazards they were bound to refuse, was the violation of their faith to the Irish princes, in sharing among these insatiable barons their ancient territories; which, setting aside the wrong of the first invasion, were protected by their homage and submission, and sometimes by positive conventions. The whole island, in fact, with the exception of the county of Dublin and the maritime towns, was divided, before the end of the thirteenth century, and most of it in the twelfth, among ten English families: earl Strongbow, who had some colour of hereditary title, according to our notions of law, by his marriage with the daughter of Dermot, king of Leinster, obtaining a grant of that province; Lacy acquiring Meath, which was not reckoned a part of Leinster, in the same manner; the whole of Ulster being given to de Courcy; the whole of Connaught to de Burgh; and the rest to six others. These, it must be understood, they were to hold in a sort of feudal suzerainty, parcelling them among their tenants of English race, and expelling the natives, or driving them into the worst parts of the country by an incessant warfare.

Acquisitions of English barons.

The Irish chieftains, though compelled to show some

* Davis, 135.

exterior signs of submission to Henry, never thought of renouncing their own authority, or the customs of their forefathers; nor did he pretend to interfere with the government of their septs, content with their promise of homage and tribute, neither of which were afterwards paid. But in those parts of Ireland which he reckoned his own, it was his aim to establish the English laws, to render the lesser island, as it were, a counterpart in all its civil constitution, and mirror of the greater. The colony from England was already not inconsiderable, and likely to increase; the Ostmen, who inhabited the maritime towns, came very willingly, as all settlers of Teutonic origin have done, into the English customs and language; and upon this basis, leaving the accession of the aboriginal people to future contingencies, he raised the edifice of the Irish constitution. He gave charters of privilege to the chief towns, began a division into counties, appointed sheriffs and judges of assize to administer justice, erected supreme courts at Dublin, and perhaps assembled parliaments.* His successors pursued the same course of policy; the great charter of liberties, as soon as granted by John at Runnymede, was sent over to Ireland; and the whole common law, with all its forms of process, and every privilege it was deemed to convey, became the birthright of the Anglo-Irish colonists.†

Forms of English constitution established.

These had now spread over a considerable part of the island. Twelve counties appear to have been established by John, comprehending most of Leinster and Munster; while the two ambitious families of Courcy and de Burgh encroached more and more on the natives in the other provinces.‡ But the same necessity, which gratitude for the services, or sense of the power of the great families had

* Leland, 80. et. post. Davis, 100.

† 4 Inst. 349. Leland, 203. Harris's Hibernica, ii. 14.

‡ These counties are Dublin, Kildare, Meath (including Westmeath), Louth, Carlow, Wexford, Kilkenny, Waterford, Cork, Tipperary, Kerry, and Limerick. In the reign of Edward I. we find sheriffs also of Connaught and Roscommon. Leland, i. 19. Thus, except the northern province and some of the central districts, all Ireland was shire-ground, and subject to the crown in the thirteenth century, however it might fall away in the two next. Those who write confusedly about this subject, pretend that the authority of the king at no time extended beyond the pale; whereas that name was not known, I believe, till the fifteenth century. Under the great earl of Pembroke, who died in 1219, the whole island was perhaps nearly as much reduced under obedience as in the reign of Elizabeth. Leland, 205.

engendered, for rewarding them by excessive grants of territory, led to other concessions that rendered them almost independent of the monarchy.* The franchise of a county palatine gave a right of exclusive civil and criminal jurisdiction; so that the king's writ should not run, nor his judges come within it, though judgment in its courts might be reversed by writ of error in the king's bench. The lord might enfeoff tenants to hold by knight's service of himself; he had almost all regalian rights; the lands of those attainted for treason escheated to him; he acted in every thing rather as one of the great feudataries of France or Germany than a subject of the English crown. Such had been the earl of Chester, and only Chester, in England; but in Ireland this dangerous independence was permitted to Strongbow in Leinster, to Lacy in Meath, and at a latter time to the Butlers and Geraldines in parts of Munster. Strongbow's vast inheritance soon fell to five sisters, who took to their shares, with the same palatine rights, the counties of Carlow, Wexford, Killkenny, Kildare, and the district of Leix, since called the Queen's County.† In all these palatinates, forming by far the greater portion of the English territories, the king's process had its course only within the lands belonging to the church. ‡ The English aristocracy of Ireland, in the thirteenth and fourteenth centuries, bears a much closer analogy to that of France in rather an earlier period than any thing which the history of this island can show.

Pressed by the inroads of these barons, and despoiled frequently of lands secured to them by grant or treaty, the native chiefs had recourse to the throne for protection, and would in all likelihood have submitted without repining to a sovereign who could have afforded it.§ But John and Henry III., in whose reigns the independence of the aristocracy was almost complete, though insisting by writs and proclamations on a due observance of the laws, could do little more for their new subjects, who found a better chance of redress in standing on their own defence. The powerful septs of the

* Leland, 170.

† Davis, 140. William Marischal, earl of Pembroke, who married the daughter of earl Strongbow, left five sons and five daughters; the first all died without issue.

‡ Davis, 147. Leland, 291.

§ Id. 194. 209.

north enjoyed their liberty. But those of Munster and Leinster, intermixed with the English, and encroached upon from every side, were the victims of constant injustice; and abandoning the open country for bog and mountain pasture, grew more poor and barbarous in the midst of the general advance of Europe. Many remained under the yoke of English lords, and in a worse state than that of villenage, because still less protected by the tribunals of justice.

Exclusion of native Irish from them.

The Irish had originally stipulated with Henry II. for the use of their own laws.* They were consequently held beyond the pale of English justice, and regarded as aliens at the best, sometimes as enemies, in our courts. Thus, as by the Brehon customs murder was only punished by a fine, it was not held felony to kill one of Irish race, unless he had conformed to the English law.† Five septs, to which the royal families of Ireland belonged, the names of O'Neal, O'Connor, O'Brien, O'Malachlin, and Mac Murrough, had the special immunity of being within the protection of our law, and it was felony to kill one of them. I do not know by what means they obtained this privilege; for some of these were certainly as far from the king's obedience as any in Ireland.‡ But besides these a vast number of charters of denization were granted to particular persons of Irish descent from the reign of Henry II. downwards, which gave them and their posterity the full birthrights of English subjects;

* Leland, 225.

† Davis, 100. 109. He quotes the following record from an assize at Waterford, in the 4th of Edward II. (1311), which may be extracted, as briefly illustrating the state of law in Ireland better than any general positions. "Quod Robertus le Wayleys rectatus de morte Johannis filii Ivor Mac-Gillemory, felonicè per ipsum interfecti, &c. Venit et bene cognovit quod prædictum Johannem interfecit; dicit tamen quod per ejus interfectionem feloniam committere non potuit, quia dicit, quod prædictus Johannes fuit purus Hibernicus, et non de libero sanguine, &c. Et cum dominus dicti Johannis, cujus Hibernicus idem Johannes fuit, die quo interfectus fuit, solutionem pro ipso Johanne Hibernico suo sic interfecto petere voluerit, ipse Robertus paratus erit ad respondendum de solutione prædictâ prout justitia suadebit. Et super hoc venit quidam Johannes le Poer, et dicit pro domino rege, quod prædictus Johannes filius Ivor Mac-Gillemory, et antecessores sui de cognomine prædicto a tempore quo dominus Henricus filius imperatricis, quondam dominus Hiberniæ, tritavus domini regis nunc, fuit in Hibernià, legem Anglicanam in Hibernià usque ad hanc diem habere, et secundum ipsam legem judicari et deduci debent." We have here both the general rule, that the death of an Irishman was only punishable by a composition to his lord, and the exception in behalf of those natives who had conformed to the English law.

‡ Id. 104. Leland, 82. It was necessary to plead in bar of an action, that the plaintiff was Hibernicus, et non de quinque sanguinibus.

nor does there seem to have been any difficulty in procuring these.* It cannot be said, therefore, that the English government, or those who represented it in Dublin, displayed any reluctance to emancipate the Irish from thraldom. Whatever obstruction might be interposed to this was from that assembly whose concurrence was necessary to every general measure, the Anglo-Irish parliament. Thus, in 1278, we find the first instance of an application from the community of Ireland, as it is termed, but probably from some small number of septs dwelling among the colony, that they might be admitted to live by the English law, and offering 8000 marks for this favour. The letter of Edward I. to the justiciary of Ireland on this is sufficiently characteristic both of his wisdom and his rapaciousness. He is satisfied of the expediency of granting the request, provided it can be done with the general consent of the prelates and nobles of Ireland; and directs the justiciary, if he can obtain that concurrence, to agree with the petitioners for the highest fine he can obtain, and for a body of good and stout soldiers.† But this necessary consent of the aristocracy was withheld. Excuses were made to evade the king's desire. It was wholly incompatible with their systematic encroachments on their Irish neighbours to give them the safeguard of the king's writ for their possessions. The Irish renewed their supplication more than once, both to Edward I. and Edward III.; they found the same readiness in the English court; they sunk at home through the same unconquerable oligarchy.‡ It is not to be imagined that the entire Irishry partook in this desire of renouncing their ancient customs. Besides the prejudices of nationality, there was a strong inducement to preserve the Brehon laws of tanistry, which suited better a warlike tribe than the hereditary succession of England. But it was the unequivocal duty of the legislature to avail itself of every token of voluntary submission; which, though beginning only with the subject septs of Leinster, would gradually incorporate the whole nation in a common bond of co-equal privileges with their conquerors.

* Davis, 106. "If I should collect out of the records all the charters of this kind, I should make a volume thereof." They began as early as the reign of Henry III. Leland, 225.

† Leland, 243. ‡ Id. 289.

Meanwhile, these conquerors were themselves brought under a moral captivity of the most disgraceful nature; and, not as the rough soldier of Rome is said to have been subdued by the art and learning of Greece, the Anglo-Norman barons, that had wrested Ireland from the native possessors, fell into their barbarous usages, and emulated the vices of the vanquished. This degeneracy of the English settlers began very soon, and continued to increase for several ages. They intermarried with the Irish; they connected themselves with them by the national custom of fostering, which formed an artificial relationship of the strictest nature *; they spoke the Irish language; they affected the Irish dress and manner of wearing the hair †; they even adopted, in some instances, Irish surnames; they harassed their tenants with every Irish exaction and tyranny; they administered Irish law, if any at all; they became chieftains rather than peers; and neither regarded the king's summons to his parliaments, nor paid any obedience to his judges. ‡ Thus the great family of De Burgh

Degeneracy of English settlers.

* "There were two other customs, proper and peculiar to the Irishry, which, being the cause of many strong combinations and factions, do tend to the utter ruin of a commonwealth. The one was *fostering*, the other *gossipred*; both which have ever been of greater estimation among this people than with any other nation in the christian world. For *fostering*, I did never hear or read that it was in that use or reputation in any other country, barbarous or civil, as it hath been, and yet is, in Ireland, where they put away all their children to fosterers; the potent and rich men selling, the meaner sort buying, the alterage and nursing of their children; and the reason is, because in the opinion of this people, *fostering* hath always been a stronger alliance than blood; and the foster-children do love and are beloved of their foster-fathers and their sept, more than of their own natural parents and kindred, and do participate of their means more frankly, and do adhere to them in all fortunes, with more affection and constancy. The like may be said of *gossipred* or compaternity, which though by the canon law it be a spiritual affinity, and a juror that was gossip to either of the parties might in former times have been challenged, as not indifferent, by our law, yet there was no nation under the sun that ever made so religious an account of it as the Irish." Davis, 179.

† "For that now there is no diversity in array between the English marchers and the Irish enemies, and so by colour of the English marchers, the Irish enemies do come from day to day into the English counties as English marchers, and do rob and kill by the highways, and destroy the common people by lodging upon them in the nights, and also do kill the husbands in the nights, and do take their goods to the Irish men; wherefore it is ordained and agreed, that no manners man that will be taken for an Englishman shall have no beard above his mouth; that is to say, that he have no hairs upon his upper lip, so that the said lip be once at least shaven every fortnight, or of equal growth with the nether lip. And if any man be found among the English contrary hereunto, that then it shall be lawful to every man to take them and their goods as Irish enemies, and to ransom them as Irish enemies." Irish Statutes, 25 H. 6. c. 4.

‡ Davis, 152. 182. Leland, i. 256, &c. Ware, ii. 58.

or Burke, in Connaught, fell off almost entirely from subjection; nor was that of the earls of Desmond, a younger branch of the house of Geraldine or Fitzgerald, much less independent of the crown; though by the title it enjoyed, and the palatine franchises granted to it by Edward III. over the counties of Limerick and Kerry, it seemed to keep up more show of English allegiance.

The regular constitution of Ireland was, as I have said, as nearly as possible a counterpart of that established in this country. The administration was vested in an English justiciary or lord deputy, assisted by a council of judges and principal officers, mixed with some prelates and barons, but subordinate to that of England, wherein sat the immediate advisers of the sovereign. The courts of chancery, king's bench, common pleas, and exchequer, were the same in both countries; but writs of error lay from judgments given in the second of these to the same court in England. For all momentous purposes, as to grant a subsidy, or enact a statute, it was as necessary to summon a parliament in the one island as in the other. An Irish parliament originally, like an English one, was but a more numerous council, to which the more distant as well as the neighbouring barons were summoned, whose consent, though dispensed with in ordinary acts of state, was both the pledge and the condition of their obedience to legislative provisions. Not long after 1295, the sheriff of each county and liberty is directed to return two knights to a parliament held by Wogan, an active and able deputy.* The date of the admission of burgesses cannot be fixed with precision; but it was probably not earlier than the reign of Edward III. They appear in 1341; and the earl of Desmond summoned many deputies from corporations to his rebel convention held at Kilkenny in the next year.† The commons are mentioned as an essential part of parliament in an ordinance of 1359; before which time, in the opinion of lord Coke, "the conventions in

Parliament of Ireland.

* Leland, 253. [The precise year is not mentioned, but Wogan became deputy in 1295. Archbishop Usher, however, (in Collectanea Curiosa, vol. i. p. 36.) says that there had been a parliament as early as 48 H. 3. (1264). Usher makes a distinction between small and great parliaments, calling the former rather *parlies*.—1845.]

† Cox's Hist. of Ireland, 117. 120.

Ireland were not so much parliaments as assemblies of great men."* This, as appears, is not strictly correct; but in substance they were perhaps little else long afterwards.

The earliest statutes on record are of the year 1310; and from that year they are lost till 1429, though we know many parliaments to have been held in the mean time, and are acquainted by other means with their provisions. Those of 1310 bear witness to the degeneracy of the English lords, and to the laudable zeal of a feeble government for the reformation of their abuses. They begin with an act to restrain great lords from taking of prises, lodging, and sojourning with the people of the country against their will. "It is agreed and assented," the act proceeds, "that no such prises shall be henceforth made without ready payment and agreement, and that none shall harbour or sojourn at the house of any other by such malice against the consent of him which is owner of the house to destroy his goods; and, if any shall do the same, such prises, and such manner of destruction, shall be holden for open robbery, and the king shall have the suit thereof, if others will not, nor dare not sue. It is agreed also, that none shall keep idle people nor kearn (foot-soldiers) in time of peace to live upon the poor of the country, but that these which will have them, shall keep them at their own charges, so that their free tenants, nor farmers, nor other tenants, be not charged with them." The statute proceeds to restrain great lords or others, except such as have royal franchises, from giving protections, which they used to compel the people to purchase; and directs that there shall be commissions of assize and gaol delivery through all the counties of Ireland.†

These regulations exhibit a picture of Irish miseries. The barbarous practices of coshering and bonaght, the latter of which was generally known in later times by the name of coyne and livery, had been borrowed from those native chieftains whom our modern Hibernians sometimes hold forth as the paternal benefactors of their country.‡ It was the crime

* Id. 125. 129. Leland, 313. [It may be probably thought, that the majores civitatum regalium, whom Desmond summoned to Kilkenny, were mayors, rather than representatives. Usher, ibid.—1845.]

