THE HISTORY OF THE COMMON LAW:

BY

SIR MATTHEW HALE.

THE FIFTH EDITION,

(WITH CONSIDERABLE ADDITIONS)

ILLUSTRATED WITH

NOTES AND REFERENCES,

AND

SOME ACCOUNT OF THE LIFE OF THE AUTHOR.

By CHARLES RUNNINGTON,

SERJEANT AT LAW.

> Of Law no leſs can be acknowledged, than that her ſeat is the boſom of God; her voice the harmony of the world; all things in heaven and earth do her homage; the very leaſt, as feeling her care, and the greateſt, as not exempted from her power.
>
> HOOKER.

IN TWO VOLUMES.

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CHAP. III.

Concerning the common law of England, *its uſe and excellence, and the reaſon of its denomination.*

I COME now to that other branch of our laws, the common municipal law of this kingdom, which has the ſuperintendency of all thoſe other particular laws uſed in the before-mentioned courts, and is the common rule for the adminiſtration of common juſtice in this great kingdom, of which it has been always tender, and there is great reaſon for it. For it is not only a very juſt and excellent law in itſelf, but it is ſingularly accommodated to the frame of the Engliſh government, and to the diſpoſition of the Engliſh nation; and ſuch as by a long experience and uſe is, as it were, incorporated into their very temperament, and in a manner become the complexion and conſtitution of the Engliſh commonwealth.

INSOMUCH that even as in the natural body the due temperament and conſtitution does by degrees work out thoſe accidental diſeaſes which ſometimes happen, and do reduce the body to its juſt ſtate and conſtitution; ſo, when at any time through the errors, diſtempers, or iniquities of men, or times, the peace of the kingdom and right order of government have received interuption, the common law has waſted and wrought out thoſe diſtempers, and reduced the kingdom to its juſt ſtate and temperament; as our preſent and former times can eaſily witneſs.

THIS law is that which aſſerts, maintains, and, with all imaginable care, provides for the ſafety of the king's royal perſon, his crown and dignity; and all his juſt rights, revenues,

nues, powers, prerogatives, and government; as the great foundation (under God) of the peace, happineſs, honour and juſtice of this kingdom. And this law is alſo that which declares and aſſerts the rights, and liberties, and the properties of the ſubject; and is the juſt, known, and common rule of juſtice and right, between man and man, within this kingdom.

AND from hence it is, that the wiſdom of the kings of England, and their great council, the honourable houſe of parliament, have always been jealous and vigilant for the reformation of what has been at any time found defective in it; to remove all ſuch obſtacles as might obſtruct the free courſe of it, and to ſupport, countenance and encourage the uſe of it; as the beſt, ſafeſt, and trueſt rule of juſtice in all matters, as well criminal as civil.

I SHOULD be too voluminous to give thoſe ſeveral inſtances that occur frequently in the ſtatutes, the parliament rolls, and parliamentary petitions, touching this matter; and ſhall therefore only inſtance in ſome few particulars in both kinds, viz. criminal and civil. And firſt, in matters civil.

IN the parliament 18 Edw. I. in a petition in the lords houſe, touching land, between Hugh Lowther and Adam Edingthorp, the defendant alledges, that if the title ſhould in this manner be proceeded in, he ſhould loſe the benefit of his warranty; and alſo, that the plaintiff, if he hath any right, hath his remedy at common law by aſſize of mortdanceſtor; and therefore demands judgment, *ſi de libero tenemento debeat hic ſine brevi reſpondere*. The judgment of the lords in parliament thereupon is entered in theſe words:

" Et quia actio de prædicto tenemento petendo & etiam
" ſuum recuperare, ſi quid habere debeat vel poſſit eidem Adæ

" per

" per aſſiſam mortis anteceſſoris competere debet, nec eſt juri
" conſonum vel hactenus in curia iſta uſitat' quod aliquis ſine
" lege communi & brevi de cancellaria de libero tenemento
" ſuo reſpondeat, & maxime in caſu ubi breve de cancellaria
" locum habere poteſt, dictum eſt præfato Adæ quod ſibi per-
" quirat per breve de cancellaria ſi ſibi viderit expe-
" dire."

ROT. Parl. 13 R. 2. No. 10. Adam Chaucer preferred his petition to the king and lords in parliament againſt ſir Robert Knolles, to be relieved touching a mortgage which he ſuppoſed was ſatisfied, and to have reſtitution of his lands: The defendant appeared, and upon the ſeveral allegations on both ſides the judgment is thus entered, viz.

" Et apres les raiſons & les allegeances de l'un party & de
" l'autre, y ſembles a ſeigneurs du parlement que le dit peti-
" tion ne eſtoit petition du parlement, deins que le mattier
" en icel comprize *dovit eſtre* diſcuſs per le commune ley.
" Et pur ceo agard ſuit que le dit Robert iroit eut ſans jour &
" que le dit Adam ne prendroit rien per ſay ſuit icy, eins que
" il ſueroit per le commune ley ſi il luy ſembloit ceo faire."
Where we may note, the words are " *dovit eſtre*," and not " poet eſtre diſcuſſe per le," &c.

ROT. Parl. 50 Edw. 3. No. 43. A judgment being given againſt the biſhop of Norwich for the archdeaconry of Norwich, in the common bench, the biſhop petitioned the lords in parliament, that the record mighbe brought into that houſe, and be reverſed for error. " Et quoy a luy eſtoit
" finalement reſpondu per common aſſent des ils les juſtices
" que ſi error y fuſt ſi aſcun a fine force per le ley de Angle-
" terre tiel error fuit voire en parlement immediatement per
" voy de error ains en bank le roy, & en nul part ailhors,
" mais

" mais ſi le caſe avenoit que error fuſt fait en bank le roy
" adonque ceo ſerra amendes en parlement."

AND let any man but look over the rolls of parliament, and the bundles of petitions in parliament, of the times of Edward I. Edward II. Edward III. Henry IV. Henry V. and Henry VI. he will find hundreds of anſwers of petitions in parliament, concerning matters determinable at common law, endorſed with anſwers to this, or the like effect:—" Sues
" vous a le commune ley;—ſequatur ad communem legem;
" —perquirat breve in cancellaria ſi ſibi viderit expedire;
" ne eſt petition du parlement;—mandetur iſta petitio in
" cancellarium, vel cancellario, vel juſticiariis de banco,
" vel theſaurario, & baronibus de ſcaccario"—and the like.

AND theſe were not barely upon the *bene placita* of the lords, but were *de jure*, as appears by thoſe former judgments given in the lords houſe in parliament. And the reaſon is evident. Firſt, becauſe if ſuch a courſe of extraordinary proceedings ſhould be had before the lords in the firſt inſtance, the party would loſe the benefit of his appeal by writ of error, according as the law allows. And that is the reaſon why even in a writ of error, or petition of error upon a judgment in any inferior court, it cannot go *per ſaltum* into parliament, till it has paſſed the court of king's bench, for that the firſt appeal is thither. Secondly, becauſe the ſubject would by that means loſe his trial *per pares*, and conſequently his attaint in caſe of a miſtake in point of iſſue or damages, to both which he is intitled by law.

AND although ſome petitions of this nature have been determined in that manner, yet it has been (generally) when the exception has not been ſtarted, or at leaſt not inſiſted upon. And one judgment in parliament, " that caſes of that

" nature

" nature ought to be determined according to the courſe of " the common law," is of greater weight than many caſes to the contrary wherein the queſtion was not ſtirred; yea, even though it ſhould be ſtirred, and the contrary affirmed upon a debate of the queſtion; becauſe greater weight is to be laid upon the judgment of any court when it is excluſive of its juriſdiction, than upon a judgment of the ſame court in affirmance of it.

NOW as to matters criminal, whether capital or not, they are determinable by the common law, and not otherwiſe. And in affirmance of that law were the ſtatutes of Magna Charta cap. 29. 5 Edw. 3. cap. 9. 25 Edw. 3. cap. 4. 29 Edw. 3. cap. 3. 27 Edw. 3. cap. 17. 38 Edw. 3. cap. 9. & 40 Edw. 3. cap. 3; the effect of which is, that no man ſhall be put out of his lands or tenements, or be impriſoned by any ſuggeſtion, unleſs it be by indictment or preſentment of lawful men, or by proceſs at common law.

AND by the ſtatute of 1 Hen. 4. cap. 14. it is enacted, that no appeals be ſued in parliament at any time to come. This extends to all accuſations by particular perſons, and that not only of treaſon or felony, but of other crimes and miſdemeanours. It is true, the petition upon which that act was drawn up, begins with appeals of felony and treaſon; but the cloſe thereof, as alſo the king's anſwer, refers as well to miſdemeanours as matters capital. And becauſe this record will give a great light to this whole buſineſs, I will here ſet down the petition and the anſwer verbatim. Vide Rot. Parl. 1 Hen. 4. No. 144 (*a*).

" Item, Supplyont les commens que deſore en avant nul " appele de traiſon ne de autre felony quelconq; ſoit accept " ou receive en le parlement ains en vous autres courts de " dan voſtre realm dementiers que en vous dits courts purra

(*a*) 3 Inſt. 31. 132. Raſt. Ent. 49, 50. 1 Mod. 148. St. at lar. 4to. ed. 1786. 1 v. 397.

" eſtre

" eſtre terminer come ad ote fait & uſe ancienement en temps
" de vous noble progeniteurs; et que cheſcun perſon qui en
" temps a venir ſerra accuſe ou impeach en voſtre parlement
" ou en aſcuns des vos dits courts per les ſeignors & commens
" di voſtre realm ou per aſcun perſon & defence ou reſponſe a
" ſon accuſement ou empeachment & ſur ſon reſponſe rea-
" ſonable record jugement & tryal come de ancienement
" temps ad eſtre fait & uſe per les bones leges de voſtre realm,
" nient obſtant que les dits empeachments ou accuſements
" ſoient faits per les ſeigneurs ou commens de voſtre relme
" come que de novel en temps de Ric. nadgarius roy ad eſtre
" fait & uſe a contrar, a tres grand miſchief & tres grand
" maleveys exemple de voſtre realm."

" LE roy voet que de cy en avant toutes les appeles de
" choſes faits deins le relme ſoient tryez & terminez per les
" bones leys faits en temps de tres noble progeniteurs de noſ-
" tre dit ſeigneur le roy, et que touts les appeles de choſes
" faits hors du realm, ſoient triez & terminez devant le
" conſtable & marſhal de Angleterre, & que nul appele ſoit
" fait en parlement defore en aſcun temps a venir."

THIS is the petition and anſwer. The ſtatute, as drawn up hereupon, is general, and runs thus: " Item, pur plu-
" ſieurs grands inconveniences & miſchiefs que pluſieurs
" fait ont advenus per colour des pluſieurs appeles faits deins
" le realm avant ces heurs ordain eſt & eſtabluz, que defore en
" avant touts appeles de choſes faits deins le realm ſoient
" tries & termines per les bones leys de le realm faits & uſes
" en temps de tres noble progeniteurs de dit noſtre ſeigneur
" le roy; et que ils les appeles de choſes faits hors du realm
" ſoient tries & termines devant le conſtable & marſhal pur
" les temps eſteant; et ouſter accordes eſt & aſſentus que nulls
" appeles ſoient defore faits ou purſues en parlement en nul
" temps avenir *(b)*."

(b) Vide ſtat. 1 Hen. 4. cap. 14. and ſee the Quarto edit. of ſtat. 14. 431.—See alſo 3 Inſt. 31. 132. 1 Mod. 148. Raſt. Ent. 49, 50.

WHERE we may obſerve, that though the petition expreſſes only treaſon and felony, yet the act is general againſt ALL appeals in parliament. And many times the purview of an act is larger than the preamble, or the petition, and ſo it is here: for the body of the act prohibits all appeals in parliament, and there was reaſon for it. For the miſchief, viz. appeals in parliament, in the time of king Richard 2. as in the petition is ſet forth, were not only of treaſon and felony, but of miſdemeanors alſo. As appears by that great proceeding, 11 Ric. 2. againſt divers, by the lords appellants; conſequently it was neceſſary to have the remedy as large as the miſchief. And I do not remember that after this ſtatute, there were any appeals in parliament, either for matters capital or criminal, at the ſuit of any particular perſon or perſons.

IT is true, impeachments by the houſe of commons, ſent up to the houſe of lords, were frequent, as well after as before this ſtatute; and that juſtly, and with good reaſon. For that neither the act, nor the petition, ever intended to reſtrain them, but only to regulate them; viz. that the parties might be admitted to their defence to them. And as neither the words of the act, nor the practice of after-times, extended to reſtrain ſuch impeachments as were made by the houſe of commons, ſo neither do thoſe impeachments and appeals agree in their nature or reaſon. For appeals were nothing elſe but accuſations, either of capital or criminal miſdemeanors, made in the lords houſe by particular perſons: but an impeachment is made by the body of the houſe of commons, which is equivalent to an indictment *pro corpore regni*, and therefore is of another nature than an accuſation or appeal. Only herein they agree, viz. impeachments in caſes CAPITAL againſt peers of the realm have been ever tried and determined in the lords houſe; but impeachments againſt a commoner have not been uſual in the houſe of lords,

lords, unleſs preparatory to a bill, or to direct an indictment in the courts below. But impeachments at the proſecution of the houſe of commons for MISDEMEANORS, as well againſt a commoner as any other, have uſually received their determinations and final judgments in the houſe of lords; whereof there have been numerous precedents in all times, both before and ſince the ſaid act. [A]

[A] As to parliamentary impeachment, the great guardian of the purity of our conſtitution, the ſtudent may conſult that moſt excellent and uſeful publication, "the Parliamentary Hiſtory of "England;" Monteſq. Sp. L. xi. 6. 1 Hal. H. P. C. 150. Rot. Parl. 4 Ed. 3. n. 2. and 6. 2 Brad. Hiſt. 190. Seld. Judic. in Parl. c. 1. Blac. Com. 1 v. 269. 4 v. 259. 399. & 12 & 13 W. 3. c. 2.

Since the publication of the laſt edition of this Hiſtory, an important queſtion, relative to the nature and continuance of Parliamentary impeachments, has taken place. Warren Haſtings Eſq. having been impeached by the Commons for certain high crimes and miſdemeanors, the Parliament, pending his trial, (which had engroſſed two or three years) was diſſolved. Within a ſhort time after the meeting of the new Parliament, namely on Friday the 17th of December 1790, it was moved in the Houſe of Commons, "That it appears that an impeachment by this Houſe, in "the name of the Commons of Great Britain, againſt Warren Haſtings, "Eſq. late Governor General of Bengal, for ſundry high crimes "and miſdemeanors, is now depending."—The Honourable Member * who moved it, ſtated, that his intention was not to move any thing which implied a doubt, but a plain aſſertion of the privileges of the Houſe of Commons, as handed down to them by their predeceſſors, through an uninterrupted ſucceſſion of five hundred years, and to be as faithfully tranſmitted to future generations. That in all the convulſions of our Government, in all the ſtruggles, conteſts, and incidental or progreſſive changes of the functions and powers of the Houſe of Commons, this alone had remained immutable—that an impeachment was never to be defeated by colluſion with a Miniſter, or by the power of the Crown. That an impeachment abated by a diſſolution of Parliament, was not to be found in plain expreſs terms on the Journals of the Houſe of Lords, on the Journals of the Houſe of Commons, nor, taking the confluence of the Rhone and the Soane, in the Minutes of the Conferences between the two Houſes. It was as little to be found in any

* Mr. Burke.

book of authority, or in any good report of law caſes. If the Houſe of Commons poſſeſſed any privileges which were not held for their own individual accommodation, but in truſt for their conſtituents, (as the right of originating money bills, and of proſecuting State criminals) they could not ſurrender or concede them, without a breach of faith. They could no more ſurrender the law and privilege of Parliament when in their favour, than they could abrogate the law when it was againſt them.

The Houſe of Lords, it had been ſaid, was a Supreme Court of Juſtice, and therefore the ſole judge of its own proceedings. Had the Commons no control over the Houſe of Lords in their judicial capacity? He was ready to pronounce that they had. The Houſe of Commons had no judicial, no executive function; but as the ſeeming paradoxes in our conſtitution would appear, on examination, to be founded in the deepeſt wiſdom, from this apparent want of function in the Houſe of Commons, from this ſeeming want of power, it had all power. It was the watch, the inquiſitor, the purifier of every judicial and executive function; and from its apparent impotence, derived its greateſt ſtrength and beauty. If it gave up this, it gave up all, and, like ſalt which had loſt its ſavour, was good for nothing. Were the Lords to reſolve, in their judicial capacity, that a writ of error abates by prorogation or diſſolution of Parliament, would the Houſe of Commons heſitate a moment to interfere, as they had interfered in the caſe of Skinner and the Eaſt India Company, when the Lords attempted to uſurp original juriſdiction? That interference gave riſe to a diſpute, but the iſſue was as happy as the interference was proper, and inſtead of fomenting diſcord between the two Houſes, had been the means of promoting their future harmony.

This motion brought on a very animated and intereſting debate. All the legal characters in the Houſe (excepting only three or four) ſtrongly reſiſted the motion; but happily without ſucceſs. Againſt the motion it was urged, that a Committee ſhould be appointed to ſearch for precedents on the ſubject; by which courſe alone, an aſſembly ſo very popular could decide with the preciſion neceſſary on ſuch a momentous occaſion, and conſiſtently with that dignity which they ought always to preſerve in the eyes of the Public which they repreſented.

Before however recourſe was had to precedents, a great preliminary queſtion preſented itſelf: By what rule, and upon what principles, the ſubject was to be inveſtigated; whether it was a queſtion of privilege to be decided by expediency, or a queſtion of law to be determined by rule?

The objection was, that it appeared to be judicial. The reſolution ſeemed to preſuppoſe doubts of the continuance, which had never been ſtirred, and quieted them by a reſolution that the impeachment was *now pending*. This ſeemed not only the aſſumption of judicial authority,

authority, but a declaration which might pledge the Houſe to give it more than judicial effect.

That the preſent ſtate of the impeachment, be it what it might, was a pure queſtion of law; to be decided by the Houſe of Lords, ſitting as a Court of Impeachment on the inquiſition of the Commons; as much an Engliſh Court of criminal law, as the Court of King's Bench, or the Quarter Seſſions. That it was impoſſible to deny this, without inſiſting that *Magna Charta*, and the thirty ſtatutes confirmatory of it, were all repealed; or at leaſt that though exiſting for ſubordinate purpoſes, they could in the preſent inſtance be made to bend to the will of one branch of the Legiſlature. That the firſt ſtruggles of our anceſtors were to fix deeply and immoveably the root of all ſound and rational liberty, by bringing juſtice, criminal and civil, to a preciſe ſtandard. That arbitrary and anomalous proceedings, by which the ſubject was queſtioned before juriſdictions not defined by law, and expoſed to trials and judgments aſcertained by no legal ſtandard, were the great vice of the ancient government of England; the grievance which firſt called forth the ſpirit and wiſdom of the founders of the conſtitution, to put an end to thoſe worſt of evils. To bring the enjoyment of life, property, and liberty, within the plain unequivocal protection of poſitive law, was the very object of *Magna Charta*; and was amply ſecured by the twenty-ninth chapter, which enacted, that no man ſhould be taken, or impriſoned, or deprived of any property, privilege, or franchiſe, but by the judgment of his equals, or the law of the land. Under ſuch an alternative, therefore, every Engliſh trial muſt be had; a jury of equals muſt decide in all caſes on the life or perſon of an Engliſh commoner, unleſs where there were exceptions by immemorial cuſtom, or poſitive ſtatute; in other words, by the law of the land.

That the trial by impeachment was one of thoſe exceptions; its only foundation muſt therefore be Engliſh law, conſequently the courſe of proceeding under it could never be changed or abrogated by a reſolution of the Houſe of Commons, but muſt be changed alone by the entire Legiſlature of the kingdom. This ſacred ſecurity of the Engliſh Government *Magna Charta* firſt eſtabliſhed; and its thirty confirmatory ſtatutes, with their ſtrong, deep, and intertwiſted roots, bound faſt the ſpreading tree of our liberties, often ſhaken indeed, but never looſened, by the contending tempeſts of ages; and the Houſe of Commons had ever ſtood as a fence around it, and planted new laws for its ſhelter and preſervation.

That the trial by impeachment, eſtabliſhed by the moſt ancient uſage, was unqueſtionably an inſtitution neceſſary for the preſervation even of the laws themſelves, and all the ſecurities of the Government; but was inſtituted by the ſame cautious wiſdom, and tempered with that juſt and benevolent ſpirit, which ſo peculiarly

characteriſed Engliſh juriſprudence. In times when the power of the Crown and its ſubordinate executive magiſtrates would, without due check, have laid waſte all the rights of the ſubject; when even the judges of the law were but too often the ſubordinate engines of oppreſſion, it became neceſſary to provide a tribunal, where criminals could be queſtioned, whoſe authority or means of corruption might over-awe or ſeduce the ordinary courts and miniſters of juſtice. But though ſpurred on by neceſſity, the founders of the conſtitution did not forget the ſafety of the criminal, even in providing for the ſuperior ſafety of the ſtate. When they conferred an inquiſitorial juriſdiction on one branch of the Legiſlature, they recollected the over-ruling influence and authority of ſuch an accuſer, and therefore conferred the power of judicature upon a coequal branch of the government; which, from being ſuperior to awe or influence, actuated by different intereſts, and divided by diſſimilar prejudices, was likely to hold even, the balance of this neceſſary and ſuperior court of juſtice.

By this mode of conſidering the ſubject (and it was ſo conſidered by every writer of authority), the trial by impeachment ſtood harmoniouſly conſiſtent with the entire conſtitution, and with all the analogies of law. By this mode of conſidering it, it could alone be reconciled with *Magna Charta*; for though the party impeached was not tried indeed by his equals, becauſe his equals were his accuſers, yet he was ſtill tried by the law of the land, (the alternative in the wording of the ſtatute) which he could not be, if an impeachment were not a branch of the eſtabliſhed criminal juſtice of England.

Beſides this legal proceeding by impeachment before the Peers of the realm as a court of criminal law, it would appear, from an inſpection of the ancient records of Parliament, (many of which had been collected by Lord Chief Juſtice Hale in a manuſcript printed by Mr. Hargrave, but not publiſhed) that the Lords anciently drew Commoners before them, on the accuſation of individuals, contrary to *Magna Charta* and the various confirmatory ſtatutes. Repeated complaints were made of theſe abuſes by the Commons, and at laſt they were declared to be utterly void, and were formally aboliſhed by ſtatute (*a*). The Lords however, for ſome time, ſeemed to have diſregarded the ſtatute, till upon a private impeachment of Lord Clarendon by Lord Briſtol, the Houſe of Lords referred the queſtion to the Judges, who declared ſuch a proceeding, on the accuſation of an individual, to be contrary to law; coming, as Lord Hale expreſſed it in the work alluded to, within the words of the 29th chapter of Magna Charta: *Nec ſuper eum ibimus, nec ſuper eum ponemus* (*b*). From that time an impeachment by the

(*a*) 1 Hen. 4. c. 14. ante, page 65. (*b*) *Mittemus* in orig.

Commons

Commons was the only caſe in which a Commoner could be ſubjected, by law, to the judicature of the Peers. Aſſuming then an impeachment to be a legal proſecution, on the accuſation of the Commons before the Lords Houſe, could it be any longer a queſtion, by which of the two Houſes every matter which the accuſed had a direct intereſt in for his preſervation, ſhould be adjudged? Common ſenſe and common juſtice equally revolted at a judgment affecting the accuſed, delivered by the accuſer. The court appointed to judge him could alone decide it; and it ſhould be left to its deciſion, without being led by authority, influence, or fear, which were all alike hoſtile to the impartial deliberations of juſtice.

If the Commons, therefore, on examination of the ſubject, ſhould have reaſon to think that, conſiſtently with a ſeries of former judgments of the Lords in ſimilar caſes, a perſon impeached had a legal right to be diſmiſſed from the impeachment by a diſſolution of the Parliament, they ought ſtudiouſly to forbear, by an exerciſe of their own authority, to place any perſon accuſed by themſelves in a worſe condition before his judges, than he might ſtand in without ſuch interference; and rather repair the defect of the law by a proſpective ſtatute, than deprive an individual of the protection of it by an *ex poſt facto* reſolution.

That the juriſdiction of deciding on the exiſtence or ſtate of the impeachment, as it might be affected by the diſſolution of Parliament, was a queſtion equally judicial with any other which might occur in the courſe of trial. The Lords might be obliged to decide it on the objection of the perſon accuſed. And it could not be conceived, that the Commons had a privilege to affect the ſtate of the priſoner in judgment. If the Lords indeed were, *mala fide*, to give a judgment hoſtile to the validity of an impeachment, and contrary to eſtabliſhed rule and cuſtom; which, in the abſence of ſtatute, could alone determine what was law; ſuch a proceeding would deſerve the moſt ſerious conſideration, as a dangerous abuſe of judicial authority. Still the queſtion of judicature would not be changed by the poſſibility of ſuch a ſuppoſition, and it equally remained to be decided by precedent, what the rule of proceeding had been which eſtabliſhed the law.

If the deciſion then was with the Lords, it was next to be examined by what rule it ought and might be expected to be decided by them. If the rules of deciſion were not to be found in the Lords' Journals, where were they to be ſought for, and what rule of law for the protection of the ſubject could exiſt? And was it to be believed, that after the virtue and wiſdom of ages had been exerted for the ſecurity of the ſubject againſt every ſpecies of arbitrary power and puniſhment; was it to be believed, that when the probability of oppreſſion in accuſations of ſtate, had reduced their anceſtors to provide ſo many ſecurities againſt vexation in the courſe of trial, that they ſhould purpoſely have left, without bounds or limits, an engine of power, highly neceſſary indeed, but like

every other power not meaſured by law, deſtructive of all the happineſs and ſecurity of life? That, therefore, the Lords muſt govern themſelves by the judgments of their own Houſe on ſimilar occaſions, and muſt deal with him, if he were placed before them, as they had dealt with others in judgment. A perſon accuſed had, by the genius of the law, a right to come under the protection of technical and formal objections, even when he ſtood not within the reaſon of them, much more if the protection inſiſted on was conſiſtent with the whole ſpirit, and all the analogies, of juſtice. The Court of King's Bench could not enforce Mr. Wilkes's outlawry, though valid in every ſubſtantial part, becauſe the County Court, where he was proclaimed and exacted, was not deſcribed upon the record with the preciſion ſanctioned by cuſtom; though it was plain to a common reader, that it was deſcribed ſo as to be diſtinguiſhed from any other. The firſt inclination of the mind oppoſed ſuch a precedent. But the defeat of juſtice in that, or any other particular caſe, was never lamented beyond its meaſure by any wiſe man; becauſe when even good judges muſt thus ſometimes ſtand diſappointed in the juſt execution of the law, from the ſtrictneſs neceſſary to the adminiſtration of it, the example formed an inexorable barrier againſt the inroads of power and tyranny, in caſes where policy and expediency might eaſily be warped on the ſpur of occaſions, to confiſcate property, or to deſtroy liberty and life. It was admitted, that the power of defeating an impeachment was an inconvenient and exceptionable prerogative of the Crown; but not more dangerous than many other prerogatives formerly belonging to the Kings of England, which in ſubſequent ages had been taken away. But how taken away? Not by reſolutions of their inexpediency, acted upon till the prerogatives were abandoned without ſtatute, but by the regular courſe of legiſlation; the Commons employing the weight of their privileges to compel conſent to a new and better rule of action, and not deſtroying the ſanctions of government, or beating down one dangerous power by the introduction of a greater. That the ſtate of the impeachment therefore ſhould be decided on by the Court, where the Commons by law had lodged it; and that the former judgments of that Court of competent juriſdiction and an acquieſcing Legiſlature, conſtituted the law on the ſubject. By an acquieſcing Legiſlature was meant, that when a ſeries of judgments by a court of competent juriſdiction, *à fortiori* of a court in the laſt reſort, had eſtabliſhed any rule of deciſion, every ſubject had a right to the benefit of it in judgment, while the rule remained in exiſtence, unreverſed by the authority of Parliament; therefore, the ſolution of the queſtion (let it be diſcuſſed where it might) depended wholly on the judgments of the Lords in ſimilar inſtances, to be collected from their different acts, as found in the Journals of that Houſe.

That the Repreſentatives were perfectly independent of the people, and were themſelves, during the legal continuance of their

powers,

powers, the Commons of the land. Hence the Commons of one Parliament were unfettered by their predeceſſors, and would never give them credit for proceedings which had not received the ſanction of law. It followed equally, that when the Parliament was at an end, their controul over the rights of the ſubject, and their ſupport of thoſe rights, were equally at an end. That the idea of taking up an old proceeding *in ſtatu quo*, as it had been called, was refuted by a fair deſcription of all their powers, and of the limits to which they were confined. If a day was given for attendance, and the day arrived in a new Parliament, the next Houſe of Commons could not act upon it. If the Commons impriſoned for a contempt, the door of their priſon was opened, when thoſe who impriſoned were no more. If the Commons, as a part of the Legiſlature, had framed a bill, and their meſſenger was carrying it up to the Lords when the King diſſolved the Parliament—no future Houſe could proceed upon that ſtage of the bill, but the whole was to be taken up again. If ſuch a bill was in the nature of a public charge againſt a culprit of ſtate, as an attainder, and bills of penalty, the ſame rule attached upon it, and the culprit (in effect, though in a different ſhape) would eſcape, unleſs the whole proceeding ſhould be taken up *de novo*, as if it had never been moved one ſtep. In impeachments, the Commons had a very peculiar character as accuſers:—They had no judgment either to acquit or condemn, any more than other parties who proſecuted. They had no judgment of direction as to the mode of proceeding, or the extent of judicial powers in the court at whoſe bar they appeared; but they had a judgment of diſabling at any period, by their own diſcretion, all farther ſteps in that court, and could make it wait for their *fiat*, whether the juſtice which they had invoked ſhould or ſhould not be carried into effect. The Houſe of Lords fell under the ſame diſability, and enjoyed the ſame independence in its legiſlative character. In its judicial, it could not impriſon for a day, or a minute, beyond that which cloſed the Parliament: and it was denied, that even in treaſon, where the commitment was by the Houſe of Lords upon an impeachment, the cuſtody which remained, or the diſcretion of bail upon it in the courts of law, proved an indefinite power to extend impriſonment for the ends of juſtice beyond the duration of a Parliament. The Habeas Corpus Act met the caſe of high treaſon, by conſidering the original commitment, and the original cauſe of it, as legal or illegal; and that remand, bail, or diſcharge, had no reference to any ſuppoſed controul of the Lords over their culprit, after the Parliament was at an end, by virtue of their inherent powers. It was aſked, What impriſonment reſtrained Mr. Haſtings, or kept him even in the kingdom? What penalty of bail was a guard over him, or his friends? If any lawyer would aſſert, that Mr. Haſtings and his bail could, upon impeachment for high crimes and miſdemeanors, be touched between

Parliament

Parliament and Parliament, by an order of the Lords? Indeed if they could, it would follow, that anciently impriſonment would or might have been indefinite at the mercy of the King, in all caſes of impeachment for high crimes and miſdemeanors. If it were ſaid, "No, the courts may remand the culprit or not, by their "diſcretion, as it is admitted they can upon impeachments for "high treaſon;" to this it was anſwered, "Shew firſt the im-"peachment upon a charge for high crimes and miſdemeanors, "or even the bail exiſting after the Parliament, and it would "be ſeen what the courts of law had done with it." That there was one dilemma very difficult, if not impoſſible, to be ſolved. If the Lords could not impriſon at all, or bail for a time beyond the Parliament, upon impeachment for high crimes, and might yet proceed *in ſtatu quo* at a new Parliament, the power was a mockery of juſtice, for they had no priſoner. If they could, on the other hand, impriſon him till the next Parliament, they could have done it indefinitely, as long as it pleaſed the King to diſcontinue Parliament. Upon writs of error, the Lords could not ſtir in the next Parliament, by the common law, if the error was not reverſed or affirmed in the former parliament; which had extended itſelf even to the caſe of prorogation in early times. Lord Hale had ſaid, in a manuſcript written with his own hand, that he was preſent when the Lords determined, that *in prorogation* writs of error abated (unleſs by ſpecial order continued), but that in 1673 it was firſt otherwiſe determined; affirming, however, that by diſſolution of Parliament the writ of error completely abated (and he wrote before 1678), and that he had known it ſo determined. It was true, that now writs of error do not abate, and that in that reſpect the order of 1678 had been affirmed by uſage; but if the law was originally different, it proved the idea with great force, that "*in ſtatu quo*" was out of ſight, even upon writs of error, and the analogy would, in that view of it, apply to impeachments. But the analogy between them was denied, if it was contended, that becauſe writs of error do not abate, impeachments could be taken up *in ſtatu quo*. In writs of error the record remains, and ſo in impeachments; but in writs of error there is no evidence. Was it meant by the term "depending," that the record was in court, ſo that Mr. Haſtings might be called again to plead, or that the evidence was to go on where it left off?

Upon the topic of precedents, the firſt important fact was, that from the time impeachments began, down to the year 1678, not one inſtance was to be found of an impeachment continued by the next Parliament.—It was probable, that ſome of the earlier impeachments were cloſed within the Parliament which firſt adopted them, but it ſhould be recollected how very ſhort the continuance of each Parliament uſed to be in theſe periods.—It might, therefore,

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be fairly ſuppoſed that many of thoſe proceedings died a ſudden death, by the King's power in terminating the court.—It would as little be forgotten, that moſt of the intervals between one Parliament and another were extremely tedious; which was a fact that would account for the policy of the conſtitution, in liberating the victim from cuſtody, if the other alternative ſhould have been to keep him in priſon for an indefinite period. But the caſe was far from reſting there; for inſtances, before 1678, occur, within the reigns of Charles the Firſt and Charles the Second, where impeachments, in fact, were at an end, if not in law, after the Parliament was diſſolved before judgment. It was however admitted that ſuch an actual end of an impeachment, thus interrupted by an end of the Parliament itſelf, might have ariſen from the inexpediency of carrying on the old proſecution. Yet two caſes had exiſted, in which it ſhould ſeem as if the Lords and Commons had ſuppoſed the impeachment legally at an end on the diſſolution of Parliament.

One of them was the caſe of the Duke of Buckingham in the ſecond year of Charles the Firſt, when that minion was a juſt object of popular indignation. The Commons impeached him; pending the impeachment the King diſſolved that Parliament, evidently for the purpoſe of defeating this challenge upon the juſtice of the Lords. In the mean time the King extracted the articles of impeachment, made them articles of an information againſt the Duke in the Court of Star Chamber, and ſtopped that proceeding under the colour of being ſatisfied by the evidence that he was innocent.—This conduct was clear notice to the Commons, that the King looked upon the impeachment, after a diſſolution, as a nullity. The next Parliament was convened in a very little time after the manœuvre, and we hear no more of the impeachment, nor is any complaint ſuggeſted againſt the inſult upon the Commons, though in that light it would have been viewed if the impeachment had been depending. Was the Duke leſs execrated by the Commons? Had he corrupted them? Had the King enſlaved them? Were they ignorant? or cold in the ſcent?—The Duke was more deteſted than ever; the King was at their mercy, and they were as great men as any that ever lived.—Nothing more need be ſaid of them than that, in that very year, they obtained the ſecond *Magna Charta* of England, in the Petition of Right.

In 1665 another inſtance occurred, of Drake impeached for a libel. The Lords directed, that in caſe of a diſſolution he ſhould be the object of proſecution by the Attorney-General in the King's Bench.—Why?—Could not impriſonment for the interval have ſatiated their ſpleen? And would it not have enſured the culprit when the next Parliament ſhould meet? The order for proſecuting by the Attorney-General after a diſſolution was illegal; but the ſuſpicion which gave birth to it, appeared to have been, that he would elſe

have

have eſcaped, and that neither impriſonment of him, nor bail, would have been legal between that Parliament and the next. Though, prior to theſe periods, inſtances were to be found of proceedings in Parliament againſt criminals of ſtate (not in the form of impeachments) extended in fact from one Parliament into the next; yet as far as thoſe obſolete precedents went, this at leaſt appeared: 1ſt, That ſpecial orders were deemed neceſſary ſo to continue the charge, which neceſſity admitted that, without ſpecial orders, it would have abated; and, 2dly, That unleſs it appeared the charge was acted upon *in ſtatu quo* after evidence heard, it would not reach the object of the reſolution under debate: namely, the power to go on againſt Mr. Haſtings juſt where the Managers had left off.—With reſpect to the celebrated caſe of Lord Danby in 1678, it was obſerved as to the character of thoſe times, that every ſound hiſtorian had called them times of popular fury and perſecution. It had been ſaid, "Yes, but the Lords and Commons were quarrelling "when the Parliament began, which reſolved, that impeachments "were *in ſtatu quo*. It was therefore a reluctant evidence wrung "from the Lords, by the public ſpirit of the Commons, in favour of "their conſtitutional rights." The anſwer was, that at that critical period the Lords and Commons were united, and equally violent againſt the Popiſh plot, or againſt the Miniſter, then diſgraced; that Lord Shafteſbury and the malecontents of the day had forced themſelves upon the Cabinet, and governed that very Committee, whoſe Chairman was Lord Eſſex; and theſe being the actors and the views, the act was in character. It would ſpeak for itſelf; it was full of trick—it ſhunned the light—and made a new law without reaſon, precedent, or analogy. The Lords were firſt reminded of the impeachments, and what courſe did they take? They referred to their Committee an enquiry of two points which were diſtinct; one, as to the law reſpecting the continuance or abatement of appeals and writs of error, without apparent occaſion for it; another, as to the fact reſpecting the particular ſtate of the impeachments which had been made in the former Parliament. The anſwer given on the following day was perhaps as curious a paſſage as any upon the records of Parliament, and viciated the whole proceeding engrafted upon it. They reported, that from their view of a judgment by the Lords in 1673, petitions of appeal and writs of error were in force to be acted upon. They add (as appeared by Sir Thomas Raymond's Report *), that the papers contained in that judgment of 1673 were too voluminous. In a diſtinct ſentence, after ſtating the impeachments to be upon ſpecial matter aſſigned, they gave their opinion on a point of law to which they had never been interrogated, and at one ſtroke affirmed that opinion to be, that all thoſe impeachments were *in ſtatu quo*; not in reference to the judgment of 1673, nor with a ſingle ground of any kind, either ſtated or inſinuated. Both parts

* T. Raym. 383.

of the Report were then adopted by the Houſe, who, it did not appear, had ever looked at the judgment in 1673, but gave their Committee ample credit for a candid ſtatement of its effects upon writs of error. Who would have entertained a doubt, upon that Report, that in 1673 the Lords had judicially affirmed the law by which writs of error were to continue after a diſſolution? But when the judgment, as it was called (which was only a reſolution of the Lords on a reference to their Committee), was brought forward, it appeared that no queſtion was put or imagined reſpecting diſſolution of Parliament with a reference to writs of error; the only point raiſed being, Whether if prorogation had intervened, thoſe writs were at an end? If it ſhould be urged that "prorogation was the ſame as diſſolution of Parliament in princi-"ple," that propoſition would be refuted, as well as denied to be law, under the wings of Lord Hale, who died after 1673, and before 1678 *. In his Manuſcript, that great man alludes to the reſolution of 1673, as correcting and reverſing the law of a former judgment (made by the Lords in his hearing, and in that ſame Parliament), that even upon prorogation writs of error abated. But was Lord Hale of opinion, that prorogation and a diſſolution of Parliament were the ſame as to writs of error? So far from it, after ſeeming to adopt the deciſion of 1673 as good law, he proceeds to affirm, as a point clear of doubt, that after a diſſolution of Parliament the writ of error and petition of appeal was at an end; adding, that he had himſelf known it ſo ruled. Here then was detected an inſidious concealment of the fact by thoſe Lords, in 1678, as to the import of the judgment in 1673, and at the beſt a perverted analogy between two caſes, which the exiſting law had completely diſtinguiſhed. But the opinion aſſerted in the next breath, by thoſe Lords, as to impeachments, could not be juſtified even by that judgment, if the firſt analogy between prorogation and a diſſolution had been correct, becauſe there was no fair analogy between writs of error and impeachments, after a diſſolution of Parliament; one of them containing mere points of law upon the face of the record, the other containing an accuſation upon fact. In one of them the public accuſer, who had a diſcretion to interpoſe before judgment, was dead, and in the other no plaintiff was changed, but the ſame parties appeared. In character with ſuch a mode of declaring or making laws as that in 1678, was the ſubſequent conduct of thoſe times. Nothing could be more infamous than what happened in the caſe of many perſecuted Catholics, whom the Judges, and Scroggs at their head, executed, againſt all the rules of law and principles of juſtice. In character with ſuch a law, and ſo made, was the courſe of impeachment againſt Lord Stafford. The trial of Lord Stafford was of extreme importance in marking what ſhame was felt upon the judgment in 1678, and in what manner the examination of it was eluded. Jones, Maynard, and Winnington ſay,

* Namely, 25th December 1676.

"The

"The Lords have paſſed a judgment. It is too clear to be diſput-
"ed. We are to ſuppoſe they had good reaſon for it; we are to
"ſuppoſe they had precedents; but if they had none, it is proper
"to make a new precedent;" that is, proper to make it, by taking away Lord Stafford's life. The Earl of Danby, in 1682, accuſed the Peers of blowing upon their own order, by refuſing a bill which would have enacted it into a law. Then came the reverſal in 1685 of that reſolution; ſo that authority againſt authority, the laſt prevails, and it was therefore the law of the court, that impeachments abated after a diſſolution of Parliament. As to the period of 1685, the firſt year of a ſhort and wicked reign, it deſerved all the odium which a more enlightened age had thrown upon it. The reverſal was indecent in the mode of it, partial in the object, and hurried through the Houſe. But a remarkable diſtinction was taken by that reverſal, between writs of error and impeachments: that part of the order which related to writs of error had been ſince received as the law of the land; and it could be proved that the other part reſpecting impeachments, had been recognized by ſubſequent authorities in the Lords, without a hint of diſapprobation by the Commons.