† Irish Statutes.

‡ Davis, 174. 189. Leland, 281.

of the Geraldines and the De Courcys to have retrograded from the comparative humanity and justice of England, not to have deprived the people of freedom and happiness they had never known. These degenerate English, an epithet by which they are always distinguished, paid no regard to the statutes of a parliament which they had disdained to attend, and which could not render itself feared. We find many similar laws in the fifteenth century, after the interval which I have noticed in the printed records. And, in the intervening period, a parliament held by Lionel duke of Clarence, second son of Edward III., at Kilkenny, in 1367, the most numerous assembly that had ever met in Ireland, was prevailed upon to pass a very severe statute against the insubordinate and degenerate colonists. It recites that the English of the realm of Ireland were become mere Irish in their language, names, apparel, and manner of living, that they had rejected the English laws, and allied themselves by intermarriage with the Irish. It prohibits, under the penalties of high treason, or at least of forfeiture of lands, all these approximations to the native inhabitants, as well as the connexions of fostering and gossipred. The English are restrained from permitting the Irish to graze their lands, from presenting them to benefices, or receiving them into religious houses, and from entertaining their bards. On the other hand, they are forbidden to make war upon their Irish neighbours without the authority of the state. And, to enforce better these provisions, the king's sheriffs are empowered to enter all franchises for the apprehension of felons or traitors.*

Disorderly state of the island.

This statute, like all others passed in Ireland, so far from pretending to bind the Irish, regarded them not only as out of the king's allegiance, but

Maurice Fitz-Thomas, earl of Desmond, was the first of the English, according to Ware, ii. 76., who imposed the exaction of coyne and livery.

* Irish Statutes. Davis, 202. Cox. Leland. [The statute of Kilkenny, though Leland, i. 329., says that Edward was obliged to relax it in some particulars, as incapable of being enforced, restored the English government for a time, if we may believe Davis, p. 222., so that it did not fall back again till the war of the Roses. About this time Edward III. endeavoured to supersede the domestic legislature by causing the Anglo-Irish to attend his parliament at Westminster; and succeeded so far, that in 1375 not only prelates and peers, but proctors of the clergy, knights, and even burgesses from nine towns, actually sat there. But this was too much against the temper of the Irish to be repeated. Leland, i. 327. 363.—1845.]

as perpetually hostile to his government. They were generally denominated the Irish enemy. This doubtless was not according to the policy of Henry II., nor of the English government a considerable time after his reign. Nor can it be said to be the fact, though from some confusion of times the assertion is often made, that the island was not subject, in a general sense, to that prince and to the three next kings of England. The English were settled in every province; an imperfect division of counties and administration of justice subsisted; and even the Irish chieftains, though ruling their septs by the Brehon law, do not appear in that period to have refused the acknowledgment of the king's sovereignty. But compelled to defend their lands against perpetual aggression, they justly renounced all allegiance to a government which could not redeem the original wrong of its usurpation by the benefits of protection. They became gradually stronger; they regained part of their lost territories; and after the era of 1315, when Edward Bruce invaded the kingdom with a Scots army, and, though ultimately defeated, threw the government into a disorder from which it never recovered, their progress was so rapid, that in the space of thirty or forty years, the northern provinces, and even part of the southern, were entirely lost to the crown of England.*

The Irish regain part of their territorities.

It is unnecessary in so brief a sketch to follow the unprofitable annals of Ireland in the fourteenth and fifteenth centuries. Amidst the usual variations of war, the English interests were continually losing ground. Once only Richard II. appeared with a very powerful army, and the princes of Ireland crowded round his throne to offer homage.† But, upon his leaving the kingdom, they returned of course to their former independence and hostility. The long civil wars of England in the next century consummated the ruin of its power over the sister island. The Irish possessed all Ulster, and shared Connaught with the degenerate Burkes. The sept of O'Brien held their own district of Thomond,

* Leland, i. 278. 296. 324. Davis, 152. 197.

† Leland, 342. The native chieftains who came to Dublin are said to have been seventy-five in number; but the insolence of the courtiers, who ridiculed an unusual dress and appearance, disgusted them.

now the county of Clare. A considerable part of Leinster was occupied by other independent tribes; while, in the south, the earls of Desmond, lords either by property or territorial jurisdiction of the counties of Kerry and Limerick, and in some measure those of Cork and Waterford, united the turbulence of English barons with the savage manners of Irish chieftains; ready to assume either character as best suited their rapacity and ambition; reckless of the king's laws or his commands, but not venturing, nor, upon the whole probably, wishing to cast off the name of his subjects.* The elder branch of their house, the earls of Kildare, and another illustrious family, the Butlers earls of Ormond, were apparently more steady in their obedience to the crown; yet, in the great franchises of the latter, comprising the counties of Kilkenny and Tipperary, the king's writ had no course; nor did he exercise any civil or military authority but by the permission of this mighty peer.† Thus in the reign of Henry VII., when the English authority over Ireland had reached its lowest point, it was, with the exception of a very few sea-ports, to all intents confined to the four counties of the English pale, a name not older perhaps than the preceding century; those of Dublin, Louth, Kildare, and Meath, the latter of which at that time included West Meath. But even in these there were extensive marches, or frontier districts, the inhabitants of which were hardly distinguishable from the Irish, and paid them a tribute called black-rent; so that the real supremacy of the English laws was not probably established beyond the two first of these counties, from Dublin to Dundalk on the coast, and for about thirty miles inland.‡ From this time, however,

English law confined to the pale.

* [It appears by the rates paid to a subsidy granted in 1420, that most of Leinster, with a small part of Munster, still contributed. Cox, 152.—1845.]

† Davis, 193.

‡ Leland, ii. 822. et post. Davis, 199. 229. 236. Holingshed's Chronicles of Ireland, p. 4. Finglas, a baron of the exchequer in the reign of Henry VIII., in his Breviate of Ireland, from which Davis has taken great part of his materials, says expressly, that, by the disobedience of the Geraldines and Butlers, and their Irish connexions, "the whole land is now of Irish rule, except the little English pale, within the counties of Dublin and Meath, and Uriel [Louth], which pass not thirty or forty miles in compass." He afterwards includes Kildare. The English were also expelled from Munster, except the walled towns. The king had no profit out of Ulster, but the manor of Carlingford, nor any in Connaught. This treatise, written about 1530, is printed in Harris's Hibernica. The proofs that, in this age, the English law and government were confined to the four shires, are abundant. It is even mentioned in a statute, 13 H. 8. c. 2.

we are to date its gradual recovery. The more steady councils and firmer prerogative of the Tudor kings left little chance of escape from their authority either for rebellious peers of English race, or the barbarous chieftains of Ireland.

I must pause at this place to observe that we shall hardly find in the foregoing sketch of Irish history, during the period of the Plantagenet dynasty (nor am I conscious of having concealed any thing essential), that systematic oppression and misrule which is every day imputed to the English nation and its government. The policy of our kings appears to have generally been wise and beneficent; but it is duly to be remembered that those very limitations of their prerogative which constitute liberty, must occasionally obstruct the execution of the best purposes; and that the co-ordinate powers of parliament, so justly our boast, may readily become the screen of private tyranny and inveterate abuse. This incapacity of doing good as well as harm has produced, comparatively speaking, little mischief in Great Britain; where the aristocratical element of the constitution is neither so predominant, nor so much in opposition to the general interest as it may be deemed to have been in Ireland. But it is manifestly absurd to charge the Edwards and Henrys, or those to whom their authority was delegated at Dublin, with the crimes they vainly endeavoured to chastise, much more to erect either the wild barbarians of the north, the O'Neals and O'Connors, or the degenerate houses of Burke and Fitzgerald, into patriot assertors of their country's welfare. The laws and liberties of England were the best inheritance to which Ireland could attain; the sovereignty of the English crown her only shield against native or foreign tyranny. It was her calamity that these advantages were long withheld; but the blame can never fall upon the government of this island.

In the contest between the houses of York and Lancaster, most of the English colony in Ireland had attached themselves to the fortunes of the White Rose; they even espoused the two pretenders, who put in jeopardy the crown of Henry VII.; and thus became of course obnoxious to his jealousy, though he was politic enough to forgive in appearance their disaffection. But, as Ireland had for a considerable

time rather served the purposes of rebellious invaders, than of the English monarchy, it was necessary to make her subjection, at least so far as the settlers of the pale were concerned, more than a word. This produced the famous statute of Drogheda, in 1495, known by the name of Poyning's law, from the lord deputy through whose vigour and prudence it was enacted. It contains a variety of provisions to restrain the lawlessness of the Anglo-Irish within the pale (for to no others could it immediately extend), and to confirm the royal sovereignty. All private hostilities without the deputy's licence were declared illegal; but to excite the Irish to war was made high treason. Murders were to be prosecuted according to law, and not in the manner of the natives, by pillaging, or exacting a fine from the sept of the slayer. The citizens or freemen of towns were prohibited from receiving wages or becoming retainers of lords and gentlemen; and, to prevent the ascendancy of the latter class, none who had not served apprenticeships were to be admitted as aldermen or freemen of corporations. The requisitions of coin and livery, which had subsisted in spite of the statutes of Kilkenny, were again forbidden, and those statutes were renewed and confirmed. The principal officers of state and the judges were to hold their patents during pleasure, "because of the great inconveniences that had followed from their being for term of life, to the king's grievous displeasure." A still more important provision, in its permanent consequence, was made, by enacting that all statutes lately made in England be deemed good and effectual in Ireland.* It has been remarked that the same had been done by an Irish act of Edward IV. Some question might also be made, whether the word "lately" was not intended to limit this acceptation of English law. But in effect this enactment has made an epoch in Irish jurispru-

Poyning's law.

* [It had been common to extend the operation of English statutes to Ireland, even when not particularly named, if the judges thought that the subject was sufficiently general to require it; as in the statute of Merchants, 13 E. 1.; the statute Westminster 2. the same year, and many others under Edw. II. and Edw. III. But in the reign of Richard III., a question was debated in the exchequer chamber, "Si villæ corporatæ in Hibernia et alii habitantes in Hibernia erunt ligati per statutum factum in Anglia." And this was resolved affirmatively by a majority of the English judges; though some differed. Usher in Collectanea Curiosa, p. 29.; citing Fitzherbert and Broke.—1845.]

dence; all statutes made in England prior to the eighteenth year of Henry VII. being held equally valid in Ireland, while none of later date have any operation, unless specially adopted by its parliament; so that the law of the two countries has begun to diverge from that time, and after three centuries has been in several respects differently modified.

But even these articles of Poyning's law are less momentous than one by which it is peculiarly known. It is enacted that no parliament shall in future be holden in Ireland, till the king's lieutenant shall certify to the king, under the great seal, the causes and considerations, and all such acts as it seems to them ought to be passed thereon, and such be affirmed by the king and his council, and his licence to hold a parliament be obtained. Any parliament holden contrary to this form and provision should be deemed void. Thus by securing the initiative power to the English council, a bridle was placed in the mouths of every Irish parliament. It is probable also that it was designed as a check on the lord-deputies, sometimes powerful Irish nobles, whom it was dangerous not to employ, but still more dangerous to trust. Whatever might be its motives, it proved in course of time the great means of preserving the subordination of an island, which, from the similarity of constitution, and the high spirit of its inhabitants, was constantly panting for an independence which her more powerful neighbour neither desired nor dared to concede.*

No subjects of the crown in Ireland enjoyed such influence at this time as the earls of Kildare; whose possessions lying chiefly within the pale, they did not affect an ostensible independence, but generally kept in their hands the chief authority of government, though it was the policy of the English court, in its state of weakness, to balance them in some measure by the rival family of Butler. But the self-confidence with which this exaltation inspired the chief of the former house laid him open to the vengeance of Henry VIII.; he affected, while lord-deputy, to be surrounded by Irish lords, to assume their wild manners, and to intermarry his daughters with their race. The coun-

Royal authority revives under Henry VIII.

* Irish Statutes. Davis, 230. Leland, ii. 102.

cillors of English birth or origin dreaded this suspicious approximation to their hereditary enemies; and Kildare, on their complaint, was compelled to obey his sovereign's order by repairing to London. He was committed to the Tower; on a premature report that he had suffered death, his son, a young man to whom he had delegated the administration, took up arms under the rash impulse of resentment; the primate was murdered by his wild followers, but the citizens of Dublin and the reinforcements sent from England suppressed this hasty rebellion, and its leader was sent a prisoner to London. Five of his uncles, some of them not concerned in the treason, perished with him on the scaffold; his father had been more fortunate in a natural death; one sole surviving child of twelve years old, who escaped to Flanders, became afterwards the stock from which the great family of the Geraldines was restored.*

The chieftains of Ireland were justly attentive to the stern and systematic despotism which began to characterise the English government, displayed, as it thus was, in the destruction of an ancient and loyal house. But their intimidation produced contrary effects; they became more ready to profess allegiance and to put on the exterior badges of submission; but more jealous of the crown in their hearts, more resolute to preserve their independence, and to withstand any change of laws. Thus, in the latter years of Henry, after the northern Irish had been beaten by an able deputy, lord Leonard Grey, and the lordship of Ireland, the title hitherto borne by the successors of Henry II., had been raised by act of parliament to the dignity of a kingdom†, the native chiefs came in and submitted; the earl of Desmond, almost as independent as any of the natives, attended parliament, from which his ancestors had for some ages claimed a dispensation; several peerages were conferred, some of them on the old Irish families; fresh laws were about the same time enacted to establish the English dress and language and to keep the colonists apart from Irish intercourse‡; and after a

* Leland.

† Irish Statutes, 33 H. 8. c. 1.

‡ Ibid. 28 H. 8. c. 15. 28. The latter act prohibits intermarriage or fostering with the Irish; which had indeed been previously restrained by other statutes. In one passed five years afterwards, it is recited that "the king's

disuse of two hundred years, the authority of government was nominally recognised throughout Munster and Connaught.* Yet we find that these provinces were still in nearly the same condition as before; the king's judges did not administer justice in them, the old Brehon usages continued to prevail even in the territories of the new peers, though their primogenitary succession was evidently incompatible with Irish tanistry. A rebellion of two septs in Leinster under Edward VI. led to a more complete reduction of their districts, called Leix and O'Fally, which in the next reign were made shireland, by the names of King's and Queen's county.† But, at the accession of Elizabeth, it was manifest that an arduous struggle would ensue between law and liberty; the one too nearly allied to cool-blooded oppression, the other to ferocious barbarism.

It may be presumed, as has been already said, from the analogy of other countries, that Ireland, if left to herself, would have settled in time under some one line of kings, and assumed, like Scotland, much of the feudal character, the best transitional state of a monarchy from rudeness and anarchy to civilization. And, if the right of female succession had been established, it might possibly have been united to the English crown on a juster footing, and with far less of oppression or bloodshed than actually took place. But it was too late to dream of what might have been: in the middle of the sixteenth century Ireland could have no reasonable prospect of independence; nor could that independence have been any other than the most savage liberty, perhaps another denomination of servitude. It was doubtless for the interest of

English subjects, by reason that they are inhabited in so little compass or circuit, and restrained by statute to marry with the Irish nation, and therefore of necessity must marry themselves together, so that in effect they all for the most part must be allied together; and therefore it is enacted, that consanguinity or affinity beyond the fourth degree shall be no cause of challenge on a jury." 33 H. 8. c. 4. These laws were for many years of little avail, so far at least as they were meant to extend beyond the pale. Spenser's State of Ireland, p. 384. et post

* Leland, ii. 178. 184.

† Leland, ii. 189. 211. 3 & 4 P. and M. c. 1. and 2. Meath had been divided into two shires, by separating the western part. 34 H. 8. c. 1. "Forasmuch as the shire of Methe is great and large in circuit, and the west part thereof laid about or beset with divers of the king's rebels." Baron Finglas says, "Half Meath has not obeyed the king's laws these one hundred years or more." Breviate of Ireland, apud Harris, p. 85.

that people to seek the English constitution, which, at least in theory, was entirely accorded to their country, and to press with spontaneous homage round the throne of Elizabeth. But this was not the interest of their ambitious chieftains, whether of Irish or English descent, of a Slanes O'Neil, an earl of Tyrone, an earl of Desmond. Their influence was irresistible among a nation ardently sensible to the attachments of clanship, averse to innovation, and accustomed to dread and hate a government that was chiefly known by its severities. But the unhappy alienation of Ireland from its allegiance in part of the queen's reign would probably not have been so complete, or at least led to such permanent mischiefs, if the ancient national animosities had not been exasperated by the still more invincible prejudices of religion.

Resistance of Irish to act of supremacy.

Henry VIII. had no sooner prevailed on the lords and commons of England to renounce their spiritual obedience to the Roman see, and to acknowledge his own supremacy, than, as a natural consequence, he proceeded to establish it in Ireland. In the former instance, many of his subjects, and even his clergy, were secretly attached to the principles of the reformation; as many others were jealous of ecclesiastical wealth, or eager to possess it. But in Ireland the reformers had made no progress; it had been among the effects of the pernicious separation of the two races, that the Irish priests had little intercourse with their bishops, who were nominated by the king, so that their synods are commonly recited to have been holden *inter Anglicos;* the bishops themselves were sometimes intruded by violence, more often dispossessed by it; a total ignorance and neglect prevailed in the church; and it is even found impossible to recover the succession of names in some sees.* In a nation so ill predisposed, it was difficult to bring about a compliance with the king's demand of abjuring their religion; ignorant, but not indifferent, the clergy, with Cromer the primate at their head, and most of the lords and commons, in a parliament held at Dublin in 1536, resisted the act of supremacy; which was nevertheless ultimately carried

* Leland, ii. 158.

by the force of government.* Its enemies continued to withstand the new schemes of reformation, more especially in the next reign, when they went altogether to subvert the ancient faith. As it appeared dangerous to summon a parliament, the English liturgy was ordered by a royal proclamation; but Dowdall, the new primate, as stubborn an adherent of the Romish church as his predecessor, with most of the other bishops and clergy, refused obedience; and the reformation was never legally established in the short reign of Edward.† His eldest sister's accession reversed of course what had been done, and restored tranquillity in ecclesiastical matters; for the protestants were too few to be worth persecution, nor were even those molested who fled to Ireland from the fires of Smithfield.

Another scene of revolution ensued in a very few years. Elizabeth, having fixed the protestant church on a stable basis in England, sent over the earl of Sussex to hold an Irish parliament in 1560. The disposition of such an assembly might be presumed hostile to the projected reformations; but, contrary to what had occurred on this side of the channel, though the peers were almost uniformly for the old religion, a large majority of the bishops are said to have veered round with the times, and supported, at least by conformity and acquiescence, the creed of the English court. In the house of commons, pains had been taken to secure a majority; ten only out of twenty counties, which had at that time been formed, received the writ of

Protestant church established by Elizabeth.

* [Leland, ii. 165. An act in this year, reciting that "proctors of the clergy have been used and accustomed to be summoned and warned to be at parliament, which were never by the order of the law, usage, custom, or otherwise, any member or parcel of the whole body of the parliament, nor have had of right any voice or suffrage in the same, but only to be there as councillors and assistants to the same," and proceeding to admit, that these proctors "have usually been privy and consulted about laws," asserts and enacts, that they have no right, as they "temerariously presume, and usurpedly take on themselves, to be parcel of the body, in manner claiming, that without their assents nothing can be enacted at any parliament within this land." Irish Statutes, 28 H. 8. c. 12. This is followed by c. 13., enacting the oath of supremacy; the refusal of which, by any person holding an office temporal or spiritual, is made treason. See Gilbert's Treatise of the Exchequer, p. 58., for the proctors of the clergy assisting in parliament.—1845.]

† [The famous Ball was made bishop of Ossory, and insisted on being consecrated according to the protestant form, though not established. He lived in a perpetual state of annoyance, brought on in great measure by his rash zeal. Leland, ii. 202. At the accession of Mary, those of the clergy who had taken wives were ejected, 207.—1845.]

summons; and the number of seventy-six representatives of the Anglo-Irish people was made up by the towns, many of them under the influence of the crown, some perhaps containing a mixture of protestant population. The English laws of supremacy and uniformity were enacted in nearly the same words; and thus the common prayer was at once set up instead of the mass, but with a singular reservation, that in those parts of the country where the minister had no knowledge of the English language, he might read the service in Latin. All subjects were bound to attend the public worship of the church, and every other was interdicted.*

There were doubtless three arguments in favour of this compulsory establishment of the protestant church, which must have appeared so conclusive to Elizabeth and her council, that no one in that age could have disputed them without incurring, among other hazards, that of being accounted a lover of unreasonable paradoxes. The first was, that the protestant religion being true, it was the queen's duty to take care that her subjects should follow no other; the second, that, being an absolute monarch, or something like it, and a very wise princess, she had a better right to order what doctrine they should believe, than they could have to choose for themselves; the third, that Ireland, being as a handmaid, and a conquered country, must wait, in all important matters, on the pleasure of the greater island, and be accommodated to its revolutions. And, as it was natural that the queen and her advisers should not reject maxims which all the rest of the world entertained, merely because they were advantageous to themselves, we need not perhaps be very acrimonious in censuring the laws whereon the church of Ireland is founded. But it is still equally true that they involve a principle essentially unjust, and that they have enormously aggravated, both in the age of Elizabeth and long afterwards, the calamities and the disaffection of Ireland. An ecclesiastical establishment, that is, the endowment and privileges of a particular religious society, can have no advantages (relatively at least to the community where it exists) but its tendency to promote in that community good order and virtue, religious

* Leland, 224. Irish Statutes, 2 Eliz.

knowledge and edification. But, to accomplish this end in any satisfactory manner, it must be their church, and not that merely of the government; it should exist for the people, and in the people, and with the people. This indeed is so manifest, that the government of Elizabeth never contemplated the separation of a great majority as licensed dissidents from the ordinances established for their instruction. It was undoubtedly presumed, as it was in England, that the church and commonwealth, according to Hooker's language, were to be two denominations of the same society; and that every man in Ireland who appertained to the one ought to embrace, and in due season would embrace, the communion of the other. There might be ignorance, there might be obstinacy, there might be feebleness of conscience for a time; and perhaps some connivance would be shown to these; but that the prejudices of a majority should ultimately prevail so as to determine the national faith, that it should even obtain a legitimate indulgence for its own mode of worship, was abominable before God, and incompatible with the sovereign authority.

This sort of reasoning, half bigotry, half despotism, was nowhere so preposterously displayed as in Ireland. The numerical majority is not always to be ascertained with certainty; and some regard may fairly, or rather necessarily, be had to rank, to knowledge, to concentration. But in that island, the disciples of the reformation were in the most inconsiderable proportion among the Anglo-Irish colony, as well as among the natives; their church was a government without subjects, a college of shepherds without sheep. I am persuaded that this was not intended nor expected to be a permanent condition; but such were the difficulties which the state of that unhappy nation presented, or such the negligence of its rulers, that scarce any pains were taken in the age of Elizabeth, nor indeed in subsequent ages, to win the people's conviction, or to eradicate their superstitions, except by penal statutes and the sword. The Irish language was universally spoken without the pale; it had even made great progress within it; the clergy were principally of that nation; yet no translation of the Scriptures, the chief means through which the reformation had been effected in England and Germany, nor even of the regular liturgy,

Effects of this measure.

was made into that tongue; nor was it possible, perhaps, that any popular instruction should be carried far in Elizabeth's reign, either by public authority, or by the ministrations of the reformed clergy. Yet neither among the Welsh nor the Scots Highlanders, though Celtic tribes, and not much better in civility of life at that time than the Irish, was the ancient religion long able to withstand the sedulous preachers of reformation.

Rebellions of her reign.

It is evident from the history of Elizabeth's reign, that the forcible dispossession of the catholic clergy, and their consequent activity in deluding a people too open at all times to their counsels, aggravated the rebellious spirit of the Irish, and rendered their obedience to the law more unattainable. But, even independently of this motive, the Desmonds and Tyrones would have tried, as they did, the chances of insurrection, rather than abdicate their unlicensed but ancient chieftainship. It must be admitted that, if they were faithless in promises of loyalty, the crown's representatives in Ireland set no good example; and, when they saw the spoliations of property by violence or pretext of law, the sudden executions on alleged treasons, the breaches of treaty, sometimes even the assassinations, by which a despotic policy went onward in its work of subjugation, they did but play the usual game of barbarians in opposing craft and perfidy, rather more gross perhaps and notorious, to the same engines of a dissembling government.* Yet if we can put any trust

* Leland gives several instances of breach of faith in the government. A little tract, called a Brief Declaration of the Government of Ireland, written by captain Lee, in 1594, and published in Desiderata Curiosa Hibernica, vol. i., censures the two last deputies (Grey and Fitzwilliams) for their ill usage of the Irish, and unfolds the despotic character of the English government. "The cause they (the lords of the north) have to stand upon those terms, and to seek for better assurance, is the harsh practices used against others, by those who have been placed in authority to protect men for your majesty's service, which they have greatly abused in this sort. They have drawn unto them by protection three or four hundred of the country people, under colour to do your majesty service, and brought them to a place of meeting, where your garrison soldiers were appointed to be, who have there most dishonourably put them all to the sword; and this hath been by the consent and practice of the lord deputy for the time being. If this be a good course to draw those savage people to the state to do your majesty service, and not rather to enforce them to stand on their guard, I leave to your majesty." P. 90. He goes on to enumerate more cases of hardship and tyranny; many being arraigned and convicted of treason on slight evidence; many assaulted and killed by the sheriffs on commissions of rebellion; others imprisoned and kept in irons; among others, a youth, the heir of a great

in our own testimonies, the great families were, by mismanagement and dissension, the curse of their vassals. Sir Henry Sidney represents to the queen, in 1567, the wretched condition of the southern and western counties in the vast territories of the earls of Ormond, Desmond, and Clanricarde.* "An unmeasurable tract," he says, "is now waste and uninhabited, which of late years was well tilled and pastured." "A more pleasant nor a more desolate land I never saw than from Youghall to Limerick."† "So far hath that policy, or rather lack of policy, in keeping dissension among them prevailed, as now, albeit all that are alive would become honest and live in quiet, yet are there not left alive in those two provinces the twentieth person necessary to inhabit the same."‡ Yet this was but the first scene of calamity. After the rebellion of the last earl of Desmond, the counties of Cork and Kerry, his ample patrimony, were so wasted by war and military executions, and famine and pestilence, that, according to a contemporary writer, who expresses the truth with hyperbolical energy, "the land itself, which before those wars was populous, well inhabited, and rich in all the good blessings of God, being plenteous of corn, full of cattle, well stored with fruit and sundry other good commodities, is now become waste and barren, yielding no fruits, the pastures no cattle, the fields no corn, the air no birds, the seas, though full of fish, yet to them yielding nothing. Finally, every

estate. He certainly praises Tyrone more than, from subsequent events, we should think just, which may be thought to throw some suspicion on his own loyalty; yet he seems to have been a protestant, and in 1594 the views of Tyrone were ambiguous, so that captain Lee may have been deceived.

* Sidney Papers, i. 20. [This is in a long report to the queen, which contains an interesting view of the state of the country during its transition from Irish to English law. Athenry, he says, had once 300 good householders, and, in his own recollection, twenty; who are reduced to four, and those poor. It had been mixed by the Clanricardes. But, "as touching all Leinster and Meath, I dare affirm on my credit unto your majesty, as well for the English pale, and the justice thereof, it was never in the memory of the oldest man that now liveth in greater quiet and obedience. — 1845.]

† Id. 24.

‡ Sidney Papers, i. 29. Spenser descants on the lawless violence of the superior Irish; and imputes, I believe, with much justice, a great part of their crimes to his own brethren, if they might claim so proud a title, the bards: "whomsoever they find to be most licentious of life, most bold and lawless in his doings, most dangerous and desperate in all parts of disobedience and rebellious disposition, him they set up and glorify in their rhymes, him they praise to the people, and to young men make an example to follow." P. 394.

way the curse of God was so great, and the land so barren both of man and beast, that whosoever did travel from the one end unto the other of all Munster, even from Waterford to the head of Limerick, which is about six-score miles, he should not meet any man, woman, or child, saving in towns and cities; nor yet see any beast but the very wolves, the foxes, and other like ravening beasts."* The severity of sir Arthur Grey, at this time deputy, was such that Elizabeth was assured he had left little for her to reign over but ashes and carcasses; and, though not by any means of too indulgent a nature, she was induced to recall him.† His successor, sir John Perrott, who held the viceroyalty only from 1584 to 1587, was distinguished for a sense of humanity and justice, together with an active zeal for the enforcement of law. Sheriffs were now appointed for the five counties into which Connaught had some years before been parcelled; and even for Ulster, all of which, except Antrim and Down, had hitherto been undivided, as well as ungoverned.‡ Yet even this apparently wholesome innovation aggravated at first the servitude of the natives, whom the new sheriffs were prone to oppress.§ Perrott, the best of Irish governors, soon fell a sacrifice to a court intrigue and the queen's jealousy; and the remainder of her reign was occupied with almost unceasing revolts of the earl of Tyrone, head of the great sect of O'Neil in Ulster, instigated by Rome and Spain, and endangering,

* Holingshed, 460.

† Leland, 287. Spenser's Account of Ireland, p. 430. (vol. viii. of Todd's edition, 1805). Grey is the Arthegal of the Faery Queen, the representative of the virtue of justice in that allegory, attended by Talus with his iron flail, which indeed was unsparingly employed to crush rebellion. Grey's severity was signalised in putting to death seven hundred Spaniards who had surrendered at discretion in the fort of Smerwick. Though this might be justified by the strict laws of war (Philip not being a declared enemy), it was one of those extremities which justly revolt the common feelings of mankind. The queen is said to have been much displeased at it. Leland, 283. Spenser undertakes the defence of his patron Grey. State of Ireland, p. 434.

‡ Leland, 247. 293. An act had passed, 11 Eliz. c. 9., for dividing the whole island into shire-ground, appointing sheriffs, justices of the peace, &c.; which however was not completed till the time of sir John Perrott. Holingshed. P. 457.

§ Leland, 305. Their conduct provoked an insurrection both in Connaught and Ulster. Spenser, who shows always a bias towards the most rigorous policy, does injustice to Perrott. "He did tread down and disgrace all the English, and set up and countenance the Irish all that he could." P. 437. This has in all ages been the language, when they have been placed on an equality, or any thing approaching to an equality, with their fellow-subjects.

far more than any preceding rebellion, her sovereignty over Ireland.