That it was not true that the Commons were then completely enſlaved; Serjeant Maynard was a hoſt in favour of liberty, and then a Member of Parliament. He had been a champion for the order of 1678 againſt Lord Stafford; but in 1685, though in the habit of proteſting againſt many encroachments, he urged not one ſyllable againſt the order of reverſal, which negatived the continuance of impeachments after a diſſolution of Parliament. In 1690, the times were excellent, and perhaps a better æra for the liberty of the ſubject could not be found than in that identical year. Maynard was in the Houſe of Commons, and Somers, then Solicitor-General, the beſt and greateſt man that perhaps ever breathed in England, or in the world. A queſtion was directly put by the Lords, Whether impeachments continued or abated, upon a diſſolution? All the old precedents were examined, and many others which were not produced in 1673, were brought from the Tower. They were all ſtated; not concealed as in 1678. The Committee intimated their ſenſe of the law to be, that impeachments were at an end, upon a view of thoſe precedents; and on view of thoſe precedents the queſtion of diſcharging the Peers was expreſſly put. It was true, that politics had a ſhare in the debate which that Report produced, and that the Lords had not raiſed the point themſelves, but had ſtated another in their favour. It was, however, certain that a debate aroſe upon that Report. What became of the Houſe of Commons, when they ſaw the Report affirming impeachments to be at an end, and when they at leaſt knew it had been a point in the debate, and when there was at leaſt ambiguity in the queſtion, whether the diſcharge was upon that ground or the pardon? They urged nothing in favour of the order of 1678.—But what ſays the famous

famous Proteſt againſt the reſolution of the Lords to diſcharge the Peers? Was that ſilent upon the Report? No, it condemns the introduction of it into the debate, but not the doctrine which it imported, and imputed a deſign beyond that of relieving the Peers who had petitioned. That deſign was explained by Burnet, as having been to ſave Lord Carmarthen, againſt whom his enemies had raiſed the queſtion again, for the purpoſe of expoſing him to an old impeachment, which hung over his head, unleſs the diſſolution had made an end to it. The enemies of that Peer were buſy againſt him in the Commons; and it was propoſed, at that very time, to vote that, on account of the impeachments in a former Parliament, he ſhould be no longer one of the King's Cabinet Miniſters. Yet his enemies, aware of their own purpoſe in the Lords, and aware of the meaſures by which it had been met there, made no complaint againſt the danger, at leaſt of the order in 1678, if it could have been ſuppoſed that it was not then done away by the order of 1635.

In 1717, the Earl of Oxford was made ſubject, by a reſolution of the Lords, to an impeachment after prorogation; and it was not poſſible to read the diſſenting Lords in their Proteſt, without a neceſſary inference, that the point in queſtion had been, Whether if diſſolution abated, prorogation had or had not a ſimilar effect? That queſtion aſſumed the law of abatement as reſulting from diſſolution, and the Lords in their Proteſt never controverting that law, but affirming and commending it, expreſſed their fears that it might be weakened by a judgment in the caſe of prorogation, which they repreſented as the ſame thing; but the majority thought otherwiſe; and it was impoſſible to conceive that judgment either ſupported in argument, or in argument arraigned, unleſs upon this point conceded, namely, that a diſſolution of Parliament was the termination of an impeachment. Upon this view of the precedents a ſerious doubt was expreſſed, at leaſt whether impeachments could be taken up *in ſtatu quo* by a new Parliament. That if all the precedents were thrown into the fire, a fate which, upon the mere character of the times, two of them deſerved, yet the conſtitutional powers reſiding in both Houſes of Parliament, and general illuſtration conſidered, the Houſe was adjured to be deliberate and wary, in examining all the materials which could enlighten their judgment, before they affirmed, in the form of an aſſerted privilege, a judicial duty of the court, whoſe juriſdiction they could not change, and whoſe judgment they could not force.

Here it was enquired whether by the terms "now depending" in the motion, was meant that the impeachment was depending in all its forms, or, in other words, *in ſtatu quo*, as it depended before the diſſolution of the laſt Parliament? If ſo, the queſtion ſeemed to be ſubſtantially different from the mere conſideration whether the impeachment abated, and muſt be renovated by a particular proceſs elſewhere, not neceſſary to be then deſcribed. It was anſwered,

that

that with regard to the word "depending," introduced in the motion, it was the very word uſed in the reſolution ſent up to the Houſe of Lords in the caſe of the Earl of Danby, and therefore had been thought the proper word to be uſed on the preſent occaſion.

After this enquiry, the arguments againſt the motion were reſumed. It was ſaid to have been admitted, that there was no precedent to be found previous to 1678, of an impeachment having ſurvived a diſſolution; and therefore, not being able to eſtabliſh that order on the direct cuſtom of Parliament, recourſe had been had to the different precedents which were collected by the Committee in 1673, when the queſtion concerning writs of error was before the Houſe. But beſides that none of thoſe precedents related to impeachments by the Commons, all of them which were criminal proceedings, and not mere writs of error, were criminal appeals, directly contrary to *Magna Charta* and the ancient ſtatutes; perſiſted in, even after the ſtatute 1ſt of Henry the Fourth, chapter the 14th; and finally declared by the Lords, on reference to all the Judges, to be contrary to law, in Lord Briſtol's charge of Lord Clarendon. Such precedents therefore, even if applicable, could be no legal foundation for the ſhort-lived order of 1678. That in thoſe caſes, the Lords had given a day to the parties, in the ſucceeding Parliament, which they had omitted in the preſent inſtance, even if they had the power to have given one; by which, according to all authorities, there was an incurable chaſm in the proceedings. The party was, without day, in court, and his bail finally diſcharged from their recognizances, which went only to have him before that Parliament; Mr. Haſtings therefore was not bound to appear, nor had the Lords any proceſs to enforce his appearance; —at all events none to continue the proceedings, which were diſcontinued by no day having been given.—For this Hawkins's Pleas of the Crown, title "Diſcontinuance," where all the authorities are collected, was referred to.—Again, on adverting to the precedents, it was ſaid that that of 1673 (founded too on the anomalous and illegal proceedings alluded to) declared only that writs of error continued from ſeſſion to ſeſſion; and nothing farther was done on the ſubject till 1678, when the Parliament was diſſolved ſubſequent to the impriſonment of the Popiſh Lords under the pretended plot. The nation, at that time, was wrought up to a pitch of phrenzy concerning Popery, and upon *that ſubject*, neither the voice of reaſon nor law could be heard. The Lords and Commons, the accuſers and judges of the Lords in the Tower, jointly examined Oates, and came to a reſolution of the exiſtence of the plot, on the ſole evidence of the perſon who could give it no exiſtence but by his charge on the priſoners, who were afterwards to be tried before the Peers; which fact was ſtated, to ſhew the diſorder and irregularity which prevailed throughout that particular proceeding.

That

That on the 12th of March 1678, to give colour to the continuance of the impeachments, which by no reſolution before that time had been voted to have continuance, it was moved to declare, that writs of error (which by the reſolution in 1673 had been declared to continue from ſeſſion to ſeſſion) continued from Parliament to Parliament; and a Committee was appointed to ſearch precedents. This was evidently done to give colour to what followed; for only two days after, viz. on the 17th of the ſame March, without doing any thing on the firſt order, it was added (as an inſtruction to the Committee) to enquire alſo into the ſtate of the impeachments brought up in the laſt Parliament; and in two days afterwards, report was made to the Houſe, that "*on peruſal of the Journal of the 29th of March* 1673" (which, as had been ſhewn, applied only to the continuance of writs of error from ſeſſion to ſeſſion), and without ſearch of any other authority, or ſtatement of any one principle,—that the ſtate of the impeachments brought up in the former Parliament was not altered. The Lords agreeing with that report, made the order of 1678.

That order therefore was eſtabliſhed upon no antecedent cuſtom of Parliament, but ſtood on a moſt ſtrained and forced analogy to writs of error, which it was notorious never did continue from Parliament to Parliament till the exiſtence of the order in queſtion, as appeared from the authority of Lord Hale and Lord Coke, and a deciſion of all the Judges *temp.* Charles I.

To ſhew that that order was made on the ſpur of the occaſion, the immediate and barbarous uſe which was made of it, on the trial and execution of Viſcount Stafford, was alluded to. Lord Nottingham, whoſe authority had been cited for the continuance of impeachments, was Speaker of the Lords on that trial, and kindly conſented that Lord Stafford ſhould have counſel, provided they did not ſtand near enough to prompt him; and that aged and infirm priſoner was refuſed the right of arguing the queſtion, whether his impeachment had not abated. Perhaps, however, the Managers of that day were right, when they objected to the admiſſibility of ſuch argument, the exiſtence of the order of 1678; but for that very reaſon, if a good one, the argument now turned the other way, ſince the reverſal of that order of 1678 by that of 1685. The reverſing order was then ſtated, the language of which, it was contended, ſhould be attended to. It was not a reſolution either in the abſtract, or in a particular inſtance, that impeachments abated by the diſſolution of Parliament; leaving the order of 1678 ſtill ſtanding as an exiſting reſolution, which might have left future times to cite one judgment againſt the other, as they happened to be moſt conſonant to the opinions of thoſe who adopted the one or the other in argument. No, the order of 1685 entirely cut down and annihilated the former; the words of it being,—

" Reſolved, that the order of the 19th of March 1678-9 ſhall be " reverſed and annulled as to impeachments."

That if the Lords had juriſdiction to make the order of 1678, they had ſurely juriſdiction to unmake it; as the firſt ſtood on no antecedent cuſtom or rule of practice; and therefore while the order of 1685 remained in exiſtence, the matter was not debateable, and the Lords (let the Commons vote what they might) could not, without an act of violence and caprice, refuſe the beneſit of it to any man ſtanding before them in judgment. The queſtion, therefore, was, Whether the order of 1685 was in force? As to that, it had ſtood on the Lords Journals from the time it paſſed, and no impeachment had continued from Parliament to Parliament. Perſons impeached had been diſcharged from impriſonment on the footing of its exiſtence, and under its direct authority; and the Commons, neither when it was paſſed, nor ſubſequently acted upon, had ever made the ſmalleſt objection of any invaſion of their privileges, or of the law.

Having diſcuſſed the precedents of 1678 and 1685, it was ſaid that the true way of ſettling their authorities, was to examine what was done by the Lords themſelves, and how they regarded them the firſt ſubſequent time that the point occurred; and, alſo to obſerve how the Commons behaved on the ſame occaſion.

The next precedent was of the Lords Saliſbury and Peterborough, who were impeached of high treaſon in 1689. Parliament was diſſolved in the beginning of 1689, and a new one met in the ſame year. In 1690 thoſe Lords petitioned to be diſcharged from their impriſonment, ſtating the diſſolution of Parliament, and alſo a free and general pardon. The operation of the pardon was referred to the Judges; on their anſwer, the queſtion being put for their diſcharge from impriſonment, it paſſed in the negative; and being then admitted to bail, they remained ſubject to the impeachment, till they were diſcharged wholly upon the ſearch of precedents, and on the order of 1685. This would be evident to whoever would look at the Journals, though it was not eaſy to ſhew it to two hundred perſons, who had not the precedents, and who refuſed to look at them. That after the anſwer of the Judges, the matter of pardon was never diſcuſſed again; but the Lords aſſembled on the general queſtion of the continuance of impeachments; a Committee having before been appointed to ſearch precedents on the ſubject. It appeared by the Lords Journals of the 30th of March 1690, that the Committee, on that day reported, " that they had examined the Jour- " nals of the Houſe, from their beginning in the 12th of Henry VII. " and all the precedents of impeachments ſince that time, which " were in a liſt in the hands of the clerk, and alſo all the precedents " brought by Mr. Petyt from the Tower, among all which none " were found to continue from one Parliament to another, except

" the

"the Lords who were lately ſo long in the Tower;"—alluding to the Popiſh Lords, who were kept there under the order of 1678, and afterwards diſcharged under the order of 1685, which annulled it. It was upon this report, and not on the footing of pardon, that thoſe Lords were diſcharged. The entry mocked all argument; it was only neceſſary to read it. The words were,

"After conſideration of which report, and reading the orders "made the 19th of March 1678, and the 22d of May 1685, con- "cerning impeachments, and long debate thereon, it was reſolved, "that Lords Saliſbury and Peterborough ſhould be diſcharged from "their bail;" and they were diſcharged accordingly.

What farther ſhewed that the pardon was no ingredient in the diſcharge, if the ſtate of the proceeding were not in itſelf concluſive, was, that the pardon could not have deſtroyed the impeachment, even ſuppoſing the parties to be intitled to it; but muſt have been pleaded before the Lords in bar to it; and on which the Commons, according to every rule of law, as well as the moſt inveterate cuſtom and privilege in impeachments, muſt have been heard.

Nothing remained therefore to be ſaid on that caſe but the conduct of the Commons. Their impeachment was put an end to; the priſoner diſcharged without conſent, meſſage, or communication; and by a direct affirmance of the order of 1685, made on the face of the Lords Journals: yet no reſolution was come to in the Commons, nor any objection taken by any body, though this happened when the Commons were in high ſtrength, and in the very day-ſpring of the Revolution.

As an additional proof that the Lords acted on the order of 1685, it would appear, that a Committee to ſearch precedents had been at the ſame time appointed, on the motion of other perſons impeached, who were alſo diſcharged ſoon after, and on the precedent of Lords Saliſbury and Peterborough. Such was the caſe of Sir Adam Blair, Mole, Gray, and Elliott, who had been impeached about the ſame time with the two Lords. A Committee was appointed to ſearch precedents, on their application to the Houſe of Lords; and after continuing on bail till the diſcharge of Lords Saliſbury and Peterborough, they were alſo liberated, without communication with the Commons, and without any ſubſequent objection or diſſatisfaction; though all thoſe proceedings were of the moſt public notoriety, and could not be unknown to the Houſe of Commons of that day.

The Duke of Leeds's caſe in 1701, which followed next in order, (and which would no doubt be relied on in favour of the continuance) it was ſaid, made quite the other way. After the articles had been brought up, and towards the cloſe of the ſame Parliament, the Lords had, by meſſage, reminded the Commons of

their impeachment, and told them the ſeſſion was drawing to its cloſe. Soon after the Parliament was diſſolved. On the meeting of the new one, the Lords, without any new meſſage to the Commons, diſmiſſed the articles; entering on their Journals only, that in the *former Parliament* the Duke of Leeds had been impeached, articles brought up, and anſwer put in; but that, the Commons not proſecuting, he was diſcharged. That that failure of proſecution muſt have applied to the expired Parliament; for if the impeachment had continued to the new one, a new meſſage ſhould have been ſent before the articles were diſmiſſed for want of proſecution, according to a privilege always inſiſted on by the Commons, that the Lords, on an impeachment, can take no ſtep but in their preſence. The diſcharge was therefore, becauſe the juriſdiction of the Lords was at an end, and not an act of judicature on a ſubſiſting impeachment, as the Commons never made any complaint, as they did when Lord Somers was acquitted in their abſence.

That the caſes of the Lords Somers, Oxford, and Halifax, where the entries were ſimilar to that of the Duke of Leeds, were open to the ſame obſervation. As to the laſt and only remaining precedent, namely, that of the Earl of Oxford, in 1717, that precedent, it was ſaid, eſtabliſhed, beyond all queſtion, what effect a diſſolution was then ſuppoſed to have on an impeachment; for if it had then been doubted, much more if it had been denied, that a diſſolution would deſtroy an impeachment, it was extravagant to believe that Lord Oxford could have been adviſed to build a petition to be diſcharged on the intervention of a prorogation only, even if a diſſolution had been taken to be ineffectual; ſtill more improbable that the Lords would have ſeriouſly entertained it, and ſearched for precedents on the ſubject. It was true, it was decided that the intervening *prorogation* had not terminated that impeachment; but the language of the Lords who proteſted againſt the deciſion, demonſtrated that there was but one opinion concerning the effect of a diſſolution. For if the Lords who voted againſt the effect of the prorogation, had founded their opinion on the denial alſo of the effect of a diſſolution, the proteſting Lords muſt have ſeen that the vote had been given on the reverſal of the order of 1685; whereas they ſay, that as they, in oppoſition to the other part of the Houſe, could ſee no difference between a prorogation and diſſolution, they were afraid that the vote would *tend to weaken* the order of 1685; a language perfectly abſurd, if they had conceived that the vote had been grounded on a reverſal of it. The language of the Proteſt was therefore plainly this, "We are all agreed about the effect of a diſſolution, which is "the ſettled practice; but this vote againſt the effect of a prorogation, which we cannot diſtinguiſh from a diſſolution, may bring "even that point into doubt, which was not meant to be queſtioned."

Reference

Reference was now made to the case in Carthew *, where Lord Holt was supposed to have decided that impeachments were not abated by dissolution. That case, it was urged, was an application by Lord Salisbury to the King's Bench to be bailed before the Parliament met; and he was properly told by the King's Bench, that being impeached of treason, he was not within the act of Habeas Corpus, and therefore not being *de jure* bailable, the rest was, of course, matter of discretion. The Court, indeed, took notice that *commitments* of the Lords continued notwithstanding a dissolution of the Parliament. But the case which would probably be relied on for that doctrine, was Lord Stafford's, which was while the order in 1678 remained in force, which beat down all subordinate or collateral opinions; and besides that, the House of Lords, which alone had jurisdiction to decide upon the existence of the articles, made the decision, on the meeting of Parliament, in the very instance of Lord Salisbury; and without a murmur from the Commons, finally discharged that very impeachment which had been the subject of Lord Salisbury's application to Lord Chief Justice Holt. That Holt's opinion, on a collateral point too, and where the King's Bench had no jurisdiction, could never be opposed to the judgment of the House of Lords, which had jurisdiction, and which decided the very point in the very instance for which his opinion might be cited. The argument, therefore, might be rested on the principles set out with; the judgments of the Court competent to decide, and an acquiescing Legislature; nay, what was stronger than both, acquiescing accusers: for, besides that it had been admitted that no impeachments before 1678 appeared to have been continued from Parliament to Parliament, the case of the Duke of Buckingham, in the time of Charles the First, shewed the sense of the Commons themselves on that subject. They had impeached the Duke, who had become universally odious; apprehending the loss of their proceedings by dissolution, they had sent a remonstrance to the King on the subject; but the Parliament was nevertheless dissolved. The new one met equally revengeful against Buckingham; yet instead of going on with the impeachment, they addressed the King to remove him from his councils, on the imputation of the crimes charged by the former articles; but the impeachment was never mentioned again, not even in debate. It was worth observing, too, that Sir Edward Coke sat in that Parliament, who had been removed from his seat in the King's Bench by Buckingham, and who had also made him Sheriff, to prevent his return to Parliament; yet it never occurred to that great lawyer, with all his resentments about him, to consider the prosecution as existing.—Hence it was contended, that the precedents all went

* Carth. 132.

to the utter extinction even of the articles in the Lords House by the diſſolution of Parliament, without the right of proceeding even *de novo* on the trial, for that in every one of the precedents the articles had been only carried up, and no proceedings had been had in the original Parliament which had received them. Even the ſolitary order of 1673 had not declared that an impeachment in part proceeded upon, remained in *ſtatu quo*, to be taken up again without a re-commencement of trial; ſo far from it, it appeared to be worded to repel ſuch a concluſion. For though, in the very ſame order, the Lords had declared, in the abſtract, that writs of error, on which no trial could exiſt at all, to be broken and divided, continued from Parliament to Parliament; yet, in the next line, when they came to impeachments, they ſtudiouſly changed the ſtile, and inſtead of declaring generally that impeachments alſo continued from Parliament to Parliament, they only reſolved that the diſſolution did not alter the ſtate of thoſe impeachments brought up in the preceding Parliament; a declaration which, as no trial had begun on them, could not be brought to bear upon the preſent impeachment. Leaving therefore the queſtion of the total abatement to reſt, for the preſent, upon the authority of the precedents only, though they might be fortified by ſolid principles of law, a much greater queſtion lay behind, which the reſolution, though its meaning was avowed, did not diſtinctly expreſs; viz. Whether, ſuppoſing the articles themſelves did ſtill remain of record untouched by the diſſolution, *the proceedings upon them* exiſted *in ſtatu quo?* a poſition not only without ſupport from any one precedent, but repugnant to every principle of Engliſh juſtice.

That in order to decide upon both the queſtions, *i. e.* either upon the exiſtence of the impeachment at all after a diſſolution, or its exiſtence *in ſtatu quo* if it ſtill remained, the principles of Engliſh criminal law, and the rules of criminal trial in other caſes, ſhould be conſidered; becauſe the conſtitution, in permitting the exiſtence of a Court of Impeachment as a Supreme Criminal Court for high and extraordinary occaſions, could never have intended that it ſhould bring all the other laws into diſrepute by an avowed departure from their principles;—or deprive the ſubjects of England of the great protection of Engliſh juſtice, applicable to every other occaſion. The nature of the trial by impeachment, deprived the accuſed of many advantages which the law had provided for the ſafety of accuſed perſons in all other caſes; therefore the reaſonings from other proceedings would not cloſely apply; but in the abſence of precedents, the univerſal ſecurities and ſanctions of juſtice ought not to be farther violated, than neceſſarily and unavoidably flowed from the very frame and conſtitution of the Court. And in conſidering whether the impeachment at all continued, or, if continuing, could go on in an uninterrupted courſe, the Houſe ought to keep in view the general principles of Engliſh criminal

minal law and juſtice, and to apply them as far as precedent and ſound analogy would ſupport the application. That it was proper to bring in review before the Houſe, the anxious ſolicitude of the conſtitution, which was but another name for the law, to protect perſons accuſed from all vexation and oppreſſion; proviſions which conſtituted the great characteriſtic of Engliſh liberty, eſtabliſhed for ages, and which other nations were now ſtruggling, through blood and confuſion, to obtain. An impeachment continuing, as was propoſed and inſiſted on, violated them all.

The firſt ſecurity was, that perſons accuſed ſhould be brought to a ſpeedy, or rather an immediate trial, to avoid long impriſonment, and the anxious miſeries of a doubtful condition. This was amply provided for by the Habeas Corpus Act; which enabled a perſon arreſted to call upon his accuſer to bring forward his indictment the firſt ſeſſion after his impriſonment, and to try him on it at the next; on failure of which, he was, in the firſt inſtance, entitled to bail, and in the laſt, to a final diſcharge from the accuſation.

That if ſome limitation had not applied to an impeachment, by its being a proceeding confined to a Parliament, it appeared ſtrange that the proviſions of that ſecond *Magna Charta* had not been extended to that caſe, or at leaſt ſome convenient limitation enacted, conſiſtent with that ſpecies of proceeding; for if impeachments might continue beyond one Parliament, they might continue for life, and operate to perpetual impriſonment. The liberty of the ſubject would then no longer depend on the law, but on the will of one branch of the Legiſlature.

The next great ſecurity was, that the perſons appointed to try, were to be purged from all prejudice by the challenges of the priſoner. It was true, that the conſtitution of the Court, where the Judges ſat by inheritance or creation of the Crown, to a certain degree ouſted that great privilege; and in one Parliament, or in the courſe of trials in general, its operation in ſo large a body could not be very dangerous. But if it could continue from Parliament to Parliament, without limitation, the party impeached might come at laſt to be judged by ſtrangers to his impeachment, and, what was worſe, even by his very accuſers; who, coming up from the other Houſe by ſucceſſion and creation, would judge upon property and life, on their own accuſation; yet without the poſſibility of challenge or objection from the accuſed. The law of England could never mean to ſubject any of its ſubjects to ſuch a horrible inquiſition. If at the time of the Union, the Legiſlature had thought that an impeachment could have had ſuch continuance, it ſeemed reaſonable to ſuppoſe that a clauſe of diſqualification would have been introduced, to prevent the Peers of Scotland from ſitting as judges on trials, the firſt parts of which they by no poſſibility could have heard.

The laſt great rule of Engliſh trial was, that the trial, once begun, ſhould go on without alteration or ſeparation, to prevent impreſſions from any ſource but the evidence; that the evidence ſhould be given by the witneſſes in preſence of the proſecutor, the priſoner, and the Court; and that the verdict ſhould be given on the recent view and recollection of it. Here again, the frame and conſtitution of the Court of Impeachment, to a certain extent, deprived the ſubject of thoſe valuable privileges. But ſtill, conſidering it as a trial *in one Parliament*, the evil, though to be lamented, had its limits. The proſecutors were the ſame; the Court nearly ſo; and the evidence might, during adjournment, or even prorogation, be, with the aid of notes, recollected. But what was the caſe when the Parliament was diſſolved? It could not be ſaid that the pendency of an impeachment deprived the people of the free choice of their repreſentatives; not one Member, therefore, of the former Parliament might return, by election, to the new one. How, then, was ſuch new Houſe of Commons to proceed?

Suppoſe the former Parliament to have been diſſolved juſt when the accuſed had made his defence, and that while the evidence on which his accuſation reſted was freſh in his own memory, and preſent to the recollection of the Managers and the Lords, he had reſted his whole defence on obſervations on that evidence, without calling witneſſes; appealing to the honour of the Managers for the truth of them, as well as to the juſtice of the Houſe—ſuppoſe, when he had thus finiſhed, and had impreſſed even the Commons themſelves with his innocence, the Parliament had been diſſolved; how could ſuch a trial proceed *in ſtatu quo?* Were the new Commons to reply to the priſoner, whoſe defence they had never heard? or was the priſoner to make it over again, when the foundation of it was forgotten, in order that the new Commons might hear it? And ſuppoſing he could do it, it would ſtill be obſervations on evidence which the Managers had never ſeen, and of which there was no record, and which, even if recorded, would be written evidence, contrary to the genius of Engliſh law. Suppoſe even an interval of years to exiſt, which might often happen, between the giving of the evidence by the witneſſes in one Parliament, and the hour of deliberation and judgment in the next; and in a caſe, too, where a judgment of guilt or innocence might abſolutely depend upon the moſt accurate recollection of the proofs; in what ſituation would the Lords and Commons ſtand upon ſuch an occaſion? The Lords who had ſat from the beginning of the trial, muſt judge wholly from the injudicial notes of a ſleepy clerk, and with but a feeble recollection of the oral teſtimony; and the new Lords, open to no challenge, could judge from no other poſſible ſource, never having even ſeen the witneſſes who delivered it. In the ſame blind manner muſt the Commons demand judgment againſt a perſon whom the old Commons, who had heard the evidence, might have acquitted.

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By ſuch rules of trial, who would deſtroy the life of a ſparrow, or even pluck a feather out of his wing? What would the Judges, as well as the Lords, ſay to the caſe of a Peer indicted for murder in the King's Bench, and whoſe indictment was brought up by *certiorari* for trial, as it muſt be, into the Lords' Houſe, if, pending ſuch a trial, and when the moſt important witneſs was under croſs-examination, the Parliament were diſſolved;—would the witneſs be ſet up again a twelvemonth afterwards, to go on with what he had been ſaying the year before? or would the trial begin *de novo?* That that part of the argument might reſt on the anſwer which the Lords and Judges would give to that judicial queſtion, where the Commons could have no pretence of privilege; and if it were anſwered, that the trial ſhould begin *de novo*, upon what principles ſhould a Commoner be expoſed to dangers on an impeachment, which could not belong to a Peer, on an indictment for the higheſt crime?

Argument being now almoſt exhauſted *againſt the motion*, it was, in general, added, that in the lapſe of ſeven centuries, no criminal trial in any Court had ever been interrupted, and taken up again *in ſtatu quo*; nor had any one impeachment ever been ſo continued from one Parliament to another; nor before that moment had ſuch a poſition been ever hinted at by any hiſtorian, or aſſerted by any man living, in or out of Parliament. The caſe of the Duke of Suffolk was an extraordinary one to look to as a precedent. The noble Duke had been baniſhed, and his enemies, not thinking *that* a ſufficient puniſhment, moved an impeachment in that Houſe; but it was not true that a trial had been begun in one Parliament and continued in the next. While thoſe proceedings, however, were going on at home, the noble Duke lay dead in France. One inherent principle in the conſtitution was, that the Crown commanded the activity and exertion of its different powers. In ſupport of that poſition, the general adminiſtration of juſtice, and the hardſhip attending the diſcontinuance or revival of ſuits in ordinary Courts of Judicature, were referred to; adding, that there were always days appointed for putting in appearances. That the ſame rule of law obtained in the Parliament; by the King's proclamation a ſeſſion was to be holden upon a particular day; and upon the authority of Lord Coke every ſeſſion is a new Parliament; and new bills are uſually brought in. That there was a great difference between writs of error and appeals and an impeachment; writs of error and appeals being regulated by the laws and cuſtoms of the realm, modified by the uſage of Parliament; but an impeachment was always governed by the law of Parliament only. That upon a diſſolution, impeachments muſt abate, ſince a perſon impeached was put without a day, which conſequently entitled him to his diſcharge. That the Houſe had no power to revive an impeachment, ſince it was an acknowledged principle, inherent

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in the conſtitution, that the Parliament ſhould die, and all its proceedings determine with its exiſtence.

It was again aſked, Whether the word *depending* meant depending *in ſtatu quo?* for if the queſtion meant that it was depending *in ſtatu quo*, no one could heſitate to declare that it outraged every idea of judicial proceeding. So far from its being a propoſition, the maintenance of which was eſſential to the privileges of the Commons of England, it was a doctrine which militated againſt their privileges. That they gave up their privileges in giving up the point of abatement, ſince one of the moſt eſſential privileges of the people was ſecurity and protection againſt indefinite trial, the protracted and tedious trial to which the doctrine of non-abatement led. That it was not only abated as to the *ſtatu quo*, but abated with reſpect to the record in the Houſe of Lords. It could not ſurely be imagined that the laſt Houſe of Commons could bind the preſent by any one of its reſolutions—if it had the right ſo to do, it muſt alſo have the means—it could not; nor could a blade of graſs, the property of any gentleman of landed property, nor the ſmalleſt coin, the property of any monied man, be touched by any reſolution of that Houſe; then how could a reſolution of the Houſe hold a ſubject of this country bound to anſwer from year to year? It may be ſaid, Shall a Miniſter adviſe the King to diſſolve the Parliament, that he might free himſelf from an impeachment? To this it might be anſwered, that perhaps the King might be properly adviſed to diſſolve the Parliament, for the purpoſe of ſeeing whether the impeachment they had brought was countenanced by the people. Precedents, when militating againſt truth and juſtice, were to be received with jealouſy. But they were always to be conſidered moſt attentively, becauſe if they had, by their uniformity, conſtituted a rule of law, it was wiſe and prudent that they ſhould not raſhly be departed from. Did they deſire too much in requeſting time to ſearch for the true rule of law, in the concurring precedents on the caſe? That the precedents were uniform and concurring to the ſupport of the arguments, except in the ſolitary inſtance of 1678. If however the precedents were abſurd, yet if they had made a rule of law, and that rule was eſtabliſhed and underſtood, it was of more conſequence that the rule of law ſhould be acted upon, than that that impeachment ſhould be continued upon any abſtract principle of theoretic benefit. They ſhould ſolemnly alter the rule by an act of the Legiſlature, and not abet a ſide-wind proceeding, againſt the rule ſo eſtabliſhed. That the continuance of the impeachment was farther illegal, becauſe it was not before the Law Judges, nor proſecuted by the ſame accuſer as at the outſet. The integrity of the cauſe was violated, it being an invariable rule in criminal juriſprudence, that the Judges and the accuſers ſhould be the ſame throughout. It was then aſked, Whether in the caſe of Earl Ferrers, if a diſſolution had taken place it might not have been pleaded in bar to judgment? And in the

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and it was averred that the Crown ought to have the right of diſſolving, for the purpoſe of abating impeachments, to ſee the ſenſe of the people. And if the ſecond Houſe of Commons ſhould think fit to revive the charges, they ſhould ſee the whole caſe, or otherwiſe they could not conſcientiouſly make up their minds upon the ſubject. It was denied that the Lords having appointed minutes to be taken, furniſhed thereby good evidence for the new Houſe, inaſmuch as the demeanour of witneſſes went a conſiderable way in determining what degree of credit was to be given to their evidence; and in the end it was ſaid, that in civil cauſes the rigour of evidence was nonſenſe, in compariſon of what it was in criminal procedure.

In SUPPORT *of the motion*, it was confidently ſaid, that after having examined, with all poſſible accuracy and attention, ſuch precedents as were analogous to the caſe in queſtion, each of them went decidedly in favour of the impeachment remaining *in ſtatu quo*. The growth and developement of the principle of impeachment was traced from the reign of Edward IV. for the purpoſe of ſhewing that in its relation to the effect of a diſſolution, it was preciſely the ſame for impeachments as for writs of error and appeal. Various inſtances were produced of writs of error not abating prior to 1673, and thence it was concluded that the report of the Lords' Committee, and the reſolutions of the Lords at that time, which had remained unqueſtioned ever ſince, were founded on precedents, and what was clearly underſtood to be the practice of Parliament. That the report and reſolution of 1678, reſpecting the continuance of an impeachment after a diſſolution, were grounded upon that of 1673; becauſe both impeachments and writs of error ſtood ſo ſtrictly connected in principle, that it was impoſſible to make a diſtinction between them. That the reſolution of 1673 could not have been adopted merely as a colourable foundation for the reſolution of 1678, becauſe when the former paſſed it was impoſſible that the caſe to which the latter applied, could have been foreſeen; and that when the Earl of Danby applied to the Court of King's Bench to be bailed after the diſſolution of Parliament, the Court recognized the doctrine, that the impeachment did not fall to the ground in conſequence of the diſſolution, as the known and eſtabliſhed law of Parliament. On the precedent of 1685, by which the reſolution, as far as it reſpected impeachments, was reverſed, it was remarked, that its authority was of no avail, the Commons having been corruptly choſen and wholly devoted to the Court;—the principal evidence for the proſecution, Titus Oates, convicted of perjury, and conſequently incompetent; and the reſolution itſelf paſſed without any examination of precedents, not generally with expreſs limitation to the particular caſe. Hence it was inferred, that from the caſes of the Lords Saliſbury and Peterborough, 1690, it was underſtood to be the law of Parliament, that impeachments do not abate by a diſſolution; and after much delay and management, they were at laſt diſcharged by

by a reſolution ſtrictly applicable to their particular caſe, and in no reſpect affecting the general queſtion. Even the caſe of the Earl of Oxford, in the year 1717, would, as far as it proceeded, warrant a ſimilar concluſion. It behoved the Houſe to uſe the utmoſt circumſpection, in aſcertaining how far their right might be affected by the doubt which appointing a Committee to ſearch for precedents would imply. The friends of Mr. Haſtings ſhould remember that his caſe was unconnected with the general queſtion: that if it were proper for the Houſe to proceed againſt him, the renewal of the impeachment would be a greater hardſhip than to take it up where it then ſtood; and that, at all events, neither the length of the proof, nor the magnitude of the crime, could, with any ſhadow of decency, be ſuffered to protect the criminal. The Houſe was then earneſtly adviſed not to put it in the power of the Crown to ſet aſide an impeachment by a diſſolution; or of the Lords, to defeat it by delay; which, as they might chooſe on what and how many days they would ſit each ſeſſion of Parliament, they might be able to do, were a diſſolution not to carry it into effect. On the preſent occaſion, it certainly was the duty of the Houſe of Commons entirely to clear away all doubts which might have ariſen concerning the nature, force, and extent of their own privileges; to ſtamp a double certainty upon the caſe in queſtion; and thus, whilſt they did honour to themſelves, to confer one of the moſt important ſervices in their power upon poſterity. The queſtion was no leſs, than whether the right of the Commons to impeach ſhould exiſt; for it was ridiculous to affirm that the Commons had the right to impeach, if it was coupled with a power in the Crown to prevent the efficacy of an impeachment at any period, which might ſuit the purpoſe of the adviſers of the King, and deſtroy it even in the moment of conviction and judgment.