The old English of the pale were little more disposed to embrace the reformed religion, or to acknowledge the despotic principles of a Tudor administration, than the Irish themselves; and though they did not join the rebellions of those they so much hated, the queen's deputies had sometimes to encounter a more legal resistance. A new race of colonists had begun to appear in their train, eager for possessions, and for the rewards of the crown, contemptuous of the natives, whether aboriginal or of English descent, and in consequence the objects of their aversion or jealousy.* Hence in a parliament summoned by sir Henry Sidney in 1569, the first after that which had reluctantly established the protestant church, a strong country party, as it may be termed, was formed in opposition to the crown. They complained with much justice of the management by which irregular returns of members had been made; some from towns not incorporated, and which had never possessed the elective right; some self-chosen sheriffs and magistrates; some mere English strangers, returned for places which they had never seen. The judges, on reference to their opinion, declared the elections illegal in the two former cases: but confirmed the non-resident burgesses, which still left a majority for the court.

Opposition in parliament.

The Irish patriots, after this preliminary discussion, opposed a new tax upon wines, and a bill for the suspension of Poyning's law. Hooker, an Englishman, chosen for Athenry, to whose account we are chiefly indebted for our knowledge of these proceedings, sustained the former in that high tone of a prerogative lawyer which always best pleased his mistress. "Her majesty," he said, "of her own royal authority, might and may establish the same without any of your consents, as she hath already done the like in England; saving of her courtesy, it pleaseth her to have it pass with your own consents by order of law, that she might thereby have the better trial and assurance of your dutifulness and good-will towards her." This language from a stranger, unusual among a people proud of their birthright in the common constitution, and little

* Leland, 248.

accustomed even to legitimate obedience, raised such a flame that the house was adjourned; and it was necessary to protect the utterer of such doctrines by a guard. The duty on wines, laid aside for the time, was carried in a subsequent session in the same year; and several other statutes were enacted, which, as they did not affect the pale, may possibly have encountered no opposition. A part of Ulster, forfeited by Slanes O'Neil, a rebel almost as formidable in the first years of this reign as his kinsman Tyrone was near its conclusion, was vested in the crown; and some provisions were made for the reduction of the whole island into shires. Connaught, in consequence, which had passed for one county, was divided into five.*

Arbitrary proceedings of sir Henry Sidney.

In sir Henry Sidney's second government, which began in 1576, the pale was excited to a more strenuous resistance, by an attempt to subvert their liberties. It had long been usual to obtain a sum of money for the maintenance of the household and of the troops by an assessment settled between the council and principal inhabitants of each district. This, it was contended by the government, was instead of the contribution of victuals which the queen, by her prerogative of purveyance, might claim at a fixed rate, much lower than the current price.† It was maintained on the other side to be a voluntary benevolence. Sidney now devised a plan to change it for a cess or permanent composition for every plough-land, without regard to those which claimed exemption from the burden of purveyance; and imposed this new tax by order of council, as sufficiently warrantable by the royal prerogative. The landowners of the pale remonstrated against such a violation of their franchises, and were met by the usual arguments. They appealed to the text of the laws; the deputy replied by precedents against law. "Her majesty's prerogative," he said, "is not limited by Magna Charta, nor found in Littleton's Tenures, nor written in the books of Assizes, but registered in the remembrances of her majesty's exchequer, and remains in the rolls of records of the Tower."‡ It was

* Holingshed's Chronicles of Ireland, 342. This part is written by Hooker himself. Leland, 240. Irish Statutes, 11 Eliz.

† Sidney Papers, i. 153.

‡ Id. 179.

proved, according to him, by the most ancient and credible records in the realm, that such charges had been imposed from time to time, sometimes by the name of cess, sometimes by other names, and more often by the governor and council, with such of the nobility as came on summons, than by parliament. These irregularities did not satisfy the gentry of the pale, who refused compliance with the demand, and still alleged that it was contrary both to reason and law to impose any charge upon them without parliament or grand council. A deputation was sent to England in the name of all the subjects of the English pale. Sidney was not backward in representing their behaviour as the effect of disaffection; nor was Elizabeth likely to recede, where both her authority and her revenue were apparently concerned. But, after some demonstrations of resentment in committing the delegates to the Tower, she took alarm at the clamours of their countrymen; and, aware that the king of Spain was ready to throw troops into Ireland, desisted with that prudence which always kept her passion in command, accepting a voluntary composition for seven years in the accustomed manner.*

James I. ascended the throne with as great advantages in Ireland as in his other kingdoms. That island was already pacified by the submission of Tyrone; and all was prepared for a final establishment of the English power upon the basis of equal laws and civilized customs; a reformation which in some respects the king was not ill fitted to introduce. His reign is perhaps on the whole the most important in the constitutional history of Ireland, and that

James I.

* Sidney Papers, 84. 117, &c. to 236. Holingshed, 389. Leland, 261. Sidney was much disappointed at the queen's want of firmness; but it was plain by the correspondence that Walsingham also thought he had gone too far. P. 192. The sum required seems to have been reasonable, about 2000*l.* a year from the five shires of the pale; and, if they had not been stubborn, he thought all Munster also, except the Desmond territories, would have submitted to the payment. (P. 183.) "I have great cause," he writes, "to mistrust the fidelity of the greatest number of the people of this country's birth of all degrees; they be papists, as I may well term them, body and soul. For not only in matter of religion they be Romish, but for government they will change, to be under a prince of their own superstition. Since your highness' reign the papists never showed such boldness as now they do." P. 184. This however hardly tallies with what he says afterwards, p. 208.: "I do believe, for far the greatest number of the inhabitants of the English pale, her highness hath as true and faithful subjects as any she hath subject to the crown;" unless the former passage refer chiefly to those without the pale, who in fact were exclusively concerned in the rebellions of this reign.

from which the present scheme of society in that country is chiefly to be deduced.

1. The laws of supremacy and uniformity, copied from those of England, were incompatible with any exercise of the Roman catholic worship, or with the admission of any members of that church into civil trust. It appears indeed that they were by no means strictly executed during the queen's reign* ; yet the priests were of course excluded, so far as the English authority prevailed, from their churches and benefices; the former were chiefly ruined; the latter fell to protestant strangers, or to conforming ministers of native birth, dissolute and ignorant, as careless to teach as the people were predetermined not to listen.† The priests, many of them, engaged

* Leland, ii. 381.

† "The church is now so spoiled," says sir Henry Sidney in 1576, "as well by the ruin of the temples, as the dissipation and embezzling of the patrimony, and most of all for want of sufficient ministers, as so deformed and overthrown a church there is not, I am sure, in any region where Christ is professed." Sidney Papers, i. 109. In the diocese of Meath, being the best inhabited country of all the realm, out of 224 parish churches, 105 were impropriate, having only curates, of whom but eighteen could speak English, the rest being "Irish rogues, who used to be papists," fifty-two other churches had vicars, and fifty-two more were in better state than the rest, yet far from well. Id. 112. Spenser gives a bad character of the protestant clergy, p. 412. [It was chiefly on this account, that the university of Dublin was founded in 1591. Leland, ii. 319.—1845.]

An act was passed, 12 Eliz. c. 1., for erecting free schools in every diocese, under English masters; the ordinary paying one third of the salary, and the clergy the rest. This however must have been nearly impracticable. Another act, 13 Eliz. c. 4., enables the archbishop of Armagh to grant leases of his lands out of the pale for a hundred years without assent of the dean and chapter, to persons of English birth, "or of the English and civil nation, born in this realm of Ireland," at the rent of 4*d.* an acre. It recites the chapter to be "except a very few of them, both by nation, education, and custom, Irish, Irishly affectioned, and small hopes of their conformities or assent unto any such devices as would tend to the placing of any such number of civil people there, to the disadvantage or bridling of the Irish." In these northern parts, the English and protestant interests had so little influence that the pope conferred three bishopries, Derry, Clogher, and Raphoe, throughout the reign of Elizabeth. Davis, 254. Leland, ii. 248. What is more remarkable is, that two of these prelates were summoned to parliament in 1585. Id. 295.; the first in which some Irish were returned among the commons.

The reputation of the protestant church continued to be little better in the reign of Charles I., though its revenues were much improved. Strafford gives the clergy a very bad character in writing to Laud. Vol. i. 187. And Burnet's Life of Bedell, transcribed chiefly from a contemporary memoir, gives a detailed account of that bishop's diocese (Kilmore), which will take off any surprise that might be felt at the slow progress of the reformation. He had about fifteen protestant clergy, but all English, unable to speak the tongue of the people, or to perform any divine offices, or converse with them, "which is no small cause of the continuance of the people in popery still." P. 47. The bishop observed, says his biographer, "with much regret, that the English had all along neglected the Irish as a nation, not only conquered but undisciplinable; and that the clergy had scarce considered them as a part of their

in a conspiracy with the court of Spain against the queen and her successor, and all deeming themselves unjustly and sacrilegiously despoiled, kept up the spirit of disaffection, or at least of resistance to religious innovation, throughout the kingdom.* The accession of James seemed a sort of signal for casting off the yoke of heresy; in Cork, Waterford, and other cities, the people, not without consent of the magistrates, rose to restore the catholic worship; they seized the churches, ejected the ministers, marched in public processions, and shut their gates against the lord deputy. He soon reduced them to obedience; but almost the whole nation was of the same faith, and disposed to struggle for a public toleration. This was beyond every question their natural right, and as certainly was it the best policy of England to have granted it; but the king-craft and the priest-craft of the day taught other lessons. Priests were ordered by proclamation to quit the realm; the magistrates and chief citizens of Dublin were committed to prison for refusing to frequent the protestant church. The gentry of the pale remonstrated at the court of Westminster; and, though their delegates atoned for their self-devoted courage by imprisonment, the secret menace of expostulation seems to have produced, as usual, some effect, in a direction to the lord deputy that he should endeavour to conciliate the recusants by instruction. These penalties of recusancy, from whatever cause, were very little enforced, but the catholics murmured at the oath of supremacy, which shut them out from every distinction: though here again the execution of the law was sometimes mitigated, they justly thought themselves humiliated, and the liberties of their country endangered, by standing thus at the mercy of the crown. And it is plain that even within the pale,

Laws against catholics enforced.

charge; but had left them wholly into the hands of their own priests, without taking any other care of them but the making them pay their tithes. And indeed their priests were a strange sort of people, that knew generally nothing but the reading their offices, which were not so much as understood by many of them; and they taught the people nothing but the saying their paters and aves in Latin." P. 114. Bedell took the pains to learn himself the Irish language; and though he could not speak it, composed the first grammar ever made of it, had the common prayer read every Sunday in Irish, circulated catechisms, engaged the clergy to set up schools, and even undertook a translation of the Old Testament, which he would have published, but for the opposition of Laud and Strafford. P. 121.

* Leland, 413.

the compulsory statutes were at least far better enforced than under the queen; while in those provinces within which the law now first began to have its course, the difference was still more acutely perceived.*

English law established throughout Ireland.

2. The first care of the new administration was to perfect the reduction of Ireland into a civilized kingdom. Sheriffs were appointed throughout Ulster; the territorial divisions of counties and baronies were extended to the few districts that still wanted them; the judges of assize went their circuits every where; the customs of tanistry and gavelkind were determined by the court of king's bench to be void; the Irish lords surrendered their estates to the crown, and received them back by the English tenures of knight-service or soccage; an exact account was taken of the lands each of these chieftains possessed, that he might be invested with none but those he occupied; while his tenants, exempted from those uncertain Irish exactions, the source of their servitude and misery, were obliged only to an annual quit-rent, and held their own lands by a free tenure. The king's writ was obeyed, at least in profession, throughout Ireland; after four centuries of lawlessness and misgovernment, a golden period was anticipated by the English courtiers, nor can we hesitate to recognise the influence of enlightened, and sometimes of benevolent minds, in the scheme of government now carried into effect.† But two unhappy maxims

* Leland, 414, &c. In a letter from six catholic lords of the pale to the king in 1613, published in Desiderata Curiosa Hibernica, i. 158., they complain of the oath of supremacy, which, they say, had not been much imposed under the queen, but was now for the first time enforced in the remote parts of the country; so that the most sufficient gentry were excluded from magistracy, and meaner persons, if conformable, put instead. It is said on the other side, that the laws against recusants were very little enforced, from the difficulty of getting juries to present them. Id. 359. Carte's Ormond, 33. But this at least shows that there was some disposition to molest the catholics on the part of the government; and it is admitted that they were excluded from offices, and even from practising at the bar, on account of the oath of supremacy. Id. 320.; and compare the letter of six catholic lords, with the answer of lord deputy and council in the same volume.

† Davis's Reports, ubi supra. Discovery of Causes, &c. 260. Carte's Life of Ormond, i. 14. Leland, 418. It had long been an object with the English government to extinguish the Irish tenures and laws. Some steps towards it were taken under Henry VIII.; but at that time there was too great a repugnance among the chieftains. In Elizabeth's instructions to the earl of Sussex on taking the government in 1560, it is recommended that the Irish should surrender their estates, and receive grants in tail male, but no greater estate. Desiderata Curiosa Hibernica, i. 1. This would have left a reversion in the crown, which could not have been cut off by suffering

debased their motives, and discredited their policy; the first, that none but the true religion, or the state's religion, could be suffered to exist in the eye of the law; the second, that no pretext could be too harsh or iniquitous to exclude men of a different race or erroneous faith from their possessions.

3. The suppression of Slanes O'Neil's revolt in 1567 seems to have suggested the thought, or afforded the means, of perfecting the conquest of Ireland by the same methods that had been used to commence it, an extensive plantation of English colonists. The law of forfeiture came in very conveniently to further this great scheme of policy. O'Neil was attainted in the parliament of 1569; the territories which acknowledged him as chieftain, comprising a large part of Down and Antrim, were vested in the crown; and a natural son of sir Thomas Smith, secretary of state, who is said to have projected this settlement, was sent with a body of English to take possession of the lands thus presumed in law to be vacant. This expedition however failed of success; the native occupants not acquiescing in this doctrine of our lawyers.* But fresh adventurers settled in different parts of Ireland; and particularly after the earl of Desmond's rebellion in 1583, whose forfeiture was reckoned at 574,628 Irish acres, though it seems probable that this is more than double the actual confiscation.† These lands in the counties of Cork and Kerry, left almost desolate by the oppression of the Geraldines themselves, and the far greater cruelty of the government in subduing them, were parcelled out among English undertakers at low rents, but on condition of planting

Settlements of English in Munster, Ulster, and other parts.

a recovery. But as those who held by Irish tenure had probably no right to alienate their lands, they had little cause to complain. An act in 1569, 12 Eliz. c. 4., reciting the greater part of the Irish to have petitioned for leave to surrender their lands, authorises the deputy, by advice of the privy council, to grant letters patent to the Irish and degenerate English, yielding certain reservations to the queen. Sidney mentions, in several of his letters, that the Irish were ready to surrender their lands. Vol. i. 94. 105. 165.

The act 11 Jac. 1. c. 5. repeals divers statutes that treat the Irish as enemies, some of which have been mentioned above. It makes all the king's subjects under his protection to live by the same law. Some vestiges of the old distinctions remained in the statute-book, and were eradicated in Strafford's parliament. 10 & 11 Car. 1. c. 6.

* Leland, ii. 254.

† See a note in Leland, ii. 302. The truth seems to be, that in this, as in other Irish forfeitures, a large part was restored to the tenants of the attainted parties.

eighty-six families on an estate of 12,000 acres; and in like proportion for smaller possessions. None of the native Irish were to be admitted as tenants; but neither this nor the other conditions were strictly observed by the undertakers, and the colony suffered alike by their rapacity and their neglect.* The oldest of the second race of English families in Ireland are found among the descendants of these Munster colonists. We find among them also some distinguished names, that have left no memorial in their posterity; sir Walter Raleigh, who here laid the foundation of his transitory success, and one not less in glory, and hardly less in misfortune, Edmund Spenser. In a country house once belonging to the Desmonds, on the banks of the Mulla, near Doneraile, the first three books of the Faery Queen were written; and here too the poet awoke to the sad realities of life, and has left us, in his Account of the State of Ireland, the most full and authentic document that illustrates its condition. This treatise abounds with judicious observations; but we regret the disposition to recommend an extreme severity in dealing with the native Irish, which ill becomes the sweetness of his muse.

The two great native chieftains of the north, the earls of Tyrone and Tyrconnel, a few years after the king's accession, engaged, or were charged with having engaged, in some new conspiracy, and flying from justice, were attainted of treason. Five hundred thousand acres in Ulster were thus forfeited to the crown; and on this was laid the foundation of that great colony, which has rendered that province, from being the seat of the wildest natives, the most flourishing, the most protestant, and the most enlightened part of Ireland. This plantation, though projected no doubt by the king and by lord Bacon, was chiefly carried into effect by the lord deputy, sir Arthur Chichester, a man of great capacity, judgment, and prudence. He caused surveys to be taken of the several counties, fixed upon proper places for building castles or founding towns, and advised that the lands should be assigned; partly to English or Scots undertakers, partly to servitors of the crown, as they were called, men who had

* Leland, ii. 301.

possessed civil or military offices in Ireland, partly to the old Irish, even some of those who had been concerned in Tyrone's rebellion. These and their tenants were exempted from the oath of supremacy imposed on the new planters. From a sense of the error committed in the queen's time by granting vast tracts to single persons, the lands were distributed in three classes, of 2000, 1500, and 1000 English acres; and in every county one half of the assignments was to the smallest, the rest to the other two classes. Those who received 2000 acres were bound within four years to build a castle and bawn, or strong court-yard; the second class within two years to build a stone or brick house with a bawn; the third class a bawn only. The first were to plant on their lands within three years forty-eight able men, eighteen years old or upwards, born in England or the inland parts of Scotland; the others to do the same in proportion to their estates. All the grantees were to reside within five years, in person or by approved agents, and to keep sufficient store of arms; they were not to alienate their lands without the king's licence, nor to let them for less than twenty-one years; their tenants were to live in houses built in the English manner, and not dispersed, but in villages. The natives held their lands by the same conditions, except that of building fortified houses; but they were bound to take no Irish exactions from their tenants, nor to suffer the practice of wandering with their cattle from place to place. In this manner were these escheated lands of Ulster divided among a hundred and four English and Scots undertakers, fifty-six servitors, and two hundred and eighty-six natives. All lands which through the late anarchy and change of religion had been lost to the church were restored; and some further provision was made for the beneficed clergy. Chichester, as was just, received an allotment in a far ampler measure than the common servants of the crown.*

This noble design was not altogether completed according

* Carte's Life of Ormond, i. 15. Leland, 429. Farmer's Chronicle of sir Arthur Chichester's government in Desiderata Curiosa Hibernica, i. 32.; an important and interesting narrative; also vol. ii. of the same collection, 37. Bacon's Works, i. 657.

to the platform. The native Irish, to whom some regard was shown by these regulations, were less equitably dealt with by the colonists, and by those other adventurers whom England continually sent forth to enrich themselves and maintain her sovereignty. Pretexts were sought to establish the crown's title over the possessions of the Irish; they were assailed through a law which they had but just adopted, and of which they knew nothing, by the claims of a litigious and encroaching prerogative, against which no prescription could avail, nor any plea of fairness and equity obtain favour in the sight of English-born judges. Thus, in the King's and Queen's counties, and in those of Leitrim, Longford, and Westmeath, 385,000 acres were adjudged to the crown, and 66,000 in that of Wicklow. The greater part was indeed regranted to the native owners on a permanent tenure; and some apology might be found for this harsh act of power in the means it gave of civilising those central regions, always the shelter of rebels and robbers; yet this did not take off the sense of forcible spoliation, which every foreign tyranny renders so intolerable. Surrenders were extorted by menaces; juries refusing to find the crown's title were fined by the council; many were dispossessed without any compensation, and sometimes by gross perjury, sometimes by barbarous cruelty. It is said that in the county of Longford the Irish had scarcely one third of their former possessions assigned to them, out of three fourths which had been intended by the king. Those who had been most faithful, those even who had conformed to the protestant church, were little better treated than the rest. Hence, though in many new plantations great signs of improvement were perceptible, though trade and tillage increased, and towns were built, a secret rankling for those injuries was at the heart of Ireland; and in these two leading grievances, the penal laws against recusants, and the inquisition into defective titles, we trace, beyond a shadow of doubt, the primary source of the rebellion in 1641.*

Injustice attending them.

* Leland, 437. 466. Carte's Ormond, 22. Desiderata Curiosa Hibernica, 238. 243. 378., et alibi, ii. 37. et post. In another treatise published in this collection, entitled a Discourse on the State of Ireland, 1614, an approaching rebellion

4. Before the reign of James, Ireland had been regarded either as a conquered country, or as a mere colony of English, according to the persons or the provinces which were in question. The whole island now took a common character, that of a subordinate kingdom, inseparable from the English crown, and dependent also, at least as was taken for granted by our lawyers, on the English legislature; but governed after the model of our constitution, by nearly the same laws, and claiming entirely the same liberties. It was a natural consequence, that an Irish parliament should represent, or affect to represent, every part of the kingdom. None of Irish blood had ever sat, either lords or commoners, till near the end of Henry VIII.'s reign. The representation of the twelve counties, into which Munster and part of Leinster were divided, and of a few towns, which existed in the reign of Edward III., if not later, was reduced by the defection of so many English families to the limits of the four shires of the pale.* The old counties, when they returned to their allegiance under Henry VIII., and those afterwards formed by Mary and Elizabeth, increased the number of the commons: though in that of 1567, as has been mentioned, the writs for some of them were arbitrarily withheld. The two queens did not neglect to create new

Constitution of Irish Parliament.

is remarkably predicted. "The next rebellion, whensoever it shall happen, doth threaten more danger to the state than any that hath preceded; and my reasons are these: 1. They have the same bodies they ever had; and therein they have and had advantage over us. 2. From their infancies they have been and are exercised in the use of arms. 3. The realm, by reason of long peace, was never so full of youth as at this present. 4. That they are better soldiers than heretofore, their continual employments in the wars abroad assure us; and they do conceive that their men are better than ours. 5. That they are more politic, and able to manage rebellion with more judgment and dexterity than their elders, their experience and education are sufficient. 6. They will give the first blow; which is very advantageous to them that will give it. 7. The quarrel for which they rebel will be under the veil of religion and liberty, than which nothing is esteemed so precious in the hearts of men. 8. And lastly, their union is such, as not only the old English dispersed abroad in all parts of the realm, but the inhabitants of the pale cities and towns, are as apt to take arms against us, which no precedent time hath ever seen, as the ancient Irish." Vol. i. 432. "I think that little doubt is to be made, but that the modern English and Scotch would in an instant be massacred in their houses." P. 438. This rebellion the author expected to be brought about by a league with Spain, and with aid from France.

* The famous parliament of Kilkenny, in 1367, is said to have been very numerously attended. Leland, i. 319. We find indeed an act, 10 H. 7. c. 23., annulling what was done in a preceding parliament, for this reason, among others, that the writs had not been sent to all the shires, but to four only. Yet it appears that the writs would not have been obeyed in that age.

boroughs, in order to balance the more independent representatives of the old Anglo-Irish families by the English retainers of the court. Yet it is said that in seventeen counties out of thirty-two, into which Ireland was finally parcelled, there was no town that returned burgesses to parliament before the reign of James I., and the whole number in the rest was but about thirty.* He created at once forty new boroughs, or possibly rather more; for the number of the commons, in 1613, appears to have been 232.† It was several times afterwards augmented, and reached its complement of 300 in 1692.‡ These grants of the elective franchise were made, not indeed improvidently, but with very sinister intents towards the freedom of parliament; two thirds of an Irish house of commons, as it stood in the eighteenth century, being returned with the mere farce of election by wretched tenants of the aristocracy.

The province of Connaught, with the adjoining county of Clare, was still free from the intrusion of English colonists. The Irish had complied, both under Elizabeth and James, with the usual conditions of surrendering their estates to the crown in order to receive them back by a legal tenure. But, as these grants, by some negligence, had not been duly enrolled in Chancery (though the proprietors had paid large fees for that security), the council were not ashamed to suggest, or the king to adopt, an iniquitous scheme of declaring the whole country forfeited, in order to form another plantation as extensive as that of Ulster. The remonstrances of

* Speech of sir John Davis (1612), on the parliamentary constitution of Ireland, in Appendix to Leland, vol. ii. p. 490., with the latter's observations on it. Carte's Ormond, i. 18. Lord Mountmorres's Hist. of Irish Parliament.

† In the letter of the lords of the pale to king James above mentioned, they express their apprehension that the erecting so many insignificant places to the rank of boroughs was with the view of bringing on fresh penal laws in religion; "and so the general scope and institution of parliament frustrated; they being ordained for the assurance of the subjects not to be pressed with any new edicts or laws, but such as should pass with their general consents and approbations." P. 158. The king's mode of replying to this constitutional language was characteristic. "What is it to you whether I make many or few boroughs? My council may consider the fitness, if I require it. But what if I had created 40 noblemen and 400 boroughs? The more the merrier, the fewer the better cheer." Desid. Cur. Hib. 308.

‡ Mountmorres, i. 166. The whole number of peers in 1634 was 122, and those present in parliament that year were 66. They had the privilege not only of voting, but even protesting by proxy; and those who sent none were sometimes fined. Id. vol. i. 316.

those whom such a project threatened put a present stop to it; and Charles, on ascending the throne, found it better to hear the proposals of his Irish subjects for a composition. After some time it was agreed between the court and the Irish agents in London, that the kingdom should voluntarily contribute 120,000*l.* in three years by equal payments, in return for certain graces, as they were called, which the king was to bestow. These went to secure the subject's title to his lands against the crown after sixty years' possession, and gave the people of Connaught leave to enrol their grants, relieving also the settlers in Ulster or other places from the penalties they had incurred by similar neglect. The abuses of the council-chamber in meddling with private causes, the oppression of the court of wards, the encroachments of military authority, and excesses of the soldiers were restrained. A free trade with the king's dominions or those of friendly powers was admitted. The recusants were allowed to sue for livery of their estates in the court of wards, and to practise in courts of law, on taking an oath of mere allegiance instead of that of supremacy. Unlawful exactions and severities of the clergy were prohibited. These reformations of unquestionable and intolerable evils, as beneficial as those contained nearly at the same moment in the Petition of Right, would have saved Ireland long ages of calamity, if they had been as faithfully completed as they seemed to be graciously conceded. But Charles I. emulated, on this occasion, the most perfidious tyrants. It had been promised by an article in these graces, that a parliament should be held to confirm them. Writs of summons were accordingly issued by the lord deputy; but with no consideration of that fundamental rule established by Poyning's law, that no parliament should be held in Ireland until the king's licence be obtained. This irregularity was of course discovered in England, and the writs of summons declared to be void. It would have been easy to remedy this mistake, if such it were, by proceeding in the regular course with a royal licence. But this was withheld; no parliament was called for a considerable time; and, when the three years had elapsed during which the voluntary contribution had been

Charles I. promises graces to the Irish.

Does not confirm them.

payable, the king threatened to straiten his graces, if it were not renewed.*

Administration of Strafford.

He had now placed in the vice-royalty of Ireland that star of exceeding brightness, but sinister influence, the willing and able instrument of despotic power, lord Strafford. In his eyes the country he governed belonged to the crown by right of conquest; neither the original natives, nor even the descendants of the conquerors themselves, possessing any privileges which could interfere with its sovereignty. He found two parties extremely jealous of each other, yet each loth to recognise an absolute prerogative, and thus in some measure having a common cause. The protestants, not a little from bigotry, but far more from a persuasion that they held their estates on the tenure of a rigid religious monopoly, could not endure to hear of a toleration of popery, which, though originally demanded, was not even mentioned in the king's graces; and disapproved the indulgence shown by those graces to recusants, which is said to have been followed by an impolitic ostentation of the Romish worship.† They objected to a renewal of the contribution, both as the price of this dangerous tolerance of recusancy, and as debarring the protestant subjects of their constitutional right to grant money only in parliament. Wentworth, however, insisted upon its payment for another year, at the expiration of which a parliament was to be called.‡

* Carte's Ormond, i. 48. Leland, ii. 475. et post.

† Leland, iii. 4. et post. A vehement protestation of the bishops about this time, with Usher at their head, against any connivance at popery, is a disgrace to their memory. It is to be met with in many books. Strafford, however, was far from any real liberality of sentiment. His abstinence from religious persecution was intended to be temporary, as the motives whereon it was founded. "It will be ever far forth of my heart to conceive that a conformity in religion is not above all other things principally to be intended. For undoubtedly till we be brought all under one form of divine service the crown is never safe on this side, &c. It were too much at once to distemper them by bringing plantations upon them, and disturbing them in the exercise of their religion, so long as it be without scandal; and so indeed very inconsiderate, as I conceive, to move in this latter, till that former be fully settled, and by that means the protestant party become by much the stronger, which in truth I do not yet conceive it to be." Straff. Letters, ii. 39. He says, however, and I believe truly, that no man had been touched for conscience-sake since he was deputy. Id. 112. Every parish, as we find by Bedell's Life, had its priest and mass-house; in some places mass was said in the churches; the Romish bishops exercised their jurisdiction, which was fully obeyed; but "the priests were grossly ignorant and openly scandalous, both for drunkenness and all sort of lewdness." P. 41. 76. More than ten to one in his diocese, the county of Cavan, were recusants.

‡ Some of the council-board having in-

The king did not come without reluctance into this last measure, hating, as he did, the very name of parliament; but the lord deputy confided in his own energy to make it innoxious and serviceable. They conspired together how to extort the most from Ireland, and concede the least; Charles, in truth, showing a most selfish indifference to any thing but his own revenue, and a most dishonourable unfaithfulness to his word.* The parliament met in 1634, with a strong desire of insisting on the confirmation of the graces they had already paid for; but Wentworth had so balanced the protestant and recusant parties, employed so skilfully the resources of fair promises and intimidation, that he procured six subsidies to be granted before a prorogation, without any mutual concession from the crown.† It had been agreed that a second session should be held for confirming the graces; but in this, as might be expected, the supplies having been provided, the request of both houses that they might receive

timated a doubt of their authority to bind the kingdom, "I was then put to my last refuge, which was plainly to declare that there was no necessity which induced me to take them to counsel in this business, for rather than fail in so necessary a duty to my master, I would undertake, upon the peril of my head, to make the king's army able to subsist, and to provide for itself amongst them, without their help." Strafford Letters, i. 98.

* Id. i. 183. Carte, 61.