That a right admitted and acquieſced in for centuries, was not to be ſuppoſed doubtful, becauſe ſome ingenious men had endeavoured to bring into queſtion, what their anceſtors had agreed in for three hundred years; and if forced analogies and ſceptical arguments, from vague and unſupported theories, were to be the grounds of appointing Committees of Enquiry into the privileges of the Commons, there was no right ſo eſtabliſhed but might be called in queſtion, and no privilege, however neceſſary, but might be diſputed. Not a line in the Journals of the Commons could juſtify even a doubt; and if doubts were to be raiſed by inveſtigation of the Lords Journals, no Member of that Houſe would look into thoſe Journals for the privileges of the Commons, nor aſk the opinion of a Houſe of Peers upon the extent of the Commons powers. They alone were competent to declare their own privileges; and there was an end of the power of impeachment itſelf, if they were to inquire of the Lords what were its limits, and calmly ſubmit that important privilege to their ſole

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determination. In this view of the ſubject, it was idle to ſearch for precedents, becauſe the principle was a matter of daily practice; for three years the Houſe had gone on with the trial, from ſeſſion to ſeſſion, from prorogation to prorogation; and that in principle and in law, there was no difference between diſſolution and prorogation, between a new ſeſſion and a new Parliament. It had been admitted that the courſe of deciſions of a competent court were ſufficient to form the law; though it could never be admitted that any deciſion of the Houſe of Lords could make the law. Their deciſions, conſiſtent with principle, were the beſt evidence of the law, which the Houſe could not make by its reſolutions. That very principle, however, proved the impeachment did not abate; for no courſe of deciſions, not even one authority, could be produced for its abating, but the miſerable deciſion of the year 1685, which was to be raked from the aſhes in which it had lain ever ſince it had paſſed, deſpiſed and forgotten by the very men who made it; contaminated and diſgraced by the miſerable circumſtances which gave it birth, and the diſgraceful times in which it happened. That the queſtion had been attempted to be reaſoned, upon principle, upon analogy, and upon direct authority. It was too obvious that the Miniſter who committed a crime deſerving of impeachment, would be the firſt to give himſelf indemnity, by the commiſſion of a freſh crime. With regard to analogy, the foundation of analogical reaſoning conſiſted in proving the admiſſion of a principle in one inſtance, and drawing from thence an argument, that in ſimilar proceedings, and in like caſes, the ſame principle ought to be admitted. But it was remarkable that in all the analogies introduced into the debate, much care had been taken to fly from analogies to other judicial proceedings in the Houſe of Peers, and to apply to ſuppoſed analogies drawn from other courts, and other proceedings founded upon other principles, and ſtanding in circumſtances entirely different and diſtinct from thoſe in which the two Houſes ſtood with regard to any proceeding before the Houſe of Lords in its judicial capacity. Among other analogies, bills of attainder and other legiſlative proceedings had been alluded to, which were unqueſtionably abated and deſtroyed by a diſſolution. But if there was any analogy between the two caſes, the objection to the argument was, that it proved too much. Unfortunately, bills of attainder, like other legiſlative proceedings, ended with a ſeſſion, and were deſtroyed by a prorogation, equally as by a diſſolution. Where had the analogy lain for four years? Had the friends of Mr. Haſtings been ſo negligent as not to remark the ſimilarity between impeachments and bills of attainder till then? Or if they had remarked it, why did they not come forward with the analogy three years ago, convey the knowledge to the Houſe, and inform them that they were proſecuting Mr. Haſtings without any authority, becauſe impeachments were like bills of attainder; and ended, as they did, with the ſeſſion of parliament in

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which they commenced? That it never had been doubted within thoſe walls, that impeachments continued from Parliament to Parliament. In truth it could hardly be ſaid with fairneſs, that it had ever been doubted any where. Before the queſtion was agitated with any party view, in the caſe of the Popiſh Lords, the great Lord Nottingham, a man eminently learned, to whom the profeſſion of the law owed as much as to any man; who had done more to form and improve one branch of our law than all who had ſucceeded him;—that great Judge, in declaring the cauſes of holding the Parliament, and ſpeaking for the Crown itſelf, had ſolemnly and deliberately been of opinion; that a diſſolution made no alteration on an impeachment. Upon the meeting of Parliament in the year after the Popiſh Lords were impeached, addreſſing himſelf to the Commons, he informed them that the King had, during the diſſolution of Parliament, been applied to, to liberate thoſe Lords; but that he had thought it right to reſerve them for juſtice, and deſired the Commons to proceed ſpeedily with their trials, that they might not ſuffer the miſeries of indefinite confinement. Before he had directed the Commons to proceed upon the trials, he muſt have been of opinion that the trials were in exiſtence. When the queſtion came afterwards in the next ſeſſion to be agitated, it was ſolemnly ſettled by the reſolution of 1678, that the ſtate of impeachments was not affected by diſſolution of Parliament; not upon the ſpur of the occaſion, but upon mature deliberation and enquiry; upon following up the principle which was firmly eſtabliſhed in the year 1673, and which never ſince had been controverted. Much abuſe had been thrown on the times about the year 1678: It was true they were times of much ferment, but it was to the fermenting of the great ſpirit of liberty at that time, that we owed our very exiſtence, even the meeting in that Houſe then to diſcuſs that queſtion. That ſome exceſſes might have been practiſed, could not be denied; and the particular exiſtence of the Popiſh plot might be a chimera. But the fear of popery, and terror for the loſs of liberty, were not at that time ideal fears. It was to the ſpirit of our anceſtors then, and to the principles which they ſucceſsfully maintained, that this country owed the Revolution, and the exiſtence of the preſent family upon the throne of the kingdom. Let thoſe times be what they might, the reſolution in queſtion was not tainted by any thing which might be bad in them. It had nothing to do with the Popiſh plot. The queſtion was agitated in the impeachment of Lord Danby, impeached for crimes totally diſtinct from the plot, and decided by a Houſe of Lords, certainly not particularly inimical to that Miniſter. After that period the queſtion came again to be mentioned in the Houſe of Commons. In one of the conferences with regard to Lord Danby, the Managers, among other things, reported, that one of the Lords had put the Commons in mind that they

they had gained two great points in that Parliament, viz. that impeachments continued from Parliament to Parliament, and that the impeached Lord muſt withdraw. The Managers for the Commons replied, that thoſe points were agreeable to the ancient law and rule of Parliament. The propriety and truth of that anſwer was not at the time queſtioned by any man. No one therefore could doubt what he found above one hundred years ago declared by great and able men, and admitted by the whole Houſe of Commons, to be the ancient law and uſage of Parliament. Upon that law, Lord Stafford was tried and executed; and in his caſe it was ſolemnly decided. Much had been ſaid with regard to that trial, namely, that the witneſſes were perjured, and that unfortunate nobleman had a hard fate. But if the witneſſes were believed, the conviction was juſt; the other circumſtances of the trial, and the mode in which it was conducted, were little liable to objection. The form of conducting a trial, the principles which directed it, the queſtions of law which aroſe in the courſe of it, were not to be ſet aſide becauſe the witneſſes happened to be perjured, or even becauſe an innocent man had loſt his life by their being believed. That about the period when thoſe things paſſed in Parliament, the queſtion had more than once occurred in Weſtminſter Hall, where it was equally admitted as law, that impeachments continued notwithſtanding a diſſolution. Lord Danby and the Popiſh Lords had applied to be bailed; if an idea had prevailed of the abatement of the impeachment, their application ought to have been to be diſcharged. But the Court would not even bail them, till Jefferies was made Chief Juſtice. Bailing was an affirmance of the commitment, and therefore a direct authority that the impeachment ſubſiſted. Upon looking into the caſe of Fitzharris, there was ground to ſay, that the queſtion had been ſolemnly determined by all the Judges of England. Fitzharris had been generally impeached by the Commons of high treaſon; no articles were preſented againſt him; Parliament was diſſolved. He was afterwards indicted for a ſpecial treaſon under an act of Charles the Second; he pleaded that he was impeached. In the courſe of the diſcuſſion of the plea, his Counſel often endeavoured to argue that impeachments continued from Parliament to Parliament. Had the law been clearly otherwiſe, it would have been eaſy to have told them, "What ſignifies all this argument? The impeachment is "gone" So far from it, the Chief Juſtice ſtudiouſly avoided that queſtion; and when they were preſſing to argue it, ſtopped them by telling them, that the only queſtion before the Court upon the plea was, Whether a general impeachment for treaſon could be pleaded in bar of an indictment for the particular treaſon ſet forth? In the courſe of the trial, one of the Counſel for Fitzharris inſiſted that it had been, after the diſſolution of Parliament, ſolemnly reſolved by all the Judges, that the King could not proceed upon the indictments againſt the Popiſh Lords on account

account of the impeachments which were *then depending* againſt them: the chief anſwer made by the then Attorney-General was, that that was an extra-judicial opinion.—Though that opinion was extra-judicial, ſtill it had all the weight of an opinion of the twelve Judges; an opinion which they could not have formed if they had not thought impeachments did not abate, and that a diſſolution of Parliament had no effect whatever upon the ſtate of an impeachment,

After all this, it might have been thought that the point was clear; but in the firſt day of the firſt Parliament of James the Second, in the moment of ſervility and adulation, the Houſe of Lords thought proper to reverſe the order of 1678, ſo far as related to impeachments, and next day to diſcharge the Popiſh Lords. If ever there was a time dangerous to the liberties of this country, it was that period: a weak and bigoted Prince upon the throne; a packed and garbled Houſe of Commons almoſt named by the Crown, in conſequence of the violent and arbitrary deſtruction of the charters of the different corporations; and a people broken-hearted and almoſt worn down in their repeated ſtruggles with the Crown; added to all which, had the Houſe of Commons been differently formed from what it was, to proceed with the proſecution was impoſſible. The principal witneſſes were convicted of perjury; yet in ſuch a time, and under ſuch circumſtances, even the then Houſe of Peers was aſhamed to declare the reſolution of 1678 not to be law. On the very day in which that miniſter of wickedneſs Jefferies took his ſeat as a Peer, it was reverſed, without putting any declaration in its place, without enquiry, without examination, without the knowledge of the Commons, and without daring to look in the face the very reſolution which was attempted to be reverſed; the Proteſt expreſly ſtating, that it was not *even allowed to be read, though repeatedly called for*. That ſuch a precedent, at ſuch a time, and under ſuch circumſtances, was now gravely contended to be ſufficient to overturn ſettled law, deſtroy every principle, and trample upon the privileges of the Commons. But had even that caſe been regarded and followed? The very man who made it deſerted it. It had ſerved his purpoſe, and was laid by for ever. Not many years afterwards, in 1688-9, Lords Saliſbury and Peterborough were impeached; and after the diſſolution they applied to the King's Bench to be bailed. Lord Holt was then Chief Juſtice, a man of as great and reſpectable character as ever ſat upon the bench, but certainly not remarkable for his great reſpect for the privileges of the two Houſes of Parliament. He was the friend, and had been the Counſel of Lord Danby. In his caſe he had had opportunity to conſider the nature of impeachments; that very queſtion muſt therefore have been before him, and he could not be ignorant of the reſolution of

1685, which had liberated his client. Yet neither the Lords applying to be bailed, nor the Court in refusing to bail them, take the least notice of that order. Upon the authority of the case of Lord Stafford, (which certainly was not law if the order of 1685 was supposed to have had any operation) the Chief Justice and all the Judges refused to bail them; expressly grounding their judgment; and resting their opinion, on what had been determined at that trial, as having settled and fixed the law upon the point. Had either the Lords themselves, or the Judges, an idea that the resolution of 1685 had altered the law, would the one have totally forgotten in their application to the court, and the other totally neglected in their judgment, a solemn determination made only four years before, and within the positive knowledge of both the parties and the Judges? Upon the meeting of Parliament those Lords applied to the House of Peers, who, indeed, did appoint a Committee to search precedents, and did attempt to involve their case with that general question; but with that question their case had nothing to do. An act of general pardon had passed. A question was put to the Judges, whether their case fell within it. The Judges were of opinion, that if the offences were committed under certain circumstances, they were within the act; and on a subsequent day they were discharged. It was impossible to read the Protest, and not to see that the pardon was the ground of the discharge. The Protest states the proceeding to be extra-judicial and without proper parties; complains that the Commons were not heard, and that even the House had not been attended with precedents of the effect of pardon. Nothing could be more ridiculous than such a Protest, if the Lords had been discharged; because the impeachment was at an end. To have heard the Commons would have been impossible, no proceeding being in existence. To have enquired about pardons must have been idle, because the Lords were discharged on a separate and distinct ground. But had the precedent been followed since? The same person who had been impeached as Earl of Danby, was in 1695 impeached as Duke of Leeds; he lay under impeachment for five years, and through several Parliaments. How did it happen that he never claimed the benefit of the resolution of 1685? After five years and three dissolutions, the House of Lords took up his case, but did not declare that it had long been at an end. They acted upon it as *a pending* proceeding, and dismissed it; "*the Commons not prosecuting:*" which was a direct authority in the present case. About the same period (in the year 1701) Lord Holt had again occasion to consider the law of Impeachments; in deciding the case of Peters and Benning, reported in 12th Mod. Rep. 604—in which he declared, *that impeachments upon which some proceedings had been had, and Parliament dissolved, might be continued in a subsequent Parliament.* Mr. Justice

Foſter expreſsly ſtates the caſe of Lord Saliſbury, as grounded on the act of general pardon; and reaſons from it in a manner which it was impoſſible he ſhould have done, if he had been of opinion that his impeachment had been ended by a diſſolution. To all theſe authorities, parliamentary and legal, nothing was oppoſed but the proceedings in 1685. That an attempt had been made to argue ſomething from the Proteſt in the caſe of Lord Oxford, in the year 1717, urging that it muſt have been admitted in the debate, that diſſolution would abate an impeachment. No ſuch admiſſion could be gathered from the Proteſt. It was true that it had been aſſerted by the Minority, who, from their own aſſertion, argued that a prorogation would equally abate it. That that Proteſt ſtated as a fact a matter notoriouſly untrue, *viz.* That diſſolution and prorogation equally put an end to judicial, as to legiſlative, proceedings. Every one knew that judicial proceedings in the Houſe of Lords abate neither by the one nor the other. But if any thing to the preſent argument was to be drawn from that Proteſt, it was, that both ſides of the Houſe were agreed that there was no difference between diſſolution and prorogation; if ſo, as a prorogation did not put an end to an impeachment, neither did a diſſolution.

It had been ſaid that writs of error and other judicial proceedings had, till the year 1673, conſtantly abated by a diſſolution, and that impeachments muſt do ſo too. At that very time it was equally held, that prorogation abated a writ of error; how then came it that impeachments continued from ſeſſion to ſeſſion? If the fact were true, it would prove that impeachments did not in former times abate, when writs of error did; or if it were admitted that the analogy was well founded, it would prove that when it came to be held that writs of error did not abate by diſſolution, it ought equally to have been held ſo as to impeachments. The poſition that writs of error and appeals in ancient times abated by a diſſolution, was not however well founded. The order of 1673 was not the reſult of the arbitrary will of the Houſe of Lords, but the conſequence of an inveſtigation into what was the ancient courſe of proceeding in that Houſe; and whoever would look at the caſes quoted in the Report preceding the order of 1673, or would examine the numerous caſes to be found in Lord Hale's book, or the rolls of Parliament, would ſee that the ancient courſe was to preſent a petition complaining of an erroneous judgment, in conſequence of which a *ſcire facias* iſſued returnable at the next Parliament. So far was the proceeding from abating, that in the ordinary and regular courſe, the party was not compelled to appear and hear the errors till the next Parliament; which principle was not confined to proceedings in error alone, but extended itſelf to every judicial proceeding before the Houſe of Lords, as

was evident from a bare inſpection of the Report in the year 1673. That there was a caſe in Levinz Reports *, (17th Charles II.) where it was expreſsly declared, that writs of error, and *ſcire facias* thereon, did not abate by prorogation. About the middle of the reign of James the Firſt, a practice began, which became more frequent in the time of Charles the Second, of making writs of error returnable immediately, and making orders of the Houſe of Lords for their hearing from time to time. It was then argued, that as thoſe writs, and the appearance of the parties, were ſupported by orders of the Houſe of Lords, and as all orders fell with a diſſolution or prorogation, that the writs of error were at an end. In conſequence of this reaſoning, the Courts of Law held the writ to be abated; but ſo far were they from making any diſtinction between diſſolution and prorogation, that all the caſes which held thoſe proceedings abated by a diſſolution, were grounded on the caſe of Gonſalove and Heydon, which was the caſe of a diſſolution. So far thoſe caſes were an authority to prove that there was no diſtinction between prorogation and diſſolution, as to judicial proceedings. That when the Houſe of Lords found the courts below proceeding in this courſe, they were driven to inveſtigate the ſubject; the conſequence was, the order of 1673; which order, it was true, extended only to prorogation; but the principle extended equally to diſſolution, and was accordingly applied to that caſe, in the year 1678. Thoſe orders again brought the law back to its ancient principle, and judicial proceedings in Parliament have ever ſince, as they had done in ancient times, continued undiſturbed by a diſſolution. The court in which they are, continues the ſame; the time of its meeting is fixed to a certain day by prorogation, to an uncertain one by a diſſolution; but the court, the judges, and all the proceedings, remain untouched and unaltered. That there was no diſtinction in law between diſſolution and prorogation. Lord Coke expreſsly ſays, that every new ſeſſion is a new Parliament; and in that he has been followed, without contradiction or diſpute, by every lawyer who has ſucceeded him. So far, therefore, as analogy to other judicial proceedings in the Houſe of Lords could apply, that analogy was clearly in favour of the motion. That the preſent caſe had been attempted to be compared to abatements at common law by the death of the King; but in order to ſupport that reaſoning, recourſe muſt firſt be had to fiction, and then to analogy. There was no poſſible reſemblance between the death of the King and the diſſolution of Parliament; and even if there were, it was unfair to reaſon from it. Abatement of judicial proceedings by demiſe of the Crown, was an anomalous proceeding; the general rule being, that the King never died, and from that

* Pritchard's caſe, 1. Lev. 165.

it was an exception: the argument, therefore, ought to be drawn from the rule and not from the exception. Every person knew that in early times, the profits of courts of justice formed a considerable part of the royal revenue; to increase which was equally the object of the King, and the Judges; and the doctrine of abatement was encouraged and extended, even contrary to other principles. But admitting that those cases were not anomalous, and that some analogy might be drawn, still the argument was equally defective. The idea upon which suits abated by the death of the King, was a notion of personal trust and confidence granted by the King to particular judges; the dissolution of Parliament, or the calling of another, neither gave nor entrusted any personal confidence whatever. It had been said that Commissioners of oyer and terminer, and the like, abated also by the death of the King, and that their proceedings were at an end by whatever destroyed their commission. There was in those cases, however, not only the notion of personal confidence from the person of the Crown, but also the very authority of the judges was conferred, created, and limited, by the commission itself. There was no analogy between a commission conferring a special authority, and a writ calling an existing inherent authority into exercise. Calling a Parliament conferred no authority; dissolving it took away none; the rights and powers of the peerage existed independent of the Crown and its powers, and when called into action, naturally returned to their former state. The calling of a Parliament was nothing more than appointing a time for the high Court of Peers to meet, without having the least operation upon its proceedings.

Considering the matter shortly upon principle, it was difficult to believe that to be law, which appeared so totally destructive of the necessary powers of the House of Commons. Impeachments were of no use, if they might be stopped at the pleasure of the person accused. They were naturally directed against Ministers, and men often in the possession of power. Could it be doubted, that he who had so advised the Crown to misuse its authority as to deserve an impeachment, would hesitate in advising a dissolution to save himself? Would he who had risked every thing in the commission of one crime, doubt about the commission of another, to give himself security from the consequences of his former one? There was no period of an impeachment in which it might not be done: the criminal might take the chance of an acquittal, and finding that likely to fail him, save himself by this mode. It was said he might be impeached again, at least; the doctrine however went to throw open his prison-doors and to elude justice. Was it a thing unknown in the History of England, for a Minister to fly from the vengeance of Parliament? Was it nothing that the means of escape were put in his power? But suppose he did not fly, did he not return to the new Parliament with the same weapon in his hand,

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to defeat and elude the juſtice of his country? The length of the preſent Trial had been complained of; but that length would be doubled, if it was held that the proceedings abated, unleſs it was alſo held that a criminal was to eſcape merely becauſe it had been found neceſſary to diſſolve the Parliament; or becauſe a crime happened to be committed near the period when by law it would expire.

That the deciſion involved in it conſiderations of the firſt magnitude. The rights and privileges of Parliament were concerned, which muſt remain ever inviolably ſacred, or our valuable and excellent Conſtitution be ſubverted and deſtroyed. Precedents had been conſulted with laborious induſtry; but thoſe adduced in favour of impeachments *abating* on a diſſolution of Parliament, were in number ſo few, and of ſuch queſtionable authority, as clearly to evince the *imbecility* of the poſition. Indeed if there were precedents which *clearly* eſtabliſhed the point, they might be called upon to bow in ſilence to the authority, but ſhould loſe no time in providing ſome remedy againſt a practice, whoſe tendency was hoſtile to the privileges of the Houſe, and deſtructive of the liberties of the country. The authority of ſuch precedents no one would ſay ought to be relied on, in preference to that of the *fundamental principles* of the Conſtitution. But there exiſted no evidence of ſuch a uniform rule of parliamentary practice. From a diſpaſſionate review of the different precedents, it was aſſerted with confidence, and the ſequel, it was truſted, would abundantly juſtify the aſſertion, that impeachments did continue *in ſtatu quo* from Parliament to Parliament, notwithſtanding the precedents ſo much inſiſted upon in ſupport of an *abatement* of ſuch proceedings by a diſſolution. Caſes perfectly in point might be adduced from the reigns of Richard the Second, and others; but it would be ſufficient to inſiſt on the caſe of the Duke of Suffolk, in the reign of Henry the Sixth, which indiſputably proved that Impeachments continued from one Parliament to another, By the reſolution of the Lords in 1673, writs of error and petitions of appeal, were made to continue from Parliament to Parliament; but it had been contended, ſince no mention was made of *impeachments* in that reſolution, that a diſſolution of Parliament operated as an *abatement* of ſuch proceedings. The very oppoſite concluſion was deducible from the Report of the Committee; which expreſsly ſtated, that *writs of error, petitions of appeal, and other buſineſſes of a judicial nature*, ought not to be narrowed in their diſcuſſion, but to extend from Parliament to Parliament. Impeachments, therefore, as judicial proceedings, did not neceſſarily *abate* by a diſſolution, In the order of 1678, *impeachments* were expreſsly mentioned, in common with writs of error and petitions of appeal, to continue from one Parliament to another. To that precedent, however clear and deciſive, objections had been taken to invalidate its authority. Firſt, it was affirmed to have been a very

precipitate proceeding. How could that objection apply? Did it refer to any new matter not included in the former resolution of 1673? Clearly not. That order was only a deduction from the principles already laid down in the former decision; it could not then be a *precipitate* measure. But the critical juncture of affairs, during the ferment of party violence and of civil contention, might probably, it was said, contribute materially to that resolution, which authorized the continuance of impeachments. That objection, too, must vanish the moment the circumstances of the times, when the decision in question took place, were contrasted with those of the subsequent period, when it was rescinded. In 1678, the proceedings of the Lords were not influenced by any particular reference to some matter then depending; it was a general order, that writs of error, petitions of appeal, and impeachments, should survive a dissolution of parliament. Nor was that measure the production of any party violence or animosity; it was an unanimous decision, founded on the resolution of 1673, to serve as a standing precedent for the conduct of future impeachments. But what was the case of the reversal of that decision in 1685, so much depended on as a precedent in favour of the abatement of impeachment by dissolution? Was it not at the æra when James the Second, a bigoted and Popish Prince, had ascended the Throne; when the Parliament was *obsequiously* devoted to the will of the monarch; when the sacrifice of principle was required to be made, by the prejudices of the times; when certain Popish Lords were about to be solemnly impeached, who were the supposed favourites of the King? Under such circumstances, what was the conduct of Parliament? They might think compliance was better than resistance at such a period; and therefore determined, probably with the best intentions, to rid themselves of the impeachments in contemplation, by rescinding the order of 1678. The professed object of that reversal, then, was to screen the noblemen in question from the impending danger of impeachment. Against which of the decisions did the objection taken from the circumstances of the times apply most forcibly; to the order of 1678, or to its reversal in 1685? Unquestionably to the latter.—The next objection to the order of 1678 was taken from the case of Lord Stafford. How could that instance invalidate the authority of the precedent in question? Because it afforded an opportunity of appealing to the passions; — that, from an eloquent and pathetic description of the trial, conviction, and execution of that unfortunate nobleman, the Committee might infer the injustice of the principle of continuing impeachments. Was that a legitimate and conclusive argument? Would not such reasoning prove adverse to the cause attempted to be established? For, admitting the Parliament in that instance to have acted improperly by continuing an impeachment, might not another Parliament be equally culpable in dispensing with

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the continuance of such a proceeding? Suppose a delinquent impeached, the charges of crimination gone through, and a dissolution of Parliament to take place; would it not prove the extremity of injustice to stay the proceedings in such a case, by which the defendant would be precluded from entering on his defence, and judgment of crimination or acquittal could not pass without a renewal of the proceedings *de novo*? His innocence or guilt must remain a subject of much doubt and suspicion. Would it not therefore be infinitely more expedient and proper, for the honour and reputation of both parties, that such proceedings, conducted by one Parliament, should be resumed *in statu quo* by another? Upon such a liberal principle the accuser would have every fair opportunity of making good his charge; and the accused have equal liberty to establish his defence. Nothing short of that procedure could deserve the name of public justice. What, because the fate of one nobleman, from the continuance of impeachment, was supposed hard and oppressive, did it therefore follow that the exercise of such a privilege of the Commons, in every instance, would be attended with the same noxious consequences? If the abuse of an institution was a valid argument of its inutility, the objection might apply; otherwise pathetic expostulation would go for nothing; for in deciding upon the merit of a dry precedent, our passions ought not to interfere with our judicial deliberations. The validity of the order of 1678 stood therefore unimpeached; a precedent which neither eloquence nor sophistry could possibly invalidate.

That the case of Lords Salisbury and Peterborough, adduced as a precedent in favour of an *abatement* of impeachment by dissolution, was equally unfortunate; for there did not appear from the proceedings, any reference whatever, either to the order of 1685, or to any former decision on the subject. Nor did the impeachment of Sir Adam Blair and others apply. And as to the impeachment of Lord Danby, there could not remain a doubt as to the sentiments then entertained by Parliament; since he was clearly dismissed, because the Commons had declined the prosecution. Three dissolutions of Parliament had obtained, before he was discharged. It was evident, if a dissolution operated as an abatement, Lord Danby would have been dismissed on the first dissolution; nay, he would have been, upon that principle, discharged of course. But the case was quite otherwise; for Parliament was repeatedly dissolved, and Lord Danby as often detained; until at length, the Commons declining to prosecute, he was discharged; so that that impeachment *abated* by the act of the Commons, and not by the operation of a dissolution. In the cases of Lords Somers, Halifax, Portland, and the Duke of Leeds, the impeachments abated in the same manner; the Commons not prosecuting, the parties were discharged. On which side did the weight of evidence from prece-

dents preponderate? Did not the ſcale fairly incline in favour of the continuance of impeachments from Parliament to Parliament? The right to proſecute an impeachment until judgment was obtained, was clear, unequivocal, and indiſputable, even from the authority of thoſe precedents.

Parliament, it was urged, exerciſed two powers, legiſlative and judicial, each of which had ſeparate and diſtinct limits and duration. The confuſion of thoſe powers was the principal ſource of all the doubts upon the preſent queſtion. Lawyers had differed as much in their opinions reſpecting writs of error, and petitions of appeal, as of impeachments: and from ſuch a colliſion of oppoſite ſentiments, much ſatisfaction could not be expected. Reference ſhould therefore be made to the clear and eſtabliſhed principle of the Conſtitution, in order to remove every difficulty. Every act of legiſlation terminated by prorogation, as well as by diſſolution; but no judicial act was influenced by either. Impeachment therefore being a judicial proceeding, could not be affected by prorogation or diſſolution. In the caſe of writs of error, and of petitions of appeal, the proceſs continued from ſeſſion to ſeſſion, and from Parliament to Parliament; much more neceſſary was it that the proceedings in an impeachment ſhould alſo continue; for in the one caſe, there was only one individual againſt another; but in the other, the Houſe of Commons, and all the Commons of Great Britain, were parties againſt a State delinquent. The impeachment in queſtion was not the act of the late Parliament, but of the whole Commons of the realm; the proceeding being in the name both of Conſtituents and Repreſentatives. It had been aſked, If the Houſe of Commons, in this inſtance, were the attornies of the people? In one ſenſe they were conſidered as agents, conſulting their own judgment and diſcretion, in protecting the intereſts of their conſtituents; but they were not the attornies of the people, as agents delegated with power, to act merely by the inſtructions of their conſtituents. An impeachment had been commenced by the Commons in the perſons of their late repreſentatives; ſuch a proceeding ought not to be diſcontinued without due enquiry and deliberation; for the Houſe ſtood in a ſimilar ſituation with a ſucceſſor to the King's Attorney-General, who was always required to proceed, with all trials already commenced on the part of the King. In law, it had been ſaid, there was no ſuch body as the Commons of England recognized. Would any one draw ſuch an abſurd inference, from an accidental omiſſion, that ſuch a body had no real exiſtence, which was to be regarded as the principal object of legiſlation in every civilized country? Our anceſtors had, in their accuſtomed wiſdom, ſufficiently guarded againſt ſuch a ſuppoſed ſoleciſm in politics, by ordering all ſupplies to be granted in the name of the Commons, as well as all impeachments to be laid in their name;—and when once a proceeding

ceeding assumed a judicial form, its existence no longer depended on the persons who were immediately concerned in its institution. That the House of Commons was only the legal organ of instituting impeachments, as the Attorney-General was of filing an information, *ex officio*, or an indictment, in the name of the King. The public prosecutors in the one case were the Commons of the realm, and the King was the prosecutor in the other. From the consideration of the capacity in which the House, as a judicial body, acted in the conduct of impeachments, it followed, that their proceedings could not abate, or be affected, either by a prorogation or dissolution of Parliament.

That the authority of Lord Hale was to be distrusted in the present instance, since writs of error, petitions of appeal, and impeachments, were considered by him as legislative proceedings. All legislative proceedings unquestionably abated by prorogation, as well as dissolution; but impeachments, writs of error, and petitions of appeal, are judicial proceedings, which continue from session to session, and from Parliament to Parliament. The error of Lord Hale proceeded from his confounding the legislative with the judicial power, in parliamentary proceedings. Lord Holt entertained a different opinion on the subject, since he had argued from the case of Lord Stafford, as a weighty and irrefragable precedent, in favour of the continuance of impeachments, and other judicial proceedings, from one Parliament to another. Lord Chief Baron Comyns, an authority of the highest respectability in Courts of Justice, was also decided in his opinion on the subject; for, from a passage in his Digest *, it appeared, not only that impeachments continued, but that they could be resumed and prosecuted, until judgment was obtained, notwithstanding any contingent interruption, from either prorogation or dissolution. Had such proceedings abated in consequence of such an event, it was evident that the course of public justice would be greatly interrupted. But there was neither precedent nor law which authorized such a deduction; and the continuance of impeachments was frequently rendered indispensably necessary, in order to produce a salutary operation, and to guard against their abuse. And if impeachments were allowed to be a branch of the judicial power, they must necessarily have the same operation with other acts of that power. Writs of error, petitions of appeal, as judicial acts, survived prorogation and dissolution; so also ought impeachments. To admit the continuance of the former, and insist on the abatement of the latter, by the operation of a dissolution, was the grossest absurdity; since, as judicial proceedings, they were branches of the same power, and their connection depended on a permanent union in principle.—That those who insisted upon the abatement of impeachments, were consistent,

* 5. V. oct. 249, 250.

ſitent, if they alſo inſiſted on the abatement of writs of error and petitions of appeal; but when once the continuance of the latter was allowed, and the abatement of the former contended for, in conſequence of a diſſolution, then it was evident that impeachments were made, in one inſtance, a branch of the judicial power, and in another, an act of the legiſlative, to ſerve ſome particular purpoſe. Such a confuſion of the two parliamentary powers ſhould be ſtudiouſly avoided, leſt their proceedings, impeded by endleſs doubts and difficulties, might terminate in injuſtice to individuals, and eventually tend to ſubvert the conſtitution. That the power of impeachment was a privilege of the firſt conſequence to the liberties of the country; it operated as a ſalutary check upon thoſe in adminiſtration, and effectually guarded againſt every undue influence of the Crown, in the protection of State delinquency. Ought the event of an impeachment, then, to depend on the operation of a diſſolution? If the exerciſe of that power were once to be influenced by ſuch an event, there would be an end to official reſponſibility; the moſt flagrant acts of corruption, oppreſſion, and injuſtice, would paſs with impunity; for the party impeached might procure, by intereſt or influence, a diſſolution of Parliament, in order to eſcape the puniſhment his offences might juſtly deſerve. Voluntary exile was, indeed, too heavy a puniſhment for injured innocence to endure, to avoid an unjuſt impeachment; but for the guilty delinquent to enjoy ſuch an indulgence, would be no puniſhment, but rather a reward. The abatement of impeachments therefore by diſſolution of Parliament, would throw an inſurmountable obſtacle in the way of public juſtice, and deprive the Houſe of a power the moſt formidable to a corrupt Adminiſtration.

The objection, that no man could be a Judge *de jure* in a court without a competent knowledge of the whole proceedings, was admitted to be true, in an inferior Court of Judicature; but not applicable to the Houſe of Lords, inaſmuch as that Supreme Court was liable perpetually to change its Members. And ſuppoſing the new Members ignorant of the proceedings already had of the impeachment depending, what inconvenience could ariſe from that circumſtance, when copies of the whole evidence were printed? They need only refer for requiſite information to the Journals. They had a right to judge from the Minutes, on the fidelity and accuracy of which they might always depend, ſince they were diſtributed not only among thoſe Peers who were preſent at the taking of the evidence, but among thoſe who were abſent, for their information. That an impeachment was an extraordinary caſe, which did not admit of being conducted by the ſame rules which governed an inferior Court of Judicature. In the one caſe, judgment was formed upon printed evidence; but in the other, *viva voce* evidence was certainly requiſite,

site. And were the rules of the Court of King's Bench to obtain in the Houſe of Lords, the queſtion would be wholly at an end, and the right of impeachment at once annihilated; ſince it were better to file an indictment in the one, than prefer an impeachment in the other. But the principle of impeachment was, to bring delinquents to juſtice, who would have eſcaped, if tried according to the ordinary rules of Courts of Judicature. That the practice of the Houſe of Lords was incompatible with that of other Courts, in regard to *viva voce* evidence and deciſion, without ſeparating. Notes were in conſtant practice, and written evidence conſulted, without which it were impoſſible, in caſes of impeachment, to reduce under one view the whole body of the evidence; for there were few inſtances in which impeachments did not occupy ſome days: written evidence was then as indiſpenſable in a trial of ten days, as of three years. But it was ſaid, that in a long impeachment, in conſequence of the conſtant change of Members in the Houſe of Lords, ſome who had been accuſers became Judges. In reply it was obſerved, that there was no period of prorogation to which the ſame objection would not apply. The Members who were ſo circumſtanced, certainly could not be deprived of their judicial powers; at the ſame time, the exerciſe and application of thoſe powers remained at the ſole diſpoſal of their own feelings and conſciences. It was an unavoidable circumſtance incidental to the nature of ſuch a proceeding as an impeachment, from which no danger of injuſtice could be apprehended with any ſhadow of reaſon.

That the Court in which the Trial had been conducted, was acceſſible to all; the reports and papers reſpecting the evidence were open to general inſpection; ſo that it was entirely at the option, not only of every Member of the Houſe of Commons, but alſo of every Britiſh ſubject, to remain in ignorance of any part of the proceedings. It was wiſhed it ſhould be underſtood by all, as an eſtabliſhed and incontrovertible principle, that impeachments continued *in ſtatu quo*; inaſmuch as a contrary mode of proceeding would be attended with conſequences deſtructive of the privileges of the Houſe, as well as injurious to the party accuſed. If an offence, for inſtance, was committed, the conviction of which required proceeding by impeachment on the eve of a diſſolution of Parliament, the proſecution might be poſtponed until the meeting of a new Parliament, in order to avoid a repetition of the proceedings; the conſequence naturally to be apprehended would be, the eſcape of the delinquent. If, on the other hand, an impeachment had been carried on for ſuch a conſiderable length of time as to exceed a diſſolution of Parliament, the repetition of the proceedings in that caſe might materially impede the progreſs of other public buſineſs. The death of a witneſs, in the mean time might conſiderably affect the ſtate of the evidence; and an impeachment, by that mode of

proceeding,

proceeding, be converted into an engine of oppreſſion and injuſtice. Suppoſe the party impeached to have made ſome progreſs in his defence, his accuſers might poſſeſs ſufficient influence to procure a ſudden diſſolution of Parliament; the conſequence might be, a freſh accuſation againſt him, fabricated out of his own defence. By ſuch a nefarious proceeding, he might continue to be the object of public proſecution all his life, without the poſſibility of being pronounced either innocent or guilty. An impeachment, therefore, muſt continue *in ſtatu quo* after a diſſolution. The Houſe of Lords could not proceed to judgment, unleſs the Houſe of Commons prayed it; in like manner, as the Court of King's Bench, on a conviction on a criminal information or indictment preferred by the Attorney-General, would not give judgment until that officer came into Court and prayed it.—That in ancient days, the Parliament was diſſolved, or expired, at the end of a ſingle ſeſſion; but as election petitions and other public buſineſs increaſed, it had been found neceſſary to increaſe the duration of Parliaments. And in defining the diſtinction of the rules of proceeding in the Courts of Law and the Court of Parliament, it was ſaid, that in the former, the whole power of the Court was derived from the Crown; but in the Court of Parliament, all the power was derived from the People.

The Houſe of Lords had been admitted to be a permanent Court of Judicature. In all impeachments, the accuſing party virtually, though not identically, was the ſame after a diſſolution as before; for it would be ridiculous to contend that the great body of the people, in whoſe name, and on whoſe behalf, the Articles had been carried up to the Houſe of Lords, had ſuſtained any material or aſſignable alteration. As no real change, then, had happened either in the tribunal or proſecutor, it was clear that whatever was actually criminal ſix months ago, had not become leſs criminal from the interval which had taken place. The primary law of right, the true object of all human legiſlation, and the criterion of its excellence, was neither to be affected by lapſe of time, nor difference of ſituation: and upon what principles of reaſon, or of juſtice, ſhould the chances of eſcape be multiplied to the guilty, or the tortures of imputed guilt prolonged to the innocent, becauſe the King might be adviſed to call a new Parliament?

But there was another conſideration, which aroſe out of the caſe of the Earl of Danby. That Miniſter had been impeached by the Houſe of Commons in 1678, and, after conſiderable delays, had pleaded the King's pardon. Charles the Second told his Parliament, in the moſt expreſs terms, that he had given Lord Danby his pardon under his broad ſeal: that if that pardon ſhould be found defective in form, he would renew it, again and again, till it ſhould be perfect; for he was determined to protect him, as he was not criminal (and his Majeſty had aſſigned not a very conſtitutional

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reaſon for his innocence), having acted only in obedience to his orders. That was preciſely the ſort of caſe which an impeachment was peculiarly calculated to reach. The King could never regularly be anſwerable for the faults of his government. Miniſters alone were reſponſible; and if they valued their reputation or their ſafety, would relinquiſh their ſituations, whenever the King ſhould be reſolved to act in contempt of their advice: the boaſted right of impeachment, upon which the Houſe of Commons ſo juſtly valued itſelf, would otherwiſe be a mockery. If the King, who was not amenable, could affectedly take the blame upon himſelf and protect his Miniſter by a pardon, corruption, and every ſpecies of political infamy, would be placed beyond the vengeance of an inſulted nation. The Houſe of Commons, in 1678, felt that if the plea of Lord Danby were allowed, it would undermine the right of impeachment; a right derived to them from their conſtituents; to be exerciſed for their benefit, and not for their own, any farther than as they were a part of, and not diſtinct from, the great body of the people. They had had no precedent of a plea of pardon, but they had what was better than precedent—they had good ſenſe and principle to direct them. They reſiſted the validity of the plea with ſpirit and firmneſs; and as they were neither to be ſoothed nor intimidated, the King had recourſe to his only chance of ſcreening his favourite from juſtice, by diſſolving the Parliament.—That the doctrine ſo properly contended for by the Houſe of Commons in Lord Danby's caſe, had been afterwards ſolemnly eſtabliſhed by an Act, which every one muſt conſider as one of the moſt happy and ſacred Acts of the Legiſlature, namely. the 12th and 13th of William the Third, (*a*) which had ſettled the ſucceſſion to the Crown upon the Houſe of Hanover; and had enacted, for the better ſecuring the rights and liberties of the ſubject, that no pardon under the great ſeal *ſhould be pleadable* to an impeachment by the Commons. But of what uſe was that ſalutary clauſe, if the King, who was reſtrained from the improper exerciſe of his prerogative in one mode, might eventually produce the ſame effect in another—by diſſolving the Parliament? It was true, that in ſome reſpects the preſent times did not reſemble thoſe of Charles the Second, and that no man would be found raſh enough to adviſe the diſſolution of a Parliament for ſo infamous a purpoſe. And though the Legiſlature had wiſely declined to mark out the exact limits within which the exerciſe of the Royal prerogative ſhould be confined; yet the enlightened ſtate of the country had ſufficiently aſcertained, for all wholeſome purpoſes, the boundaries beyond which diſcretion would not incline it to proceed. Such was the fortunate, the glorious ſituation in which they were then placed; but, as the peculiar guardians of the rights and liberties of the people, their duty called upon them to extend their political views beyond the contracted ſpace of

(*a*) c. 2. ſ. 3.

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their own natural exiſtence; and to take care that poſterity ſhould not ſuffer, becauſe they felt and rejoiced in their own ſecurity.—That it had been well obſerved, in opening the buſineſs, that the Houſe were in a Committee, in one of its great ſuperintending capacities, namely, in the Committee of Courts of Juſtice: and it was the nature of the Court, and the circumſtance of the Houſe of Commons itſelf being the proſecutor, which could produce a doubt. But when the caſe was ſtated, it would prove more clearly the neceſſity of ſtanding upon their privileges, and only admitting the precedents (not deciſive) of other Courts, and of the Houſe of Lords, as illuſtrative of the great conſtitutional queſtion. Suppoſe the Court of King's Bench, which obtained juriſdiction in civil ſuits by the fiction of the defendant being in the cuſtody of the Marſhal of the Marſhalſea; or the Exchequer, whoſe civil juriſdiction was obtained by feigning the plaintiff to be the King's debtor, were to ſay, "We will no longer admit the operation of thoſe fictions; fictions "which the wiſdom of our anceſtors had contrived in order to in-"troduce powers equal and co-ordinate in the diſtribution of private "juſtice, and to give three places, inſtead of the Common Pleas alone, "to decide on the property and perſonal rights of individuals;" whereby, among other wiſe regulations, juſtice had been brought to a higher degree of perfection in this country, than in any other in the civilized world; if the Judges of thoſe Courts were to diſregard thoſe uſeful fictions, and thus abridge the means of juſtice, by ſhutting up two of the ſources from whence it flows, would not the Houſe of Commons inquire; would they not by their anathemas, either in the form of Reſolution, of Addreſs, of Impeachment, or ſome other conſtitutional mode of exerciſing their inquiſitorial power, compel thoſe Judges to do their duty? So in the preſent caſe; Could the Commons ſit by and ſee their day of trial paſſed over unnoticed, the fiction of a diſſolution operating, it was hoped inadvertently, on the Lords, to put the impeachment of a great State criminal aſide, without enquiry and reſolution, founded on their known and undoubted privilege? a privilege ſimilar to that which founded their inquiries into the conduct of the inferior juriſdictions, and which only differed in this, that in the caſe of the Lords it was one ſupreme power in conflict with another, without any third authority to decide between them, and therefore more purely and emphatically a queſtion of privilege. That they ſtood upon the beſt and ſoundeſt precedent in the hiſtory of the Conſtitution, when they determined not to go into a Committee to enquire into precedents, where their privileges were clear and material. It had been agitated in 1679, whether a pardon was pleadable in bar of an impeachment. The Commons, when called upon by the Lords to argue the queſtion at their bar, refuſed to argue it, becauſe it was ſo clearly interwoven with the Conſtitution, and ſo eſſential a privilege, that to argue was to doubt; and to doubt, almoſt an abandonment

donment of the right.—The reſolution of 1673 was again adverted to. Upon the face of the order of the Lords to inquire in 1673, and on the Report and Reſolution founded on that Report, a clear diſtinction was taken between the proceedings of the Houſe of Lords in a judicial and in a legiſlative capacity. In particular the Report of the Committee ſaid, that "*any buſineſs in which their Lordſhips act as a "Court of Judicature, and not in their legiſlative capacity*, continues "in *ſtatu quo* from ſeſſion to ſeſſion." And the Reſolution on that Report ſaid, that *buſineſſes* continued.—What *buſineſſes?*—Undoubtedly the buſineſſes referred to by the Reporting Committee; of judicial, as contradiſtinguiſhed from a legiſlative capacity. And that reſolution, though proceeding on various precedents, did not make, but ſet forth the real conſtitution of the Court of the King in Parliament; which was the true, real foundation for the continuance of an impeachment; namely, that it was a conſtantly exiſting Court; and although from diſſolution, or other cauſe, it might not be ſitting to do juſtice, yet it was always open to receive appeals and writs of error. Many caſes were in the law books, which ſhewed that a writ of error might be brought *ad proximum Parliamentum* during diſſolution, as well as *ad proximam ſeſſionem* during prorogation; which proved the Court of the King in Parliament, which was the Court in which the Commons impeached, as well as that in which error was tried, to be a conſtantly exiſting Court; which was alſo founded in the very origin and ſource of the Lords' juriſdiction.—That the identity of Parliament was gone, and that the Houſe ſat under a new authority, was denied. The Lords, it was ſaid, had been properly ſtiled the *hereditary Judges* of the kingdom. Why?—Becauſe they derived their juriſdictions from their patent of Peerage, not from the writ of ſummons on diſſolution, or proclamation to meet in Parliament after prorogation. That the patent of Peerage, to the Peer and his heirs for ever, according to the nature of the limitation, gave to him and his heirs of full age, as each ſucceeded, a right to act as a Judge in that ſupreme Court of the King in Parliament. This was ſo clear a right, that no power could deprive him of it; for it was expreſsly laid down by Lord Coke, and admitted by every lawyer, that the Peer was intitled to his writ of ſummons to Parliament; and if not ſent to him, he might go, demand, and take it from the office. That the writ, or patent, was the ſource of judicial power to the Peer and his heirs, for ever; who was thereby conſtituted *an hereditary Judge*; exactly as the writ or patent to a Judge in Weſtminſter Hall, for life, and for the life of the King, gave judicial power to the Judge. The power once given, could not be taken away by the Crown, during the life and good behaviour of the Judge. That of the Peer only ended by extinction of the Peerage, or forfeiture to the laws. The Judge's power ceaſed (before the firſt year of the preſent King,)

King) with the demiſe of the Crown; but the judicial authority of the Peer did not. 'Why?—Becauſe it was hereditary. That in the ſeventh Report of Lord Coke, reſpecting the diſcontinuance of proceſs by the demiſe of the Crown, it was expreſsly laid down, that proceſs by the Sheriff of London does not abate, nor any heritable juriſdiction. Why?—Becauſe the authority was independent of the Crown; whereas the proceedings in Weſtminſter Hall did abate; ſubject, however, to revival. Why?—Becauſe the authority which gave birth to the juriſdiction was gone; whereas the juriſdiction of the Lords was in perpetuity. No act of the King could take it away; no act of the King could therefore abate it. The authority was given with the patent of Peerage; the day or time to exerciſe it, by the writ of ſummons, to meet at the beginning of a Parliament; or of the proclamation, to meet at the beginning of a ſeſſion. Thus the day of meeting appointed by the King, at pleaſure, gave the time for exerciſing the juriſdiction of the Court, ſtiled the Court of the King in Parliament; juſt as the common law, by giving the Term to the Judges of Weſtminſter Hall, gave the time for exerciſing their judicial powers. The Judges in Weſtminſter Hall could no more exerciſe juriſdiction *in Bank*, (interlocutory matters done in chambers being different) out of Term, than the Court of the King in Parliament could, when Parliament was in prorogation or diſſolution. But the King could abridge neither juriſdiction, at the times allotted for it, by law and practice. He could not withhold a Judge, or impede a cauſe in the King's Bench; he could not diſſolve a cauſe, or withhold a Peer in the Court of the King, in Parliament. In ſhort, it was a Court perpetually exiſting; and Lord Hale, whoſe authority, had been ſo much relied on, on the other ſide, ſaid in the caſe of *Sedgwick* and *Goſton*, reported in 1ſt Modern *(a)* in the year 1673, that the Regiſter of writs contains a *ſcire facias* for a writ of error *ad proximum Parliamentum*. The Lords therefore, when they reſolved that judicial matters ſurvived in *ſtatu quo* from ſeſſion to ſeſſion, in 1673, conſidered ſeſſion and Parliament (as it was) to be one and the ſame thing; not only on the force of the precedents there cited, but on the reaſon of the thing, derived from the nature of the juriſdiction; conſidering it as a Court, which though, like all other Courts, it had certain times of acting, yet, like all other Courts, it had a conſtant exiſtence, and could not be annihilated. Hiſtorical anecdote ought to be conſulted, in explaining deciſions and precedents. Who would abandon hiſtory, as a mean of clearing doubtful caſes? The characters of the Judges who decided, was material in the judgments of courts of law; ſo was the character of the times, in parliamentary precedents. On the precedent of 1673, hiſtory was ſilent; but the ſilence of hiſtory was an important ingredi-

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(a) 106.—3. Keb. 256. S. C.

ent in the caſe of 1673. Reſearch had been made in vain, into all the hiſtories of the times, for the origin of that important reſolution: but what had been looked for in vain in the hiſtories of the times, had been found in the law books. From the Reſtoration, to the year 1673, it appeared by many of the law reporters, that many caſes, reſpecting the operation of prorogation and diſſolution, on writs of error and appeals, had taken place; doubts had ariſen, and the Courts knew not how to decide. The reſolution of 1673 muſt therefore have been a rule to ſettle thoſe doubts; a rule, taking its riſe, not out of impeachment, party agitation, or political ſpirit, but out of mere queſtions of private right and private property, uninfluenced by paſſion or violence. And what did that calm, mild, reſolution, originating in peace, not ſpringing from diſcord, mark out? That the Court of the King in Parliament, was a conſtantly exiſting Court, whoſe judicial proceedings were not touched by the exertion of prorogation, but remained *in ſtatu quo*, from ſeſſion to ſeſſion, which was the ſame as from Parliament to Parliament.

To reſcue from abuſe the reſolution of 1678, it was ſaid, that inſtead of being ſtated inſidiouſly, it was ſtated fairly and correctly. Had the matter of impeachment been coupled with writ of error or appeal, it would have been inſidious, becauſe it would have been ſetting forth that as a principle, which was merely a concluſion. In that reſolution it was fairly ſtated, held out ſingly, diſunited from other judicial proceedings, in order to provoke conſideration. It was deſired by the Lords' reſolution of 1678, that the Committee ſhould, as well as writs of error, conſider the ſtate of impeachments; and it was reſolved upon the report, ſubſtantively and diſtinctly, that diſſolution of Parliament did not alter the ſtate of impeachments; that is, that the continuance of impeachment after diſſolution, was a corollary, flowing from the ſtate of other judicial proceedings. As to their citing no precedent for the proceeding, the obſervation was equally without foundation. The Committee of 1678 referred to the Journal 1673; which ſtates precedents, not only of civil caſes, but, as had been obſerved, of criminal caſes, and of criminal caſes ſubſequent to the act of Henry the Fourth. Thoſe antecedent, however, were as good authority to the preſent point, as thoſe ſubſequent. The object of the act of Henry the Fourth was to aboliſh criminal proceedings before the Lords, at the ſuit of individuals; till that time they were legal; and by the precedents they appeared to have endured from Parliament to Parliament. At that time of day if they endured from ſeſſion to ſeſſion, they endured from Parliament to Parliament; for it was admitted that in the early times of Parliament, there were no prorogations; at leaſt none appeared on record, previous to the reign of Philip and Mary. Thoſe caſes therefore, whether prior to or ſince the time of Henry the Fourth, eſtabliſhed, that criminal proceedings begun in one Parliament,

were carried on in ſubſequent Parliaments, and did not abate. But it had been endeavoured to ſhew, that the Parliament of 1678 deſerved no credit! a Parliament which, next to that which ſettled the Revolution, and that which ſeated the Houſe of Brunſwick on the throne, deſerved more of poſterity than any Parliament on record. It was not right to conſider Parliament by the character of the times, but by conſtitutional acts, in their legiſlative and deliberative capacity. In that view, there was not an important or material privilege of perſonal freedom, parliamentary independence, or conſtitutional principle, afterwards enacted and enforced at the Revolution, which was not enforced and carried by the Houſe of Commons in 1678. All the ſeeds were ſown in that Parliament, which afterwards grew to maturity. It paſſed the *habeas corpus* act;—it reſiſted Lord Shafteſbury, who, as Chancellor, had attempted to regain the power of trying elections, and judging of the right of Members to their ſeats; and thus, by a ſecond ſtruggle, fixed that invaluable privilege for ever. It reſolved, not on precedent and record, but on the clear unalienable rights of a free conſtitution, and the independence of inquiſitorial power (without which inquiſitorial power was a mockery)—that a pardon was not pleadable in bar of an impeachment;—that a Lord High Steward, an officer named by the Crown, was not a neceſſary part of the Court of the King in Parliament; which, if it had been neceſſary, empowered the Crown to ſtop an impeachment *in limine*, by refuſing to appoint that officer; and laſtly completed the great work of inquiſitorial independence, by deciding that a diſſolution did not annul an impeachment. The reſolution of 1678, therefore, was not only ſound and juſt in itſelf, but was the act of a Parliament, whoſe reputation ſtood as high, for conſtitutional doctrine, as any in the annals of our hiſtory. With regard to the precedent of 1685, if, inſtead of having paſſed in times when a ſervile Houſe of Lords, and a packed Houſe of Commons, choſen by boroughs deprived of their legal rights, acting under a bigoted and miſguided Prince, that reſolution had paſſed in the beſt of times, and under the moſt perfect Parliament, it would amount to no authority whatever; becauſe it only removed one reſolution, without putting another in its place; and in ſo doing left the principle entire, for it did not venture to affect other judicial proceedings. If ſo, it was like reverſing a rule of court;—(rules which Courts of Judicature were competent to make, to advance juſtice or regulate proceedings;)—but which could neither make law nor annul it.

The caſes at common law, confirmatory of the continuance of an impeachment, were again alluded to: and firſt, the caſe of Lord Danby, in Skinner's reports *. In that caſe, Lord Holt was counſel at the bar, and Jeffries the Judge came down on purpoſe to do the

* 56. 162.

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job of the day; and yet he, who was not fettered by any principle of duty, who could foresee all the consequences of admission, admitted that all that was done was to enlarge Lord Danby's custody, and that upon the meeting of the new Parliament, they might proceed to the trial of Lord Danby. So far there was the authority of Jeffries, that instrument of prerogative and oppression, that impeachment endured from Parliament to Parliament. The next case in the books (from Carthew's reports †), arose on the application of Lord Salisbury to be bailed, in 1690. Lord Holt, counsel for the prisoner in the former case, was now Chief Justice of the King's Bench, and presided at that application; and he, who knew exactly all that had passed, said, that commitments by the Peers endured from Parliament to Parliament; that Lord Danby being bailed to appear at the next session of Parliament, was an affirmance of the commitment, and a plain proof of the opinion of the Court at the time, that the commitment was not avoided or discharged by prorogation or dissolution. In 12th Modern, 604, Lord Holt says (by way of illustration), "If an impeachment be in one "Parliament, and some proceeding thereon, and then the Parliament "is dissolved, and a new one called; there may be a continuance on "the impeachment." Holt, who was counsel for the Popish Lords in 1679, had twice, as Chief Justice, delivered that doctrine; and was, perhaps, of all the Judges who ever sat in Westminster Hall, the Judge whose authority was of most importance in a point of Parliamentary privilege; he who had been led to a full consideration of the privileges of both Houses, and had opposed as a Judge in Westminster Hall the privileges of each (*a*). So that if any cases deserved authority, those deserved authority, as being delivered by a Judge, who had more means of information on the particular case, than any person of the times; who was not afraid of combating the privileges of either House of Parliament; whose authority therefore, on a question of that kind, might be deservedly reckoned higher than that of any Judge who had ever sat in Westminster Hall; because if he had prejudices, they were prejudices unfavourable to the privileges of Parliament, when set in opposition to the Courts of Westminster Hall.

It had been argued, that the present House of Commons must be supposed totally ignorant of the whole which had passed, and therefore incapable of going on with the prosecution. A great constitutional principle, however, was not to be decided by extreme and abstract cases, but by the real solid principles of reason and law, applied to the conduct of men; to the principles of the constitution, and the

† 132.

(*a*) See the case of the King *v.* Knollys, 1. Ld. Raym. 10. and Ashby and White, 2. Ld. Raym. 938. 6. Mod. 45.

exiſting ſtate of things. Perhaps the beſt way of anſwering one extreme caſe, was by putting another. It was admitted, that prorogation did not annul an impeachment; yet, it required no ſtretch of imagination to put a caſe, where prorogation ſhould work the exact phyſical impoſſibility of going on, which was not actually, but only politically true (if true at all) in the caſe of diſſolution. Suppoſe Elizabeth, whoſe power as to holding Parliaments was not conſtrained by any act of the Legiſlature, inſtead of maintaining the conſequence of this country among the other Powers of Europe (which created public neceſſities, and obliged her to hold Parliaments), had been, like her grandfather, Henry the Seventh, frugal, parſimonious, unambitious, living on the income of her Crown lands and hereditary revenue;—the Parliament which met at the beginning of her reign, might have been continued by prorogations to the end of it; and an impeachment might have taken place at the beginning, which, according to the neceſſary admiſſion on the other ſide, muſt have ſurvived to the laſt year of her reign, entire and unabated. During the three-and-forty years of that reign, it was hardly ſuppoſable, by the courſe of nature, but quite certain from the fluctuation of repreſentation, that any one Member of the Parliament of the firſt year, would be in the Parliament of the laſt; yet the law was admitted to be, that the impeachment would not abate, provided the Parliament was prolonged for forty-three years by prorogation, but that forty days of diſſolution annihilated it; yet the prorogation of forty-three years would leave no one Member, nor no one veſtige or trace of the proceeding. That a diſſolution leaves in Parliament in general, by all obſervation on changes in Parliament, all or moſt of the leading men; all whoſe ſituation leads them to conduct affairs, or guide the buſineſs of Parliament. From which extreme caſe was to be derived this important obſervation—the whole was a queſtion of expediency. That the neceſſity of ending the impeachment did not ariſe from diſſolution; becauſe the new Houſe of Commons, being ſtill the legal organ of the people of England, who never die, could as well expreſs their ſenſe in the new, as in the former Parliament; and in a new Parliament, the ſame, or very many of the ſame perſons were returned, who did know the facts, who had conducted the buſineſs, and therefore who could decide upon the expediency of proceeding; whereas, after a long prorogation, ſuch as had been ſuppoſed, the Members being dead, gone, or retired, all memory and trace of the proceeding being obliterated, the expediency was to end it.

But conceding that prorogation did not annul an impeachment, had given up the queſtion; for there was no diſtinction, in the opinion of lawyers, or in the thing itſelf, between prorogation and diſſolution. Whether Parliament were conſidered according to its perſonal,

ſonal, deliberative, legiſlative, or judicial functions, diſſolution and prorogation were the ſame. If either Houſe of Parliament, in its deliberative capacity, was engaged in any inveſtigation, diſſolution put an end to the proceeding; ſo did prorogation. If a legiſlative act was in its progreſs, diſſolution put an end to that meaſure of legiſlation; ſo did prorogation. During the ſeſſion of Parliament, and coming and going, each Member had perſonal privilege; which privilege was put an end to by diſſolution, as well as by prorogation. But as to judicial proceedings, it was the reverſe;—they continued. A writ of error was, confeſſedly, not ended by prorogation; neither by diſſolution. Why? Becauſe prorogation and diſſolution were the ſame in law. An appeal was not ended either by prorogation or diſſolution. And the queſtion now was, Whether an impeachment, that great act of inquiſitorial power, which controuls Miniſters and Judges, and protects the conſtitution,—in its nature judicial,—in its proceeding analogous to the trial of a Peer in a Court which never ceaſes to exiſt (though its time of acting might be interrupted at the will of the Crown), was to be an exception to this great general rule;—whether that, without which all the reſt would be uſeleſs, ſhould bend to a power, which ſhook none of the others;—whether, while a cauſe between two individuals reſiſted the ſtorm of prerogative, and in the ſhape of a writ of error ſurvived diſſolution,—a cauſe inſtituted by the repreſentatives of the Commons of England, for themſelves and all the Commons of England, ſhould give way to that power?

From the analogy of the death of the Houſe of Commons to the demiſe of the Crown, it could not be argued that the record was gone; becauſe on the demiſe of the Crown, the proceedings on an information or indictment only abated; the information itſelf remained. It was aſked, What they meant to do with the record? Was it to remain unacted upon? Was the accuſed to remain for ever under it? or, Was there to be a *noli proſequi* by the Commons? or, Was there to be a proceeding? If a *noli proſequi*, of courſe it might as well abate; for whether a thing ended of itſelf, or could not be carried on from want of knowledge in the proſecutors, was one and the ſame thing. Was it to be carried on? If it was, that either ſuppoſed knowledge, or the means of acquiring it. But the record remained: and why ſhould not the proceeding upon it remain? Becauſe, by the demiſe of the Crown, proceedings on an information abated.—But what ſort of proceedings? Thoſe which were preparatory to trial; the plea, and what are called, in the language of Weſtminſter Hall, the continuances;—proceedings merely preparatory to impanelling the jury. Whereas, in the caſe of that impeachment, the Lords were a jury impanelled to try the cauſe of Mr. Haſtings;—a jury who did not fall within the rules of

other juries, but who were equally known to the conſtitution as thoſe already deſcribed; and who could only be diſcharged from their duty, like all other juries, by a verdict. It could not with propriety be compared with the common trial by jury. When a jury was impanelled to try a cauſe, a Judge preſided—the Judge took notes, but there was no ſtop to take down the queſtion—no ſtop to receive the anſwer—no form which made the evidence, as it were, a record—all was done on the general impreſſion, and, as it were, *uno flatu*. The jury could not ſeparate till they had given their verdict; could neither eat, drink, nor take refreſhment; and if they retired, muſt retire in cuſtody of a bailiff, till they pronounced upon the priſoner whom they were impanelled to try. It was not ſo in the Court of the King in Parliament; there the Court adjourned and continued *de die in diem,—de ſeſſione in ſeſſionem*, and, as was contended *de Parliamento in Parliamentum*; and their proceedings and forms were all calculated to ſuit that conſtitution. The evidence was taken in a different manner. The queſtion, inſtead of being aſked of the witneſs, was put to the Court by the Manager; the Chancellor preſiding, put the queſtion to the witneſs; that queſtion being firſt taken down by the clerk, who likewiſe, before another queſtion was put, took down the anſwer given by the witneſs. Thus, not the general effect, but the preciſe terms were taken down, and preſerved for the benefit of the Court; that as well thoſe who were not preſent, as thoſe who from death, creation, &c. found their way into the Court, might legally give judgment of condemnation or acquittal. Therefore, if the argument, founded on the demeanor of a witneſs not being ſeen by the proſecutors, had any foundation, it applied more ſtrongly to the Court: for if a perſon might judge, who had not ſeen a witneſs examined, ſurely the proſecutor might aſk for judgment, under ſimilar circumſtances.

Hence the Court in which the Commons impeached, was the Court in which a Peer was tried; the ſame Court which tried writs of error; which in no caſe required the King to ſupply it with powers to enable it to act; but poſſeſſed thoſe powers inherently, in its own nature and conſtitution. The Crown gave it a day; but in the language of Mr. Juſtice Foſter, it openeth at the beginning, and ſhutteth at the end of every ſeſſion, as the King's Bench openeth and ſhutteth with the Term.

That in a queſtion which concerned the ſafety and welfare of the people, every conſideration, except what had a tendency to promote thoſe great objects, became ſuperſeded: *Salus populi ſuprema lex, prima lex, media lex*. To thoſe who were only ordinary Members of Parliament, the rights of the Commons were every thing. They took it for granted, that what they poſſeſſed in favour of their conſtituents, was lawfully poſſeſſed; that what was never diſputed there, ought not to be diſputed any where. They employed argument

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and reſearch to defend their right againſt thoſe who attacked them, not to raiſe queſtions amongſt themſelves againſt themſelves; or to furniſh offenſive weapons to their adverſaries, by teaching them to doubt the legality of their beſt-founded claims.

That the Judges, in all the Courts, take notes, not only for their own uſe, but for the inſtruction of the Jury, and ſumming up of the evidence. It was ſingular, that things provided as aids to the known frailty of memory, ſhould be alledged as reaſons for rejecting memory ſo aſſiſted. How came the memory to be worſe for that, which was always done *in perpetuam rei memoriam?*

Charles II. himſelf, in his ſpeech from the Throne, expreſſly ſaid to his new Parliament, that he would not diſcharge the Earl of Danby, becauſe he was under impeachment by the laſt Parliament, and ought to be tried in the new; a declaration which ſhewed that the King acted on the clear, known, recognized law, not on any claim of the Commons. The Houſe afterwards took it up on the ſame ground. They ſent word to the Lords, to remind them of the depending impeachment of Lord Danby. The Lords take it into conſideration, and ſolemnly adjudge, that an impeachment is not diſcontinued by the diſſolution of Parliament. It was not conſidered as a right regained or recovered; it was the clear, indubitable right of the Commons, in which the Lords acquieſced.

Were they ſatisfied with a bare acquieſcence? When Lord Staffford was brought to trial, he pleaded the diſcontinuance. Did the Lords yield to it? They would not ſo much as ſuffer it to be argued. On the foundation of that privilege, Lord Staffford was tried, condemned, executed, and by the attainder his whole line of ſucceſſion cut off. Should that which had been ſufficient to attaint and degrade for ever, one of the nobleſt families in the world, not be ſufficient to ſupport the right of maintaining a temperate proceſs, for bringing to legal judgment one India delinquent?

The High Court of Impeachment was compoſed of the hereditary branch of the Legiſlature—the Lords of Parliament; whoſe authority did not depend on the ſitting of Parliament, although during the ſitting of Parliament they exerciſed their authority in judicial proceedings. Like the Judges between Term and Term, they did not in the receſs exerciſe their functions, but in that receſs their functions were not extinguiſhed. The meeting of Parliament was to them, therefore, no more than notice from the Crown to proceed in the exerciſe of their privileges, but which the Crown could neither take away, abridge, nor render void. What was the caſe of the proſecutors, and what was the right? The proſecutors were the Commons of Great Britain, of whom the Commons Houſe of Parliament was the organ and the inſtrument. The great conſtituent body of the people of England poſſeſſed the accuſatory right of impeachment

inceſſantly; a right neceſſarily and phyſically exiſting at all times; which could neither be taken from them, nor abridged by any change which they might make in their agents the Houſe of Commons, whom they choſe to conduct ſuch impeachment. If, therefore, neither the judicature, before whom the matter of impeachment was to be tried, nor the accuſers on ſuch impeachment, were either politically or phyſically annihilated by diſſolution; if it was true, that though the means of acting were for a time ſuſpended, the right remained;—it followed, that every judicial proceeding in which they happened to be engaged before ſuch a ſuſpenſion took place, revived on their meeting again in the proper capacity to put in motion their inherent rights; and that during every ſuch interval, every ſuch proceeding muſt be ſtill depending in the ſtate in which it was left.

It was remarked as a ſingular circumſtance, that when their own Journals were free from any opinion, much leſs any inſtance of denial, they ſhould be referred to the Journals of the Houſe of Lords, to learn what were the privileges of the Houſe of Commons. That there was not one ſingle *dictum* on the Journals of the Houſe of Commons againſt the doctrine, not even a ſurmiſe. What was the popular argument advanced for the diſcontinuance of the impeachment? Merely that the evidence could not be known to the accuſers perſonally, and that they muſt truſt to written minutes, of the truth of which they were uncertain. What was all this appeal to the heart, on the duty of hearing evidence *vivâ voce*, inſtead of reading it, when truly written? Was it to be eſtabliſhed as a principle, that to the pure adminiſtration of juſtice, memory muſt alone aſſiſt the judgment, unrefreſhed by minutes? If an impeachment ſhould laſt the whole poſſible length of a Parliament, the memory muſt hold out, as they could not conſcientiouſly demand judgment, if their recollection was aſſiſted by referring to the notes which had been taken; and unleſs they poſſeſſed memories of that retentive kind, they were to be deprived of all exerciſe of judgment. Why ſhould they, who had only to make up their minds on the evidence, to juſtify them in demanding judgment, require more preciſe means of knowledge than the noble Lords who had to give judgment? Why ſet up a wild theory againſt plain ſenſe? If they were not to judge on evidence ſo taken, in what a predicament did they place the Sovereign? To him, both in the exerciſe of his gracious prerogative, that of mercy, as well as in that of his moſt afflicting duty,—enforcing the execution of juſtice,—the chief Magiſtrate of the kingdom had only written evidence, taken by others, to truſt to. His Majeſty could only judge from what he read, or from what he was told; yet it was never imagined, much leſs imputed to the exerciſe of thoſe Royal prerogatives, that the Royal judgment had been led by defective evidence; which

which muſt be admitted, unleſs it ſhould be ſtated that his Majeſty was always, in fact, preſent in every Court, and maſter of every part of the evidence. Again were the times of Charles II. alluded to. They were not, it was ſaid, bad times in parliamentary law, nor could any precedent derived from them be ſuſpected merely on that account. The fact was, that the times, in a conſtitutional point of view, were good. All that could be charged upon them was their credulity. The people, harraſſed and alarmed by repeated attempts on their liberty, were perhaps too ready to liſten to thoſe who wiſhed to take advantage of their fears; but while ſome of their acts, viewed coolly, and at a diſtance, might be blameable, the principle on which they acted was good. The condemnation of Lord Stafford, viewed, as we were now enabled to view it, diveſted of fear and credulity, and convinced that Oates and Bedloe, the principal witneſſes againſt him, were impoſtors, we muſt naturally lament. But every man who had peruſed the printed account of that trial, muſt admit that it was regular in form, and that the verdict of his Peers, believing, as they did, the evidence of Oates and Bedloe, was a juſt verdict, ſuch as they were bound in conſcience to pronounce. In thoſe times, which were reprobated as incapable of affording a precedent fit to be followed, every queſtion neceſſary to ſtop an impeachment, by the exerciſe of prerogative, had been tried; and all had been baffled by the vigorous and conſtitutional exertions of the Commons, and ever ſince completely ſettled. The King firſt tried to ſtop the impeachment by refuſing to appoint a Lord High Steward. The Commons conteſted the point, agitated it with the Lords, and it ended in ſettling the commiſſion of a Lord High Steward, by inſerting words, which have ever ſince ſtood in the commiſſion, and which make the Lord High Steward not a neceſſary part of the Court. Thus the Commons, without an act of Parliament, eſtabliſhed that the King could not ſtop an impeachment by refuſing to appoint a Lord High Steward; becauſe that office was determined to be unneceſſary. The King next tried to ſtop the impeachment by granting a pardon to Lord Danby. There again the prerogative of the King was routed by the privilege of the Commons. The Lords too diſallowed the pardon, as a plea in bar; and ſuch a meaſure had never ſince been attempted.

Diſappointed in all thoſe means of ſaving Lord Danby, the King reſolved to diſſolve the Parliament. Here again he was foiled. The new Houſe of Commons took the buſineſs up with the ſpirit of the former; and arguing on the true principles of the conſtitution, enforced upon the ſoundeſt doctrine and cleareſt precedents, that notwithſtanding diſſolution, an impeachment remained *in ſtatu quo* to be proceeded on by the new Parliament. The guilt of Lord Danby was, perhaps, as much the guilt of the King, as his own. The King had employed his favourite to ſell the intereſt of his people to a foreign

a foreign power, and to barter away the dignity of his Crown for a diſgraceful penſion to himſelf. Implicated in the crime, he was naturally anxious to protect the inſtrument of it, and for that purpoſe reſorted to every exerciſe of his prerogative, which the advice of his Miniſter, or his own ingenuity, could ſuggeſt. Every one of his meaſures on that occaſion, had a direct parliamentary condemnation. Fortunate it was for the country, fortunate for poſterity, that the King had had recourſe to thoſe manœuvres; becauſe it had been the means of eſtabliſhing beyond a doubt, that no ſhift or evaſion, no abuſe of prerogative, no colluſion between the Crown and the criminal, could defeat an impeachment by the Commons.

Of the times in which the reſolution of 1678 was made, the opinion of men who ſpoke of them, without reference to any particular queſtion, but on a general view of our hiſtory and conſtitution, would far outweigh all that had been ſaid, as applicable to the preſent caſe. Judge Blackſtone, whoſe opinion was juſtly in high eſteem, had ſaid, that the Parliament known by the name of the Long Parliament of Charles the Second, was deſerving of the higheſt praiſe in a conſtitutional view. In the body of his work, he enumerates many different regulations, which were the work of that Parliament; and ſays they demonſtrate this truth, "that the conſtitution of England had arrived to its full vigour, and the true balance between "liberty and prerogative was happily eſtabliſhed by *law*, in the "reign of King Charles the Second (*g*)." And in a note on that paſſage, he ſays, "The point of time at which I would chuſe to "fix this *theoretical* perfection of our public law, is the year 1679; "after the *habeas corpus* act was paſſed, and that for licenſing the "preſs had expired; though the years which immediately followed "it were times of great *practical* oppreſſion (*h*)."

In ſettling every conteſted point of law, we ſhould firſt look to uſage and then to reaſon. That there was a great diſtinction between the ordinary law, in the common courts of juſtice, and the conſtitutional law. For the former we ſhould look to uſage, where that could direct; but for the latter, to reaſon, in preference to uſage; becauſe in ordinary caſes *certainty* was of more value than ſoundneſs of principle; but in conſtitutional law, ſoundneſs of principle was every thing. Certainty of uſage, on a conſtitutional point, if it failed, ſerved only to increaſe deſpair, and to drive to the laſt deſperate remedy, for deſperate caſes. That the law of impeachment was not to be collected from the uſage of courts of juſtice—for who was it meant to controul? Not only men in high ſtations, who might commit crimes which the common law could not reach; but firſt and principally, the courts of juſtice themſelves. If the power of impeachment be rendered nugatory, what ſecurity is there for

(*g*) Comm. 4. V. oct. 439. (*h*) *Id.*

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the integrity of Judges, and the pure adminiſtration of juſtice? Were it to be governed by abſurd or iniquitous rules of practice, what abuſe could it correct? They would not imagine extraordinary caſes of enormity in Judges, but ſuppoſe them ſo devoted to the Crown, as to give ſuch a deciſion as had been given in the caſe of *Ship-Money*. Suppoſe them, as in the reign of Charles II. ſo pliant to the prevailing party of the day, as to execute Whigs one day, and Tories the next, under colour of law, what remedy was left, if that of impeachment did not apply? Were a Judge even to attain to that enormous pitch of arbitrary wickedneſs, as to order a man to puniſhment who had been acquitted by a Jury, there was no mode of proceeding againſt him but by impeachment. With regard to the force of precedents on conſtitutional points, had the diſpenſing power claimed by the Stuarts been decided by precedent, it might, perhaps, have been found to be good. But would any man regard a precedent in ſuch a caſe? Muſt it not be perceived, that a Legiſlature and a diſpenſing power in the Crown were things incompatible; and that wherever any uſage appeared ſubverſive of the conſtitution, if it had laſted for one, or for two hundred years, it was not a precedent, but an uſurpation?

They were told they might proceed by a bill of pains and penalties. What, it was argued, would be gained by that, unleſs it could be made appear, that a bill of pains and penalties could not be ſtopped in its progreſs by the Crown? And though ſuch abuſes were not, in general, to be ſuppoſed, yet when controul was removed, all abuſes were to be ſuppoſed. Again they were told, that if a Miniſter adviſed the Crown to diſſolve the Parliament, to get rid of an impeachment, they might impeach him again. By the ſame rule he might adviſe to diſſolve them again; and ſo they might go on, impeaching and diſſolving alternately, with no other effect than a mockery of juſtice. It had alſo been ſaid, that the points on which the law of Parliament turned, were of ſuch nicety, that none but a lawyer could underſtand them. The ſuppoſed nicety proved the falſity of the argument. Were the caſe ſo, how could the law of Parliament be ever underſtood by men of common education and plain underſtanding? How could it have been eſtabliſhed, by men of ſtill more ordinary education, who compoſed the majority of the Houſe of Commons, when the theory of the conſtitution was developed and explained? But they had, it ſeemed, no knowledge of the proceedings, on the impeachment, during the late Parliament;—there was no evidence on which they could judge, whether any thing had been proved by the Managers appointed by the late Houſe of Commons. It was ſomewhat ſtrange, that profeſſional men ſhould be ſo profoundly ignorant of what was known to all the world beſide. They could liſten only to oral evidence; the minutes of the evidence taken down and printed by direc-

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tion of the Lords for their own information, were to lawyers of no uſe whatever. That one learned gentleman, who unfortunately had not attended the trial; who had not heard the evidence; who had no materials on which to form his judgment; who could not ſuffer himſelf to read written minutes, of written evidence, ſuch as compoſed the greater part of the evidence on the trial; and who was ſo conſcientious, that he would not, as an accuſer, pray judgment againſt a man who, for any thing he knew, might be innocent; had aſked how he, as a Member of the Houſe of Commons, could go to the bar of the Lords, and demand judgment againſt Mr. Haſtings, ſuppoſing him to be found guilty? To this it was anſwered, that when that learned gentleman came to be Attorney General, he might with the greateſt propriety move the Court of King's Bench for judgment againſt all perſons convicted by his predeceſſor in office; and that on much weaker evidence than the minutes of the impeachment; on no other evidence than a copy of the record; and when he came to be a Judge, might even pronounce judgment on what might be conſidered as ſtill weaker evidence, namely, the notes of a brother Judge. It was well known that nine-tenths of miſdemeanors were tried at ſittings, and the record being returned to the Court from whence it iſſued, ſentence was there pronounced, by Judges who had heard no part of the oral evidence—who had ſeen nothing of the demeanor of the priſoner, or the witneſſes—who had no knowledge whatever of the caſe, or of its circumſtances, but what they derived from the notes of the Judge who tried the cauſe. Affidavits, both in extenuation and aggravation, might be, and frequently were, produced and read; and on that ſort of evidence, which was thus gravely repreſented by profeſſional men as no evidence at all;—on the written evidence of a note book, with the addition ſometimes of written affidavits; on evidence of ſuch authority (which, if tho ſewhoſe buſineſs it was to underſtand it beſt, were to be believed, ought not to be of force to pluck a feather from a ſparrow's wing), would learned gentlemen, when advanced to the Bench, decide, whether a fellow-ſubject ſhould be fined a ſhilling or ten thouſand pounds—whether he ſhould be impriſoned in the King's Bench for a week, or in Newgate for three years. That it had been aſked, if all their proceedings did not ceaſe with a diſſolution? Preciſely thoſe, it was anſwered, which ceaſed on a prorogation. On a prorogation, all votes of money, all bills depending, fell to the ground. So they did on a diſſolution. By prorogation, the ſtate of an impeachment was not affected. No more was it affected by a diſſolution. During the interval occaſioned by either, the High Court of Parliament could not ſit, any more than the Courts of Common Law, in the interval between Term and Term.

When

When Parliament met after either, judicial proceedings were taken up *in ſtatu quo*, juſt as in the Courts below after a vacation. In this manner had the proceedings on the impeachment been ſuſpended, by every prorogation of Parliament, and the Committee of Managers diſſolved. After prorogation, the Committee had been re-appointed, and the proceedings on the trial reſumed. That there was no difference between the preſent ſituation of the Houſe, and its ſituation after any of the prorogations ſince the trial commenced;—except that having been ſent back to their conſtituents, they might more properly review their former proceedings, to ſee what they would abide by, and what they would abandon. That by the act of 1773, for enquiring into offences committed in India, it was provided that various parliamentary proceedings, neceſſary for that purpoſe, ſhould continue from Seſſion to Seſſion, and from Parliament to Parliament; but not one word was ſaid of impeachments. That was no caſual omiſſion, but an omiſſion on principle. It was in the contemplation of the framers of that act, to include impeachments; but on the advice of the late Mr. Dyſon, whoſe knowledge of the law of Parliament had never been queſtioned, they were expreſsly omitted, that the undoubted right and privilege of the Commons might not be weakened, by an indirect admiſſion on their own part that it was not clear.

It had been obſerved, that as the diſſolution of Parliament was generally expected, thoſe who conducted the impeachment, and were anxious that public juſtice ſhould not be defeated, ought to have brought in a bill to continue the impeachment over the diſſolution, when they ſaw that the trial could not be concluded before it. Thoſe who ſaid ſo, ought to recollect, that it was not the opinion of the Managers, that the impeachment would be affected by a diſſolution. All which on them depended, the Managers had done. They had moved a reſolution in the laſt Seſſion of the late Parliament, that the Commons would perſevere in the proſecution of the impeachment till the ends of public juſtice were obtained; and the reſolution had been adopted by the Houſe. What was the conduct of thoſe who thought a diſſolution would put an end to the impeachment? Did they apprize the Houſe of it? No—When they ſaw the Houſe voting that it would perſevere in the impeachment, when they knew that a diſſolution was approaching, which, in their opinion, muſt neceſſarily be fatal to it, inſtead of bringing forward their conſtitutional law for the information of the Houſe, when ſuch information might have been uſeful, they concealed it, and now, for the firſt time, brought it into action. They had on their own Journals an expreſs declaration, that an impeachment did not abate by diſſolution of Parliament; a declaration acquieſced in by the Lords, repeatedly acted upon by the Commons, and never once contradicted by any ſubſequent declaration; and it was ſtrange indeed to hear thoſe

who

who had *laid it* down as a principle, that an order of any competent Court, acquieſced in for a ſeries of years, and never afterwards annulled, made law—adviſing the Houſe of Commons to conſult the Journals of the Lords, for the purpoſe of turning aſide the clear and uniform ſtream of the law of Parliament, as it appeared on their own, for more than a century. Were any man to affirm, in defiance of the act of Queen Anne, that Parliament had no right to interfere with the deſcent of the Crown—that the act of ſettlement was not law, and that the Houſe of Stuart, and not the Houſe of Brunſwick, had the only legal right to it—no one would feel an apprehenſion that the propoſition might be true; but would deſire time to recover from his aſtoniſhment, to repreſs the indignation which it muſt naturally excite, and to obtain for it ſuch a free and temperate diſcuſſion, as might procure the moſt ſolid and effectual condemnation of a doctrine ſo abſurd and extravagant. Such a diſcuſſion the queſtion before the Houſe had received; and great as were the advantages which the nation had derived from the acceſſion of the Houſe of Brunſwick to the Throne, the deciſion of it was of as much importance to the conſtitution and the future happineſs of the people, as whether the ſucceſſion ſhould continue in that Houſe, or revert to the Houſe of Stuart. That next to the independent, free-born ſpirit of the people, the law of impeachment was the beſt ſecurity for the undiſturbed enjoyment of their lives and liberties. It was the only peaceable ſecurity againſt the vices of Government; and let no man, by weakening or annihilating that, reduce them to the neceſſity of having recourſe to any other. To declare that an impeachment did not abate by diſſolution of Parliament, with a view to prevent the improper interference of the Crown, had been called *muzzling the lion with a cobweb.* After the privilege was aſſerted and eſtabliſhed, the King, it was ſaid, might diſſolve the Parliament, when the Lords were on the point of pronouncing a priſoner guilty, or after he had been found guilty and before judgment was given; and ſo afford him the means of eſcape; or, he might create fifty new Peers in a day, for the purpoſe of acquitting a ſtate criminal. All this was undoubtedly true. Though every one would lament to ſee the power of creating Peers abuſed, yet they would much more lament to ſee that power taken away; and it was a poſſible evil, againſt which they could propoſe no remedy. But whenever ingenuity could point out ſome poſſible abuſe againſt which they could not provide, were they to give up every ſecurity againſt that abuſe, which the conſtitution had put into their hands? No human form of Government was ever yet ſo perfect, as to guard againſt every poſſible abuſe of power; and the ſubjects of

every

every Government muſt bear with ſome. But when abuſes became ſo frequent, or enormous, as to be oppreſſive and intolerable, and to threaten the deſtruction of Government itſelf, then it was that the laſt remedy muſt be applied—that the free ſpirit of the people muſt put into action their natural power to redreſs thoſe grievances, for which they had no peaceable means of redreſs, and aſſert their indefeaſible right to a juſt and equitable Government. No man would deny, that caſes might occur, in which the people could have no choice but ſlavery, or reſiſtance; no man would heſitate to ſay what their choice ought to be; and it was the beſt wiſdom of every Government, not to create a neceſſity for reſiſtance, by depriving the people of the legal means of redreſs. The alternative every good man muſt deprecate, as too dreadful in its probable conſequences; and whenever ſad neceſſity ſhould urge it on, every individual, who had a heart to feel for the calamities of his country, muſt deplore the exigency of the times. Nevertheleſs, they were to watch poſſibilities in that Houſe with the eye of jealouſy; and ſhould tyranny ever be enforced, no doubt the gentlemen of the Long Robe would contradict the ſentiments which they had choſen to deliver, by their actions; and prove, by their zeal and activity, that they were as ready to lay down their lives in defence of their freedom, as any deſcription of men whatever. That the right of impeachment proceeding, without abatement, from Seſſion to Seſſion, and from Parliament to Parliament—was the vital, the defenſive principle of the conſtitution; which preſerved it from internal decay; which protected it from internal injury; without which every office of executive power, every function of judicial authority, might be exerciſed or abuſed, at the diſcretion or caprice of him who held, or of him who had the right of appointing to it.

The motion was put, and carried, without a diviſion (*i*). At a ſubſequent time, this important queſtion was debated in the Houſe of Lords, and was attended with the ſame ſucceſs. On the 16th May 1791 it was moved, that "A Meſſage be ſent to "the Commons to inform them that the Lords were ready to "proceed on the Trial of Warren Haſtings Eſq." which paſſed in the affirmative, by a majority of 48—Contents 66—Not Contents 18.—(*k*)

(*i*) Vide Parl. Reg. by Debrett, 28 vol. fo. 150. where there is a liſt of the precedents from 18 Ed. 1. to 3 Geo. 1.

(*k*) *Id.* 30 vol. fo. 189.

AND

AND thus much in general, touching the great regard that parliaments and the kingdom have had, and that moſt juſtly, to the common law; and the great care they have had to preſerve and maintain it, as the common intereſt and birthright of the king and kingdom.

I SHALL now add ſome few words touching the ſtiles and appellations of the common law, and the reaſons of it. It is called ſometimes, by way of eminence, *lex terræ*, as in the ſtatute of *Magna Charta*, cap. 29. where certainly the common law is at leaſt principally intended by thoſe words, *aut per legem terræ*; as appears by the expoſition thereof in ſeveral ſubſequent ſtatutes, and particularly in the ſtatute 28. Edw. 3. cap. 3. which is but an expoſition and declaration of that ſtatute. Sometimes it is called *lex Angliæ*, as in the ſtatute of Merton, cap. 9. "*Nolumus leges Angliæ* "*mutari* (*l*), &c." Sometimes it is called *lex & conſuetudo regni*; as in all commiſſions of *oyer* and *terminer*, and in the ſtatutes of 18. Edw. 1. cap. . . and *De Quo Warranto*, and divers others. But moſt commonly it is called the common law; or, the common law of England; as in the ſtatute of *Articuli ſuper Chartas*, cap. 15. in the ſtatute 25. Edw. 3. cap. 5. and infinite more records and ſtatutes.

Now, the reaſon why it is called the common law, or what was the occaſion that firſt gave that determination to it, is variouſly aſſigned, viz.

FIRST, ſome have thought it to be ſo called, by way of contradiſtinction to thoſe other laws that have obtained within this kingdom. As, firſt, by way of contradiſtinction to the ſtatute law. Thus a writ of entry *ad Communem Legem*, is ſo

(*l*) Seld. Differt. ad Fletam. 3 Inſt. 208. Barring. on Stat. 44.

called

called in contradiſtinction to writs of entry *in Caſu conſimili*, and *Caſu proviſo*, which are given by act of parliament. Secondly, by way of contradiſtinction to particular cuſtomary laws. Thus diſcents at common law, dower at common law, are in contradiſtinction to ſuch dowers and diſcents as are directed by particular cuſtoms. And thirdly, in contradiſtinction to the civil, canon, martial and military laws, which are, in ſome particular caſes and courts, admitted as the rule of their proceedings.