† The protestants, he wrote word, had a majority of eight in the commons. He told them, "it was very indifferent to him what resolution the house might take; that there were two ends he had in view, and one he would infallibly attain,—either a submission of the people to his majesty's just demands, or a just occasion of breach, and either would content the king; the first was undeniably and evidently best for them." Id. 277, 278. In his speech to the two houses, he said, "His majesty expects not to find you muttering, or to name it more truly, mutinying in corners. I am commanded to carry a very watchful eye over these private and secret conventicles, to punish the transgression with a heavy and severe hand; therefore it behoves you to look to it." Id. 289. "Finally," he concludes, "I wish you had a right judgment in all things; yet let me not prove a Cassandra amongst you, to speak truth and not be believed. However, speak truth I will, were I to become your enemy for it. Remember therefore that I tell you, you may easily make or mar this parliament. If you proceed with respect, without laying clogs and conditions upon the king, as wise men and good subjects ought to do, you shall infallibly set up this parliament eminent to posterity, as the very basis and foundation of the greatest happiness and prosperity that ever befell this nation. But, if you meet a great king with narrow circumscribed hearts, if you will needs be wise and cautious above the moon [sic], remember again that I tell you, you shall never be able to cast your mists before the eyes of a discerning king; you shall be found out; your sons shall wish they had been the children of more believing parents; and in a time when you look not for it, when it will be too late for you to help, the sad repentance of an unadvised heart shall be yours, lasting honour shall be my master's."

These subsidies were reckoned at near 41,000*l.* each, and were thus apportioned: Leinster paid 13,000*l.* (of which 1000*l.* from the city of Dublin), Munster 11,000*l.*, Ulster 10,000*l.*, Connaught 6,800*l.* Mountmorres, ii. 16.

the stipulated reward met with a cold reception; and ultimately the most essential articles, those establishing a sixty years' prescription against the crown, and securing the titles of proprietors in Clare and Connaught, as well as those which relieved the catholics in the court of wards from the oath of supremacy, were laid aside. Statutes, on the other hand, were borrowed from England, especially that of uses, which cut off the methods they had hitherto employed for evading the law's severity.*

Strafford had always determined to execute the project of the late reign with respect to the western counties. He proceeded to hold an inquisition in each county of Connaught, and summoned juries in order to preserve a mockery of justice in the midst of tyranny. They were required to find the king's title to all the lands, on such evidence as could be found and was thought fit to be laid before them; and were told that what would be best for their own interest would be to return such a verdict as the king desired, what would be best for his, to do the contrary; since he was able to establish it without their consent, and wished only to invest them graciously with a large part of what they now unlawfully withheld from him. These menaces had their effect in all counties except that of Galway, where a jury stood out obstinately against the crown, and being in consequence, as well as the sheriff, summoned to the castle in Dublin, were sentenced to an enormous fine. Yet the remonstrances of the western proprietors were so clamorous that no steps were immediately taken for carrying into effect the designed plantation; and the great revolutions of Scotland and England which soon ensued gave another occupation to the mind of lord Strafford.† It has never been disputed that a more uniform administration of justice in ordinary cases, a stricter coercion of outrage, a more extensive commerce, evidenced by the augmentation of customs, above all, the foundation of

* Irish Statutes, 10 Car. 1. c. 1, 2, 3, &c. Strafford Letters, i. 279. 312. The king expressly approved the denial of the graces, though promised formerly by himself. Id. 345. Leland, iii. 20.

"I can now say," Strafford observes, (Id. 344.), "the king is as absolute here as any prince in the whole world can be; and may still be, if it be not spoiled on that side."

† Strafford Letters, i. 353. 370. 402. 442. 451. 454. 473.; ii. 113. 139. 366. Leland, iii. 30. 39. Carte, 82.

the great linen manufacture in Ulster, distinguished the period of his government.* But it is equally manifest that neither the reconcilement of parties, nor their affection to the English crown, could be the result of his arbitrary domination; and that, having healed no wound he found, he left others to break out after his removal. The despotic violence of this minister towards private persons, and those of great eminence, is in some instances well known by the proceedings on his impeachment, and in others is sufficiently familiar by our historical and biographical literature. It is indeed remarkable that we find among the objects of his oppression and insult all that most illustrates the contemporary annals of Ireland, the venerable learning of Usher, the pious integrity of Bedell, the experienced wisdom of Cork, and the early virtue of Clanricarde.

The parliament assembled by Strafford in 1640 began with loud professions of gratitude to the king for the excellent governor he had appointed over them; they voted subsidies to pay a large army raised to serve against the Scots, and seemed eager to give every manifestation of zealous loyalty.† But after their prorogation, and during the summer of that year, as rapid a tendency to a great revolution became visible as in England; the commons, when they met again, seemed no longer the same men; and, after the fall of their great viceroy, they coalesced with his English enemies to consummate his destruction. Hate long smothered by fear, but inflamed by the same cause, broke forth in a remonstrance of the commons presented through a committee, not to the king, but a superior power, the long parliament of England. The two houses united to avail themselves of the advantageous moment, and to extort, as they very justly might, from the necessities of Charles that confirmation of his promises which had been refused in his prosperity. Both parties, catholic as well as protestant, acted together in this national cause, shunning for the present to bring forward those differences which

* It is however true that he discouraged the woollen manufacture, in order to keep the kingdom more dependent, and that this was part of his motive in promoting the other. Strafford Letters, ii. 19.

† Leland, iii. 51. Strafford himself (ii. 397.) speaks highly of their disposition.

were not the less implacable for being thus deferred. The catalogue of temporal grievances was long enough to produce this momentary coalition: it might be groundless in some articles, it might be exaggerated in more, it might in many be of ancient standing; but few can pretend to deny that it exhibits a true picture of the misgovernment of Ireland at all times, but especially under the earl of Strafford. The king, in May, 1641, consented to the greater part of their demands, but unfortunately they were never granted by law.*

But the disordered condition of his affairs gave encouragement to hopes far beyond what any parliamentary remonstances could realize; hopes long cherished when they had seemed vain to the world, but such as courage, and bigotry, and resentment would never lay aside. The court of Madrid had not abandoned its connexion with the disaffected Irish, especially of the priesthood; the son of Tyrone, and many followers of that cause, served in its armies; and there seems much reason to believe that in the beginning of 1641 the project of insurrection was formed among the expatriated Irish, not without the concurrence of Spain, and perhaps of Richelieu.† The government had passed from the vigorous

* Carte's Ormond, 100. 140. Leland, iii. 54. et post. Mountmorres, ii. 29. A remonstrance of the commons to lord-deputy Wandesford against various grievances was presented 7th November, 1640, before lord Strafford had been impeached. Id. 39. As to confirming the graces, the delay, whether it proceeded from the king or his Irish representatives, seems to have caused some suspicion. Lord Clanricarde mentions the ill consequences that might result, in a letter to lord Bristol. Carte's Ormond, iii. 40.

† Sir Henry Vane communicated to the lords justices, by the king's command, March 16. 1640–41, that advice had been received and confirmed by the ministers in Spain and elsewhere, which "deserved to be seriously considered, and an especial care and watchfulness to be had therein: that of late there have passed from Spain (and the like may well have been from other parts) an unspeakable number of Irish churchmen for England and Ireland, and some good old soldiers, under pretext of asking leave to raise men for the king of Spain; whereas, it is observed among the Irish friars there, a whisper was, as if they expected a rebellion in Ireland, and particularly in Connaught." Cartes's Ormond, iii. 30. This letter, which Carte seems to have taken from a printed book, is authenticated in Clarendon State Papers, ii. 143. I have mentioned in another part of this work, Chap. VIII., the provocations which might have induced the cabinet of Madrid to foment disturbances in Charles's dominions. The lords justices are taxed by Carte with supineness in paying no attention to this letter, vol. i. 166.; but how he knew that they paid none seems hard to say.

Another imputation has been thrown on the Irish government and on the parliament, for objecting to permit levies to be made for the Spanish service out of the army raised by Strafford, and disbanded in the spring of 1641, which the king had himself proposed. Carte, i. 133.; and Leland, 82., who follows the former implicitly, as he always does. The event indeed proved that it would have been far safer to let those soldiers,

hands of Strafford into those of two lords justices, sir William Parsons and sir John Borlase, men by no means equal to the critical circumstances wherein they were placed, though possibly too severely censured by those who do not look at their extraordinary difficulties with sufficient candour. The primary causes of the rebellion are not to be found in their supineness or misconduct, but in the two great sins of the English government; in the penal laws as to religion which pressed on almost the whole people, and in the systematic iniquity which despoiled them of their possessions. They could not be expected to miss such an occasion of revolt; it was an hour of revolution, when liberty was won by arms, and ancient laws were set at nought; the very success of their worst enemies, the covenanters in Scotland, seemed the assurance of their own victory, as it was the reproach of their submission.*

Rebellion of 1641.

The rebellion broke out, as is well known, by a sudden massacre of the Scots and English in Ulster, designed no doubt by a vindictive and bigoted people to extirpate those races, and, if contemporary authorities are to be credited, falling little short of this in its execution. Their evident exaggeration has long been acknowledged; but possibly the scepticism of later writers has extenuated rather too much the horrors of this massacre.† It was certainly

chiefly catholics, enlist under a foreign banner; but considering the long connexion of Spain with that party, and the apprehension always entertained that the disaffected might acquire military experience in her service, the objection does not seem so very unreasonable.

* The fullest writer on the Irish rebellion is Carte, in his Life of Ormond, who had the use of a vast collection of documents belonging to that noble family; a selection from which forms his third volume. But he is extremely partial against all who leaned to the parliamentary or puritan side, and especially the lords justices, Parsons and Borlase; which renders him, to say the least, a very favourable witness for the catholics. Leland, with much candour towards the latter, but a good deal of the same prejudice against the presbyterians, is little more than the echo of Carte. A more vigorous, though less elegant historian, is Warner, whose impartiality is at least equal to Leland's, and who may perhaps, upon the whole, be reckoned the best modern authority. Sir John Temple's History of Irish Rebellion, and lord Clanricarde's Letters, with a few more of less importance, are valuable contemporary testimonies.

The catholics themselves might better leave their cause to Carte and Leland than excite prejudices instead of allaying them by such a tissue of misrepresentation and disingenuousness as Curry's Historical Account of the Civil Wars in Ireland.

† Sir John Temple reckons the number of protestants murdered, or destroyed in some manner, from the breaking out of the rebellion in October, 1641, to the cessation in September, 1643, at three hundred thousand, an evident and enor-

not the crime of the catholics generally; nor, perhaps, in the other provinces of Ireland are they chargeable with more cruelty than their opponents.* Whatever may have been the

mous exaggeration; so that the first edition being incorrectly printed, and with numerals, we might almost suspect a cipher to have been added by mistake, p. 15. (edit. Maseres.) Clarendon says forty or fifty thousand were murdered in the first insurrection. Sir William Petty, in his Political Anatomy of Ireland, from calculations too vague to deserve confidence, puts the number massacred at thirty-seven thousand. Warner has scrutinized the examinations of witnesses, taken before a commission appointed in 1643, and now deposited in the library of Trinity College, Dublin; and, finding many of the depositions unsworn, and others founded on hearsay, has thrown more doubt than any earlier writer on the extent of the massacre. Upon the whole, he thinks twelve thousand lives of protestants the utmost that can be allowed for the direct or indirect effects of the rebellion, during the two first years, except losses in war (History of Irish Rebellion, p. 397.), and of these only one third by murder. It is to be remarked, however, that no distinct accounts could be preserved in formal depositions of so promiscuous a slaughter, and that the very exaggerations show its tremendous nature. The Ulster colony, a numerous and brave people, were evidently unable to make head for a considerable time against the rebels; which could hardly have been, if they had only lost a few thousands. It is idle to throw an air of ridicule (as is sometimes attempted) on the depositions, because they are mingled with some fabulous circumstances, such as the appearance of the ghosts of the murdered on the bridge at Cavan; which, by the way, is only told, in the depositions subjoined to Temple, as the report of the place, and was no cold-blooded fabrication, but the work of a fancy bewildered by real horrors.

Carte, who dwells at length on every circumstance unfavourable to the opposite party, despatches the Ulster massacre in a single short paragraph, and coolly remarks, that there were not many murders, "*considering the nature of such an affair*," in the first week of the insurrection. Life of Ormond, i. 175—177. This is hardly reconcilable to fair dealing. Curry endeavours to discredit even Warner's very moderate estimate; and affects to call him in one place, p. 184., "a writer highly prejudiced against the insurgents," which is grossly false. He praises Carte and Nalson, the only protestants he does praise, and bestows on the latter the name of impartial. I wonder he does not say that no one protestant was murdered. Dr. Lingard has lately given a short account of the Ulster rebellion (Hist. of England, x. 154.), omitting all mention of the massacre, and endeavouring, in a note at the end of the volume, to disprove, by mere scraps of quotation, an event of such notoriety, that we must abandon all faith in public fame if it were really unfounded.

* Carte, i. 253. 266.; iii. 51. Leland, 154. Sir Charles Coote and Sir William St. Leger are charged with great cruelties in Munster. The catholic confederates spoke with abhorrence of the Ulster massacre. Leland, 161. Warner, 203. They behaved, in many parts, with humanity; nor indeed do we find frequent instances of violence, except in those counties where the proprietors had been dispossessed. [It has been not unfrequent with Catholic writers to allege that 3000 Irish had been massacred by the protestants in Isle Magee, near Carric-fergus, before the rebellion broke out. Curry, in his grossly unfair History of the Civil Wars, and Plowden, in his not less unfair, and more superficial, Historical Review of the State of Ireland, are among these; the latter having been misled, or affecting to be persuaded, by a passage in the appendix to Clarendon's Historical Account of Irish Affairs; which appendix evidently was not written by that historian himself, but subjoined by some one to the posthumous work. Carte, though he seems to be staggered by the numbers, gives some credit to, or at least states as not improbable, the main fact, that this massacre occurred antecedently to any committed by the Irish themselves. Life of Ormond, i. 188. But Leland refers to the original depositions in Trinity College, Dublin, whence

original intentions of the lords of the pale, or of the Anglo-Irish professing the old religion in general (which has been a problem in history), a few months only elapsed before they were almost universally engaged in the war.* The old distinctions of Irish and English blood were obliterated by those of religion; and it became a desperate contention whether the majority of the nation should be trodden to the dust by forfeiture and persecution, or the crown lose every thing beyond a nominal sovereignty over Ireland. The insurgents, who might once perhaps have been content with a repeal of the penal laws, grew naturally in their demands through success, or rather through the inability of the English government to keep the field, and began to claim the entire establishment of their religion; terms in themselves not unreasonable, nor apparently disproportionate to their circumstances, and which the king was, in his distresses, nearly ready to concede, but

it appears, that some Scots soldiers, in garrison at Carric-fergus, sallied out in January, when the rebellion was at its height, and slaughtered a few families of unoffending natives in Isle Magee. Leland, iii. 129. Dr. Lingard, it must in justice be added, does not repeat this slander.—1845.]

* Carte and Leland endeavour to show that the Irish of the pale were driven into rebellion by the distrust of the lords justices, who refused to furnish them with arms, after the revolt in Ulster, and permitted the parliament to sit for one day only, in order to publish a declaration against the rebels. But the prejudice of these writers is very glaring. The insurrection broke out in Ulster, October 23. 1641; and in the beginning of December the lords of the pale were in arms. Surely this affords some presumption that Warner has reason to think them privy to the rebellion, or, at least, not very averse to it. P. 146. And with the suspicion that might naturally attach to all Irish catholics, could Borlase and Parsons be censurable for declining to intrust them with arms, or rather for doing so with some caution? Temple, 56. If they had acted otherwise, we should certainly have heard of their incredible imprudence. Again, the catholic party in the house of commons were so cold in their loyalty, to say the least, that they objected to giving any appellation to the rebels worse than that of discontented gentlemen. Leland, 140. See too Clanricarde's Letters, p. 33, &c. In fact, several counties of Leinster and Connaught were in arms before the pale.