SECONDLY, ſome have conceived, that the reaſon of this appellation was this, viz. In the beginning of the reign of Edward III. before the Conqueſt, commonly called Edward the Confeſſor, there were ſeveral laws, and of ſeveral natures, which obtained in ſeveral parts of this kingdom, viz. THE MERCIAN LAWS—in the counties of Glouceſter, Worceſter, Hereford, Warwick, Oxon, Cheſter, Salop, and Stafford: THE DANISH LAWS—in the counties of York, Derby, Nottingham, Leiceſter, Lincoln, Northampton, Bedford, Bucks, Hertford, Eſſex, Middleſex, Norfolk, Suffolk, Cambridge and Huntington: THE WEST-SAXON LAWS—in the counties of Kent, Suſſex, Surrey, Berks, Southampton, Wilts, Somerſet, Dorſet, and Devon (*m*).

THI;

(*m*) The old laws of the Saxons make particular mention of the Daniſh, the Mercian, and the Weſt Saxon laws. And notwithſtanding Sir Matthew Hale is ſupported by the authority of Camden, Spelman, Cowell, Selden, Du Freſne, Phillips, and Tyrrell, yet biſhop Nicholſon (Eng. Hiſt. lib. 1. 113. Scotch Hiſt. pref. 29) ſtrongly contends that ſuch a diviſion of the Engliſh laws is merely imaginary. The biſhop has taken great pains to define the genuine import of the word laga; and will have it, that laga (in compoſition with Dæna, Myncena, and Weſt Sexena, in any of our Saxon remains) ſignifies properly a country, a diſtrict or a province, and that it cannot be otherwiſe rightly tranſlated. Giving all due credit to the learning, to the induſtry and ingenuity of the biſhop, it is certain that all our hiſtorians and antiquarians (himſelf alone excepted)

THIS king, to reduce the kingdom as well under one law, as it then was under one monarchical government, extracted out of all thoſe provincial laws, one law to be obſerved through the whole kingdom. Thus Ranulphus Ceſtrenſis, cited by ſir Henry Spelman in his Gloſſary, under the title *Lex*, ſays, *Ex tribus his Legibus Sanctus Edvardus unam Legem—&c.* And the ſame, *in totidem verbis*, is affirmed in his hiſtory of the laſt year of the ſame king Edward. (*Vide ibid. plura de hoc.*) But Hoveden carries up the common laws, or thoſe ſtiled the Confeſſor's laws, much further. For in his Hiſtory of Henry II. he tells us, *Quod iſtæ Leges prius inventæ & conſtitutæ erant tempore Edgari, avi ſui, &c.* Vide Hoveden. And poſſibly the grandfather might be the firſt collector of them into a body, and afterwards Edward might add to the compoſition, and give it the denomination of the common law. But the original of it cannot in truth be referred to either, but is much more ancient, and is as undiſcoverable as the head of Nile. Of which more at large in the following chapter.

THIRDLY, others ſay, and that moſt truly, that it is called the common law, becauſe it is the common municipal law, or rule of juſtice, in this kingdom. So that *Lex Communis*,

excepted) are agreed that there was a threefold diviſion of laws, out of which and other laws then extant, the Confeſſor made that collection which is called by his name, and which made one COMMON LAW; and that the proper definition of lagꝫ is *lex*, law. [Blackſtone has followed this general received opinion. Com. 1 v. 65. Though theſe laws were ſomewhat different from each other, yet it muſt be admitted, that the difference for centuries chiefly conſiſted in the various rates of mulcts or fines which were exacted from thoſe who were guilty of certain crimes, according to the plenty or ſcarcity of money in their reſpective countries. They all held (ſays Spelman) "an "uniformity in ſubſtance, differ-"ing rather in their mulcts than "in their canon;—in the quanti-"ty of amercements, than in the "courſe of juſtice." Reliquiæ Spelm. 49.

or

or *Jus Communis*, is all one and the ſame with *Lex Patriæ*, or *Jus Patrium*. For although there are divers particular laws, ſome by cuſtom, applied to particular places, and ſome to particular cauſes; yet that law, which is common to the generality of all perſons, things, and cauſes, and has a ſuperintendency over thoſe particular laws that are admitted in relation to particular places or matters, is *Lex Communis Angliæ*; as the municipal laws of other countries may be, and are ſometimes called, the common law of that country; as *Lex Communis Norrica*, *Lex Communis Burgundica*, *Lex Communis Lombardica*, *&c.* So that although all the former reaſons have their ſhare in this appellation, yet the principal cauſe thereof ſeems to be the latter: and hence ſome of the ancients called it *Lex Communis*; others *Lex Patriæ*; and ſo they were called in their confirmation by king William I. whereof hereafter (*n*).

(*n*) See Dr. Taylor's Elements of the Civil Law—a book of infinite learning, and which the inquiſitive and induſtrious ſtudent will find of infinite advantage. Though Mr. Gibbon (ſpeaking of that work) ſays it is "a work of amuſing, though various reading; but which cannot be praiſed for philoſophical preciſion." Gib. Hiſt. 8 v. oct. 66.—And in another place, (id. 77) he terms the author—"a learned, rambling, ſpirited writer."

CHAP. IV.

Touching the original of the common law of England.

THE kingdom of England, being a very ancient kingdom, has had many viciſſitudes and changes, eſpecially before the coming in of king William I. under ſeveral, either conqueſts or acceſſions, of foreign nations. For though the Britons were, as is ſuppoſed, the moſt ancient inhabitants, yet there were mingled with them, or brought in upon them, the Romans, the Picts, the Saxons, the Danes, and laſtly, the Normans. And many of thoſe foreigners were, as it were, incorporated together, and made one common people and nation. Hence ariſes the difficulty, and indeed moral impoſſibility, of giving any ſatisfactory, or ſo much as probable conjecture, touching the original of the laws, for the following reaſons.

FIRST, from the nature of laws themſelves in general; which being to be accommodated to the conditions, exigencies, and conveniences of the people, for or by whom they are appointed, (*a*) as thoſe exigencies and conveniencies do inſenſibly grow upon the people, ſo many times there grows inſenſibly a variation of laws, eſpecially in a long tract of time. And hence it is, that though for the purpoſe in ſome

(*a*) Inventæ ſunt leges ad ſalutem civium, civitatum que incolumitatem, vitamque hominum & quietam & beatam. Cic. de Leg. l. 4. See Blac. Com. 1 v. 63. to 92 and 4 v. 409. Summam divinæ mentis rationem, (ſays Hopperus, of the law) et vocem cum bonitate et potentia conjunctam, quæ præſita in Repub. jubet ea, quæ facienda ſunt, et prohibet contraria. L. 1. de Vera Juriſprud. tit. 20.

particular

particular part of the common law of England, we may eaſily ſay, that the common law, as it is now taken, is otherwiſe than it was in that particular part, or point, in the time of Henry II. when Glanville wrote; or than it was in the time of Henry III. when Bracton wrote;—yet it is not poſſible to aſſign the certain time when the change began. Nor have we all the monuments, or memorials, either of acts of parliament, or of judicial reſolutions, which might induce or occaſion ſuch alterations. For we have no authentic records of any acts of parliament, before 9. Hen. III. and thoſe we have of that king's time, are but few. Nor have we any reports of judicial deciſions, in any conſtant ſeries of time, before the reign of Edward I.; though we have the plea rolls of the times of Henry III. and king John, in ſome remarkable order. So that uſe and cuſtom, judicial deciſions and reſolutions, and acts of parliament, though not now extant, might introduce ſome new laws, and alter ſome old, which we now take to be the very common law itſelf, though the times and preciſe periods of ſuch alterations are not explicitly, or clearly known. But though thoſe particular variations and acceſſions have happened in the laws, yet they being only partial and ſucceſſive, we may with juſt reaſon ſay, they are the ſame Engliſh laws now, that they were, ſix hundred years ſince, in the general. As the Argonauts ſhip was the ſame when it returned home, as it was when it went out; though in that long voyage it had ſucceſſive amendments, and ſcarce came back with any of its former materials;—and as Titius is the ſame man he was forty years ſince; though phyſicians tell us, that in a tract of ſeven years, the body has ſcarce any of the ſame material ſubſtance it had before.

SECONDLY, the ſecond difficulty in the ſearch of the antiquity of laws and their original, is in relation to that people, unto whom the laws are applied; which, in the caſe of

England, will render many obſervables, to ſhew it hard to be traced. For,

FIRST, it is an ancient kingdom. And in ſuch caſes, though the people and government had continued the ſame *ab origine*, as they ſay the Chineſe did, till the late incurſion of the Tartars, without the mixture of other people or laws; *(b)* yet it were an impoſſible thing, to give any certain account of the original of the laws of ſuch a people; unleſs we had as certain monuments thereof, as the Jews had of theirs, by the hand of Moſes (*c*). And that upon the following accounts. Firſt, we have not any clear and certain monuments of the original foundation of the Engliſh kingdom, or ſtate; when, and by whom, and how it came to be planted. That which we have concerning it, is uncertain and traditional. And ſince we cannot know the original of the planting of this kingdom, we cannot certainly know the original of the laws thereof, which may be well preſumed to be very near as ancient as the kingdom itſelf (*d*). Again, ſecondly, though tradition might be a competent diſcoverer of the ori-

(*b*) The Chineſe are a very ſingular object for the attention of the world, as well on account of the extraordinary duration of their empire, as an unchangeable attachment to their maxims.—Attached to their antient cuſtoms from taſte, and to their antient government from habit and from principle; they place their whole happineſs in obedience; unwilling to quit their ſtation, provided that their cuſtoms and their manners, which confirm the conſtitution of their country, be preſerved to them; forgetting, however, that a ſlaviſh ſubmiſſion to national cuſtoms, not only perpetuates national errors, but deprives a nation of numerous advantages.

(*c*) Blac. Com. 4 v. 409.

(*d*) The hiſtory of paſt events is immediately loſt or disfigured when intruſted to memory, or to oral tradition. The only certain means by which nations can indulge their curioſity in reſearches concerning their remote origin, is to conſider the language, the manners, and the cuſtoms of their anceſtors, and to compare them with thoſe of the neighbouring nations.

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ginal of a kingdom or ſtate, I mean oral tradition, yet ſuch a tradition were incompetent without written monuments to derive to us, at ſo long a diſtance, the original laws and conſtitutions of the kingdom. Becauſe they are of a complex nature, and therefore not orally traducible to ſo great a diſtance of ages, unleſs we had the original, or authentic tranſcript of thoſe laws, as the Jews had of their law; or as the Romans had of their laws of the Twelve Tables, engraven in braſs (*e*). But yet further, thirdly, it is very evident to every day's experience, that laws, the further they go from their original inſtitution, grow the larger, and the more numerous. In the firſt coalition of a people, their proſpect is not great; they provide laws for their preſent exigence and convenience. But in proceſs of time, poſſibly, their firſt laws are changed, altered, or antiquated, as ſome of the laws of the Twelve Tables, among the Romans, were. But whatſoever be done touching their old laws, there muſt of neceſſity be a proviſion of new and other laws, ſucceſſively anſwering to the multitude of ſucceſſive exigencies and emergencies, that in a long tract of time will offer themſelves. So that, if a man could at this day have the proſpects of all the laws of the Britons, before any invaſion upon them, it would yet be impoſſible to ſay, which of them were new and which were old; and the ſeveral ſeaſons and periods of time wherein every law took its riſe and original; eſpecially ſince it appears, that in thoſe elder times, the Britons were not reduced to that civilized eſtate, as to keep the annals and memorials of their laws and government, as the Romans and other civilized parts of the world have done. It is true, when the conqueſt of a country appears, we can tell when the laws of a conquering people came to be given to the conquered. Thus we can tell, that in the time of Henry II. when the conqueſt of Ireland had obtained a good progreſs, and in the time of king

(*e*) Blac. Com. 1 v. 80. ſeq.

John, when it was compleated, the Engliſh laws were ſettled in Ireland (*f*). But if we were upon this inquiry, "what were the original of thoſe Engliſh laws that were "thus ſettled there;" we are ſtill under the ſame queſt and difficulty that we are now, *viz.* what is the original of the Engliſh laws.—For they that begin new colonies, plantations and conqueſts, if they ſettle new laws, and which the places had not before, yet for the moſt part, I don't ſay altogether, they are the old laws which obtained in thoſe countries from whence the conquerors or planters came.

SECONDLY, the ſecond difficulty of the diſcovery of the original of the Engliſh laws is this:—That this kingdom has had many and great viciſſitudes of people that inhabited it, and that in their ſeveral times prevailed and obtained a great hand in the government of this kingdom; whereby it came to paſs, that there aroſe a great mixture and variety of laws; in ſome places, the laws of the Saxons; in ſome places, the laws of the Danes; in ſome places, the laws of the ancient Britons; in ſome places, the laws of the Mercians; and in ſome places, or among ſome people perhaps, the laws of the Normans. For although, as I ſhall ſhew hereafter (*g*), the Normans never obtained this kingdom by ſuch a right of conqueſt as did or might alter the eſtabliſhed laws of the kingdom; yet, conſidering that king William I. brought with him a great multitude of that nation, and many perſons of great power and eminence, which were planted generally over this kingdom, eſpecially in the poſſeſſions of ſuch as had oppoſed his coming in, it muſt needs be ſuppoſed, that thoſe occurrences might eaſily have a great influence upon the laws of this kingdom, and ſecretly and inſenſibly introduce new laws, cuſtoms and uſages (*h*). So

(*f*) Cap. 9. (*g*) Cap. 5, 6. (*h*) Blac. Com. 4 v. 409.

that

that although the body and groſs of the law might continue the ſame, and ſo continue the ancient denomination that it firſt had, yet it muſt needs receive diverſe acceſſions from the laws of thoſe people that were thus imtermingled with the ancient Britons or Saxons. As the rivers of Severn, Thames, Trent, &c. though they continue the ſame denomination which their firſt ſtream had, yet have the acceſſion of divers other ſtreams added to them, in the tracts of their paſſage, which enlarge and augment them. And hence grew thoſe ſeveral denominations of the Saxon, Mercian, and Daniſh laws, out of which, as before is ſhewn, the Confeſſor extracted his body of the common law. And therefore among all thoſe various ingredients and mixtures of laws, it is almoſt an impoſſible piece of chymiſtry to reduce every *Caput Legis* to its true original; as to ſay, this is a piece of the Daniſh, this of the Norman, or this of the Saxon or Britiſh law. Neither was it, or indeed is it much material, which of theſe is their original. For 'tis very plain, the ſtrength and obligation, and the formal nature of a law is not upon account that the Danes, or the Saxons, or the Normans, brought it in with them; but they became laws, and binding in this kingdom, by virtue only of their being received and approved here (*i*).

THIRDLY, a third difficulty ariſes from thoſe accidental emergencies that happened, either in the alteration of laws, or communicating or conveying of them to this kingdom. For firſt, the ſubdiviſion of the kingdom into ſmall kingdoms under the Heptarchy, did moſt neceſſarily introduce a variation of laws; becauſe the ſeveral parts of the kingdom were

(*i*) Law may be conſidered as a treaty to which the members of the ſame community have agreed, and under which the magiſtrate and the ſubject continue to enjoy their rights, and to maintain the peace of ſociety.

not

not under one common ſtandard. And ſo it will ſoon be in any kingdoms that are cantonized, and not under one common method of diſpenſation of laws, though under one and the ſame king. Again, the intercourſe and traffick with other nations, as it grew more or greater, did gradually make a communication and tranſmigration of laws from us to them, and from them to us. Again, the growth of Chriſtianity in this kingdom, and the reception of learned men from other parts, eſpecially from Rome, and the credit that they obtained here, might reaſonably introduce ſome new laws; and antiquate or abrogate ſome old onés, that ſeem leſs conſiſtent with the Chriſtian doctrines. And by this means were introduced not only ſome of the judicial laws of the Jews, but alſo ſome points relating to, or bordering upon, or derived from the canon or civil laws; as may be ſeen in thoſe laws of the ancient kings, Ina, Alfred, Canutus, &c. collected by Mr. Lambard (*k*).

HAVING thus far premiſed, it ſeems, upon the whole matter, an endleſs and inſuperable buſineſs to carry up the Engliſh laws to their ſeveral ſprings and heads, and to find out their firſt original. Neither would it be of any moment or uſe if it were done. For whenever the laws

(*k*) That the civil law is intimately connected with the municipal juriſprudence in ſeveral countries of Europe, is a fact ſo well known, that it needs no illuſtration. Though our common law is ſuppoſed by ſome to form a ſyſtem perfectly diſtinct from the Roman code, and however we may affectedly boaſt of the diſtinction, yet it is evident that many of the ideas and maxims of the civil law are incorporated into the Engliſh juriſprudence. This is well illuſtrated by Mr. Barrington, Obſerv. on Stat. 76. ſeq. "The laws of all nations (ſaid chief juſtice Holt) are doubtleſs raiſed out of the ruins of the civil law; it muſt be own'd that the principles of our law are borrowed from the civil law, and therefore grounded on the ſame reaſon in many things." 12 Mod. 482.

of

of England, or the ſeveral *Capita* thereof began; or from whence or whomſoever derived; or what laws of other countries contributed to the matter of our laws; yet moſt certainly their obligation ariſes not from their matter, but from their admiſſion and reception, and authorization in this kingdom. And thoſe laws, if convenient and uſeful for the kingdom, were never the worſe, though they were deſumed and taken from the laws of other countries; ſo as they had their ſtamp of obligation and authority from the reception and approbation of this kingdom, by virtue of the common law; of which this kingdom has been always jealous, eſpecially in relation to the canon, civil, and Norman law, for the reaſons hereafter ſhewn.

PASSING therefore from this unſearchable inquiry, I ſhall deſcend to that which gives the authority, viz. the formal conſtituents, as I may call them, of the common law. And they ſeem to be principally, if not only, thoſe three, viz. 1. The common uſage, or cuſtom, and practice of this kingdom, in ſuch parts thereof as lie in uſage or cuſtom: 2. The authority of parliament, introducing ſuch laws: and, 3. The judicial deciſions of courts of juſtice, conſonant to one another, in the ſeries and ſucceſſions of time.

1. As to the firſt of theſe, USAGE AND CUSTOM generally received, do *obtinere vim Legis*, and is that which gives power, ſometimes to the canon law, as in the eccleſiaſtical courts; ſometimes to the civil law, as in the admiralty courts; and again, controuls both, when they croſs other cuſtoms that are generally received in the kingdom. This is that which directs diſcents; has ſettled ſome ancient ceremonies and ſolemnities in conveyances, wills and deeds, and in many more particulars. And if it be enquired, what is the evidence of this cuſtom, or wherein it conſiſts, or is to be found?

found? I anſwer, it is not ſimply an unwritten cuſtom, nor barely orally derived down from one age to another; but it is a cuſtom that is derived down in writing, and tranſmitted from age to age; eſpecially ſince the beginning of Edward I. to whoſe wiſdom the laws of England owe almoſt as much as the laws of Rome to Juſtinian (*l*).

2. ACTS OF PARLIAMENT. And here it muſt not be wondered at, that I make acts of parliament one of the authoritative conſtituents of the common law, though I had before contradiſtinguiſhed the one from the other. For we are to know, that although the original or authentic tranſcripts of acts of parliament are not before the time of Henry III. and many that were in his time are periſhed and loſt; yet CERTAINLY SUCH THERE WERE; and many of thoſe things that we now take for common law, were undoubtedly acts of parliament, though now not to be found of record (*m*). And if in the next age, the ſtatutes made in the time of Henry III. and Edward I. were loſt, yet even thoſe would paſs for parts of the common law. And indeed, by long uſage and the many reſolutions grounded upon them, and by their great antiquity, they ſeem even already to be incorporated with the very common law. That this is ſo, may appear, though not by records, for we have none ſo ancient, yet by an authentical and unqueſtionable hiſtory, wherein a man may, without much difficulty, find, that many of thoſe *Capitula Legum* that are now uſed and taken for common law, were things enacted in parliaments or great councils under William I. and his predeceſſors, kings of England, as may be made appear hereafter. But yet, thoſe conſtitutions and laws being made before time of memory, do now obtain, and

(*l*) Blac. Com. 1 v. 68.

(*m*) Vide the caſe of Collins and Blantern, Will. par. 2. to 348. 351. and the firſt chapter of this Hiſtory, note (*e*).

are

are taken as part of the common law and immemorial customs of the kingdom. And so they ought now to be esteemed, though in their first original they were acts of parliament.

3. JUDICIAL DECISIONS. It is true, the decisions of courts of justice, though by virtue of the laws of this realm they do bind, as a law between the parties thereto, as to the particular case in question, till reversed by error or attaint; yet they do not make a law, properly so called, for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring, and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times. And though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, AS SUCH, whatsoever—(*n*).

FIRST, because the persons who pronounce those decisions, are men chosen by the king for that employment, as being of greater learning, knowledge, and experience in the laws than others. Secondly, because they are upon their oaths to judge according to the laws of the kingdom. Thirdly, because they have the best helps to inform their judgments. Fourthly, because they do *sedere pro tribunali*, and their judgments are strengthened and upheld by the laws of this kingdom, till they are by the same law reversed or avoided (*o*).

(*n*) An opinion, though erroneous, concluding to the judgment of a court, is a judicial opinion; because it is not only delivered under the sanction of the judge's oath, but on mature deliberation. But an extra-judicial opinion, whether given in or out of court, is no more than the *prolatum* of him who gives it; it has no legal efficacy. So, an opinion given in court, if not necessary to the judgment, is extra-judicial. Vaugh. 382.

(*o*) Blac. Com. 1 v. 69. seq. Id. 267. Forteſc. de Laud. cap. 8. Seld. Review of Tith. cap. 8. 13 W. 3. cap. 2. 1 Geo. 3. cap. 23. and De Lolme, cap. 8.

Now

Now judicial deciſions, as far as they refer to the laws of this kingdom, are for the matter of them of three kinds.

FIRST, they are either ſuch as have their reaſons ſingly in the laws and cuſtoms of the kingdom. As, who ſhall ſucceed as heir to the anceſtor;—what is the ceremony requiſite for paſſing a freehold;—what eſtate, and how much ſhall the wife have for her dower; and many ſuch matters, wherein the ancient and expreſs laws of the kingdom give an expreſs deciſion, and the judge ſeems only the inſtrument to pronounce it. And in theſe things, the law or cuſtom of the realm is the only rule and meaſure to judge by; and in reference to thoſe matters, the deciſions of courts are the conſervatories and evidences of thoſe laws.

SECONDLY, or they are ſuch deciſions, as by way of deduction and illation upon thoſe laws, are framed or deduced. As for the purpoſe, whether of an eſtate thus, or thus, limited, the wife ſhall be endowed;--whether if thus, or thus limited, the heir may be barred; and infinite more of the like complicated queſtions. And herein the rule of deciſion is, firſt, the common law and cuſtom of the realm, which is the great *ſubſtratum* that is to be maintained; and then authorities or deciſions of former times, in the ſame or the like caſes; and then the reaſon of the thing itſelf (*p*).

THIRDLY, or they are ſuch as ſeem to have no other guide but the common reaſon of the thing, unleſs the ſame point has been formally decided. As in the expoſition of the intention of clauſes in deeds, wills, covenants, &c. where the very ſenſe of the words, and their poſitions and

(*p*) This ſource of deciſion is called "*præteritorum memoria* "*eventorum.*"

relations,

relations, give a rational account of the meaning of the parties. And in ſuch caſes, the judge does much better herein, than what a bare grave grammarian, or logician, or other prudent man could do. For in many caſes there have been former reſolutions, either in point, or agreeing in reaſon or analogy with the caſe in queſtion; or, perhaps alſo, the clauſe to be expounded is mingled with ſome terms or clauſes that require the knowledge of the law, to help out with the conſtruction or expoſition. Both which do often happen in the ſame caſe, and therefore it requires the knowledge of the law, to render and expound ſuch clauſes and ſentences. And doubtleſs a good common lawyer is the beſt expoſitor of ſuch clauſes, &c. (*q*).

(*o*) Plowd. 122. ſeq. 140. ſeq. Thus the practice and deciſions of courts acquire the authority of laws; every proceeding is conducted by ſome fixed and determinate rule; and the beſt and moſt effectual precautions are taken for the impartial application of rules to particular caſes.

CHAP.

CHAP. V.

How the common law of England *ſtood at and for ſome time after the coming in of king* William I.

IT is the honour and ſafety, and therefore the juſt deſire of kingdoms that recognize no ſuperior but God, that their laws have theſe two qualifications. Firſt, that they be not dependent upon any foreign power; for a dependency in laws, derogates from the honour and integrity of the kingdom, and from the power and ſovereignty of the prince thereof. Secondly, that they taſte not of bondage or ſervitude; for that derogates from the dignity of the kingdom, and from the liberties of the people thereof.

IN relation to the former conſideration, the kings of this realm, and their great councils, have always been jealous and careful, that they admitted not any foreign power; eſpecially ſuch as pretended authority to impoſe laws upon other free kingdoms or ſtates; nor to countenance the admiſſion of ſuch laws here, as were derived from ſuch a power.

ROME, as well ancient as modern, pretended a kind of univerſal power and intereſt; the former by their victories, which were large, and extended even to Britain itſelf; and the latter, upon the pretence of being univerſal biſhop, or vicar general, in all matters eccleſiaſtical. So that upon pretence of the former the civil law, and upon pretence of the latter the canon law, was introduced, or pretended to

ſome

ſome kind of right, in the territories of ſome abſolute princes, and among others here in England. But this kingdom has been always very jealous of giving too much countenance to either of thoſe laws, and has always ſhewn a juſt indignation and reſentment againſt any incroachments of this kind, either by the one law or the other. It is true, as before is ſhewn, that in the admiralty and military courts, the civil law has been admitted, and in the eccleſiaſtical courts, the canon law has been, in ſome particulars, admitted: but ſtill they carry ſuch marks and evidences about them, whereby it may be known that they bind not, nor have the authority of laws from themſelves, but from the authoritative admiſſion of this kingdom.

AND as thus the kingdom, for the reaſons before given, never admitted the civil or the canon law to be the rule of the adminiſtration of common juſtice in this kingdom; ſo neither has it endured any laws to be impoſed upon the people by any right of conqueſt; as being unſuitable to the honour or liberty of the Engliſh kingdom, to recognize their laws as given them at the will and pleaſure of a conqueror. And hence it was, that although the people unjuſtly aſſiſted king Henry IV. in his uſurpation of the crown, yet he was not admitted thereunto, until he had declared, that he claimed not as a conqueror (*a*), but as a ſucceſſor (*b*). Only he reſerved to himſelf the liberty of extending a pretence of conqueſt againſt the Scroops, that were ſlain in battle againſt him; which yet he durſt not

(*a*) His right as a conqueror was never avowed, it was only inſinuated.

(*b*) See Knyghton 2757. Henry patched up a title in the beſt manner he could; and in the end, he left himſelf, in the eyes of men of ſenſe, no foundation of right, but his poſſeſſion.

reſt upon without a confirmation in parliament. Vide Rot. Parl. 1 H. 4. No. 56. & Pars 2. ibid. No. 17. [A]

[A] It is without queſtion that Henry IV. claimed not the crown as a conqueror, though he was very much inclined ſo to do (*a*), but as a ſucceſſor, by deſcent, from the right line of the blood royal.

In order to this he ſet up a ſhew of two titles: the one, upon the pretence of being the firſt of the blood royal, in the entire male line, whereas the duke of Clarence left only one daughter Philippa; from which female branch, by a marriage with Edmond Mortimer, earl of March, the houſe of York deſcended: the other, by reviving an exploded rumour, firſt propagated by John of Gaunt, that Edmund earl of Lancaſter, to whom Henry's mother was heireſs, was in reality the elder brother of king Edward I. though his parents, on account of his perſonal deformity, had impoſed him on the world for the younger; and therefore Henry would be intitled to the crown, either as ſucceſſor to Richard II. in caſe the entire male line was allowed a preference to the female; or, even prior to that unfortunate prince, if the crown could deſcend through a female, while an entire male line was exiſting.

However, as in Edward the Third's time we find the parliament approving and affirming the law of the crown, ſo in the reign of Henry IV. they actually exerted their right of new ſettling the ſucceſſion to the crown. And this was done by the ſtatute 7 Hen. IV. c. 2. whereby it is enacted, "that the inheritance "of the crown and realms of England and France, and all "other the king's dominions, ſhall be ſet and remain (*b*) in "the perſon of our ſovereign lord the king, and in the heirs of "his body iſſuing;" and prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body iſſuing, with remainder to lord Thomas, lord John, and lord Humphrey, the king's ſons, and the heirs of their bodies reſpectively. Which is indeed nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It however ſerves to ſhew, that it was then generally underſtood, that the king and Parliament had a right to new-model and regulate the ſucceſſion to the crown. And we may obſerve, with what caution and delicacy the parliament then avoided declaring any ſentiment of Henry's original title. However, ſir Edward Coke more than once expreſsly declares (*c*), that at the time of paſſing this act, the right of the crown was in deſcent from Philippa, daughter and heir of Lionel duke of Clarence (*d*).

(*a*) Seld. Tit. Hon. 1 3. (*b*) Soit mys et demoerge. (*c*) 4 Inſt. 37. 205.
(*d*) Blac. Com. 1 v. 202.

AND

AND upon the like reaſon it was, that King William I. though he be called the Conqueror, and his attaining the crown here, is often in hiſtory, and in ſome records, called CONQUESTUS ANGLIÆ; yet in truth it was not ſuch a conqueſt as did, or could alter the laws of this kingdom; or impoſe laws upon the people *per modum conqueſtûs*, or *jure belli*. And therefore, to wipe off that falſe imputation upon our laws, as if they were the fruit, or effect of a conqueſt, or carried in them the badge of ſervitude to the will of the Conqueror, which notion ſome ignorant and prejudiced perſons have entertained; I ſhall rip up and lay open this whole buſineſs from the bottom, and to that end enquire into the following particulars, viz.

FIRST, of the thing called conqueſt; what it is when attained; and the rights thereof.

SECONDLY, of the ſeveral kinds of conqueſt, and their effects, as to the alteration of laws by the victor.

THIRDLY, how the Engliſh laws ſtood at the entry of king William I.

FOURTHLY, by what title he entered: and whether by ſuch a right of conqueſt as did, or could, alter the Engliſh laws.

FIFTHLY, whether *de facto* there was any alteration of the ſaid laws, and by what means, after his coming in.

FIRST touching the firſt of theſe, viz. conqueſt, what it is when attained, and the rights thereof. It is true, that it ſeems to be admitted as a kind of law among all nations, that in caſe of a ſolemn war between ſupreme princes, the conqueror acquires a right of dominion, as well as a property over the things and perſons that are

fully conquered *(c)*. The reaſons aſſigned are principally theſe, viz.

FIRST, becauſe both parties have appealed to the higheſt tribunal that can be; viz. the trial by war; wherein the great Judge and Sovereign of the world, the Lord of Hoſts, ſeems in a more eſpecial manner than in other caſes, to decide the controverſy. Secondly, becauſe unleſs this ſhould be a final deciſion, mankind would be deſtroyed by endleſs broils, wars, and contentions; therefore, for the preſervation of mankind, this great deciſion ought to be final, and the conquered ought to acquieſce in it *(d)*. Thirdly, becauſe if this ſhould not be admitted, and be, as it were, by the tacit conſent of mankind, accounted a lawful acquiſition, there would not be any ſecurity or peace under any government. For by the various revolutions of dominion acquired by this means, have been, and are to this day, the ſucceſſions of kingdoms and ſtates preſerved. What was once the Romans, was before that the Grecians; and before them, the Perſians; and before the Perſians, the Aſſyrians. And if this juſt victory were not allowed to be a firm acqueſt of dominion, the preſent poſſeſſors would be ſtill obnoxious to the claim of the former proprietors, and ſo they would be in a reſtleſs ſtate of doubts, difficulties, and changes, upon the pretenſion of former claims; therefore, to cut off this inſtability and unſettledneſs in dominion and property, it would ſeem that the common conſent

(*c*) In the opinion of Grotius, he may impoſe ſubjection upon the whole body, whether it be a ſtate, or only part of a ſtate; and whether that ſubjection be civil, mixt, or deſpotick. De Jure Belli ac Pacis l. 8. c. 8. Seneca makes uſe of this argument in the controverſy *de Olynthio*.—Vide Controverſ. 2 v. Contr. xxxiv. 390. edit. Gron. Major.

(*d*) See the Diſſertation of Cocceius de Jure Victoriæ Diverſo a Jure Belli, ſect. 23. but Freuer has attempted to refute the opinion of Coccius, in his notes upon Puffendorf de Offic. Hom. & Civ. l. 2. c. 16. ſect. 13.

of

of all nations has tacitly ſubmitted, that acquiſition by right of conqueſt, in a ſolemn war between perſons not ſubjects of each other by bonds of allegiance or fidelity, ſhould be allowed as one of the lawful titles of acquiring dominion over the perſons, places and things ſo conquered.

BUT whatever be the real truth or juſtice of this poſition, yet we are much at a loſs touching the things *in hypotheſi*; viz. whether this be the effect of every kind of conqueſt? Whether the war be juſt or unjuſt? What are the requiſites to the conſtituting of a juſt war (*e*)? Who are the perſons that may acquire? and, What are the ſolemnities requiſite for that acqueſt? But above all, the greateſt difficulty is, When there ſhall be ſaid ſuch a victory as acquires this right? Indeed if there be a total deletion of every perſon of the oppoſing party or country, then the victory is complete, becauſe none remains to call it in queſtion. But ſuppoſe they are beaten in one battle, may they not rally again? or if the greater part be ſubdued, may not the leſſer keep their ground? or if they do not at the preſent, may they not in the next age regain their liberty? or if they be quiet for a time, may they not, as they have opportunity, renew their pretenſions? And although the victor, by his power, be able to quell and ſuppreſs them, yet he is beholden to his ſword for it; and the right that he got by his victory before, would not be ſufficient, without a power and force to eſtabliſh and ſecure him againſt new troubles. And on the other ſide, if thoſe few ſubdued perſons can by force regain what they once had a pretence to, a former victory will be but a weak defence; and if it would, they would have the like pretence to a claim of acqueſt by victory over him, as he had over them.

(*e*) Of a juſt and ſolemn war, ſee Grot. l. 3. c. 3. according to the right of nations,

IT ſeems, therefore, a difficult thing to determine, in what indiviſible moment this victory is ſo compleat, that *jure belli*, the acqueſt of dominion is fully gotten. And therefore, victors are uſed to ſecure themſelves againſt diſputes of that kind; and as it were to under-pin their acqueſt *jure belli* —(that they might not be loſt by the ſame means whereby they were gained)—by the continuation of eternal forces of ſtanding armies, caſtles, garriſons, munitions, and other acts of power and force; ſo as thereby to over-bear and prevent an ordinary poſſibility of the prevailing of the conquered or ſubdued people againſt the conqueror or victor. He that lays the weight of his title upon victory or conqueſt, rarely reſts in it, as a complete conqueſt, till he has added to it ſomewhat of conſent or faith of the conquered, (*f*) ſubmitting voluntarily to him. Then, and not till then, he thinks his title ſecure, and his conqueſt complete. And indeed, he has no reaſon to think his title can be otherwiſe ſecure; for where the title is merely force or power, his title will fail, if the conquered can with like force or power over-match his, and ſo regain their former intereſt or dominion.

Now this conſent is of two kinds, either expreſſed, or implied.

AN expreſs conſent is, when after a victory, the party conquered do expreſly ſubmit themſelves to the victors, either ſimply or abſolutely;—by dedition, yielding themſelves, giving him their faith and their allegiance; or elſe, under certain pacts, conventions, agreements, or capitulations. As when the ſubdued party, either by themſelves, or by ſubſtitutes, or delegates by them choſen, do yield their faith

(*f*) In ſuch caſe the acquiſition is lawful, and that whether the war be juſt, or unjuſt. Grot. l. 3. c. 8. ſect. 1. note 1. l. 3. c. 19. ſect. 11. note 1 Puffendorf, l. 8. c. 8. ſect. 1.

and

and their allegiance to the victor, upon certain pacts or agreements between them; as, for holding or continuing their religion, their laws, their form of civil administration, &c.

AND thus, though force were perhaps the occasion of this consent, yet in truth it is consent only that is the true proximate and fixed foundation of the victor's right; which now no longer rests barely upon external force, but upon the express consent and pact of the subdued people. Consequently, this pact or convention is that which is to be the immediate foundation of that dominion. And upon a diligent observation of most acquests gotten by conquest, or so called, we shall find this to be the conclusion of almost all victories; they end in deditions and capitulations, and faith given to the conqueror; whereby oftentimes the former laws, privileges, and possessions are confirmed to the subdued, without which the victors seldom continue long or quiet in their new acquests, without extreme expence, force, severity, and hazard.

AN implied consent is, when the subdued do continue for a long time quiet and peaceable under the government of the victor; accepting his government; submitting to his laws; taking upon them offices and employments under him; and obeying and owning him as their governor, without opposing him, or claiming their former right. This seems to be a tacit acceptance of, and assent to him. And though this is gradual, and possibly no determinate time is stinted, wherein a man can say, this year, or this month, or this day, such a tacit consent was completed and concluded;—for circumstances may make great variations in the sufficiency of the evidence of such an assent;—yet by a long and quiet tract of peaceable submission to the laws and go-

vernment of the victor, men may reaſonably conjecture, that the conquered have relinquiſhed their purpoſe of regaining by force, what by force they loſt.

BUT ſtill all this is intended of a lawful conqueſt by a foreign prince or ſtate, and not an uſurpation by a ſubject, either upon his prince or fellow ſubjects. For ſeveral ages and diſcents do not purge the unlawfulneſs of ſuch an uſurpation.

SECONDLY, concerning the ſeveral kinds of conqueſts, and their effects, as to the alteration of laws by the victor. There ſeems to be a double kind of conqueſt, which induces a various conſideration touching the change of laws; viz. *victoria in regem & populum, & victoria in regem tantùm.*

THE conqueſt over the people or country, is when the war is denounced by a prince or ſtate foreign, and no ſubject; and when the intention and denunciation of the war is againſt the king and people or country; and the pretenſion of title is by the ſword, or *jure belli.* Such were moſt of the conqueſts of ancient monarchs, viz. the Aſſyrian, Perſian, Grecian, and Roman conqueſts. And in ſuch caſes, the acquiſitions of the victor were abſolute and univerſal. He gained the intereſt and property of the very ſoil of the country ſubdued; which the victor might, at his pleaſure, give, ſell, or *arrent.* He gained a power of aboliſhing or changing their laws and cuſtoms; and of giving new, or, of impoſing the law of the victor's country. But although this the conqueror might do, yet a change of the laws of the conquered country was rarely univerſally made, eſpecially by the Romans; who, though in their own particular colonies, planted in conquered countries, they

they obſerved the Roman law; which poſſibly might by degrees, without any rigorous impoſition, gain and inſinuate themſelves into the conquered people, and ſo gradually obtain, and inſenſibly conform them, at leaſt ſo many of them as were *conterminous* to the colonies and garriſons, to the Roman laws;—yet they rarely made a rigorous and univerſal change of the laws of the conquered country, unleſs they were ſuch as were foreign and barbarous, or altogether inconſiſtent with the victor's government. But in other things, they commonly indulged unto the conquered, the laws and religion of their country, upon a double account, viz.

FIRST, on account of humanity; thinking it a hard and over-ſevere thing, to impoſe preſently upon the conquered, a change of their cuſtoms, which long uſe had made dear to them. And, ſecondly, upon the account of prudence; for the Romans, being a wiſe and experienced people, found that thoſe indulgencies made their conqueſts the more eaſy, and their enjoyments thereof the more firm. Whereas a rigorous change of the laws and religion of the people, would render them in a reſtleſs and unquiet condition, and ready to lay hold of any opportunity, of defection or rebellion, to regain their ancient laws and religion, which ordinary people count moſt dear to them. Though at this day, the indulgence of a Paganiſh religion is not uſed to be allowed by any Chriſtian victor, as is obſerved in Calvin's caſe, in the Seventh Report. To give one inſtance for all, it was upon this account, that though the Romans had wholly ſubdued Syria and Paleſtina, yet they allowed to the inhabitants the uſe of their religion and laws, ſo far forth as conſiſted with the ſafety and ſecurity of the victor's intereſt. And therefore, though they reſerved to themſelves the cognizance of ſuch cauſes as concerned themſelves, their officers, or revenues;

revenues; and such cases as might otherwise disturb the security of their empire—as treasons, insurrections, and the like; yet it is evident, they indulged the people of the Jews, &c. to judge by their own law; not only of some criminal proceedings, but even of capital, in some cases; as appears by the history of the Gospels and Acts of the Apostles.

BUT still this was but an indulgence, and therefore was resumable by the victor; unless there intervened any capitulation between the conqueror and the conquered to the contrary, which was frequent; especially in those cases when it was not a compleat conquest, but rather a dedition upon terms and capitulations, agreed between the conqueror and the conquered; wherein usually, the yielding party secured to themselves, by the articles of their dedition, the enjoyment of their laws and religion; then by the laws of nature and of nations, both which oblige to the observation of faith and promises, those terms and capitulations were to be observed. Again, secondly, when after a full conquest, the conquered people resumed so much courage and power as began to put them into a capacity of regaining their former laws and liberties; this commonly was the occasion of terms and capitulations between the conquerors and conquered. Again, thirdly, when by long succession of time, the conquered had either been incorporated with the conquering people, whereby they had worn out the very marks and discriminations between the conquerors and conquered; and if they continued distinct, yet by a long prescription, usage and custom, the laws and rights of the conquered people were in a manner settled; and the long permission of the conquerors amounted to a tacit concession or capitulation, for the enjoyment of their laws and liberties.