It has been thought by some that the lords justices had time enough to have quelled the rebellion in Ulster before it spread farther. Warner, 130. Of this, as I conceive, we should not pretend to judge confidently. Certain it is that the whole army in Ireland was very small, consisting of only nine hundred and forty-three horse, and two thousand two hundred and ninety-seven foot. Temple, 32. Carte, 194. I think sir John Temple has been unjustly depreciated; he was master of the rolls in Ireland at the time, and a member of the council,—no bad witness for what passed in Dublin; and he makes out a complete justification as far as appears, for the conduct of the lords justices and council towards the lords of the pale and the catholic gentry. Nobody alleges that Parsons and Borlase were men of as much energy as lord Strafford; but those who sit down in their closets, like Leland and Warner, more than a century afterwards, to lavish the most indignant contempt on their memory, should have reflected a little on the circumstances.

such as never could have been obtained from a third party, of whom they did not sufficiently think, the parliament and people of England. The commons had, at the very beginning of the rebellion, voted that all the forfeited estates of the insurgents should be allotted to such as should aid in reducing the island to obedience; and thus rendered the war desperate on the part of the Irish.* No great efforts were made, however, for some years; but, after the king's person had fallen into their hands, the victorious party set themselves in earnest to effect the conquest of Ireland. This was achieved by Cromwell and his powerful army after several years, with such bloodshed and rigour that, in the opinion of lord Clarendon, the sufferings of that nation, from the outset of the rebellion, to its close, have never been surpassed but by those of the Jews in their destruction by Titus.

Subjugation of the Irish by Cromwell.

At the restoration of Charles II. there were in Ireland two people, one either of native, or old English blood, the other of recent settlement; one catholic, the other protestant; one humbled by defeat, the other insolent with victory; one regarding the soil as his ancient inheritance, the other as his acquisition and reward. There were three religions; for the Scots of Ulster and the army of Cromwell had never owned the episcopal church, which for several years had fallen almost as low as that of Rome. There were claims, not easily set aside on the score of right, to the possession of lands, which the entire island could not satisfy. In England, little more had been necessary than to revive a suspended constitution: in Ireland, it was something beyond a new constitution and code of law that was required; it was the titles and boundaries of each man's private estate

Restoration of Charles II.

* "I perceived (says Preston, general of the Irish, writing to lord Clanricarde), that the catholic religion, the rights and prerogatives of his majesty, my dread sovereign, the liberties of my country, and whether there should be an Irishman or no, were the prizes at stake." Carte, iii. 120. Clanricarde himself expresses to the king, and to his brother, lord Essex, in January, 1642, his apprehension that the English parliament meant to make it a religious war. Clanricarde's Letters, 61. et post. The letters of this great man, perhaps the most unsullied character in the annals of Ireland, and certainly more so than even his illustrious contemporary, the duke of Ormond, exhibit the struggles of a noble mind between love of his country and his religion on the one hand, loyalty and honour on the other. At a later period of that unhappy war, he thought himself able to conciliate both principles.

that were to be litigated and adjudged. The episcopal church was restored with no delay, as never having been abolished by law; and a parliament containing no catholics, and not many vehement non-conformists, proceeded to the great work of settling the struggles of opposite claimants, by a fresh partition of the kingdom.*

The king had already published a declaration for the settlement of Ireland, intended as the basis of an act of parliament. The adventurers, or those who, on the faith of several acts passed in England in 1642, with the assent of the late king, had advanced money for quelling the rebellion, in consideration of lands to be allotted to them in certain stipulated proportions, and who had, in general, actually received them from Cromwell, were confirmed in all the lands possessed by them on the 7th of May, 1659; and all the deficiencies were to be supplied before the next year. The army was confirmed in the estates already allotted for their pay, with an exception of church lands and some others. Those officers who had served in the royal army against the Irish before 1649 were to be satisfied for their pay, at least to the amount of five eighths, out of lands to be allotted for that purpose. Innocent papists, that is, such as were not concerned in the rebellion, and whom Cromwell had arbitrarily transplanted into Connaught, were to be restored to their estates, and those who possessed them to be indemnified. Those who had submitted to the peace of 1648, and had not been afterwards in arms, if they had not accepted lands in Connaught, were also to be restored, as soon as those who now possessed them should be satisfied for their expenses. Those who had served the king abroad, and thirty-six enumerated persons of the Irish nobility and gentry, were to be put on the same footing as the last. The precedency of restitution, an important point where the claims exceeded the means of satisfying them, was to be in the order above specified.† Act of settlement.

This declaration was by no means pleasing to all concerned. The loyal officers, who had served before 1649, murmured that they had little prospect of more than twelve shillings

* Carte, ii. 221. Leland, 420.

† Carte, ii. 216. Leland, 414.

and sixpence in the pound, while the republican army of Cromwell would receive the full value. The Irish were more loud in their complaints; no one was to be held innocent who had been in the rebel quarters before the cessation of 1643; and other qualifications were added so severe that hardly any could expect to come within them. In the house of commons the majority, consisting very much of the new interests, that is, of the adventurers and army, were in favour of adhering to the declaration. In the house of lords it was successfully urged that, by gratifying the new men to the utmost, no fund would be left for indemnifying the loyalists, or the innocent Irish. It was proposed that, if the lands not yet disposed of should not be sufficient to satisfy all the interests for which the king had meant to provide by his declaration, there should be a proportional defalcation out of every class for the benefit of the whole. These discussions were adjourned to London, where delegates of the different parties employed every resource of intrigue at the English court. The king's bias towards the religion of the Irish had rendered him their friend; and they seemed, at one time, likely to reverse much that had been intended against them; but their agents grew rash with hope, assumed a tone of superiority which ill became their condition, affected to justify their rebellion, and finally so much disgusted their sovereign that he ordered the act of settlement to be sent back with little alteration, except the insertion of some more Irish nominees.*

The execution of this act was intrusted to English commissioners, from whom it was reasonable to hope for an impartiality which could not be found among the interested classes. Notwithstanding the rigorous proofs nominally exacted, more of the Irish were pronounced innocent than the commons had expected; and the new possessors having the sway of that assembly, a clamour was raised that the popish interest had prevailed; some talked of defending their estates by arms, some even meddled in fanatical conspiracies against the government; it was insisted that a closer inquisition should be made, and stricter qualifications demanded. The

* Carte, 222. et post. Leland, 420. et post.

manifest deficiency of lands to supply all the claimants for whom the act of settlement provided, made it necessary to resort to a supplemental measure, called the act of explanation. The adventurers and soldiers relinquished one third of the estates enjoyed by them on the 7th of May, 1659. Twenty Irish nominees were added to those who were to be restored by the king's favour; but all those who had not already been adjudged innocent, more than three thousand in number, were absolutely cut off from any hope of restitution. The great majority of these no question were guilty; yet they justly complained of this confiscation without a trial.* Upon the whole result, the Irish catholics having previously held about two thirds of the kingdom, lost more than one half of their possessions by forfeiture on account of their rebellion. If we can rely at all on the calculations, made almost in the infancy of political arithmetic by one of its most diligent investigators, they were diminished also by much more than one third through the calamities of that period.†

It is more easy to censure the particular inequalities, or

* Carte, 258—316. Leland, 431. et post.

† The statements of lands forfeited and restored, under the execution of the act of settlement, are not the same in all writers. Sir William Petty estimates the superficies of Ireland at 10,500,000 Irish acres (each being to the English measure nearly as thirteen to eight), whereof 7,500,000 are of good land, the rest being moor, bog, and lake. In 1641, the estates of the protestant owners and of the church were about one third of these cultivable lands, those of catholics two thirds. The whole of the latter were seized or sequestered by Cromwell and the parliament. After summing up the allotments made by the commissioners under the act of settlement, he concludes that, in 1672, the English, protestants, and church, have 5,140,000 acres, and the papists nearly half as much. Political Anatomy of Ireland, c. 1. In lord Orrery's Letters, i. 187. et post., is a statement, which seems not altogether to tally with sir William Petty's; nor is that of the latter clear and consistent in all its computations. Lawrence, author of "The Interest of Ireland Stated," a treatise published in 1682, says, "of 10,868,949 acres, returned by the last survey of Ireland, the Irish papists are possessed but of 2,041,108 acres, which is but a small matter above the fifth part of the whole." Part ii. p. 48. But, as it is evidently below one fifth, there must be some mistake. It appears that in one of these sums he reckoned the whole extent, and in the other only cultivable lands. Lord Clare, in his celebrated speech on the Union, greatly overrates the confiscations. [It is stated in the English Journals of Commons, 12th Jan. 1694, that the court of claims (that is, the commissioners appointed as in the text) allotted 4,560,037 acres to the English, 2,323,809 to the Irish, and left 824,391 undisposed. This, by supposing the last to have been afterwards divided, would very closely tally with sir William Petty's estimate.—1845.]

Petty calculates that above 500,000 of the Irish "perished and were wasted by the sword, plague, famine, hardship, and banishment, between the 23d day of October 1641, and the same day 1652;" and conceives the population of the island in 1641 to have been nearly 1,500,000, including protestants. But his conjectures are prodigiously vague.

even, in some respects, injustice of the act of settlement, than to point out what better course was to have been adopted. The re-adjustment of all private rights after so entire a destruction of their landmarks could only be effected by the coarse process of general rules. Nor does it appear that the catholics, considered as a great mass, could reasonably murmur against the confiscation of half their estates, after a civil war wherein it is evident that so large a proportion of themselves were concerned.* Charles, it is true, had not been personally resisted by the insurgents; but, as chief of England, he stood in the place of Cromwell, and equally represented the sovereignty of the greater island over the lesser, which under no form of government it would concede.

Hopes of the catholics under Charles and James.

The catholics, however, thought themselves oppressed by the act of settlement; and could not forgive the duke of Ormond for his constant regard to the protestant interests, and the supremacy of the English crown. They had enough to encourage them in the king's bias towards their religion, which he was able to manifest more openly than in England. Under the administration of lord Berkely in 1670, at the time of Charles's conspiracy with the king of France to subvert religion and liberty, they began to menace an approaching change, and to aim at revoking, or materially weakening, the act of settlement. The most bigoted and insolent of the popish clergy, who had lately rejected with indignation an offer of more reasonable men to renounce the tenets obnoxious to civil governments, were countenanced at Dublin; but the first alarm of the new proprietors, as well as the general apprehension of the court's designs in England, soon rendered it necessary to desist from the projected innovations.† The next reign, of course, reanimated the Irish party; a dispensing prerogative set aside all the statutes; every civil office, the courts of justice, and the privy council, were filled with catholics; the protestant soldiers were disbanded; the citizens of that religion were

* Petty is as ill satisfied with the restoration of lands to the Irish, as they could be with the confiscations. "Of all that claimed innocency, seven in eight obtained it. The restored persons have more than what was their own in 1641, by at least one fifth. Of those adjudged innocents, not one in twenty were really so."

† Carte, ii. 414. et post. Leland, 458. et post.

disarmed; the tithes were withheld from their clergy; they were suddenly reduced to feel that bitter condition of a conquered and proscribed people, which they had long rendered the lot of their enemies.* From these enemies, exasperated by bigotry and revenge, they could have nothing but a full and exceeding measure of retaliation to expect; nor had they even the last hope that an English king, for the sake of his crown and country, must protect those who formed the strongest link between the two islands. A man violent and ambitious, without superior capacity, the earl of Tyrconnel, lord lieutenant in 1687, and commander of the army, looked only to his master's interests, in subordination to those of his countrymen, and of his own. It is now ascertained that, doubtful of the king's success in the struggle for restoring popery in England, he had made secret overtures to some of the French agents for casting off all connexion with that kingdom, in case of James's death, and, with the aid of Louis, placing the crown of Ireland on his own head.† The revolution in England was followed by a war in Ireland of three years' duration, and a war on both sides, like that of 1641, for self-preservation. In the parliament held by James at Dublin, in 1690, the act of settlement was repealed, and above 2000 persons attainted by name; both, it has been said, perhaps with little truth, against the king's will, who dreaded the impetuous nationality that was tearing away the bulwarks of his throne.‡ But the magnanimous defence of Derry and the splendid victory of the Boyne restored the protestant cause; though the Irish, with the succour of French troops, maintained for two years a gallant resistance, they could not ultimately withstand the triple superiority of military talents, resources, and discipline. Their bravery, however, served to obtain the articles of

War of 1689, and final reduction of Ireland.

* Leland, 493. et post. Mazure, Hist. de la Révolut. ii. 113.

† M. Mazure has brought this remarkable fact to light. Bonrepos, a French emissary in England, was authorized by his court to proceed in a negotiation with Tyrconnel for the separation of the two islands, in case that a protestant should succeed to the crown of England. He had accordingly a private interview with a confidential agent of the lord lieutenant at Chester, in the month of October, 1687. Tyrconnel undertook that in less than a year every thing should be prepared. Id. ii. 281. 288.; iii. 430.

‡ Leland, 537. This seems to rest on the authority of Leslie, which is by no means good. Some letters of Barillon, in 1687, show that James had intended the repeal of the act of settlement. Dalrymple, 257. 263.

Limerick on the surrender of that city; conceded by their noble-minded conqueror, against the disposition of those who longed to plunder and persecute their fallen enemy. By the first of these articles, "the Roman catholics of this kingdom shall enjoy such privileges in the exercise of their religion as are consistent with the laws of Ireland, or as they did enjoy in the reign of king Charles II.; and their majesties, as soon as their affairs will permit them to summon a parliament in this kingdom, will endeavour to procure the said Roman catholics such further security in that particular as may preserve them from any disturbance upon the account of their said religion." The second secures to the inhabitants of Limerick and other places then in possession of the Irish, and to all officers and soldiers then in arms, who should return to their majesties' obedience, and to all such as should be under their protection in the counties of Limerick, Kerry, Clare, Galway, and Mayo, all their estates, and all their rights, privileges, and immunities, which they held in the reign of Charles II., free from all forfeitures or outlawries incurred by them.*

This second article, but only as to the garrison of Limerick or other persons in arms, is confirmed by statute some years afterwards.† The first article seems, however, to be passed over. The forfeitures on account of the rebellion, estimated at 1,060,792 acres, were somewhat diminished by restitutions to the ancient possessors under the capitulation; the greater part were lavishly distributed to English grantees.‡ It appears from hence that at the end of the seventeenth century, the Irish or Anglo-Irish catholics could hardly possess above one sixth or one seventh of the kingdom. § They were still formidable from their numbers and their sufferings; and the victorious party saw no security but in a system of oppression, contained in a series

* See the articles at length in Leland, 619. Those who argue from the treaty of Limerick against any political disabilities subsisting at present do injury to a good cause. —[1827.]

† Irish Stat. 9 Will. 3. c. 2.

‡ Parl. Hist. v. 1202.