BUT

BUT of this more than enough is ſaid, becauſe it will appear in what follows, that William I. never made any ſuch conqueſt of England.

SECONDLY, therefore I come to the ſecond kind of conqueſt, viz. that which is only *victoria in regem*. And this is where the conqueror either has a real right to the crown or chief government of a kingdom, or at leaſt has, or makes ſome pretence or claim thereunto; and, in purſuance of ſuch claim, raiſes war, and by his forces obtains what he ſo pretends a title to. Now this kind of conqueſt does only inſtate the victor in thoſe rights of government, which the conquered prince, or that prince to whom the conqueror pretends a right of ſucceſſion, had; whereby he becomes only a ſucceſſor *jure belli*, but not a victor, or conqueror upon the people; and therefore has no more right of altering their laws, or taking away their liberties or poſſeſſions, than the conquered prince, or the prince to whom he pretends a right of ſucceſſion, had. For the intention, ſcope, and effect of his victory extends no further than the ſucceſſion, and does not at all affect the rights of the people. The conqueror is, as it were, the plaintiff; the conquered prince is the defendant; and the claim is a claim of title to the crown. And becauſe each of them pretends a right to the ſovereignty, and there is no other competent trial of the title between them, they put themſelves upon the great trial by battle *(g)*; wherein there is nothing in queſtion touching the rights of the people, but only touching the right of the crown; and that being decided by the victory, the victor comes in as a ſucceſſor, and not *jure victoriæ*, as in relation to the people's rights; the moſt ſacred whereof are their laws and religion.

(g) Vide cap. 6. note *(b)*.

INDEED,

INDEED, thoſe that do voluntarily aſſiſt the conquered prince, commonly undergo the ſame hazard with him, and do, as it were, put their intereſt upon the hazard and iſſue of the ſame trial; and therefore commonly fall under the ſame ſeverity with the conquered, at leaſt *de facto*; becauſe, perchance, the victor thinks he cannot be ſecure without it. Yet uſage, and indeed common prudence, makes the conquerors uſe great moderation and diſcrimination, in relation to the aſſiſtants of the conquered prince; and to extend this ſeverity only to the eminent and buſy aſſiſtants of the conquered; and not to the *gregarii*, or ſuch as either by conſtraint, or by neceſſity, were enforced to ſerve againſt him. And as to thoſe alſo, on whom they exerciſe their power, it has been rarely done *jure belli aut victoriæ*, but by a judiciary proceeding, as in caſes of treaſon; becauſe now the great title by battle has pronounced for the right of the conqueror; and at beſt, no man muſt dare to ſay otherwiſe now, whatſoever debility was in his pretenſion or claim. We ſhall ſee the inſtances hereof in what follows.

THIRDLY, as to the third point, how the laws of England ſtood at the entry of king William I. It ſeems plain, that at the time of his entry into England, the laws commonly called the laws of Edward the Confeſſor, were then the ſtanding laws of the kingdom (*b*). Hoveden tells us, in a digreſſion under his Hiſtory of King Henry II. that thoſe laws were originally put together by king Edgar, who was the Confeſſor's grandfather, viz.

" VERUM tamen poſt mortem ipſius regis Edgari uſq; " ad coronationem ſancti regis Edvardi quod tempus continet " ſexaginta & ſeptem annos prece (vel pretio) leges ſopitæ

(*b*) Ante cap. 1.

" ſunt

" ſunt & jus prætermiſſæ ſed poſtquam rex Edvardus in " regno fuit ſublimatus concilio baronum Angliæ legem " annos ſexaginta & ſeptem ſopitam, excitavit & confirma- " vit, & ea lex ſic confirmata vocata eſt lex ſancti Edvardi, " non quod ipſe prius inveniſſet eam ſed cum prætermiſſa " fuiſſet & oblivioni penitus dedita a morte avi ſui regis Ed- " gari qui primus inventor ejus fuiſſe dicitur uſque ad ſua " tempora, viz. ſexaginta & ſeptem annos." And the ſame paſſage, *in totidem verbis*, is in the Hiſtory of Litchfield, cited in Sir Robert Twiſden's Prologue to the Laws of King William I. But although poſſibly, thoſe laws were collected by king Edgar, yet it is evident, by what is before ſaid, they were augmented by the Confeſſor, by that extract of laws before-mentioned; which he made out of that three-fold law that obtained in ſeveral parts of England, viz. the Daniſh, the Mercian, and the Weſt-Saxon laws.

THIS manual, as I may call it, of laws, ſtiled the Confeſſor's Laws, was but a ſmall volume, and contains but few heads; being rather a ſcheme, or directory, touching ſome method to be obſerved in the diſtribution of juſtice, and ſome particular proceedings relative thereunto; eſpecially in matters of crime, as appears by the laws themſelves, which are now printed in Mr. Lambard's Saxon Laws, p. 133, and other places. Yet the Engliſh were very zealous for them, no leſs or otherwiſe than they are at this time for the Great Charter; inſomuch that they were never ſatisfied till the ſaid laws were reinforced and mingled, for the moſt part, with the coronation oath of king William I. and ſome of his ſucceſſors.

AND this may ſerve ſhortly touching this third point; whereby we ſee that the laws that obtained at the time of

the

the entry of king William I. were the Engliſh laws, and principally thoſe of Edward the Confeſſor.

FOURTHLY, the fourth particular is, the pretenſions of king William I. to the crown of England, and what kind of conqueſt he made. This will be beſt rendered and underſtood, by producing the hiſtory of that buſineſs, as it is delivered over to us by the ancient hiſtorians that lived in or near that time. The ſum, or *totum* whereof is this.

KING EDWARD the Confeſſor, having no children, nor like to have any, had three perſons related to him, whom he principally favoured, viz. Firſt,

EDGAR ÆTHELING, the ſon of Edward, the ſon of Edmond Ironſide. MATT. PARIS, anno 1066. "Edmundus "autem Latus Ferreum rex naturalis de ſtirpe regum genuit "Edwardum & Edwardus genuit Edgarum cui de jure debe-"batur regnum Anglorum."

SECONDLY, Harold, the ſon of Goodwin earl of Kent, the Confeſſor's father-in-law; he having married earl Goodwin's daughter. And Thirdly,

WILLIAM duke of Normandy; who was allied to the Confeſſor thus, viz. William was the ſon of Robert *(i)*, the

(*i*) William duke of Normandy, ſurnamed the Baſtard, was the ſon of Robert the ſecond, by Harlotta, the daughter of a tanner in Falaiſe. Brompton, 910. Our ancient hiſtorians differ about the name of William's mother. Abbot Brompton calls her Arlet, and ſo does the ancient chronicle of Normandy. Knyghton nominates her Arlee; others call her Herleva; which laſt may probably be right; moſt of the French writers, eſpecially the moderns, calling her Herleve. Writers are better agreed as to her family; for they ſay, in general, that ſhe was a tanner's daughter.

the ſon of Richard duke of Normandy, which Richard was brother unto the Confeſſor's mother. Vide Hoveden, ſub initio anni primi Willielmi primi.

THERE was likewiſe a great familiarity, as well as this alliance, between the Confeſſor and duke William; for the Confeſſor had often made conſiderable reſidences in Normandy; and this gave a fair expectation to duke William of ſucceeding him in this kingdom. And there was alſo, at leaſt, pretended, a promiſe made him by the Confeſſor, that duke William ſhould ſucceed him in the crown of England [B]. And becauſe Harold was in great favour with the king,

daughter. A French author, however, of great integrity, reports the matter differently in all reſpects. He ſays her name was Helena, and that ſhe was not the daughter of a tanner, but of one Foubert, valet-de-chambre to the Duke of Normandy, which Foubert was the ſon of a tanner. Recueil des Rangs des Grands de France, par. 1. du Tillet, p. 137. William was ſo little aſhamed of his birth, that he aſſumed the appellation of Baſtard, in ſome of his letters and charters. Spelm. Gloſſ. in verb. *baſtardus*. Camden in *Richmondſhire*. Notwithſtanding his illegitimacy, and the meanneſs of his mother, he had been allowed to ſucceed in the dutchy, to his father, though not without a very dangerous and factious oppoſition; which he had the good fortune to ſubdue, by the prudent care of his guardians and his own ability.

[B] Though the inveterate prepoſſeſſions of Edward kept him from ſeconding the pretenſions of Harold, yet he took but feeble and irreſolute ſteps for ſecuring the ſucceſſion to the Duke of Normandy. The whole ſtory of the tranſactions between Edward, Harold, and the duke of Normandy is told ſo differently by the ancient writers, that there are few important paſſages of the Engliſh hiſtory liable to ſo great uncertainty. It does not ſeem likely, as ſome have ſuppoſed, that Edward ever executed a will in the duke's favour, much leſs that he got it ratified by the ſtates of the kingdom, as is affirmed by others. The will would have been known to all, and would have been produced by the Conqueror, to whom it gave ſo plauſible a title; but the doubtful and ambiguous manner in which he ſeems always to have mentioned it,

king, and of great power in England, and therefore the likelieſt man by his aſſiſtance to advance, or by his oppoſition to hinder, or temperate; the duke's expectation; there was a contract made between the duke and Harold in Normandy; in the Confeſſor's life-time, that Harold ſhould, after the Confeſſor's death, aſſiſt the duke in obtaining the crown of England (*k*). Shortly after which the Confeſſor died, and then ſtepped up the three competitors to the crown, viz.

it, proves, that he could only plead the known intentions of that monarch in his favour, which he was deſirous to call a will. There is indeed a charter of the Conqueror, preſerved by Dr. Hicks, (vol. 1.) where he calls himſelf *rex hereditarius*, meaning heir by will; but a prince poſſeſſed of ſo much power, and attended with ſo much ſucceſs, may employ what pretences he pleaſes. It is ſufficient to refute his pretences to obſerve, that there is a great diffidence and variation among the hiſtorians with regard to a point, which, had it been real, muſt have been agreed upon by all of them.

As to the circumſtance of Harold's contract with the duke, in Normandy, ſome hiſtorians, particularly Malmeſbury and Matthew Weſtminſter, affirm that Harold had no intention of going over to Normandy, but that taking the air in a pleaſure-boat on the coaſt, he was driven over, by ſtreſs of weather, to the territories of Guy, Count of Ponthieu: but beſides that this ſtory is not probable in itſelf, and is contradicted by moſt of the ancient hiſtorians, it is refuted by a very curious and authentic monument. It is a tapeſtry preſerved in the ducal palace of Rouen, and ſuppoſed to have been wrought by orders of Matilda, wife to the Emperor: at leaſt, it is of very great antiquity. Harold is there repreſented as taking his departure from king Edward in execution of ſome commiſſion, and mounting his veſſel with a great train. The deſign of redeeming his brother and nephew, who were hoſtages, is the moſt likely cauſe that can be aſſigned; and is accordingly mentioned by Eadmer, Hoveden, Brompton, and Simeon of Durham. For a farther account of this piece of tapeſtry, ſee Hiſtoire de l'Academie de Literature, tom. ix. p. 535. HUME.

(*k*) W. Malmſb. 93. Hoveden, 449. Brompton, 947. Gul. Gemet. l. 7. c. 32. H. Hunt. 366. Ingulf. 68. Wace, 459, 460. MS. penes Carte, 354.

1. EDGAR ÆTHELING, who was indeed favoured by the nobility, but being an infant was overborn by the power of Harold, who thereupon began to ſet up for himſelf. Whereupon Edgar, with his two ſiſters, fled into Scotland; where he, and one of his ſiſters, dying without iſſue, Margaret, his other ſiſter and heir, married Malcolm, king of Scots; from whence proceeded the race of the Scottiſh kings (*o*).

2. HAROLD, who having at firſt raiſed a power under pretence of ſupporting and preſerving duke William's title to this kingdom, and having by force ſuppreſſed Edgar, he thereupon claimed the crown to himſelf. And pretending an adoption, or bequeſt of the kingdom unto him by the Confeſſor, he forgot his promiſe made to duke William, and uſurped the crown; which he held but the ſpace of nine months and four days. HOVEDEN [C].

(*o*) Though Edward had, with great affection, brought up Edgar, and had alſo beſtowed on him the title of Ætheling, a title which, I believe, excluſively belonged to the royal family, and ſeemed to mark him out as heir to the crown; yet he was not afterwards, perhaps, (as Hale ſuppoſes) *overborn by the power of Harold.* On the contrary, notwithſtanding this appearance of an adoption, as he was ſtill under age when Edward died, he was not thought capable of taking the government, and therefore was not nominated by that monarch at his deceaſe, to ſucceed to the kingdom. And the ſame objection prevailed with the great council, or Witena-gemote, to ſet him aſide, and elect Harold. The excluding a minor from the ſucceſſion in England, was not new to the Saxons. Ld. Lyt. Hiſt. Hen. II. 1 v. 3. 4. 349. 350. But ſee note [C] which follows below.

[C] Harold's acceſſion was attended with as little oppoſition as if he had ſucceeded by the moſt unqueſtionable title. The citizens of London, the biſhops and clergy, had adopted his cauſe; and all the moſt powerful nobility, connected with him by alliance or by friendſhip, willingly ſeconded his pretenſions. The title of Edgar Ætheling was ſcarce ever mentioned; much leſs the claim of the duke of Nor-

3. WILLIAM duke of Normandy, who pretended a promiſe of ſucceſſion by the Confeſſor, and a capitulation or ſtipulation by Harold for his aſſiſtance; and had, it ſeems, ſo Normandy; and Harold, aſſembling the council, received the crown from their hands, without waiting for any regular meeting of the ſtates, or ſubmitting the queſtion to their free choice or determination (*m*). The new prince, founding his title on the ſuppoſed ſuffrages of the people, which appeared unanimous, was, on the day immediately ſucceeding Edward's death, crowned and anointed king by Aldred, archbiſhop of York. The whole nation ſeemed joyfully to ſwear allegiance to him.

The duke of Normandy, when he firſt received intelligence of Harold's acceſſion, was moved to the higheſt pitch of indignation; but that he might give the better colour to his pretenſions, he ſent over an embaſſy to England, upbraiding Harold, with his breach of faith, and ſummoning him to reſign immediately poſſeſſion of the kingdom. Harold replied, that the oath with which he was reproached, had been extorted by the well-grounded fear of violence, and could never, for that reaſon, be regarded as obligatory: That he had no commiſſion, either from the late king, or from the ſtates of England, who alone could diſpoſe of the crown, to make any tender of the ſucceſſion to the duke of Normandy; and if he, a private perſon, had aſſumed ſo much authority, and had even voluntarily ſworn to ſupport the duke's pretenſions, the oath was unlawful, and it was his duty to ſeize the firſt opportunity of breaking it: That he had obtained the crown by the unanimous ſuffrages of the people; and ſhould ſhew himſelf totally unworthy of their favour, did he not ſtrenuouſly maintain thoſe national liberties, with which they had entruſted him: and that the duke, if he made any attempt by force of arms, ſhould experience the power of an united nation, conducted by a prince, who, ſenſible of the obligations impoſed on him by his royal dignity, was determined, that the ſame moment ſhould put a period to his life and to his government (*n*). HUME.

(*m*) G. Pict. 196. Ypod. Neuſt. 436. Order. Vitalis, 492. M. Weſt. 221. W. Malm. 93. Ingulf. 68. Brompton 957. Knyghton 2339. H. Hunting. 210. Many of the hiſtorians ſay, that Harold was regularly elected by the ſtates; ſome, that Edward left him his ſucceſſor by will.

(*n*) W. Malm. 99. Higden 285. M. Weſt. 222. De Geſt. Angl. incerto auctore 331.

[D] The

ſo far intereſted the pope in favour of his pretenſions, that he pronounced for William againſt both the others [D].

HEREUPON the duke makes his claim to the crown of England; gathered a powerful army, and came over; and upon the 14th of October, Anno 1067 (q), gave Harold

(q) There is, I believe, a miſtake in the year, for it ſeems agreed that William, on the day of St. Michael, 1066 (and not 1067) landed at Pevenſey, in Suſſex. Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 25.

[D] The moſt important ally, whom William gained by negociation, was the Pope, who had a powerful influence over the ancient barons, no leſs devout in their religious principles, than valorous in their military enterprizes. The Roman pontiff, after an inſenſible progreſs during ſeveral ages of darkneſs and ignorance, began now to lift his head openly above all the Princes of Europe; to aſſume the office of a mediator, or even an arbiter, in the quarrels of the greateſt monarchs; to interpoſe himſelf in all ſecular affairs, and to obtrude his dictates, as ſovereign laws, on his obſequious diſciples. It was a ſufficient motive to Alexander II. the reigning pope, for embracing William's quarrel, that he alone had made an appeal to his tribunal, and rendered him umpire of the diſpute between him and Harold; but there were other advantages which that pontiff foreſaw muſt reſult from the conqueſt of England by the Norman arms. That kingdom, though at firſt converted by Romiſh miſſionaries, though it had afterwards advanced ſome farther ſteps towards ſubjection under Rome, maintained ſtill a great independence in its eccleſiaſtical adminiſtration; and forming a world within itſelf, entirely ſeparated from the reſt of Europe, it had hitherto proved inacceſſible to thoſe exorbitant claims, which ſupported the grandeur of the papacy. Alexander therefore hoped, that the French and Norman barons, if ſucceſsful in their enterprize, might import into that country a more devoted reverence to the holy ſee, and bring the Engliſh churches to a nearer conformity with thoſe of the reſt of Europe. He declared immediately in favour of William's claim (o); pronounced Harold a perjured uſurper; denounced excommunication againſt him and his adherents; and the more to encourage the duke of Normandy in his enterprize, he ſent him a conſecrated banner, and a ring with one of St. Peter's hairs in it (p). Thus (adds Mr. Hume) were all the ambition and violence of that invaſion covered over ſafely with the broad mantle of religion.

(o) W. Malm. 100. Ingulf. 69. Higden, 285. Brompton, 958.

(p) Baker, 2d. edit. 1684.

battle, and overthrew him at that place in Suſſex where William afterwards founded Battel-abbey, in memory of that victory (*r*). And then he took upon him the government of the kingdom, as king thereof; and upon Chriſtmas following was ſolemnly crowned at Weſtminſter by the archbiſhop of York (*s*). And he declared at his coronation, that he claimed the crown, not *jure belli*, but *jure ſucceſſionis*. Brompton gives us this account thereof, "cum "nomen tyranni exhorreſceret & nomen legitimi principis "induere vellet petiit conſecrari;" and accordingly, ſays the ſame author, the archbiſhop of York, in reſpect of ſome preſent incapacity in the archbiſhop of Canterbury, "mu-"nus hoc adimplevit ipſumque Gulielmum Regem ad jura "Eccleſiæ Anglicanæ tuenda & conſervanda populumque "ſuum recte regendum, & Leges rectas ſtatuendum ſa-"cramento ſolemniter adſtrinxit;" (*t*) and thereupon he took the homage of the nobility (*u*).

(*r*) Gul. Gemet. 288. Chron. Sax. 189. M. Weſt. 226. M. Paris, 9. Diceto, 482. This convent was freed by him from all epiſcopal juriſdiction. Monaſt. Ang. tom. 1. p. 311, 312.

(*s*) William pretending that Stigand, the primate, had obtained his pall in an irregular manner from pope Benedict IX. who was himſelf an uſurper, refuſed to be conſecrated by him; and therefore conferred that honour on Aldred, archbiſhop of York. Gul. Pictav. 206. Ingulf. 69. Malmeſ. 102. Hoveden, 450. M. Weſt. 245. Flor. Wig. 635. M. Paris, 4. Anglia Sacra, vol. 1. p. 248. Alur. Bever. 127. Stigand was poſſeſſed of ſuch influence and authority over the Engliſh, as might be dangerous to a new eſtabliſhed monarch. Eadmer. 6. See Biog. Brit. 1 v. 128. tit. Aldred, ed. 1778. Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 40.

(*t*) Order. Vital. 503. Malmeſb. 271.

(*u*) The King, thus poſſeſſed of the throne by a pretended deſtination of king Edward, and by an irregular election of the people, but ſtill more by the power of his arms, retired from London to Barking in Eſſex; and there received the ſubmiſſions of all the nobility who had not attended his coronation. Gul. Pictav. 208. Order. Vitalis, 503.

THIS

THIS being the true, though ſhort account of the ſtate of that buſineſs, there neceſſarily follows from thence theſe plain and unqueſtionable conſequences.

FIRST, that the conqueſt of king William I. was not a conqueſt upon the country, or people, but only upon the king of it, in the perſon of Harold, the uſurper. For William I. came in upon a pretence of title of ſucceſſion to the Confeſſor; and the proſecution and ſucceſs of the battle he gave to Harold, was to make good his claim of ſucceſſion, and to remove Harold, as an unlawful uſurper, upon his right. Which right was now decided in his favour, and determined by that great trial, by battle (*x*).

SECONDLY, that he acquired in conſequence thereof no greater right than what was in the Confeſſor, to whom he pretended a right of ſucceſſion; and therefore, could no more alter the laws of the kingdom upon the pretence of conqueſt, than the Confeſſor himſelf might; or than the duke himſelf could have done, had he been the true and rightful ſucceſſor to the crown, in point of deſcent from the Confeſſor. Neither is it material, whether his pretence were true or falſe; or whether, if true, it were available or not, to entitle him to the crown. For whatſoever it was, it was ſufficient to direct his claim, and to qualify his victory ſo, that the *jus belli* thereby acquired, could be only *victoria in regem, ſed non in populum:* and put him only in the ſtate, capacity and qualification of a ſucceſſor to the king, and not as conqueror of the kingdom (*y*).

(*x*) Seld. of Tithes, c. 8. Blac. Com. 1 v. 199.

(*y*) Though Sir Matthew Hale, and others, contend that the conqueſt by William can be conſidered in no other light than an acquiſition, without any of the powers attendant on ſubjugation, yet others, particularly Wilkins and Dr. Brady, underſtand it to have been no leſs than an abſolute conqueſt. See note [E] on this chapter.

THIRDLY, and as this his antecedent claim kept his acqueſt within the bounds of a ſucceſſor, and reſtrained him from the unlimited bounds and power of a conqueror; ſo his ſubſequent coronation, and the oath by him taken, is a further unqueſtionable demonſtration, that he was reſtrained within the bounds of a ſucceſſor, and not enlarged with the latitude of a victor. For at his coronation, he bound himſelf by a ſolemn oath to preſerve the rights of the church, and to govern according to the laws; and not abſolutely and unlimitedly, according to the will of a conqueror.

FOURTHLY, that if there were any doubt whether there might be ſuch a victory as might give a pretenſion to him of altering laws, or governing as a conqueror; yet to ſecure from that poſſible fear, and to avoid it, he ends his victory in a capitulation. Namely, he takes the ancient oath of a king unto the people; and the people reciprocally giving or returning him that aſſurance that ſubjects ought to give their prince, by performing their homage to him as their king, declared him, by the victory he had obtained over the uſurper, to be the ſucceſſor of the Confeſſor (z). Conſequently, if there might be any pretence of conqueſt over the people's rights, as well as over Harold's, yet the capitulation, or ſtipulation, removes the claim or pretence of a conqueror, and enſtates him in the regulated capacity and ſtate of a ſucceſſor. And upon all this it is evident, that king William I. could not abrogate, or alter the ancient laws of the kingdom, any more than if he had ſucceeded the Confeſſor as his lawful heir, and had acquired the crown by the peaceable courſe of deſcent, without any ſword drawn. [E]

AND

(z) See Ld. Lyt. Hiſt. Hen. II. 1 v. oct. 40. and the authorities there cited. Alſo Biog. Brit. 1 v. 128. ed. 1778. tit. Aldred.

[E] Some have been deſirous of refuſing to William the title of conqueror, in the ſenſe in which it is commonly underſtood; and on

AND thus much may ſuffice, to ſhew that king William I. did not enter by ſuch a right of conqueſt, as did or could alter the laws of this kingdom.

on pretence that the word is ſometimes in old books applied to ſuch as make an acquiſition of territory by any means, they are willing to reject William's title by right of war to the crown of England. It is needleſs to enter into a controverſy, which by the terms of it muſt neceſſarily degenerate into a diſpute of words. It ſuffices to ſay, that the Duke of Normandy's firſt invaſion of the iſland was hoſtile; that his ſubſequent adminiſtration was entirely ſupported by arms; that in the very frame of his laws, he made a diſtinction between the Normans and Engliſh, to the advantage of the former (*a*); that he acted in every thing as abſolute maſter over the natives, whoſe intereſts and affections he totally diſregarded; and that if there was an interval when he aſſumed the appearance of a legal magiſtrate, the period was very ſhort, and was nothing but a temporary ſacrifice, which he, as has been the caſe with moſt conquerors, was obliged to make of his inclination to his preſent policy. Scarce any of thoſe revolutions which both in hiſtory and in common language have always been denominated conqueſts, appear equally violent, or have been attended with ſo ſudden an alteration, both of power and property. The Roman ſtate, which ſpread its dominion over Europe, left the rights of individuals in a great meaſure untouched; and thoſe civilized conquerors, while they made their own country the ſeat of empire, found, that they could draw moſt advantage from the ſubject provinces, by beſtowing on the natives the free enjoyment of their own laws, and of their private poſſeſſions. The barbarians who ſubdued the Roman empire, though they ſettled in the conquered countries, yet being accuſtomed to a rude, uncultivated life, found a ſmall part of the land ſufficient to ſupply all their wants; and they were not tempted to ſeize extenſive poſſeſſions, which they neither knew how to cultivate nor employ. But the Normans and other foreigners who followed the ſtandard of William, while they made the vanquiſhed kingdom the ſeat of empire, were yet ſo far advanced in arts as to be acquainted with the advantages of a large property; and having totally ſubdued the natives, they puſhed the rights of conqueſt (very extenſive in the eyes of avarice and ambition, however narrow in thoſe of reaſon) to the utmoſt extremity againſt them. Except the former conqueſt of England by the Saxons themſelves, who were induced by peculiar circumſtances to proceed even

(*a*) Hoveden, p. 600.

THEREFORE I come to the laſt queſtion I propoſed to be conſidered, viz. Whether *de facto* there was any thing done by

to the extermination of the natives, it would be difficult to find in all hiſtory a revolution more deſtructive, or attended with a more complete ſubjection of the ancient inhabitants. Contumely ſeems even to have been wantonly added to oppreſſion (*b*); and the natives were univerſally reduced to ſuch a ſtate of meanneſs and poverty, that the Engliſh name became a term of reproach; and ſeveral generations elapſed before one family of Saxon pedigree was raiſed to any conſiderable honours, or could ſo much as attain the rank of barons of the realm (*c*). Theſe facts are ſo apparent from the whole tenor of the Engliſh hiſtory, that none would have been tempted to deny or elude them, were they not heated by the controverſies of faction; while one party were abſurdly afraid of theſe abſurd conſequences, which they ſaw the other party inclined to draw from this event. But it is evident, that the preſent rights and privileges of the people, who are a mixture of Engliſh and Normans, can never be affected by a tranſaction which paſſed more than ſeven hundred years ago; and as all ancient authors (*d*), who lived nearest

(*b*) H. Hunt. p. 370. Brompton, p. 980.

(*c*) So late as the reign of king Stephen, the earl of Albemarle, before the battle of the ſtandard, addreſſed the officers of the army in theſe terms: *Proceres Angliæ clariſſimi, et genere Normanni*, &c. Brompton, p. 1026. See farther Abbas Rieval. p. 339, &c. All the barons and military men of England ſtill called themſelves Normans.

(*d*) Ingulf. p. 70. H. Hunt. p. 370, 372. M. Weſt. p. 225. Gul. Neub. p. 357. Alured. Beverl. p. 124. De geſt. Angl. p. 333. M. Paris, p. 4. Sim. Dun. p. 206. Brompton, p. 962. 980, 1161. Gervaſe Tilb. lib. 1. cap 16. Textus Roſſenſis apud Seld. Spicileg. ad Eadm. p. 197. Gul. Pict. p. 206. Ordericus Vitalis, p. 521. 666. 853. Epiſt. St. Thom. p. 801. Gul. Malmeſb. p. 52, 57. Knyghton, p. 2354. Eadmer. p. 110. Thom. Rudborne in Ang. Sacra, vol. I. p. 248. Monach. Roff. in Anglia Sacra, vol. II. p. 276. Girald. Cambr. in eadem, vol. II. p. 413. Hiſt. Elyenſis, p. 516. The words of this laſt hiſtorian, who is very ancient, are remarkable, and worth tranſcribing. "Rex itaque factus Willielmus, quid in principes Anglorum, qui tantæ cladi ſupereſſe poterant, fecerit, dicere, cum nihil profit, omitto. Quid enim prodeſſet, ſi nec unum in toto regno de illis dicerem priſtine poteſtate uti permiſſum, ſed omnes aut in gravem paupertatis ærumnam detruſos aut ex hæreditatos patria pulſos, aut exſules

by king William I. after his acceſſion to the crown, in reference either to the alteration or confirmation of the laws; and how and in what manner the ſame was done.

THIS, being a narrative of matters of fact, I ſhall divide into two inquiries; viz. firſt, What was done in relation to the lands and poſſeſſions of the Engliſh; and ſecondly, What was done in relation to the laws of the kingdom in general. For both of theſe will be neceſſary to make up a clear narrative touching the alteration or ſuſpenſion, confirmation or execution, of the laws of this kingdom by him.

FIRST, therefore, touching the former, viz. What was done in relation to the lands and poſſeſſions of the Engliſh.

THESE two things muſt be premiſed, viz. Firſt, a matter of right, or law; which is this, that in caſe this had been a conqueſt upon the kingdom, it had been at the pleaſure of the conqueror to have taken all the lands of the kingdom into his own poſſeſſion;—to have put a period to all former titles;—to have cancelled all former grants;—and to have given, as it were, the date and original to every man's claim, ſo as to have been no higher nor ancienter than ſuch his conqueſt, and to hold the ſame by a title derived wholly from and under him. I do not ſay, that every abſo-

neareſt the time, and beſt knew the ſtate of the country, unanimouſly ſpeak of the Norman dominion as a conqueſt by war and arms, no reaſonable man, from the fear of imaginary conſequences, will ever be tempted to reject their concurring and undoubted teſtimony. HUME.

effoſis oculis, vel cæteris amputatis membris, opprobrium hominum factos, aut certe miſerrime afflictos, vita privatos. Simili modo utilitate carere exiſtimo dicere quid in minorem populum, non ſolum ab eo, ſed a ſuis actum ſit, cum id dictu ſciamus difficile, et ob immanem crudelitatem fortaſſis incredibile.

lute

lute conqueror of a kingdom will do thus; but that he may, if he will, and has power to effect it. Secondly, the second thing to be premiſed is, a matter of fact, which is this: That duke William brought in with him a great army of foreigners, that expected a reward of their undertaking; and therefore were doubtleſs very craving and importunate for gratifications to be made them by the conqueror (*e*). Again, it is very probable, that of the Engliſh themſelves, there were perſons of very various conditions and inclinations; ſome perchance did adhere to the duke, and were aſſiſtant to him openly, or at leaſt under-hand, towards the bringing him in; and thoſe were ſure to enjoy their poſſeſſions privately and quietly when the duke prevailed. Again, ſome did, without all queſtion, adhere to Harold; and thoſe in all probability were ſeverely dealt with, and diſpoſſeſſed of their lands, unleſs they could make their peace. Again, poſſibly there were others who aſſiſted Harold; partly out of fear and compulſion; yet thoſe, poſſibly, if they were of any note or eminence, fared little better than the reſt. Again, there were ſome that probably ſtood neuter, and meddled not; and thoſe, though they could not expect much favour, yet they might in juſtice expect to enjoy their own. Again, it muſt needs be ſuppoſed, that the duke having ſo great an army of foreigners;—ſo many ambitious and covetous minds to be ſatisfied;—ſo many to be rewarded in point of gratitude; and after ſo great a concuſſion as always happens upon the event of a victory, it muſt needs, upon thoſe and ſuch like accounts, be evident to any man that conſiders things

(*e*) William beſtowed the forfeited eſtates on the moſt powerful of his captains, and eſtabliſhed funds for the payment of his ſoldiers. Gul. Pict. 208.—His military inſtitutions were thoſe of a tyrant; at leaſt of one, who reſerved to himſelf, whenever he pleaſed, the power of aſſuming that character. H. Hunt. 369. M. Weſt. 225. Malmſb. 104.

of

of this nature, that there were great outrages and oppreſſions committed by the victor's ſoldiers and their officers;—many falſe accuſations made againſt innocent perſons;—great diſturbances and evictions of poſſeſſions;—many right owners being unjuſtly thrown out, and conſequently many occupations and uſurpations of other men's rights and poſſeſſions;—and a long while before thoſe things could be reduced to any quiet and regular ſettlement [F].

THESE

[F] Though the early confiſcation of Harold's followers might ſeem iniquitous, being extended towards men who had never ſworn fidelity to the duke of Normandy; who were ignorant of his pretenſions, and who only fought in defence of the government, which they themſelves had eſtabliſhed in their own country; yet were theſe rigonrs, however contrary to the ancient Saxon laws, excuſed on account of the urgent neceſſities of the prince. The ſucceſſive deſtruction of families was a convincing proof that the king intended to rely entirely on the ſupport and affections of foreigners; and new forfeitures, attainders, and violences were the neceſſary reſult of this deſtructive plan of adminiſtration. No Engliſhman poſſeſſed his confidence, or was intruſted with any command or authority; and ſtrangers, whom a rigorous diſcipline could have but ill contained, were encouraged in every act of inſolence and tyranny againſt them. The eaſy ſubmiſſion of the kingdom on its firſt invaſion, had expoſed the natives to contempt; the ſubſequent proofs of their animoſity and reſentment had made them the object of hatred; and they were ſoon deprived of every expedient by which they could hope to make themſelves either regarded or beloved by their ſovereign. Impreſſed with the ſenſe of this diſmal ſituation, many Engliſhmen fled into foreign countries, with an intention of paſſing their lives abroad free from oppreſſion, or of returning on a favourable opportunity to aſſiſt their friends in the recovery of their native liberties (*f*). It was crime ſufficient, in an Engliſhman, to be opulent, noble, or powerful; and the policy of the king concurring with the rapacity of his foreign adventurers, produced almoſt a total revolution in the landed property of the kingdom. Ancient and honourable families were reduced to beggary; the nobles themſelves were every where treated with ignominy and

(*f* Order. Vital. 508. M. Weſt, 225. M. Paris, 4. Sim. Dun. 197.

contempt;

THESE general obſervations being premiſed, we will now ſee what *de facto* was done in relation to men's poſſeſſions, in conſequence of this victory of the duke.

FIRST, it is certain that he took into his hands all the demeſne lands of the crown which were belonging to Edward the Confeſſor at the time of his death; and avoided all the diſpoſitions and grants thereof made by Harold, during his ſhort reign. And this might be one great end of his making that noble ſurvey, in the fourth year of his reign, called generally, Doomſday-read, in ſome records; as Rot. Winton, &c.—thereby to aſcertain what were the poſſeſſions of the crown in the time of the Confeſſor. And thoſe he entirely reſumed. And this is the reaſon why in ſome of our old books it is ſaid, ANCIENT DEMESNE is that which was held by king William the Conqueror; and in others 'tis ſaid, ancient demeſne is that which was held by king Edward the Confeſſor. And both true in their kind, in this reſpect; viz. that whatſoever appeared to be the Confeſſor's at the time of his death, was aſſumed by king William into his own poſſeſſion [G].

SECONDLY,

contempt; they had the mortification of ſeeing their caſtles and manors poſſeſſed by Normans of the meaneſt birth, and of the loweſt ſtations (*g*), and they found themſelves carefully excluded from every road, which led either to riches or preferment (*b*). HUME.

[G] Thoſe lands which were in the poſſeſſion of Edward the Confeſſor, and which afterwards came to William the Conqueror,

(*g*) Order. Vitalis, 521. M. Weſt. 229.

(*b*) The obliging all the inhabitants to put out their fires and lights at certain hours, upon the ſounding of a bell, called the courfeu, is repreſented by Polydore Virgil, lib. 9, as a mark of the ſervitude of the Engliſh. But this was a law of police, which William had previouſly eſtabliſhed in Normandy. See Du Moulin, Hiſt. de Normandie, 160. The ſame law had place in Scotland. Le Burgor, cap. 86.

and

SECONDLY, it is alſo certain, that no perſon ſimply, and *quatenus* an Engliſh man, was diſpoſſeſſed of any of his poſſeſſions;

and were by him ſet down in a book called DOMESDAY, under the title *De Terra Regis*, are ANCIENT DEMESNE LANDS. They were exempt from any *feudal* ſervitude, and were let out to huſbandmen to cultivate for the purpoſe of ſupplying the king's houſhold and family with proviſions and neceſſaries. For this purpoſe the tenants (who are called by Bracton, *villani privilegiati*) enjoyed certain privileges, and the tenure itſelf had ſeveral properties diſtinct from others, which it retains to this day; though the lands be in the hands of a ſubject, and the ſervices changed from labour to money. 2 Inſt. 542. 4 Inſt. 269. F. N. B. 14. Salk. 57. pl. 2. Black. Com. 2 v. 99. But the lands which were in the poſſeſſion of Edward the Confeſſor, and which were given away by him, are NOT at this day ancient demeſne; nor are any others, except thoſe which are written down in the book of DOMESDAY; and therefore, whether ſuch lands are ancient demeſne or not, is to be tried only by that book. Salk. 57. 4 Inſt. 269. Hob. 183. Brownl. 43. The book of DOMESDAY was brought into court by a certiorari out of chancery, directed to the treaſurer and chamberlain of the exchequer, and by mittimus ſent into the common pleas. Dy. 150. b. Iſſue was taken "whether Longhope in the county of "Glouceſter was ancient demeſne or not;" on producing the book of DOMESDAY, it appeared that Hope was ancient demeſne, but nothing ſaid of Longhope; and the Court held, that the party failed in his proof. Lev. 106. Sid. 147. But if the queſtion be, "whether lands be parcel of a manor which is ancient de-"meſne?" this ſhall be tried by a jury. Salk. 56. pl. 1. 2 Salk. 174. But ſee Burr. 1048. where an acre of land may be ancient demeſne, though the manor, of which it is parcel, is not ſo. Vide Rol. Abr. 321. and ſee F. N. B. 14. Leon. 232. Dyer 8, 11 Co. 10. Bro. Ancient Dem. 15. 2 Leon. 191. 3 Lev. 405. Lands which are next, or moſt convenient to the lord's manſion-houſe, and which he keeps in his own hands, for the ſupport of his family, and for hoſpitality, are called his demeſnes, but have not the ſame properties with ancient demeſne. Spelm. 12. Blackſtone, in treating of the rents and profits of the demeſne lands of the crown, as being a branch of the king's ordinary revenue, ſays, "Theſe demeſne lands, *terræ dominicales regis*, being either the ſhare reſerved to the crown at the original diſtribution of landed property, or ſuch as came to it afterwards by forfeitures or other means, were anciently very large and extenſive; comprizing divers manors,

poſſeſſions; conſequently their land was not pretended unto, as acquired *jure belli*. Which appears moſt plainly by the following evidences, viz.