§ [Vide supra. But of cultivable lands, if their forfeitures are to be reckoned in these alone, they may have retained about one fifth. As their freehold property at the time of the union was very much less than this, we must attribute the difference, partly to the conversion of the wealthier families, and partly to the pressure of the penal laws, which induced men to sell their lands. —1845.]

of laws during the reigns of William and Anne, which have scarce a parallel in European history, unless it be that of the protestants in France, after the revocation of the edict of Nantes, who yet were but a feeble minority of the whole people. No papist was allowed to keep a school, or to teach any in private houses, except the children of the family.* Severe penalties were denounced against such as should go themselves or send others for education beyond seas in the Romish religion; and, on probable information given to a magistrate, the burden of proving the contrary was thrown on the accused; the offence not to be tried by a jury, but by justices at quarter sessions.† Intermarriages between persons of different religion, and possessing any estate in Ireland, were forbidden; the children in case of either parent being protestant, might be taken from the other, to be educated in that faith.‡ No papist could be guardian to any child; but the court of chancery might appoint some relation or other person to bring up the ward in the protestant religion. § The eldest son, being a protestant, might turn his father's estate in fee simple into a tenancy for life, and thus secure his own inheritance. But if the children were all papists, the father's lands were to be of the nature of gavelkind, and descend equally among them. Papists were disabled from purchasing lands except for terms of not more than thirty-one years, at a rent not less than two thirds of the full value. They were even to conform within six months after any title should accrue by descent, devise, or settlement, on pain of forfeiture to the next protestant heir; a provision which seems intended to exclude them from real property altogether, and to render the others almost supererogatory.‖ Arms, says the poet, remain to the plundered; but the Irish legislature knew that the plunder would be imperfect and insecure while arms remained; no papist was permitted to retain them, and search might be made at any time by two justices.¶ The bare celebration of catholic rites was not subjected to any fresh penalties; but regular priests, bishops, and others claiming jurisdiction, and all who should come into the kingdom from

* 7 Will. 3. c. 4.
† Id.
‡ 9 Will. 3. c. 3. 2 Anne, c. 6.
§ 9 Will. 3. c. 3. 2 Anne, c. 6.
‖ Id.
¶ 7 W. 3. c. 5.

foreign parts, were banished on pain of transportation, in case of neglecting to comply, and of high treason in case of returning from banishment. Lest these provisions should be evaded, priests were required to be registered; they were forbidden to leave their own parishes; and rewards were held out to informers who should detect the violations of these statutes, to be levied on the popish inhabitants of the country.* To have exterminated the catholics by the sword, or expelled them, like the Moriscoes of Spain, would have been little more repugnant to justice and humanity, but incomparably more politic.

Dependence of the Irish upon the English parliament.

It may easily be supposed, that no political privileges would be left to those who were thus debarred of the common rights of civil society. The Irish parliament had never adopted the act passed in the 5th of Elizabeth, imposing the oath of supremacy on the members of the commons. It had been full of catholics under the queen and her two next successors. In the second session of 1641, after the flames of rebellion had enveloped almost all the island, the house of commons were induced to exclude, by a resolution of their own, those who would not take that oath; a step which can only be judged in connexion with the general circumstances of Ireland at that awful crisis.† In the parliament of 1661, no catholic, or only one, was returned‡; but the house addressed the lords justices to issue a commission for administering the oath of supremacy to all its members. A bill passed the commons in 1663, for imposing that oath in future, which was stopped by a prorogation; and the duke of Ormond seems to have been adverse to it.§ An act of the English parliament after the revolution, reciting that "great disquiet and many dangerous attempts have been made to deprive their majesties and their royal predecessors of the said realm of Ireland by the liberty which the popish recusants there have had and taken to sit and vote in parliament," requires every member of both

* 9 W. 3. c. 1. 2 Anne, c. 3. s. 7. 8 Anne, c. 3.

† Carte's Ormond, i. 328. Warner, 212. These writers censure the measure as illegal and impolitic.

‡ Leland says none; but by lord Orrery's letters, i. 35., it appears that one papist and one anabaptist were chosen for that parliament, both from Tuam.

§ Mountmorres, i. 158.

houses of parliament to take the new oaths of allegiance and supremacy, and to subscribe the declaration against transubstantiation before taking his seat.* This statute was adopted and enacted by the Irish parliament in 1782, after they had renounced the legislative supremacy of England under which it had been enforced. The elective franchise, which had been rather singularly spared in an act of Anne, was taken away from the Roman catholics of Ireland in 1715; or, as some think, not absolutely till 1727.†

These tremendous statutes had in some measure the effect which their framers designed. The wealthier families, against whom they were principally levelled, conformed in many instances to the protestant church.‡ The catholics were extinguished as a political body; and, though any willing allegiance to the house of Hanover would have been monstrous, and it is known that their bishops were constantly nominated to the pope by the Stuart princes§, they did not manifest at any period, or even during the rebellions of 1715 and 1745, the least movement towards a disturbance of the government. Yet for thirty years after the accession of George I. they continued to be insulted in public proceedings under the name of the common enemy, sometimes oppressed by the enactment of new statutes, or the stricter execution of the old; till in the latter years of George II. their peaceable deportment, and the rise of a more generous spirit among the Irish protestants, not only sheathed the fangs of the law, but elicited expressions of esteem from the ruling powers, which they might justly consider as the pledge of a more tolerant policy. The mere exercise of their religion in an

* Mountmorres, i. 158. 3 W. & M. c. 2.

† Ibid. i. 163. Plowden's Hist. Review of Ireland, i. 263. The terrible act of the second of Anne prescribes only the oaths of allegiance and abjuration for voters at elections, § 24.

‡ Such conversions were naturally distrusted. Boulter expresses alarm at the number of pseudo-protestants who practised the law; and a bill was actually passed to disable any one, who had not professed that religion for five years, from acting as a barrister or solicitor. Letters, i. 226. "The practice of the law, from the top to the bottom, is almost wholly in the hands of these converts."

§ Evidence of State of Ireland in Sessions of 1824 and 1825, p. 325. (as printed for Murray). In a letter of the year 1755, from a clergyman in Ireland to archbishop Herring, in the British Museum (Sloane MSS. 4164. 11.), this is also stated. The writer seems to object to a repeal of the penal laws, which the catholics were supposed to be attempting; and says they had the exercise of their religion as openly as the protestants, and monasteries in many places.

obscure manner had long been permitted without molestation.*

Thus in Ireland there were three nations, the original natives, the Anglo-Irish, and the new English; the two former catholic, except some, chiefly of the upper classes, who had conformed to the church; the last wholly protestant. There were three religions, the Roman catholic, the established or Anglican, and the presbyterian; more than one half of the protestants, according to the computation of those times, belonging to the latter denomination.† These, however, in a less degree were under the ban of the law as truly as the catholics themselves; they were excluded from all civil and military offices by a test act, and even their religious meetings were denounced by penal statutes. Yet the house of commons after the revolution always contained a strong presbyterian body, and being unable, as it seems, to obtain an act of indemnity for those who had taken commissions in the militia, while the rebellion of 1715 was raging in Great Britain, had recourse to a resolution, that whoever should prosecute any dissenter for accepting such a commission is an enemy to the king and the protestant interest.‡ They did not even obtain a legal toleration till 1720.§ It seems as if the connexion of the two islands, and the whole system of constitutional laws in the lesser, subsisted only for the sake of securing the privileges and emoluments of a small number of ecclesiastics, frequently strangers, who rendered very little return for their enormous monopoly. A great share, in fact, of the temporal government under George II. was thrown successively into the hands of two primates, Boulter and Stone; the one a worthy but narrow-minded man, who showed his egregious ignorance of policy in endeavouring to promote the wealth and happiness of the people, whom he at the same

* Plowden's Historical Review of State of Ireland, vol. i. passim.

† Sir William Petty, in 1672, reckons the inhabitants of Ireland at 1,100,000; of whom 200,000 English, and 100,000 Scots; above half the former being of the established church. Political Anatomy of Ireland, chap. ii. It is sometimes said in modern times, though erroneously, that the presbyterians form a majority of protestants in Ireland; but their proportion has probably diminished since the beginning of the eighteenth century. [It appears by a late census, in 1837, that the established church reckoned near 800,000 souls, the presbyterians 660,000; the catholics were above six millions.—1845.]

‡ Plowden, 243.

§ Irish Stat. 6 G. 1. c. 5.

time studied to depress and discourage in respect of political freedom; the other an able, but profligate and ambitious statesman, whose name is mingled, as an object of odium and enmity, with the first great struggles of Irish patriotism.

The new Irish nation, or rather the protestant nation, since all distinctions of origin have, from the time of the great rebellion, been merged in those of religion, partook in large measure of the spirit that was poured out on the advocates of liberty and the revolution in the sister kingdom. Their parliament was always strongly whig, and scarcely manageable during the later years of the queen. They began to assimilate themselves more and more to the English model, and to cast off by degrees the fetters that galled and degraded them. By Poyning's celebrated law, the initiative power was reserved to the English council. This act, at one time popular in Ireland, was afterwards justly regarded as destructive of the rights of their parliament, and a badge of the nation's dependence. It was attempted by the commons in 1641, and by the catholic confederates in the rebellion, to procure its repeal; which Charles I. steadily refused, till he was driven to refuse nothing. In his son's reign, it is said that "the council framed bills altogether; a negative alone on them and their several provisoes was left to parliament; only a general proposition for a bill by way of address to the lord lieutenant and council came from parliament; nor was it till after the revolution that heads of bills were presented; these last in fact resembled acts of parliament or bills, with only the small difference of 'We pray that it may be enacted,' instead of 'Be it enacted.'"* They assumed about the same time the examination of accounts, and of the expenditure of public money.†

Meanwhile, as they gradually emancipated themselves from the ascendancy of the crown, they found a more formidable power to contend with in the English parliament. It was acknowledged, by all at least of the protestant name, that the crown of Ireland was essentially dependent on that of

* Mountmorres, ii. 142. As one house could not regularly transmit heads of bills to the other, the advantage of a joint recommendation was obtained by means of conferences, which were consequently much more usual than in England. Id. 179.

† Id. 184.

England, and subject to any changes that might affect the succession of the latter. But the question as to the subordination of her legislature was of a different kind. The precedents and authorities of early ages seem not decisive; so far as they extend, they rather countenance the opinion that English statutes were of themselves valid in Ireland. But from the time of Henry VI. or Edward IV. it was certainly established that they had no operation, unless enacted by the Irish parliament.* This however would not legally prove that they might not be binding, if express words to that effect were employed; and such was the doctrine of lord Coke and of other English lawyers. This came into discussion about the eventful period of 1641. The Irish in general protested against the legislative authority of England, as a novel theory which could not be maintained†; and two treatises on the subject, one ascribed to lord chancellor Bolton, or more probably to an eminent lawyer, Patrick Darcy, for the independence of Ireland, another, in answer to it, by serjeant Mayart, may be read in the Hibernica of Harris.‡ Very few instances occurred before the revolution, wherein the English parliament thought fit to include Ireland in its enactments, and none perhaps wherein they were carried into effect. But after the revolution several laws of great importance were passed in England to bind the other kingdom, and acquiesced in without express opposition by its parliament. Molyneux, however, in his celebrated "Case of Ireland's being bound by Acts of Parliament in England stated," published in 1697, set up the claim of his country for absolute legislative independency. The house of commons at Westminster came to resolutions against this book; and, with their high notions of parliamentary sovereignty, were not likely to desist from a pretension which, like the very similar claim to impose taxes in America, sprung in fact from the semi-republican scheme of constitutional law established by means of the revolution.§ It is evident that

* Vide supra.

† Carte's Ormond, iii. 55.

‡ Vol. ii. Mountmorres, i. 360.

§ Journals, 27th June, 1698. Parl. Hist. v. 1181. They resolved at the same time that the conduct of the Irish parliament in pretending to re-enact a law made in England expressly to bind Ireland, had given occasion to these dangerous positions. On the 30th of June they addressed the king in consequence, requesting him to prevent any thing of the like kind in future. In this address, as first drawn, the legislative authority of

while the sovereignty and enacting power was supposed to reside wholly in the king, and only the power of consent in the two houses of parliament, it was much less natural to suppose a control of the English legislature over other dominions of the crown, having their own representation for similar purposes, than after they had become, in effect and in general sentiment, though not quite in the statute book, co-ordinate partakers of the supreme authority. The Irish parliament however, advancing as it were in a parallel line, had naturally imbibed the same sense of its own supremacy, and made at length an effort to assert it. A judgment from the court of exchequer in 1719, having been reversed by the house of lords, an appeal was brought before the lords in England, who affirmed the judgment of the exchequer. The Irish lords resolved that no appeal lay from the court of exchequer in Ireland to the king in parliament in Great Britain; and the barons of that court having acted in obedience to the order of the English lords, were taken into the custody of the black rod. That house next addressed the king setting forth their reasons against admitting the appellant jurisdiction. But the lords in England, after requesting the king to confer some favour on the barons of the exchequer who had been censured and illegally imprisoned for doing their duty, ordered a bill to be brought in for better securing the dependency of Ireland upon the crown of Great Britain, which declares "that the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons of Great Britain, in parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the people and the kingdom of Ireland; and that the house of lords of Ireland have not, nor of right ought to have, any jurisdiction to judge of, reverse, or affirm any judgment, sentence, or decree given or made in any court within the said kingdom; and that all proceedings before the said house of lords upon any such judgment, sentence, or

the *kingdom of England* is asserted. But this phrase was omitted afterwards, I presume, as rather novel; though by doing so they destroyed the basis of their proposition, which could stand much better on the new theory of the constitution than the ancient.

decree, are, and are hereby declared to be, utterly null and void, to all intents and purposes whatsoever." *

The English government found no better method of counteracting this rising spirit of independence than by bestowing the chief posts in the state and church on strangers, in order to keep up what was called the English interest.† This wretched policy united the natives of Ireland in jealousy and discontent, which the latter years of Swift were devoted to inflame. It was impossible that the kingdom should become, as it did under George II., more flourishing through its great natural fertility, its extensive manufacture of linen, and its facilities for commerce, though much restricted, the domestic alarm from the papists also being allayed by their utter prostration, without writhing under the indignity of its subordination; or that a house of commons, constructed so much on the model of the English, could hear patiently of liberties and privileges it did not enjoy. These aspirations for equality first, perhaps, broke out into audible complaints in the year 1753. The country was in so thriving a state that there was a surplus revenue after payment of all charges. The house of commons determined to apply this to the liquidation of a debt. The government, though not unwilling to admit of such an application, maintained that the whole revenue belonged to the king, and could not be disposed of without his previous consent. In England, where the grants of parliament are appropriated according to estimates, such a question could hardly arise; nor would there, I presume, be the slightest doubt as to the control of the house of commons over a surplus income. But in Ireland, the practice of appropriation seems never to have prevailed, at least so strictly‡; and the constitutional right might per-

Growth of a patriotic party in 1753.

* 6 G. 1. c. 5. Plowden, 244. [There was some opposition made to this bill by lord Molesworth, and others not so much connected as he was with Ireland: it passed by 140 to 83. Parl. Hist. vii. 642.—1845.] The Irish house of lords had, however, entertained writs of error as early as 1644, and appeals in equity from 1661. Mountmorres, i. 339. The English peers might have remembered that their own precedents were not much older.

† See Boulter's Letters, passim. His plan for governing Ireland was to send over as many English-born bishops as possible. "The bishops," he says, "are the persons on whom the government must depend for doing the public business here." I. 238. This of course disgusted the Irish church.

‡ Mountmorres, i. 424.

haps not unreasonably be disputed. After long and violent discussions, wherein the speaker of the commons and other eminent men bore a leading part on the popular side, the crown was so far victorious as to procure some motions to be carried, which seemed to imply its authority; but the house took care by more special applications of the revenue, to prevent the recurrence of an undisposed surplus.* From this era the great parliamentary history of Ireland begins, and is terminated after half a century by the Union: a period fruitful of splendid eloquence, and of ardent, though not always uncompromising, patriotism; but which, of course, is beyond the limits prescribed to these pages.

* Plowden, 306. et post. Hardy's Life of Lord Charlemont.

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