FIRST,

manors, honours and lordſhips; the tenants of which had very peculiar privileges. At preſent they are contracted within a very narrow compaſs, having been almoſt entirely granted away to private ſubjects. This has occaſioned the parliament frequently to interpoſe; and, particularly, after king William III. had greatly impoveriſhed the crown, an act paſſed, (1 Ann ſt. 1. c. 7.) whereby all future grants or leaſes from the crown, for any longer term than thirty-one years, or three lives, are declared to be void; except with regard to houſes, which may be granted for fifty years. And no reverſionary leaſe can be made, ſo as to exceed, together with the eſtate in being, the ſame term of three lives, or thirty-one years: that is, where there is a ſubſiſting leaſe of which there are twenty years ſtill to come, the king cannot grant a future intereſt, to commence after the expiration of the former, for any longer term than eleven years. The tenant muſt alſo be made liable to be puniſhed for committing waſte; and the uſual rent muſt be reſerved, or, where there has uſually been no rent, one third of the clear yearly value. The misfortune is, that this act was made too late, after almoſt every valuable poſſeſſion of the crown had been granted away for ever, or elſe upon very long leaſes; but may be of benefit to poſterity, when thoſe leaſes expire." Black. Com. 1 v. 286. As to the tenure, lord Holt, ſaid it was as ancient as any other, though he ſuppoſes that the privileges annexed to it, commenced by ſome act of parliament; for that it cannot be created by grant at this day. Salk. 57. Mr. Juſtice Blackſtone, in treating of this tenure, deſcribes it thus: "There is a ſpecies of tenure deſcribed by Bracton under the name ſometimes of privileged villenage, and ſometimes of villein ſocage. This he tells us, l. 4. tr. 1. c. 28, is ſuch as has been held of the kings of England from the Conqueſt downwards; that the tenants herein *villana faciunt ſervitia, ſed certa et determinata*; that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here deſcribes, is no other than an exalted ſpecies of copyhold, ſubſiſting at this day, viz. the tenure in ancient demeſne; to which, as partaking of the baſeneſs of villenage in the nature of its ſervices, and the freedom of ſocage in their certainty, he

FIRST, that very many of thoſe perſons that were poſſeſſed of lands in the time of Edward the Confeſſor, and ſo returned

he has therefore given a name compounded out of both, and calls it VILLANUM SOCAGIUM. The tenants of ancient demeſne lands, under the crown, were not all of the ſame order or degree. Some of them, as Britton teſtifies, c. 66. continued for a long time pure and abſolute villeins, dependent on the will of the lord; and thoſe who have ſucceeded them in their tenures, now differ from common copyholders in only a few points. F. N. B. 228. Others were in great meaſure enfranchiſed by the royal favour, being only bound in reſpect of their lands to perform ſome of the better ſort of villein ſervices, but thoſe DETERMINATE and CERTAIN; as, to plough the king's land, to ſupply his court with proviſions, and the like; all of which are now changed into pecuniary rents: and in conſideration hereof they had many immunities and privileges granted to them; 4 Inſt. 269.; as, To try the right of their property in a peculiar court of their own, called a court of ancient demeſne, by a peculiar proceſs denominated, a writ of right cloſe; F. N. B. 11. Not to pay toll or taxes; not to contribute to the expences of knights of the ſhire; not to be put on juries, and the like. See 1 New Abr. 111. Theſe tenants therefore, though their tenure be abſolutely copyhold, yet have an intereſt equivalent to a freehold: for, though their ſervices were of a baſe and villenous original, (Gilb. Hiſt. Exch. 16. 30.) yet the tenants were eſteemed, in all other reſpects, to be highly privileged villeins; and eſpecially in this, THAT THEIR SERVICES WERE FIXED AND DETERMINATE, and that they could not be compelled (like pure villeins) to relinquiſh theſe tenements at the lord's will, or to hold them againſt their own: "*et ideo*, ſays Bracton, *dicuntur liberi.*" Britton alſo, from ſuch their freedom, calls them abſolutely SOKEMANS, and their tenure SOKEMANRIES; which he deſcribes (c. 66.) to be lands and tenements which are not held by knight-ſervice, nor by grand ſerjeanty, nor by petit, but by ſimple ſervices, being as it were lands enfranchiſed by the king or his predeceſſors from their ancient demeſne. And the ſame name is alſo given them in Fleta, l. 1. c. 8. Hence Fitzherbert obſerves, (N. B. 13.) that no lands are ancient demeſne but lands holden in ſocage: that is, not in free and common ſocage, but in this amphibious, ſubordinate claſs, of villein ſocage. And it is poſſible, that as this ſpecies of ſocage tenure is plainly founded upon *predial* ſervices, or ſervices of the plough, it may have given cauſe to imagine that all ſocage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free ſocage or

ſocage

returned upom the book of Doomſday, retained the ſame unto them and their deſcendants; and ſome of their deſcendants retain the ſame poſſeſſions to this day; which could not have been, if preſently, *jure belli ac victoriæ univerſalis*, the lands of the Engliſh had been veſted in the conqueror. And again;

SECONDLY, we do find, that in all times, even ſuddenly after the conqueſt, the charters of the ancient Saxon kings WERE PLEADED AND ALLOWED; and titles made and created by them, to lands, liberties, franchiſes, and regalities, affirmed and adjudged under William I. Yea, when that exception was offered, THAT BY THE CONQUEST THOSE CHARTERS HAD LOST THEIR FORCE, yet thoſe claims were allowed. As in 7 E. 3. *fines*, mentioned by Mr. Selden, in his notes upon Eadmerus; which could not be, if there had been ſuch a conqueſt as had veſted all men's rights in the conqueror.

THIRDLY, many recoveries were had ſhortly after this conqueſt, as well by heirs as ſucceſſors, of the ſeiſin of their predeceſſors before the conqueſt. We ſhall take one or

ſocage of frank tenure, and villein ſocage or ſocage of ancient demeſne.—Lands holden by this tenure are therefore a ſpecies of copyhold, and as ſuch preſerved and exempted from the operation of the ſtatute of 12 Cha. 2. c. 24. Yet they differ from common copyholds, principally in the privileges beforementioned: as alſo they differ from freeholders by one eſpecial mark and tincture of villenage, noted by Bracton and remaining to this day, viz. that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the reſt; but muſt paſs by ſurrender, to the lord or his ſteward, in the manner of common copyholds: yet with this difference, (Kitch. on Courts 194.) that, in the ſurrender of theſe lands in ancient demeſne, it is not uſed to ſay, "to hold at the will of the lord," in their copies, but only "to "hold according to the CUSTOM *of the manor*." Black. Com. 2 v. 101. How ancient demeſne may become frank-fee, and where it may be pleaded, and the form, vide 1 New Abr. 112, 113, and the authorities there cited.

two

two inſtances for all; namely, that famous record *apud Pinendon*, by the archbiſhop of Canterbury, in the time of king William I. of the ſeiſin and title of his predeceſſors before the conqueſt. See the whole proceſs and proceedings thereupon, in the end of Mr. Selden's notes upon Eadmerus, and Spelman's Gloſſary, title *Drenches*. Upon theſe inſtances, and much more that might be added, it is without contradiction, that the rights and inheritances of the Engliſh, *quia tales*, were not abrogated or impeached by this conqueſt; but continued, notwithſtanding, the ſame. For, as is before obſerved, it was *jure belli quoad regem, ſed non quoad populum.*

BUT to deſcend to ſome particulars. The Engliſh perſons that the Conqueror had to deal with were of three kinds, viz.

FIRST, ſuch as adhered to him againſt Harold the uſurper; and, without all queſtion, thoſe continued the poſſeſſion of their lands; and their poſſeſſions were rather increaſed by him, than any way diminiſhed.

SECONDLY, ſuch as adhered to Harold, and oppoſed the duke, and fought againſt him; and doubtleſs, as to thoſe, the duke after his victory uſed his power, and diſpoſſeſſed them of their eſtates; which is uſual upon all concluſions and events of this kind, upon a double reaſon: Firſt, to ſecure himſelf againſt the power of thoſe that oppoſed him, and to weaken them in their eſtates, that they ſhould not afterwards be enabled to make head againſt him: and, ſecondly, to gratify thoſe that aſſiſted him, and to reward their ſervices in that expedition; and to make them firm to his intereſt, which was now twiſted with their own. For it

can't be imagined, but that the Conqueror was aſſiſted with a great company of foreigners—ſome that he favoured—ſome that had highly deſerved for their valour—ſome that were neceſſitous ſoldiers of fortune—and others that were either ambitious or covetous; all whoſe deſires, deſerts, or expectations, the Conqueror had no other means to ſatisfy, but by the eſtates of ſuch as had appeared open enemies to him; and doubtleſs, many innocent perſons ſuffered in this kind, under falſe ſuggeſtions and accuſations; which occaſioned great exclamations by the writers of thoſe times againſt the violences and oppreſſions which were uſed after this victory.

AND, thirdly, ſuch as ſtood neuter, and meddled not on either ſide during the controverſy. And doubtleſs, for ſome time after this great change, many of thoſe ſuffered very much, and were hardly uſed in their eſtates, eſpecially ſuch as were of the more eminent ſort (*i*).

GERVASIUS TILBURIENSIS, who wrote in the time of Henry II. lib. 1. cap. *Quid Murdrum & Quare ſic Dictum*, gives us a large account of what he had traditionally learned touching this matter, to this effect, viz. "Poſt regni conquiſitionem & perduellium ſubjectionem, &c. nomine autem ſucceſſionis a temporibus ſubactæ gentis nihil ſibi vendicarent, &c." i. e. after the conqueſt of the kingdom, and ſubjection of the rebels, when the king himſelf and his great men had ſurveyed their new acquiſitions, ſtrict enquiry was made, who they were that, fighting againſt the king, had ſaved themſelves by flight. From theſe, and the heirs of ſuch as were ſlain in battle, fighting againſt him, all hopes of ſucceſſion, or of poſſeſſing their

(*i*) Vide note [F] on this chapter.

eſtates,

eſtates, were loſt; for the people being ſubdued, they held their lives [*and fortunes*] as a favour.

But Gervaſe, as he ſpeaks ſo liberally in relation to the conqueſt, and the *ſubacta gens*, as he terms us; ſo it ſhould ſeem he was, in great meaſure, miſtaken in this relation. For it is moſt plain, that thoſe that were not viſibly engaged in the aſſiſtance of Harold, were not, according to the rules of thoſe times, diſabled to enjoy their poſſeſſions, or make title of ſucceſſion to their anceſtors, or tranſmit to their poſterity as formerly; though poſſibly ſome oppreſſions might be uſed to particular perſons, here and there, to the contrary. And this appears by that excellent monument of antiquity, ſet down in ſir H. Spelman's Gloſſary, in the title of *Drenches* or *Drenges*, which I ſhall here tranſcribe, viz.

"Edwinus de Sharborne, et quidam alii qui ejecti fue-
" runt & terris ſuis abierunt ad conqueſtorem & dixerunt
" ei, *quod nunquam ante conqueſtum, nec in conqueſtum, nec*
" *poſt, fuerunt contra regem ipſum in* CONCILIO AUT IN
" AUXILIO *ſed tenuerunt ſe in pace*, et hoc parati ſunt pro-
" bare qualiter rex vellet ordinare, per quod idem rex fa-
" cit inquiri per totam Angliam ſi ita fuit, quod quidem
" probatum fuit, propter quod idem rex præcepit ut om-
" nes illi qui ſic tenuerunt ſe in pace in forma prædicta
" quod ipſi REHABERENT omnes terras & dominationes
" ſuas adeo integre & in pace ut unquam habuerent vel
" tenuerunt ante conqueſtum ſuum, et quod ipſi in poſte-
" rum vocarentur *Dranges*."

But it ſeems the poſſeſſions of the Church were not under this diſcrimination, for they being held not in right of the perſon, but of the Church, were not ſubject to any confiſ-

cation by the adherence of the poſſeſſor to Harold the uſurper (*k*). And therefore, though it ſeems Stigand archbiſhop of Canterbury, at the coming in of William I. had been in ſome oppoſition againſt him, which probably might be the true cauſe why he performed not the office of his coronation, which of right belonged to him, though ſome other impediments were pretended (*l*), and might alſo poſſibly be the reaſon why a conſiderable part of his poſſeſſions were granted to Odo, biſhop of Bayeux; yet they were afterwards recovered by Lanfranc, his ſucceſſor, at Pinendon, " *in pleno comitatu, ubi rex præcepit totum comi-*
" *tatum abſque mora conſidere, & homines comitatûs omnes*
" *francigenos & præcipue Anglos in antiquis legibus & con-*
" *ſuetudinibus peritos in unum convenire.*"

To this may be added thoſe ſeveral grants and charters made by king William I. mentioned in the Hiſtory of Ely, and in Eadmerus, for reſtoring to biſhopricks and abbies ſuch lands, or goods, as had been taken away from them, viz.

" WILLIELMUS Dei gratia rex Anglorum, Lanfranco
" archiepiſcopo Cantuar' & Galfrido epiſcopo Conſtantien.
" & Roberto comiti de Ou & Richardo filio comitis Gilberti
" & Hugoni de Monteforti ſuiſque aliis proceribus regni
" Angliæ ſalutem. Summonete vicecomites meos ex meo
" præcepto & ex parte mea eis dicite ut reddant epiſcopa-
" tibus meis & abbatiis totum dominium omneſque domi-
" nicas terras quas de dominio epiſcopatuum meorum, &
" abbatarium, epiſcopi mei & abbates eis vel lenitate ti-

(*k*) William, however, retained the church in great ſubjection, as well as his lay ſubjects: and would allow none, of whatever character, to diſpute his ſovereign will and pleaſure.

(*l*) The crimes alledged againſt Stigand were mere pretences; his ruin was not only reſolved on, but proſecuted with great ſeverity. Hoveden, 453. Diceto, 482. Knyghton, 2345. Anglia Sacra, 1 v. 5, 6, Ypod. Neuſt. 438. Eadmerus in initio libri.

" more

" more vel cupiditate dederunt vel habere conſenſerunt vel
" ipſi violentia ſua inde abſtraxerunt, & quod hactenus
" injuſte poſſiderunt de dominio eccleſiarum mearum. Et
" niſi reddiderint ſicut eos ex parte mea ſummonebitis, vos
" ipſos velint nolint, conſtringite reddere; et quod ſi qui-
" libet alius vel aliquis veſtrum quibus hanc juſtitiam im-
" poſui ejuſdem querelæ fuerit reddat ſimiliter quod de
" domino epiſcopatuum vel abbatiarum mearum habuit
" ne propter illud quod inde aliquis veſtrum habebit, minus
" exerceat ſuper meos vicecomites vel alios, quicunque te-
" neant dominium eccleſiarum mearum, quod præcipio, &c."

" WILLIELMUS rex Anglor' omnibus ſuis fidelibus ſuis &
" vicecomitibus in quorum vicecomitatibus abbatia de Heli
" terras habet ſalutem. Præcipio ut abbatia præd. habeat
" omnes conſuetudines ſuas ſcilicet ſaccham & ſocham toll
" & team & infanganetheof, hamſocua, & grithbrice fith-
" wite & ferdwite infra burgum & extra & omnes alias
" forisfacturas in terra ſua ſuper ſuos homines ſicut habuit
" die qua rex Edwardus fuit vivus & mortuus, & ſicut
" mea juſſione dirationatæ apud Keneteford per plures
" ſcyras ante meos barones, viz. Galfridum Conſtantien.
" ep. & Baldewine abbatem, &c. Teſte Rogere Bigot."

" WILLIELMUS rex Angl. Lanfranco archiepo', & Rogero
" comiti Moritoniæ, & Galfrido Conſtantien. ep. ſalutem.
" Mando vobis & præcipio ut iterum faciatis congregari
" omnes ſcyras quæ interfuerunt placito habito de terris
" eccleſia de Heli, antequam mea conjux in Normaniam
" noviſſime veniret, cum quibus etiam ſint de baronibus
" meis qui competenter adeſſe poterint & prædicto placito
" interfuerint & qui terras ejuſdem eccleſiæ tenent; quibus
" in unum congregatis eligantur plures de illis Anglis qui
" ſciunt quomodo terræ jacebant præfatæ eccleſiæ die qua
" rex Edwardus obiit, & quod inde dixerint ibidem jure-

" jurando teſtentur; quo facto reſtituentur eccleſiæ terræ
" quæ in dominico ſuo erant die obitus regis Edwardi;
" exceptis his quas homines clamabant me ſibi dediſſe;
" illas vero literis mihi ſignificate quæ ſint, & qui eas te-
" nent; qui autem tenent thainlandes quæ proculdubio
" debent teneri de eccleſia faciant concordiam cum abbate
" quam meliorem poterint, & ſi noluerunt terræ remaneant
" ad eccleſiam, hoc quoque detinentibus ſocham & ſaccham
" fiat," &c.

" WILLIELMUS rex Anglorum, Lanfranco archiepiſc', &
" G. epiſc. & R. comiti M. ſalutem, &c. Defendite ne
" Remigius epiſcopus novas conſuetudines requirat infra in-
" ſulam de Heli, nolo enim quod ibi habeat niſi illud quod
" anteceſſor ejus habebat tempore regis Edwardi ſcilicet qua
" die ipſe rex mortuus eſt. Et ſi Remig. epiſcopus inde placi-
" tare voluerit placitet inde ſicut feciſſet tempore regis Edw.
" & placitum iſtum ſit in veſtra præſentia; de cuſtodia de Nor-
" guic. abbatem Simeonem quietum eſſe demittite; ſed ibi
" municionem ſuam conduci faciat & cuſtodiri. Facite re-
" manere placitum de terris quas calumniantur Willielmus de
" Ou, & Radulphus filius Gualeranni, & Robertus Gernon;
" ſi inde placitare noluerint ſicut inde placitaſſent tempore re-
" gis Edwardi, & ſicut in eodem tempore abbatia conſuetudines
" ſuas habebat, volo ut eas omnino faciatis habere ſicut abbas
" per chartas ſuas & per teſtes ſuos eas deplacitare poterit."

I MIGHT add many more charters to the foregoing, and more eſpecially thoſe famous charters in Spelman's Councils, vol. ii. fol. 14. & 165. whereby it appears, that king William I.—" communi concilio, & concilio archiepiſcoporum
" epiſcoporum & abbatum, & omnium principum & baro-
" num regni,"—inſtituted the courts for holding pleas of eccleſiaſtic cauſes to be ſeparate and diſtinct from thoſe courts

courts that had juriſdiction of civil cauſes (*m*). *Sed de his pluſquam ſatis.* [H].

AND

(*m*) Blac. Com. 4 v. 415. See alſo Seld. in Ead. p. 6. l. 24. 4 Inſt. 259. Wilk. LL. Angl. Sax. 292. and Blac. Com. 3 v. 63.

[H] The county court in the Anglo-Saxon times, and even during ſome part of the reign of William I. was a court of great power and dignity, in which the biſhop of the dioceſe ſat with the earl, and on which all the abbots, priors, barons, knights, and freeholders of the county were obliged to attend. Here all the controverſies ariſing in the county, the moſt important not excepted, were determined; though not always finally, becauſe there lay an appeal from its decrees to a higher court. In a county court of Kent, held in the reign of William I. at Pinending, and of which Hale makes mention (ante), there were preſent one archbiſhop, three biſhops, the earl of the county, the vice-earl or ſheriff, a great number of the king's barons, beſides a ſtill greater multitude of knights and freeholders, who in the courſe of three days adjudged ſeveral manors to belong to the archbiſhopric of Canterbury, which had been poſſeſſed for ſome time by Odo, biſhop of Baieux, the king's uterine brother, and by other powerful barons.(*n*)

But the county courts did not continue long after the conqueſt in this ſtate of power and ſplendour. For William I. about A. D. 1085, ſeparated the eccleſiaſtical from the civil part of theſe courts; prohibiting the biſhops to ſit as judges, the clergy to attend as ſuitors, and the cauſes of the Church to be tried but in courts of their own (*o*). By this regulation, which is ſaid to have been made in a common council of the archbiſhops, biſhops, abbots, and chief men of the kingdom, the county courts were deprived of their moſt venerable judges, their moſt reſpectable ſuitors, and moſt important buſineſs. Beſides this, after the departure of the biſhops and clergy, the earls diſdained to ſit as judges, and the great barons to attend as ſuitors, in the county courts; which, by degrees, reduced them to their preſent ſtate. This was not the worſt effect of this moſt imprudent and pernicious regulation. For by it the kingdom was ſplit aſunder; the crown and mitre were ſet at variance; and the eccleſiaſtical courts, by putting themſelves under the immediate protection of the Pope, formed the clergy into a ſeparate ſtate, under a

(*n*) Dugdale Originales Jurid. 30. Hickeſii Diſſertat. Epiſtolaris, 31. &c.

(*o*) Wilkins Concilia, l. 1. p. 368, 369.

AND thus I conclude the point I firſt propounded, viz. How king William I. after his victory, dealt with the poſſeſſions of the Engliſh. Whereby it appears that there was no pretence of an univerſal conqueſt, or that he was a victor *in populum*. Neither did he claim the title of Engliſh lands upon that account, but only made uſe of his victory thus far, to ſeize the lands of ſuch as had OPPOSED him; which is univerſal in all caſes of victories, though without the pretence of conqueſt.

SECONDLY, therefore I come to the ſecond general queſtion, viz. What was done in relation to the laws.

IT is very plain, that the king, after his victory, did, as all wiſe princes would have done, endeavour to make a ſtricter union between England and Normandy. In order thereunto, he endeavoured to bring in the French inſtead of the Saxon language, then uſed in England. "Deliberavit," ſays Holcot, "quomodo linguam Saxonicam poſſit deſtruere, "& Anglicam & Normanicam idiomate concordare; & ideo

foreign ſovereign, which in the end was productive of infinite diſorders.

The eccleſiaſtical courts, which were immediately erected in conſequence, were 1. The Archdeacon's Court. For as the archdeacon was diſcharged from ſitting as a judge, with the hundredary, in the hundred court, he was authorized to erect a court of his own, in which he took cognizance of eccleſiaſtical cauſes within his archdeaconry. 2. The Biſhop's Court, or Conſiſtory, which received appeals from the archdeacon's court, and whoſe juriſdiction extended over the whole dioceſe. 3. The Archbiſhop's Court, which received appeals from the conſiſtories of the ſeveral biſhops of the province, and had juriſdiction not only over the particular dioceſe of the archbiſhop, but over all the dioceſes in the province. From this higheſt eccleſiaſtical court, appeals lay to the Pope, which ſoon became frequent, vexatious, and expenſive (*p*).

(*p*) Id. ibid. Hen. Hiſt. 3 v. 339.

"ordinavit

" ordinavit quod nullus in curia regis placitaret NISI IN LIN-" GUA GALLICA," &c. *(q)*. From whence arose the practice of pleading in our courts of law in the Norman or French tongue, which custom continued till the statute of 36 E. 3. c. 15.

AND as he thus endeavoured to make a community in their language, so possibly he might endeavour to make the like in their laws, and to introduce the Norman laws into England, or as many of them as he thought convenient. And it is very probable, that after the victory, the Norman nobility and soldiers were scattered through the whole kingdom, and mingled with the English; which might possibly introduce some of the Norman laws and customs insensibly into this kingdom. And to that end the Conqueror did industriously mingle the English and Normans together, shuffling the Normans into English possessions here, and putting the English into possessions in Normandy, and

(*q*) Probably the customs of England were originally recorded in Saxon. William declared his conquest by a change of laws and language. He had entertained the difficult project of totally abolishing the English language; and, for that purpose, he ordered that in all schools throughout the kingdom, the youth should be instructed in the French tongue; a practice which was continued from custom, till after the reign of Edward III. and was never indeed totally discontinued in England. The pleadings in the supreme courts of judicature were in French. 36 Ed. 3. c. 15. Seld. Spicileg. ad Eadmer. 189. Fort. Laud. Leg. Angl. c. 48. The deeds were often drawn in the same language: the laws were composed in that idiom. Ingulf. 71. 88. Chron. Rothom. A. D. 1066.—No other tongue was used at court. It became the language of all fashionable societies, and the English themselves, ashamed of their own country, affected to excel in that foreign dialect. From this attention of William, and from the great foreign dominions long annexed to the crown of England, proceeded that great mixture of French which is at present to be found in the English tongue, and which composes the greatest and best part of our language. Hen. Hist. 3 v. 354.

making

making marriages among them, eſpecially between the nobility of both nations.

THIS gave the Engliſh a ſuſpicion, that they ſhould ſuddenly have a change of their laws before they were aware of it. But it fell out much better. For firſt, there ariſing ſome danger of a defection of the Engliſh, countenanced by the archbiſhop of York in the north, and Frederick, abbot of St. Albans, in the ſouth; the king, by the perſuaſions of Lanfranc, archbiſhop of Canterbury,—"pro bono "pacis apud Berkhamſtead juravit ſuper animas reliquias "ſancti Albani tactiſque ſacroſanctis evangeliis (miniſtrante "juramento abbate Frederico) ut bonas & approbatas antiquas "regni leges quas ſancti & pii Angliæ reges ejus anteceſſores, "& maxime rex Edvardus ſtatuit INVIOLABILITER OBSER-"VARET; et ſic pacificati ad propria læti receſſerunt." Vide MAT. PARIS *in vita Frederici Abbatis ſancti Albani.*

BUT although now, upon this capitulation, the ancient Engliſh laws were confirmed, and namely, the laws of St. Edward the Confeſſor; yet it appeared not what thoſe laws were; and therefore, in the fourth year of his reign, we are told by Hoveden, *(r)* in a digreſſion he makes in his Hiſtory under the reign of king Henry II. and alſo in the Chronicle of Lithfield—"Willielmus rex anno quarto regni "ſui conſilio baronum ſuorum fecit ſummonari per univerſos "conſulatos Angliæ Anglos nobiles & ſapientes & ſua lege "eruditos ut eorum jura & conſuetudines ab ipſis audiret, elec-"tis igitur de ſingulis totius patriæ comitatibus viri duodecim "jurejurando confirmaverunt ut quoad poſſint recto tramite "neque ad dextram neque ad ſiniſtram partem divertentes le-"gum ſuarum conſuetudinem & ſancitam pateſacerent nihil

(r) Vide Hoveden, 600. See Knyghton, 2355. alſo Ingulf, 88. Brompton, 982

"præter-

"præterмittentes nihil addentes, nihil prævaricando mutan-
"tes," &c. and then ſets down many of thoſe ancient laws approved and confirmed by the king, and COMMUNE CONCILIUM. Wherein it appears, that he ſeems to be moſt pleaſed with thoſe laws that came under the title of LEX DANICA, as moſt conſonant to the Norman cuſtoms.

"QUO auditu mox univerſi compatrioti qui leges dixerint
"triſtes effecti uno miniſterio deprecati ſunt quatenus permit-
"teret leges ſibi proprias & conſuetudines antiquas habere in
"quibus vixerunt patres, & ipſi in iis nati & nutriti ſunt, quia
"durum valde ſibi foret ſuſcipere leges ignotas, & judicare de
"iis quæ neſciebant; rege vero ad flectendum ingrato exiſtente,
"tandem eum perſecuti ſunt deprecantes quatenus pro anima
"regis Edvardi qui eas ſub diem ſuum eis conceſſerat barones
"& regnum & cujus, orant leges non aliorum extraneorum
"cogere quam ſub legibus perſeverare patriis; unde conſilio
"habito præcatui baronem tandem acquievit," &c.

GERVASIUS Tilburienſis, who lived near that time, ſpeaks ſhortly, and to the purpoſe, thus: "Propoſitis legibus Angli-
"canis ſecundum triplicitam earum diſtinctionem, i. e. Mer-
"chenlage, Weſtſaxon-lage, & Dane-lage, quaſdam earum
"reprobans quaſdam autem approbans illis tranſmarinas legis
"Neuſtriæ quas ad regni pacem tuendam efficaſiſſime vide-
"bantur, adjecit."

So that by this, there appears to have been a double collection of laws, viz.

FIRST, the laws of the Confeſſor, which were granted and confirmed by king William, and are alſo called the laws of king William; which are tranſcribed in Mr. Selden's notes upon Eadmerus, page 173. the title whereof is thus, viz. "Hæ ſunt leges & conſuetudines quas Willielmus rex con-
"ceſſit

" ceſſit univerſo populo Angliæ poſt ſubactam terram eadem " ſunt quas Edvardus rex cognatus ejus obſervavit ante eum." And theſe ſeem to be the very ſame that Ingulfus mentions to have been brought from London, and placed by him in the abbey of Crowland in the fifteenth year of the ſame king William; "*attuli eadem vice mecum Londini in meum* " *monaſterium legum volumen, &c.*"

SECONDLY, there were certain additional laws at that time eſtabliſhed, which Gervaſius Tilburienſis calls *leges Neuſtriæ, quæ efficaciſſimæ videbantur ad tuendam regni pacem*; which ſeem to be included in thoſe other laws of king William tranſcribed in the ſame notes upon Eadmerus, page 189. 193, &c. Which indeed were principally deſigned for the eſtabliſhment of king William in the throne, and for the ſecuring of the peace of the kingdom; eſpecially between the Engliſh and Normans, as appears by theſe inſtances, viz.

THE law *de murdro*, or the common fine for a Norman or Frenchman ſlain, and the offender not diſcovered: The law for the oath of allegiance to the king: The introduction of the trial by ſingle combat, which many learned men have thought was not in uſe here in England before William I. [I]; and the law touching knights ſervice, which Bracton,

[I] The judicial combat, or duel, though it had been long eſtabliſhed in France and Normandy, and other countries on the continent, was firſt introduced into England by the Normans (*s*). This, like other ordeals, was an appeal to the judgment of God for the diſcovery of the truth or falſehood of an accuſation which was denied, or a fact that was diſputed, founded on this ſuppoſition,—*that Heaven would always interpoſe, and give the victory to the champions of*

(*s*) Leg. Aleman. tit. 44. Burgund. tit. 45. Couſtumier de Normand. part 2. c. 2. Hoveden Annal. p. 343.—LL. Will. c. 68.

truth

Bracton, lib. 2. ſuppoſes to be introduced by the Conqueror, viz.

" QUOD omnes comites milites & ſervientes & univerſi liberi " homines totius regni habeant & teneant ſe ſemper bene in " armis & in equis ut decet & quod ſint ſemper prompti & bene " parati ad ſervitium ſuum integrum nobis explendum & pera- " gendum cum ſemper opus affuerit ſecundum quod nobis de " feodo debent & tenementis ſuis de jure facere & ſicut illis ſta-

truth and innocence. As the judicial combat was eſteemed the moſt honourable, it ſoon became the moſt common method of determining all diſputes among martial knights and barons, as well in criminal as in civil cauſes. When the combatants were immediate vaſſals of the crown, the combat was performed with great pomp and ceremony; in preſence of the king, with the Conſtable and Marſhal of England who were the judges; but if the combatants were the vaſſals of a baron, the combat was performed in his preſence. If the perſon accuſed was victorious, he was acquitted of the crime of which he had been accuſed; if defeated, he was thereby convicted, and ſubjected to the puniſhment preſcribed by law for his offence. If he was killed, his death was conſidered both as the proof and the puniſhment of his guilt. If the accuſer was vanquiſhed, he was, by the laws of ſome countries, ſubjected to the ſame puniſhment which would have fallen upon the accuſed; but in England the king had a power to mitigate or remit the puniſhment. In civil caſes, the victor gained and the vanquiſhed loſt his cauſe. Many laws were made for regulating the times and places of ſuch judicial combats, the dreſs and arms of the combatants, and every other circumſtance; which are too voluminous to be here inſerted (*t*). Several kinds of perſons were by theſe laws exempted from the neceſſity of defending their innocence, or their properties, by the judicial combat; as, women, prieſts, the ſick infirm or maimed, with young men under twenty, and old men above ſixty years of age. But all theſe perſons might, if they pleaſed, employ champions to fight their cauſes (*u*).

(*t*) See Du Cange Gloſſ. voc. *Duellum.* Spelman Gloſſ voc. *Campus.* Bract. l. 2. tract. 2. c. 21. Fleta, l. 1. c. 34, 35.

(*u*) Glanvil. de Conſuetud. Angl. l. 14 c. 1.---Henry's Hiſt. 3 v. 355. Blac. Com. 4 v. 349.

" tuimus

" tuimus per commune concilium totius regni prædicti, & " illis dedimus & conceſſimus in feodo jure hæreditario *(x)*."

WHEREIN we may obſerve, that this conſtitution ſeems to point at two things, viz. The aſſizing of men for arms, which was frequent under the title *de aſſidenda ad arma*, and is afterwards particularly enforced and rectified by the ſtat. of Winton, 13 Ed. I.—and next of conventional ſervices, reſerved by tenures upon grants made out of the crown or knights ſervice; called in Latin, *forinſecum*, or *regale ſervitium* (*y*). [K.]

AND

(*x*) See Note [K] below. (*y*) Poſt. cap. xi. note *k*.

[K] Notwithſtanding the authority of ſir Matthew Hale, which tends to ſupport the opinion, that feuds were introduced into this kingdom by the Conqueror, there are others who hold a contrary doctrine. Among theſe we may rank, ſir Edward Coke, the Judges of Ireland, Mr. Selden, Nathaniel Bacon, ſir William Temple, Saltern, and the author of the Mirror.—In truth the authorities on each ſide are numerous and reſpectable; I have therefore taken the liberty to ſubjoin the different opinions which have been publiſhed on the ſubject. I have ventured to enquire, without preſuming to decide: ſatisfied with producing the opinions of others, I pretend not to eſtabliſh any ſyſtem of my own. Sir Edward Coke ſays, that " the tenure by knights ſervice is of great " antiquity, for ſo it was in the time of king Alfred." 1 Inſt. 76. b. ſee id. 64. a. 83. a. But this opinion of Sir Edward Coke, Mr. Hargrave, the late and able editor of Coke on Littleton, ſeems, in ſome degree, to controvert; vide Harg. note 1. on Co. Lit. 64. a. and note 1. on id. 83. a.

Coke alſo, in the preface to his Third Report, ſuppoſes, that the *redditiones ſocharum et reges ſervitium*, ſaid in the book of Domeſday, *à conſtitutione antiquorum temporum*, to belong to the church of Worceſter, within the hundred of Aſwaldſhaw, prove ſocage tenure, and knight ſervice, long before the Conqueſt.

The Judges of Ireland, in the caſe of tenures, ſuppoſed, that the *Thani majores*, or *Thani reges* among the Saxons, were the king's immediate tenants of lands, which they held by perſonal ſervice, as of the king's perſon by grand-ſerjeanty, or knight ſervice in *capite*;

pite; and that the land ſo held was in thoſe times called Thane-land, as land holden in ſocage was called Reveland; and that after ſome years which followed the coming of the Normans, the title of Thane grew out of uſe, and that of Baron and Barony ſucceeded for Thane, and Thaneland. They therefore concluding ſir Henry Spelman miſtaken, who in his Gloſſary, *verb. Feudum*, refers the original of feuds in England to the Norman conqueſt, laid it down as moſt manifeſt, that *capite* tenures, tenures by knight ſervice, tenures in ſocage, &c. were frequent in the times of the Saxons, but that indeed the poſſeſſions of biſhops and abbots were firſt made ſubject to knight ſervice *in capite* by William the conqueror, in the fourth year of his reign, &c. See "The Caſe of Tenures upon the "Commiſſion of Defective Titles," &c. 8vo. printed at London, 1720. or the ſubſtance of the caſe as to this point, in biſhop Gibſon's preface to Spelman's Treatiſe of Feuds, &c.

Mr. Selden, in treating of the dignity of an earl, ſays, that in ſome places in England it was both feudal and inheritable, even from the firſt coming of the Saxons into England, which is commonly placed in 448 of Our Saviour, though by exacter calculation it falls twenty years ſooner; and that Ethelred, caldorman of Merceland, had all that which was the kingdom of Merceland to his own uſe, as an earldom and fief given him in marriage with Ethelfleda, by her father king Alfred; and to prove this cites William of Malmeſbury De Geſt. Regum, lib. 2. cap. 4. "Londonium caput regni Merciorum "cuidam Primario Ethelredo in fidelitatem ſuam cum filia Ethelfled "conceſſit." Vide Seld. Tit. of Hon. 510, 511. He ſays indeed, ibid. that Aſſerius and Florentius have it *ſervandum commendavit:* and if he had gone on, he would have found that William of Malmeſ-bury himſelf, in the very next line, calls it COMMISSUM, and afterwards cap. 5. *commendatum*; which words rather ſuggeſt a truſt than a feud. Malmeſ. de Geſt. Regum inter Scriptores poſt Bedam, fol. 44, 46. and Spelm. Poſthum. Treat. of Feuds, 13.

Mr. Selden likewiſe ſuppoſes the names of Thane and Vavaſor in the Saxon times, to have been feudal; and that as earl, king's thane, and middle thane, ſucceeded, one the other, in the Saxon laws, ſo count, baron, and vavaſor, are uſed as interpreters of them in the French laws of William I. and that the king's thanes held of the king in chief by knight ſervice, and were of the ſame kind with them that were, after the Normans, honorary or parliamentary barons. Tit. of Hon. 513. and he ſays ibid. 520, that a vavaſor was in the moſt antient times only a tenant by knight ſervice, that either held of a meſne lord, and not immediately of the king, or at leaſt of the king, as of an honour or manor, and not in chief.

Nathaniel, Bacon thinks that it is not clear from any author of credit, that the Normans changed the tenures of lands; and that none of them appeared to him to be of Norman original, although they

they received their names according to that dialect. Bacon Hist. of the Eng. Gov. 161.

Sir William Temple observes, that those authors who will make the Conqueror to have broken or changed the laws of England, and introduced those of Normandy, pretend that the duty of escuage, with the tenures of knight service and baronage, came over in this reign; but that it needs no proof, that those with the other feudal laws were all brought into Europe by the antient Goths, and by them settled in all the provinces which they conquered of the Roman Empire; and among the rest by the Saxons in England, as well as by the Franks in Gaul, and the Normans in Normandy. Temp. Introd. to the History of Eng. 171, 172.

Saltern supposes conveyances by feoffment and livery to have been before the Conquest, and that there were lords and tenants in the days of Gorbonian the Good, and that fealty was sworn to the prince in the time of Elidurus; which of necessity (says he) were accompanied with tenures, services, distresses, and the like. Saltern de Antiquis Britan. Legibus, cap. 8.

And lastly, the author of the Mirror imagines that tenures were ordained for the defence of the realm, by our old kings, before the Conquest. Mirr. cap. 1. sect. 3. p. 11, 12.

In opposition to these respectable authorities, and in support of sir Matthew Hale's opinion, may be adduced the sentiments of many able and learned men. Though the accession of William to the throne of England produced no very remarkable alteration in the ranks and orders of men in society; it produced (says Dr. Henry) many important changes in their political circumstances. These changes were chiefly owing to the establishment of the feudal system in England by William I. in the same state of maturity to which it had then attained in his dominions on the continent.

"In the Anglo-Saxon times, all the proprietors of land (the clergy excepted) were subjected to the following obligations, commonly called the *trinoda necessitas*—To attend the king with their followers in military expeditions;—to assist in building and defending the royal castles;—to keep the highways and bridges in a proper state *(a)*. To these three obligations, a fourth, called an heriot, was added by the laws of Canute the Great; which consisted in delivering to the king the horses and arms of his earls and thanes at their death, with certain sums of money, according to their rank and wealth (*b*). These may be called feudal prestations. But to these William I. added so many others, that he may be justly said to have completed, if not to have erected, the fabric of the feudal government in Britain.

(*a*) Hickesii dissertat. Epistol. p. 60. Reliquiæ Spelman. p. 22.

(*b*) Wilkins Leges Saxon.

The

The ſovereign of a feudal ſtate was, in idea at leaſt, the proprietor of all the lands in his dominions (*c*). Part of the lands he retained in his own poſſeſſion for the maintenance of his family, and ſupport of his dignity; the reſt he granted to certain of his ſubjects, as benefices or fees, for ſervices to be performed by them; and on ſuch other conditions as he thought proper to require, and they to accept. The idea of a feudal ſovereign was almoſt realized in William I.—He beheld a very great proportion of the lands in England at his diſpoſal, which enabled him to eſtabliſh the feudal ſyſtem of government in its full extent, with little or no difficulty.

In the diſtribution of the territory of England, he was not unmindful of the intereſts of the crown. He retained in his own poſſeſſion no leſs than 1422 manors, beſides foreſts, parks, chaces, farms, and houſes, in all parts of the kingdom (*d*). As the hopes of obtaining ſplendid eſtabliſhments for themſelves and followers had engaged many powerful barons, and even ſome ſovereign princes, to embark with him in his dangerous expedition, he was induced both by the dictates of honour and prudence to gratify their expectations by very liberal grants.

But none of theſe grants were unconditional; to all of them a great variety of obligations was annexed. Theſe obligations were either ſervices, which contributed to the ſplendor of the ſovereign, and ſecurity of the kingdom; or preſtations of various kinds, which conſtituted a conſiderable part of the royal revenue.

The ſervices to be performed by the immediate vaſſals of the crown, were chiefly, Homage and fealty;—Perſonal attendance upon the king in his court, at the three great feſtivals of Chriſtmas, Eaſter, and Whitſuntide, and in his parliament, at other times, when regularly called;—Military ſervices in the field, or in the defence of caſtles for a certain time, with a certain number of men, according to the extent of eſtates.—By theſe three things, the ſovereign of a feudal kingdom was ſecured, as far as human policy could ſecure him, in a ſplendid court for his honour, a numerous council for advice, and a powerful army for defence.

The payments or preſtations, to which the immediate vaſſals of the crown were ſubjected, were chiefly,—Reſerved rents;—Wardſhips;—On Marriages, Reliefs, Scutages, Aids.

The ſovereign of a feudal kingdom never appeared in greater ſplendor than when he received the homage of his immediate vaſſals in his great court or parliament. Seated upon his throne, in his royal robes, with his crown on his head, and ſurrounded by his nobles, he beheld his greateſt prelates and moſt powerful barons

(*c*) Somner on Gavel. 109. Smet. de Republic. l. 3. c. 10.

(*d*) Doomſday Book paſſim.

uncovered and unarmed, on their knees before him. In that humble poſture, they put both their hands between his, and ſolemnly promiſed "to be his liege men, of life and limb and worldly worſhip, "to bear faith and troth to him, to live and die with him, againſt "all manner of men (*e*)."

The courts of the Anglo-Norman kings were at all times very ſplendid, but more eſpecially at the three great feſtivals of Chriſtmas, Eaſter, and Whitſuntide, when all the prelates, earls, and barons of the kingdom were, by their tenures, obliged to attend their ſovereign, to aſſiſt in the celebration of theſe feſtivals, in the adminiſtration of juſtice, and in deliberating on the great affairs of the kingdom. The buſineſs conſiſted partly in determining important cauſes, and partly in deliberating on public affairs (*f*).

Military ſervice was the greateſt and moſt important obligation annexed to the grants of lands made by William I. and other feudal ſovereigns. The intention in making theſe grants, was to ſecure a ſufficient body of troops under proper leaders, well armed, and always ready to take the field, for defending the kingdom, and proſecuting ſuch wars as were thought neceſſary for the honour of the prince, and the proſperity of the ſtate (*g*). Lands ſo granted, may very well be conſidered as the daily pay of a certain number of troops, which the perſons to whom they were granted, were obliged to keep in conſtant readineſs for ſervice; and therefore the number of knights fees or ſtipends, which every eſtate comprehended, was carefully aſcertained. To add ſtill further to the ſtrength and ſecurity of the kingdom, William ſubjected the lands of ſpiritual barons to the ſame military ſervices (*h*).

Though William and other feudal ſovereigns made large grants of lands to their nobility, clergy, and other vaſſals, they did not relinquiſh all connexion with and intereſt in the lands. On the contrary, they granted only the right of USING the lands on certain conditions; ſtill retaining the property, or *dominium directum*, in themſelves: and to put their vaſſals conſtantly in mind of this circumſtance, they always reſerved certain annual payments (commonly very trifling), which were collected by the ſheriffs of the counties where the lands lay (*i*).

(*e*) Spelman. Du Cange in voc. *Homagium, Ligium.* Littleton ſect. 85. Bracton l. 2. c. 35. Glanvil l. 9. c. 1. Fleta l. 3. c. 16.

(*f*) Du Cange voc. *Curia.* Craig de Feudis, l. 2. c. 11.

(*g*) 4 Inſt. p. 192.

(*h*) M. Paris, p. 5. col. 1. ann. 1070.

(*i*) Madox Exchеq. c. 10. Craig de Feudis, l. 1. c. 9.

When

When a vaſſal of the crown died, and left his heir under age, and conſequently incapable of performing thoſe perſonal ſervices to his Sovereign, to which he was bound by tenure, the king took poſſeſſion of his eſtate, that he might therewith ſupport the heir, and give him an education ſuitable to his quality, and at the ſame time might provide another perſon to perform his ſervices in his room. This right of being the guardian of all minors, male or female, who held their lands of the crown by military ſervices, brought conſiderable profits into the royal coffers, or enabled the prince to enrich his favourites, by granting them the guardianſhip of ſome of his moſt opulent wards (*k*).

The king's female wards could not marry any perſon, however agreeable to themſelves and their relations, without the conſent of their royal guardian, that they might not have it in their power to beſtow an eſtate which had been derived from the crown, on one who was diſagreeable to the ſovereign (*l*); a cruel and ignominious ſervitude. No leſs a ſum than ten thouſand marks, equal to one hundred thouſand pounds of our money at preſent, was paid to the king for the wardſhip and marriage of a ſingle heireſs. The ſervitude was afterwards extended to male heirs (*m*).

The king had not only the guardianſhip and marriage of the heirs of all his immediate vaſſals, but he demanded and obtained a ſum of money from them when they came of age, and were admitted to the poſſeſſion of their eſtates; and alſo from thoſe heirs who had been of age at the death of their anceſtors. This laſt was called RELIEF, becauſe it relieved their lands out of the hands of their ſovereign, into which they fell at the death of every poſſeſſor (*n*). Reliefs were at firſt arbitrary and uncertain, and of conſequence the occaſion of much oppreſſion. They were afterwards fixed at the rate of one hundred ſhillings for a knight's fee, one hundred marks for a barony, and one hundred pounds for an earldom, which was ſuppoſed to be about the fourth part of the annual value of each (*o*).

Scutage, or ſhield money, was another preſtation, to which the military vaſſals of the crown, both of the clergy and laity, were ſubjected. It was a ſum of money paid in lieu of actual ſervice in the field, by thoſe who were not able or not willing to perform that ſervice in perſon, or to provide another to perform it in their room.

(*k*) Craig de Feudis, l. 2. c. 2. Spelman Reliquiæ, p. 25. Gloſs. voc. *Warda.* Madox Exchequ. c. 10. ſect. 4. Glanvil l. 7. c. 9.

(*l*) Du Cange voc. *Maritagium.* Glanvil l. 7. c. 9.

(*m*) Madox Exchequ. c. 10. ſect. 4.

(*n*) Glanvil l. 9. c. 4.

(*o*) Du Cange voc. *Relevium.* Madox Exchequ. c. 10. ſect. 4.

The rate of this commutation was not always the ſame; but moſt commonly it was two marks for every knight's fee; though ſometimes it was only twenty ſhillings, and at other times three marks, or two marks and a half (*p*).

Beſides all theſe payments, the immediate vaſſals of the crown, who were preſumed to be poſſeſſed of much affection and gratitude to their ſovereign for the favours they had received from him, granted, or rather complied with the demand of certain pecuniary AIDS, on ſome great occaſions, when he ſtood in particular need of their aſſiſtance. The occaſions on which thoſe aids were demanded and granted, were theſe; to make his eldeſt ſon a knight; to marry his eldeſt daughter; to ranſom his perſon when he was taken priſoner. The rate of theſe aids was alſo unſettled; but it ſeems to have been moſt frequently one mark, or one pound, for every knight's fee (*q*).

There is ſufficient evidence that all theſe ſervices and preſtations, ſo troubleſome in themſelves, and ſo liable to be rendered oppreſſive and intolerable, were brought from Normandy, and impoſed by William on the leaders of his victorious army, to whom he granted great eſtates in England. But theſe were far from being the only perſons who felt the weight of thoſe feudal ſervitudes. For the Norman and other barons who received extenſive tracts of lands, imitated the example of their ſovereign in the diſpoſal of them. They retained part of them, lying contiguous to their own caſtles, in their own poſſeſſion, which were called their Demeſnes; and the reſt they granted to their followers, on terms exactly ſimilar to thoſe on which they had received them from the crown. The vaſſals of every baron did him homage, with a reſervation of homage to the king, which was ſometimes not much regarded.—They gave perſonal attendance in his court at ſtated times, or when regularly called.—They followed him into the field with a certain number of troops, according to the quantity of land they had received.—They paid him certain reſerved rents.—Their heirs were his wards when under age.—They could not marry without his conſent.—They gave him a relief, when they obtained poſſeſſion of their eſtates; and aids for making his eldeſt ſon a knight, for marrying his eldeſt daughter, and for redeeming his perſon from captivity. In a word, a feudal baron was a king in miniature, and a barony was a little kingdom. Even the vaſſals of barons ſometimes granted ſubinfeudations, but always exactly on the ſame plan. By this means all the diſtreſsful ſervitudes of the feudal ſyſtem deſcended from the ſo-

(*p*) Du Cange voc. *Scutagium*. *Auxilium*. Madox Excheq. c. 15.
(*q*) Spelman Du Cange Gloſs. voc. Glanvil l. 9. c. 8.

vereign

vereign to the meaneſt poſſeſſor of land by military tenure, becoming heavier as they deſcended lower (*r*).

It is true that thoſe poſſeſſors of land who were called *Socmen* (becauſe, as many think, they followed the Soc or plough) were not ſubjected to ſome of the moſt vexatious of thoſe feudal ſervitudes, as perſonal attendance, wardſhip, marriage, &c. But this was owing to the contemptible light in which they were viewed by their ſovereign and his haughty barons, who would not admit them into their courts or their company; and conſidered the education and marriage of their heirs as matters of ſmall importance and unworthy of their attention. Nor were many of theſe Socmen more free, or more happy than the military vaſſals of the king and barons. On the contrary, they were ſubjected to lower and more laborious ſervitudes, as furniſhing men, horſes, and carriages, on various occaſions; ploughing and ſowing the lands of their lords, &c (*s*). In a word, the feudal ſyſtem of tenures, eſtabliſhed by William in England, was productive of univerſal diſtreſs and ſervitude; from which even thoſe of the higher ranks were not exempted, though they were moſt ſeverely felt by the lower orders in the ſtate (*t*).

Craig in his treatiſe De Jur. Feud. 29. ſays, "Anglos ante conqueſ-
" tum vix puto hoc jus (ſcilicet feudorum) recepiſſe: rationes cur ita
" credam hæ ſunt—Scio ante conqueſtum multas apud Anglos leges
" ab Anglo-Saxonum regibus ante conqueſtum conſcriptas—Ne veſti-
" gium quidem juris feudalis in eis pæne reperitur, nam licet vaſa-
" lorum in dominos ingratitudo, ſive felonia expreſſe aliquo ſtatuto
" puniatur, pœna tamen non eſt amiſſio feudi, ut in jure feudali,
" ſed tantum vel mulcta pecuniaria, ſi parva ſit injuria, vel pœna
" capitis, ſi major, quæ juris feudalis naturam non ſapiunt.—Præ-
" terea ex ipſo Polydoro, qui Anglorum hiſtoriam conſcripſit dili-
" gentiſſime, conſtat manifeſte, conqueſtorem, cum omnia Angliæ
" prædia jure belli ad ſe pertinere diceret, legem agrariam tuliſſe,
" quâ ſe omnium poſſeſſionum dominum declaravit (quod nihil aliud
" erat quam omnia prædia de eo tanquam domino teneri,) &c."

Sir H. Spelman ſays, " jus feodale Anglis primus impoſuit Guli-
" elmus conqueſtor." (Gloſs. ad Mag. Chart. fol. 374) And again, (ad verbum *Feodum*) " Feodorum ſervitutes in Britanniam noſtram
" primus invexit Gulielmus ſenior conqueſtor nuncupatus, qui lege
" ea e Normanniâ introducta Angliam totam ſuis diviſit commilitibus:
" innuit hoc ipſum codex ejus agrarius—(Qui) Feudum et Norman-
" niam jungit, ac ſi rei novæ notitia e Normannia diſquirendâ eſſet."
And it being ſaid by the Judges of Ireland, in the abovementioned caſe of tenures, that ſir H. Spelman, thus referring the original of

(*r*) Spelman. Du Cange Gloſſ. voc. *Baron. Feodum, Curia, Homagium, Warda, Maritagium, Relevium, Adjuxilium.*

(*s*) Spelman. Du Cange Gloſs. voc. *Socmannus.*

(*t*) Dr. Henry 3 v. p. 329.

feuds in England to the Norman conqueſt, was miſtaken; he wrote an elaborate treatiſe of the nature and original of feuds and tenures, in ſupport of his opinion. This treatiſe was publiſhed by biſhop Gibſon 1723, among the poſthumous works of this great man.

Mr. Somner ſays, "Before the conqueſt, we were not in "this kingdom acquainted with what ſince, and to this day, we call "*Feoda*, foreigners *Feuda*, i. e. Fiefs or Fees, either in that general ſenſe I mean, wherein they are diſcourſed of and handled abroad "in the book thence intitled *De Feudis*, at home in that called "Littleton's Tenures." Treat. of Gav. 100. 104. And concludes, that "to the Conqueror it is, that the names and cuſtoms of our "Engliſh fees, or (as we now vulgarly call them) tenures, ſuch at "leaſt as are military, owe their introduction."

Matthew Paris, anno 1068. fol. 6. ſays, that William I. "com- "militibus ſuis qui bello Haſtingenſi regionem ſecum ſubjugave- "rant, terras Anglorum et poſſeſſiones affluentiori manu contulit, "illudque parum quod remanſerat ſub jugo poſuit perpetuæ ſervitutis." And again, anno 1070. fol. 7. he ſays, that this king "Epiſcopa- "tus quoq; et abbatias omnes quæ baronias tenebant, et eatenus "ab omni ſervitute ſeculari libertatem habuerant, ſub ſervitute "ſtatuit militari, irrotulans ſingulos epiſcopatus et abbatias pro "voluntate ſuo quot milites ſibi et ſucceſſoribus ſuis hoſtilitatis "tempore voluit a ſingulis exhiberi: et rotulos hujus eccleſiaſticæ "ſervituris ponens in theſauris, multos viros eccleſiaſticos huic con- "ſtitutioni peſſimæ reluctantes a regno fugavit."

Mr. Camden aſſerts, that "the Engliſh were diſpoſſeſſed of "their hereditary eſtates by William I. and the lands and farms "divided among his ſoldiers; but with this reſerve, that he ſhould "ſtill remain the direct proprietor, and oblige them to do homage "to him and his ſucceſſors; that is (ſays he), that they ſhould "hold them in fee, but the king alone chief lord, and they feuda- "tory lords, and in actual poſſeſſion."

Dr. Hody ſays, that "baronies, and ſuch tenures, were firſt "brought into England by the Conqueror." Hiſt. of Convoc. 117. And Bracton, ſpeaking of the *regale ſervitium*, intimates as much in theſe words, "ſecundum quod in conqueſtu fuit adinventum." Bract. lib. 2. cap. 16. ſect. 7.

Sir Martin Wright, in his Introduction to the Law of Tenures, 52, obſerves, that William I. about the twentieth year of his reign, (*u*) and not till then, ſummoned all the great men and landholders in the kingdom (*x*) to do their homage, and ſwear their fealty to him: from whence he infers, that this was done in conſequence of

(*u*) Seld. Præf. ad Eadmer. fol. 5. Mad. Exchеq. fol. 6. in marg.

(*x*) Hen. of Huntingd. interſcript. poſt Bedam, 908. Hoveden 460. and the Waverly Annals ad An. 1084. 1086.

ſomething

ſomething new, or that theſe feudal engagements would have been required long before; and if ſo, that it is probable feudal tenures were then new. See alſo Dugd. Orig. Jurid. 6. Wilkins' Leg. Anglo-Saxon. fo. 288, 289. Cottoni Poſthuma, 13, 14. 346. Mr. Hume is of opinion that they were introduced by the Conqueror, Hiſt. Eng. 1 v. oct. 270. So is Blackſtone, Com. 4 v. 418. but ſee the fourth chapter of the ſecond book of his Commentaries paſſim. Dr. Sullivan contends for the ſame doctrine; vide his Lectures 14, 15, ſeq. and 270. ſeq.

The laws of William the Conqueror, which he added to thoſe of the Confeſſor, and by which, it is apprehended, he introduced the feudal ſyſtem into this kingdom, are as follows.

L. 52. "Statuimus (*y*) ut omnes liberi homines (*z*) feodere et ſacramento affirment, quod intra et extra (*a*) univerſum regnum Angliæ "Regi Willielmo domino (*b*) ſuo fideles (*c*) eſſe volunt, terras et honores illius omni fidelitate ubique ſervare cum eo, et contra inimicos "et alienigenas defendere."

"We ordain that all freemen ſhall oblige themſelves by homage and "fealty, that within and out of the dominions of England, they will "be faithful to king William their lord, his lands and honours with "all fidelity every where with him will preſerve, and againſt all ene"mies, foreign and domeſtic, will them defend."

L. 55. "Volumus etiam ac firmiter præcipimus et concedimus ut omnes liberi homines totius monarchiæ regni noſtri prædicti habeant et "teneant terras ſuas et poſſeſſiones ſuas bene et in pace, libere ab omni "exactione injuſta, et ab omni tallagio; ita quod nihil ab eis exigatur vel "capiatur niſi ſervitium ſuum liberum quod de jure nobis facere de-

(*y*) *Statuimus.* This implies it was not by the king alone, but by the *commune concilium*, or, as ſome ſuppoſe, the Parliament; for the ſtyle of the King of England, when ſpeaking of himſelf, was, for ages after, in the ſingular number.

(*z*) *Liberi homines.* Theſe were tenants in military ſervice, and men of truſt and reputation. Brady's Anſwer to Petyt, p. 39.

(*a*) *Intra et extra univerſum regnum Angliæ.* Theſe words are particular; for they deviate from the general principles of the feudal law, and were highly advantageous to William. By the feudal law, no vaſſal was obliged to ſerve his lord in war, unleſs it was defenſive, or one he thought a juſt one; nor for any territories belonging to his lord which were not part of the ſeigniory of which he held; but this would not effectually ſerve for the defence of William. He was Duke of Normandy, which he held from France; and he knew the king of that country was jealous of the extraordinary acceſſion of power he had gained by his new territorial acquiſition, and would take every occaſion, juſt or unjuſt, of attacking him there; in ſhort, that he muſt be always in a ſtate of war. Such an obligation on his tenants, of ſerving EVERY WHERE, was of the higheſt conſequence for him to obtain: nor was it difficult; as moſt of them alſo had eſtates in Normandy, and were by ſelf-intereſt engaged in its defence.

(*b*) *Willielmo domino ſuo*, not *regi*, not the oath of allegiance as king, but the oath of fealty from a tenant.

(*c*) *Fideles.* This is the very technical word of the feudal law for a vaſſal.

" bent et facere tenentur, et prout ſtatutum eſt eis et illis a nobis da-
" tum et conceſſum jure hæreditario impertum per commune concili-
" um totius regni noſtri prædicti."

" We will and firmly command and grant that all freemen of the
" whole monarchy of our aforeſaid kingdom may have and hold their
" lands and poſſeſſions well and in peace, free from all unjuſt exactions
" and taillage; ſo as nothing be exacted or taken, ſave their free ſervi-
" ces, which of right they ought and are bound to perform to us, and
" as it was appointed to them, and given and granted to them by us
" as a perpetual right of inheritance by the common council of the whole
" kingdom."

L. 58 " Statuimus etiam et firmiter præcipimus ut omnes comites,
" et barones, et milites, et ſervientes (*d*), et univerſi liberi homines
" totius regni noſtri prædicti habeant et teneant ſe ſemper bene in ar-
" mis et in equis ut decet et oportet, et quod ſint ſemper prompti et
" bene parati ad ſervitium ſuum integrum nobis explendum et peragen-
" dum cum ſuper opus adfuerit, ſecundum quod nobis debent de feo-
" dis et tenementis ſuis de jure facere, et ſicut illis ſtatuimus per
" commune concilium totius regni noſtri prædicti, et illis dedimus
" et conceſſimus in feodo jure hæreditario (*e*)."

" We ordain alſo, and firmly command, that all earls, and barons,
" and knights, and ſervants, and all the freemen of our whole king-
" dom aforeſaid, ſhall always be fitted with horſes and arms as they
" ought to be, and always ready and well prepared to perform their
" whole ſervice to us when there ſhall be need, according to what
" they ought by law to do to us, by reaſon of their fiefs and tenements,
" and as we have ordained to them by the common council of our
" whole kingdom aforeſaid, and have given and granted to them in
" fee in hereditary right."

L. 59. " Statuimus etiam et firmiter præcipimus ut omnes liberi
" homines (*f*) totius regni noſtri prædicti ſint fratres conjurati ad mo-
" narchiam

(*d*) *Servientes*, the lower ſoldiers not knighted, who had not yet got lands, but were quartered on the Abbeys. Others are of opinion, that by *ſervientes* are meant thoſe who held by grand or petit ſerjeanty.

(*e*) This new policy ſeems not to have been impoſed by the Conqueror, but nationally and freely adopted by the general aſſembly of the whole realm, in the ſame manner as other nations of Europe had before adopted it, upon the ſame principle of ſelf-ſecurity. And, in particular, they had the recent example of the French nation; which had gradually ſurrendered up all its allodial or free lands into the king's hands, who reſtored them to the owners, as a *beneficium* or feud, to be held to them and ſuch of their heirs as they had previouſly nominated to the king.

(*f*) *Liberi homines*—The freemen in this law are the ſame as thoſe mentioned before; ſuch as held in military tenure, though not knighted; for thoſe were called *milites*: ſometimes they are taken promiſcuouſly one for the

" narchiam noſtram et adregnum noſtrum pro viribus ſuis et facultatibus " contra inimicos pro poſſe ſuo defendendum et viriliter ſervandum, pa- " cem et dignitatem coronæ noſtræ integram obſervandam et ad judici- " um rectum et juſtitiam conſtanter omnibus modis pro poſſe ſuo ſine " dolo et ſine dilatione faciendam. Hoc decretum ſancitum eſt in " civitate London."

" We ordain alſo and firmly command, that all freemen of our " whole kingdom aforeſaid be ſworn brothers, manfully to preſerve " and defend our monarchy or government, and our kingdom, with " all their power, force, and might, againſt enemies, and keep entire " the dignity and peace of our crown, and to give right judgment, " and conſtantly to do juſtice by all ways and means, according to " their power and ability, without fraud or delay. This law was " enacted in the city of London."

L. 63. " Hoc quoque præcipimus ut omnes habeant et teneant legem " Edwardi regis (*g*) in omnibus rebus, adauctis hiis quas *conſtituimus* " (*h*) ad utilitatem Anglorum.

" This we alſo command, that all our ſubjects have and enjoy the " laws of king Edward in all things; with the addition of thoſe which " we have appointed for the benefit of the Engliſh."

Mr. Juſtice Blackſtone and Doctor Sullivan differ as to the time when William introduced the feudal ſyſtem, the former conceiving it to have been in the twentieth, and the latter in the fourth year of his reign. It was probably in the twentieth (*i*)."

On the whole, it is probable that William introduced into England the feudal law which he found eſtabliſhed in France and Normandy, and which, during that age, was the foundation both of the ſtability and of the diſorders in moſt of the monarchical governments of Europe.—It is not a little remarkable, that in tracing the great lines of the Mexican conſtitution, an image of feudal policy, in its moſt rigid form, riſes to view. In truth, its ſpirit and principles ſeem to have operated in the new world in the ſame manner as in the ancient. Dr. Robertſon, Hiſt. Amer. 2 v. 280.

the other; they were very different from our ordinary freeholders at this day. Anſwer to Petyt, p. 38, 39. Gloſſary, by the ſame author, p. 32. According to Sullivan, they were " the Saxon freeholders, and the tenants of the church, who now were ſubjected to knight's ſervice."

(*g*) *Legem Edwardi regis*—William at his coronation ſwore to obſerve the laws of Edward the Confeſſor; and with reſpect to ſuch of them as did not claſh with his deſigns, he now again confirms them, adding thereto the above laws and ſome others.

(*h*) The word *conſtituimus* implies a parliamentary act; and therefore extended to the Normans here, the benefit of the Engliſh laws. Lyt. Hiſt. Hen. II. 8vo. 1 v. 464. 468.

(*i*) Seld. pref. Ead. 5. Mad. Excheq. 6. in marg. Wright's Ten. 52.

AND

AND note, that theſe laws were not impoſed *ad libitum regis*, but they were ſuch as were ſettled *per commune concilium regni*; and poſſibly at that very time, when twelve out of every county were returned to aſcertain the Confeſſor's laws, as before is mentioned out of Hoveden. Which appears to be ASSUFFICIENT AND EFFECTUAL A PARLIAMENT AS EVER WAS HELD IN ENGLAND [L.]

By

[L] The ſtudent will find a pertinent account of the alterations of our laws under the reign of William the firſt, in the laſt chapter of the fourth volume of Mr. Juſtice Blackſtone's Commentaries. The laws of William in the Norman language, with the Latin tranſlation of Dr. Wilkins, as alſo an Engliſh one, with notes and references, were ſome time ſince publiſhed by Mr. Kelham, in his Dictionary of the Norman Language.

To aſcertain the laws of Edward the Confeſſor, we find that William ſummoned twelve men from every county; and this Sir Matthew Hale will have to be "as ſufficient and effectual a parliament as "ever was held in England." With every deference to his authority, it is apprehended that thoſe twelve men were not members of the legiſlature. If they were, how came they afterwards to be diſcontinued till the time of Henry the third, in whoſe reign we firſt find any account of the commons? It is more than probable, that they were ſummoned on a particular occaſion, and for a particular purpoſe, which none but themſelves could anſwer. William, on his coronation, had ſworn to govern by the laws of Edward the Confeſſor; ſome of which had been reduced into writing, but the greater part conſiſted of the immemorial cuſtoms of the realm. Having diſtributed the confiſcations among his followers, foreigners and ſtrangers to thoſe laws and cuſtoms, it of courſe became neceſſary to aſcertain them; to effect which he ſummoned twelve Saxons from every county. That they were not legiſlators is evident from this, that when William wanted to revive the Daniſh laws, laws which had been abliſhed by the Confeſſor, but which were ſomewhat ſimilar to the Norman mode of juriſprudence, they prevailed againſt him; not by refuſing their conſent, but by intreaty and adjuration. They intreated him by their tears and their prayers, and adjured him by the ſoul of Edward his benefactor.

Who were the conſtituent members of the great councils or parliaments of this period, is a queſtion which has been differently anſwered and warmly agitated (*k*). That all archbiſhops, biſhops, abbots, priors, earls, and barons, who held each an entire barony

(*k*) Petyt's Rights of the Commons aſſerted, Jan. Angl. Facies Nova, Dr. Frady's Tracts, &c. &c.

in me-

By all which it is apparent, firſt, that William I. did not pretend, nor indeed could he pretend, notwithſtanding this nominal

immediately of the king *in capite*, were conſtituent members of theſe great councils, has never been denied, and needs not be proved. Beſides thoſe great ſpiritual and temporal barons, there were many others who held ſmaller portions of land, as one, two, three or four knights fees, immediately of the king, by the ſame honourable tenure with the great barons; who were alſo members of the great councils of the kingdom, and were commonly called the leſſer barons, or free military tenants of the crown. Among many evidences which might eaſily be produced of this, the fourteenth article of the Great Charter of king John is one of the moſt deciſive, and ſeems to be ſufficient. "To have a common council of the kingdom, to aſſeſs "an aid otherwiſe than in the three foreſaid caſes (*l*), or to aſſeſs a "ſcutage, we will cauſe to be ſummoned the archbiſhops, biſhops, "earls, and greater barons, particularly by our letters; and beſides, "we will cauſe to be ſummoned in general, by our ſheriffs and bailiffs, "all thoſe who hold of us *in capite*." But beſides all theſe great and ſmall barons, who, by virtue of their tenures, were obliged, as well as entitled, to ſit as members in the great councils of the kingdom; our hiſtorians of this period ſometimes ſpeak of great multitudes of people, both of the clergy and laity, who were preſent in ſome of thoſe councils (*m*). Eadmerus, the friend and ſecretary of archbiſhop Anſelm, thus deſcribes the perſons aſſembled in a great council at Rockingham, A. D. 1095, to whom his patron made a ſpeech, "Anſelm ſpoke to the biſhops, abbots, and princes or principal men, and to a numerous multitude of monks, clerks, and laymen ſtanding by (*n*)." By the biſhops, abbots, and princes, we are certainly to underſtand the ſpiritual and temporal barons. But who are we to underſtand by "the numerous multitude of monks, clerks, and "laymen ſtanding by?" Were they members of this aſſembly, or were they only ſpectators and by-ſtanders? If by the multitude of thoſe clerks and laymen, the hiſtorian did not mean the leſſer barons, it is highly probable that they were only ſpectators. We are told by ſeveral contemporary hiſtorians, that the great councils of the kingdom in thoſe times were very much incommoded by crouds of ſpectators, who forced their way into their meetings. One of the hiſtorians thus deſcribes a great council held by king Stephen: "The king, by an edict, publiſhed through England, called the

(*l*) Theſe three foreſaid caſes were, to make his eldeſt ſon a knight; to marry his eldeſt daughter; to redeem his own perſon; in all which caſes, aids were due by tenure.

(*m*) Spelman. Concil. I. 2. p. 33.

(*n*) Eadmeri Hiſt. p. 26.

rulers

nominal conqueſt, to alter the laws of this kingdom without common conſent *in communi concilio regni*, or in parliament. And, ſecondly, that if there could be any pretence of any ſuch right, or if in that turbulent time ſomething of that kind had happened; yet by all thoſe ſolemn capitulations, oaths, and conceſſions, that pretence was wholly avoided, and the ancient laws of the kingdom ſettled, and were not to be altered, or added unto, at the pleaſure of the Conqueror, WITHOUT CONSENT IN PARLIAMENT.

IN the ſeventeenth year of his reign, or, as ſome ſay, the fifteenth, he began that great ſurvey recorded in two books, called the Great Doomſday Book, and Little Doomſday Book, and finiſhed it in the twentieth year of his reign, anno Domini 1086, (*o*) as appears by the learned

(*o*) At the end of Doomſday Book the date, or year, viz. 1086, is written in a large coeval hand. Mad. Exch. 1 v. 296. Wright's Ten. 52, 53.

rulers of the churches, and the chiefs of the people, to a council at London. All theſe coming thither, as into one receptacle, and the pillars of the churches being ſeated in order, and the vulgar alſo forcing themſelves in on all hands, confuſedly and promiſcuouſly, as uſual, many things were uſefully propoſed, and happily tranſacted, for the benefit of the church and kingdom (*p*)." In a great council held at Weſtminſter, May 18, A. D. 1127, the ſpectators, who are ſaid to have been innumerable; were ſo outrageous, that they interrupted the buſineſs of the council, and prevented ſome things from being debated (*q*). Upon the whole, it ſeems to be almoſt certain, that though great numbers of people of all ranks, prompted by political curioſity, or intereſted in the affairs which were to be debated, attended the great councils of the kingdom in this period, none were properly members of the councils but thoſe deſcribed in the Great Charter of king John, viz. the ſpiritual and temporal barons,

(*p*) Geſta Stephani Regis, apud Duchene, p. 932.

(*q*) Spelman. Concil. l. 2. p. 35.

who

learned preface of Mr. Selden to Eadmerus, and indeed by the books themſelves; the original record of which is ſtill extant, remaining in the cuſtody of the vice-chamberlains of his majeſty's exchequer. This record contains a ſurvey of all the ancient demeſne lands of the kingdom, and contains in many manors, not only the tenants names, with the quantity of lands and their values, but likewiſe the number and quality of the reſiants or inhabitants, with divers rights, privileges, and cuſtoms claimed by them. And being made and found by verdict, or preſentment, of juries, in every hundred, or diviſion, upon their oaths, there was no receding from, or avoiding, what was written in this record. And therefore, as Gervaſius Tilburienſis ſays, page 41. "Ob hoc nos eundem librum judiciarium nominamus; "non quod in eo de propoſitis aliquibus dubiis feratur "ſententia, ſed quod ab eo ſicut ab ultimo die judicii non "licet ulla ratione diſcedere." [M]

AND

who were perſonally ſummoned; and thoſe who held ſmaller parcels of land than baronies, immediately of the king, by knight's ſervice, who were ſummoned edictally by the ſheriffs of their reſpective counties (r).

[M] The book called Doomſday proves the great and extenſive genius, and does honour to the memory of William. It was begun in the year 1081, and was a general ſurvey of all the lands in the kingdom; their extent in each diſtrict; their proprietors, tenures, value; the quantity of meadow, paſture, wood, and arable land, which they contained; and in ſome counties, the number of tenants, cottages, and ſlaves of all denominations, who lived upon them. He appointed commiſſioners for this purpoſe, who entered every particular in their regiſter by the verdict of juries; and after a labour of SIX YEARS (for the work was ſo long in finiſhing) brought him an exact account of all the landed property of his kingdom. Chron. Sax. 190. Ingulf. 79. Chron. T. Tykes, 23. H. Hunt. 370. Hoveden, 460.

(r) Hen. Hiſt. 3 v. 345.

M. Weſt.

AND thus much ſhall ſuffice touching the fifth general head; namely, of the progreſs made after the coming in of king

M. Weſt. 229. Flor. Wigorn. 641. Chron. Abb. St. Petri de Bungo, 51. M. Paris, 8. The three northern counties, Weſtmorland, Cumberland, and Northumberland, were not comprehended in this ſurvey, on account of their wild, uncultivated ſituation. This monument, called DOMESDAY BOOK, the moſt valuable piece of antiquity poſſeſſed by any nation, is ſtill preſerved in the exchequer; and tho' only ſome extracts of it have hitherto been publiſhed, yet it ſerves to illuſtrate to us in many particulars, the ancient ſtate of England. Alfred had finiſhed a like ſurvey of the kingdom in his time, which was long kept at Wincheſter, and which probably ſerved as a model to William in this undertaking.

Mr. Madox in his Hiſtory of the Exchequer (s) ſays, "the great and memorable ſurvey of the lands holden in DEMEANE within this realm, which was finiſhed in the year 1086, and is called DOMESDAY-BOOK, ſheweth under the title TERRA REGIS, what and which the demeanes of the crown were, at that time, and in the time of king Edward the Confeſſor: and hath been ever ſince counted the great index, to diſtinguiſh the king's demeanes from his eſcheats and other lands, and from the lands of other men." It is generally known, that the queſtion "whether lands are ancient demeſne or not?" is to be decided by the DOMESDAY of William I. from whence there is no appeal; and it is a book of that authority, that even the Conqueror himſelf ſubmitted ſome caſes, wherein he was concerned, to be determined by it. See before note [G] on this chapter.

It may be neceſſary to notice ſome conjectures reſpecting the etymon of the word DOMESDAY. Many have ſuppoſed it to allude to the final day of judgment. Hammond apprehends, that the addition of DAY to this DOME-BOOK, was not meant with any alluſion to the final day of judgment, but was to ſtrengthen and confirm it; and ſignifieth the JUDICIAL DECISIVE RECORD, or, BOOK OF DOOMING JUDGMENT AND JUSTICE. But the Obſerver on our Ancient Statutes goes farther: "The common etymology of the word DOMESDAY, (ſays Barrington) in which all the Gloſſaries agree, viz. the compariſon of it to the day of judgment, never appeared to me ſatisfactory: if this whimſical account of the name was the real one, the Latin for it would be DIES JUDICII; whereas, in all the old Chronicles, it is ſtiled either LIBER JUDICIALIS, or CENSUALIS. Bullet, in his Celtic Dictionary, hath the word DOM, which he renders *Seur*, *Seigneur*, and hence the Spaniſh word DON; as alſo the words DEYA and DEIA, which he tranſ-

(s) Vol. I. 296.

later

king William, relating to the laws of England, their eſtabliſhment, ſettlement, and alteration. If any one be minded to

lates PROCLAMATION, AVERTISEMENT: Domeſday therefore may ſignify the lord's or king's advertiſement to the tenants who hold under him, and this ſenſe of the word agrees well with part of the contents of this famous ſurvey. See likewiſe Upton's notes on b. 1. canto vii. ſt. 26. of Spenſer's Faerie Queen, where he produces inſtances of the word DAYE ſignifying judgment; and DAYES-MAN, an arbitrator or judge. In the north of England, an arbitrator, or elected judge, is uſually termed a dies-man, or days-man: and Dr. Hammond ſaith, that the word DAY in all idioms ſignifies judgment. "In a petition to the "king in parliament, by the treaſurer and barons of the exchequer, "they certify with regard to the manor of Tring in Hertfordſhire, "Invenimus in libro veſtro qui vocatur Domeſday, &c." 6 Edw. 1. A. D. 1278. amongſt the collection publiſhed by the munificence of parliament (*t*).

Camden calls this book *Gulielmi librum cenſualem*, the tax book of king William; it was alſo called *Magna Rolla Winton*. The dean and chapter of York have a regiſter ſtiled Domeſday; ſo hath the biſhop of Worceſter; and there is an ancient roll in Cheſter-caſtle called Doomſday-Roll.

That the reader may have ſome idea of the manner of entering the lands in this book, I have ſelected the following inſtances.

"Eaſeſſa Terra Regis Dimid. Hundred. de Witham. Witham tenuit "Haroldus t. R. E. pro maner. et pro 5 hidis: tunc 21 villan. modo "15; tunc 9 bordar. modo 10; tunc 6 ſervi, modo 9; tunc 23 ſoche-"manni, et modo ſimiliter; tunc inter totum valebat 10 lib. modo 20; "ſed vicecomes inter ſuas conſuetudines et placita, de dimid. hundred. "recepit inde 34 lib. et 4lib. de gerſuma. In hoc manerio adjacebant "t. R. E. 34 liberi homines, qui tunc reddebant 10 ſol. de conſuetu-"dine et 11d. Ex illis tenet Ilbodius 2, de 45 acr. et val. 6 ſol. et "redd. maner. ſuam conſuetudinem. Tedricus Pointel 8, de dimid. "hid. et 22 acr. dimid. reddentes conſuetud. Ranulph Piperel 10, "de 2 hid. et 45 acr. non reddentes conſuetudinem. Willielmus Groſſe "5, et unus tantum reddit conſuetudinem, et val. 3 lib. 13 ſ. Rad. "Baignard 6, et unus reddit conſuetud. et val' 20 ſ. Hamo dapifer 1, "de dimid. hid. et val. 20 ſ. Goſcelinus Loremarius habet terram "unius, et non reddit conſuet. &c. Modo cuſtodit hoc manerium "Petrus vicecomes in manu regis."

Thus in Engliſh: "Eſſex [title in the top of the leaf]; the King's "Land;" and before the particular manor or town, the hundred in which it lies is noted, as here, "The Half Hundred of Witham.

(*t*) Bar. on Stat. 270.

"Harold

to ſee what this prince did in reference to eccleſiaſtics; let him conſult Eadmerus, and the learned notes of Mr. Selden

" Harold held Witham, in the time of king Edward; for a manor " and for 5 hides. Then there were twenty-one villains, now fif- " teen [for they recorded what was in Edward the Confeſſor's time, " as well as in that of the Conqueror]; then there were nine bor- " dars, now ten; then 6 ſervants or ſlaves, now 9; then there were " twenty-three ſochemans, now the ſame number; then the whole " was valued at ten pounds, now twenty pounds. But the viſcount, " or ſheriff, received from the half hundred, for his cuſtoms, and " mulcts, or forfeitures, thirty-three pounds; and four pounds for " fine or income. In this manor, or belonging to this manor, or in " the bounds of this manor, there were in the time of king Ed- " ward thirty-four freemen, which then paid an accuſtomable rent " of ten ſhillings and eleven pence. Of theſe, Ilbods holds two, " which had forty-five acres, and they were worth to him ſix ſhil- " lings, and paid their old rent to the manor. Tedric Pointel holds " eight, who had half a hide, and twenty-two acres and a half, " paying cuſtom or old rent. Ranulph Piperel holds ten, who had " two hides and forty-five acres, which paid no cuſtom or old rent. " William Groſſe holds five, and only one of them paid cuſtom, " and were worth to him three pounds thirteen ſhillings (by " the year is to be underſtood in all theſe ſums). Ralph Baignard " holds ſix, and one paid cuſtom; they were worth twenty ſhillings. " Hamo, the ſewer or ſteward, holds one, who had half a hide, and " was worth to him twenty ſhillings. Goſcelin Loremar hath the land " of one, and pays no cuſtom. Peter the viſcount, or ſheriff, keeps " this manor in the king's hand."

" Eſſeſſa Terra Regis Hund. de Beventre. Haveringas tenuit Harol- " dus t. R. E pro 1 maner. et pro 10 hid. Tunc 41 villan. modo 40; " ſemp. 41 bordar. et 6 ſervi, et 2 car. in dominio; tunc 41 car. homi- " num, modo 40; ſylv. id. porc. c. acr. prati; mod. 1 molen. et 2 runc. " et 10 animalia, et 160 porc. et 269. ov. Huic maner. adjacebant 4 lib. " homines, de 4 hidis, t. R. E. reddentes conſuetudinem; modo ten- " 3 hid. Rob fil. Corbutionis, Hugo de Montafori quartam hidam, " et non reddidere conſuetudinem eſſe quo eas habuere, &c. Hoc " maner. val. t. R. E. 36l. modo 40; et Petrus vicecomes inde recepit " 30l. de cenſu, et 10l. de gerſuma."

Thus in Engliſh: " Eſſex [title as before]; the King's Land; " the Hundred of Beventre. Harold held Haveringe, in the " time of Edward the Confeſſor, for one manor and ten hides. " Then there were forty-one villains, now forty; there were " always forty-one bordars, and ſix ſervants or ſlaves, and " two carucates in demeſne, or the lord's lands; there were " forty-one carucates among the men or tenants, now for- " ty; wood ſufficient for five hundred hogs, one hundred acres of " meadow,

Selden upon it; eſpecially page 167, 168, &c. where he ſhall find how this king divided the epiſcopal conſiſtory

" meadow; now one mill, and two working-horſes, or packhorſes, " and ten young growing beaſts, one hundred and ſixty hogs, and " two hundred and ſixty-nine ſheep. To this manor there be- " longed four freemen, who had four hides in the time of Edward " the Confeſſor, paying an accuſtomable rent. Now Robert, ſon of " Corbutio, holds three of thoſe hides, and Hugh Montfort the " fourth, and have paid no rent ſince they held them. This ma- " nor was worth thirty-ſix pounds; now forty; and Peter the viſ- " count, or ſheriff, receives from it eighty pounds for rent, and " ten pounds for an income or fine."

The contents of Doomſday-Book are ſummed up in the following verſes—

Quid deberetur fiſco, quæ, quanta tributa,
Nomine quid cenſus; quæ vectigalia, quantum
Quiſque teneretur feodali ſolvere jure,
Qui ſunt exempti, vel quos angaria damnat,
Qui ſunt vel glebæ ſervi, vel conditionis,
Quove manumiſſus patrono jure ligatur.

This book is ſtill remaining, fair and legible; conſiſting of two volumes, a greater and a leſs; the greater comprehending all the counties of England, except Northumberland, Cumberland, Weſtmorland, Durham, and part of Lancaſhire, which were never ſurveyed; and except Eſſex, Suffolk, and Norfolk, which are comprehended in the leſſer volume. It was formerly kept under three different locks and keys; one in the cuſtody of the treaſurer, and the others of the two chamberlains of the exchequer. It is now depoſited in the chapter-houſe at Weſtminſter, where it may be conſulted, on paying the proper officer a fee of 6s. and 8d. for a ſearch, and 4d. per line for a tranſcript.

The meritorious induſtry of modern times has applied itſelf to a ſimilar ſurvey of one part of the kingdom, and will, it is hoped, in the end, embrace the whole of it. Sir John Sinclair, in the year 1791, publiſhed a Statiſtical Account of Scotland; of which it has been ſaid, " that no publication of equal information and " curioſity has appeared in Great Britain ſince Doomſday-Book, " and that from the ample and authentic facts which it records, it " muſt be reſorted to by every future ſtateſman, philoſopher, and " divine, as the beſt baſis that has ever yet appeared for political ſpecu- " lation." On a ſimilar, though more confined ſcale, is Mr. Lyſons'

" Hiſtorical

from the county court, and how he reſtrained the clergy and their courts from exerciſing eccleſiaſtical juriſdiction upon tenants *in capite* (*u*).

(*u*) Blac. Com. 4 v. 415, 416. and ſee note [H] on this chapter.

" Hiſtorical Account of the Towns, Villages, and Hamlets, within " Twelve Miles of London."

For farther particulars concerning Domeſday-Book ſee Spelm. Gloſſ. *ad verbum* Domeſdei. Seld. Pref. ad. Eadm. 3, 4. Gerv. de Tilb. Dial. de Scacc. l. 1. c. 16. Ingulf. Hiſt. int. Script. poſt Bedam, 908, 909. Alſo an account of it printed by order of the Antiq. Soc. in 1756. and Groſe's Antiq. of England and Wales. There is an extract from Doomſday-Book in the type projected by Mr. Nichols, and in which that valuable record has been ſince printed, in Martin's Hiſtory of Thetford.

CHAP.