Of the Legislature of England after the Norman Invasion Comprehending the History of Tenures both before & after that Period & the Constitution of Parliaments

First of William's title to the Throne.

No Subject has been more debated, than William the Norman's right to England, some affirming that having Conquer'd the Country, He superceded the Old Laws, & had a right to establish arbitrary power; Others deny the Conquest, & consequently his right to despotism; but then they generaly attempt to prove it, by denying that he committed arbitrary acts; but the important question whether He realy had a right to do them, is seldom touch'd; now if it can be prov'd that

it was no conquest, & that he had no right to arbitrary power; his actions may indeed prove him a Tyrant, but cannot invalidate the right of the People, that however invaded by him, might be lawfully recover'd, & exercis'd when opportunity should offer, for the recovery of their Lawful Rights; for there can be no prescription against Liberty, from illegal Acts.

To prove this, let us examine two things,

1. the power the Norman had in his own Country.
& 2. the Causes that brought him to England.

As to the first Rollo the Dane William's Ancestor conquer'd Neustria with an Army of Danes, Norwegians, & Swedes, who all went under the name of Normans, which they gave to their Conquest; Rollo the Leader of this confederacy of different

Nations, could have no pretence to power, except what was given him by their own consent; the new conquest was divided & Government established — with the opinions, & consent of all the Chiefs, & Rollo's legitimate Issue failing in our William's Father, He was elected by the Barons to succeed him, & consequently had no right but what was conferr'd on him voluntarily;

To show that William had no right over the Army He led into England, we read in History that the Norman Barons refus'd at first to attend him, not being oblig'd by their Allegiance to serve in Foreign Wars, & tho' they at last agreed to it, yet one of the principal Normans, persisted in his refusal, therefore the Chiefs of his Army were partners, not servants in the

Expedition; & that this idea remain'd in the Reign of William's Successors appears, by the famous answer Earl Warren made, when question'd about the title to his Estate; for drawing an old sword he declar'd, "that his "Ancestors had obtain'd their Lands by the sword, "& with it he would defend them." From all this it appears plainly that the Normans led by William were a free People.

As to the second thing, the causes of the Invasion, we shall observe that the Normans & English had no difference, but liv'd in a friendly intercourse; & William pretended a right to the Crown; therefore the War wag'd was against Harold the Possessor, & not the Nation; & so William understood it, offering to decide it by single combat; so that when he routed

Harold, he certainly could have no more power over the English, than the Person he claim'd under had; & of what extent that was, we have seen before in treating of the Saxon Government.

There are two reasons asserted for William's Right of Arbitrary power, one by Salmasius, which is the addition of Dei Gratia taken to the Regal title; in answer to this let us observe that Father Mabillon tells us that Pepin, the first Prince in Europe that took that addition to his title, chose it from having no other right to the Crown, having acquir'd it by usurpation; & several of our first Clergy, as Lanfranc Archbishop of Canterbury, & even since the Restoration Juxon was stil'd Dei Gratia Archbishop of Canterbury.

The other reason is more specious for the

Lovers of Tyranny affirm, that at the Conquest the Government was Military, the Military Tenants in effect composing a Standing Army.

In answer to this we shall find that not one in fifteen, perhaps not one in thirty were under William's command; again the Military Tenants possess'd the greatest part of the Kingdom & perform'd their Services by virtue of their Knights Fees, which at the Lowest estimation is suppos'd to have been 20. £ per Annum, this was prov'd to be equivalent to 140. £ two Hundred Years ago, & at the time of the Conquest may very reasonably be put at 500. £ if so we can hardly imagine an Army compos'd of Men of such Fortunes, would be the base instruments of the Norman's Tyranny.

Having thus examin'd what William could lawfuly do, the next thing is to enquire into the manner in which he actualy did exert his power; but as this was entirely done by means of the Feudal Tenures, the History of them will be the fullest account we can give of this matter.

History of Tenures

It is agreed on all hands that the Feudal Law, which for several Centurys was the basis of this & most European Governments, deriv'd its origin from the Antient Germany, but we shall expect in vain to meet with any distinct account of this system amongst these Nations whilst they remain'd in their own Country, it realy did not exist at that time among them; it may be observ'd by the Accounts we have before given, that a Species rather than a peculiarity of institutions & Manners prevail'd, which added to the Singular System of Laws & Politicks, that ever appear'd

before, a System Common to many Nations often at enmity, differing in their dialects, & seperated by Oceans.

The distribution of the Conquer'd Lands to the Conquerors, under the condition of Military service, was a simple idea, & has been frequently practic'd; amongst the Greek, Roman, & Carthagenian Colonys, many examples occur of it; the Asiatick Conquests, made, for one Man, & not a People, demanded an Army to preserve them.

The Hebrews extirpated the Antient Inhabitants, the Tartars conform'd to the Laws of the Chinese they conquer'd; the Modern European Colonys are little more than Instruments of Commerce, & therefore generaly regulated by the Laws of

the Mother Country.

The Situation of the Germans differ'd in every respect from that of the different Kingdoms we have been mentioning, no general System of Government prevailing in their own Country, but subjected in their various districts to some Chief out of fear or love; they began their Migrations like so many independant Corps, & like individuals; the spirit of Oligarchy, not Equality prevail'd; as long as any View to their Native Country remain'd, or danger kept them on their guard, each Man's possession did not regularly dispend to his Heir, but went to him most capable of defending it; but when all Connection with their Mother Country ceas'd, & bravery became

less necessary, the possessions of individuals grew to be Hereditary contrary to what has happen'd to all other Nations whose Laws have the least resemblance to Feudal one's.

As they were a Military People & their situation oblig'd them to be ever ready to defend their Conquests, their whole Settlement with the Subordination & Military Service attending it, produc'd a system without any determin'd Plan of a Legislature that entirely swallow'd the Laws of the Countrys it was introduc'd into.

However regular & consistent this System may appear to us at present, it was nothing more than the natural consequence of Natural Causes.

It has been long a dispute amongst

Antiquarys whether the Feudal Institutions were introduc'd by the Saxons or Normans; we may safely aver by both; to explain this, it will be proper to observe, that the Saxons did not in their Conquests seize upon the property of the whole Lands, they had not occasion for them, part of them therefore remain'd to the Antient Inhabitants on the old footing, & in like manner Adventurers held the Vacant Lands they had taken possession of, without acknowledging any Chief; the Saxons however as we have seen before had in their own Country, like the other German Nations, Princes, & Chiefs, with Slaves who serv'd them not as Domesticks, but Labourers, paying Rent for their Lands, a certain quantity of

Corn, Cattle, & Cloaths; In their Conquests they assign'd portions to their Princes, the rest was divided amongst their Chiefs, who to prevent disputes could have their quotas given them in presence of the Prince, & when writing came in, confirm'd to them by Charters.

The great divisions thus made, both Prince & Chiefs, distributed their respective parts amongst their followers, & Slaves.

From what we have said it plainly appears there were two methods of holding lands, the one as possess'd by Antient Inhabitants & Strangers subject to no particular Lord, call'd in those early times Alleux, the Officer commanding these was call'd Court, the Possessors of the Lands Liber, in Latin Liberi

& often Milites, & were defin'd those who acknowledg'd no Superior, & subject to no Droits Seigneuriaux, these Lands were clas'd into Countys, subdivided into Villes under Vicarii; these again into Hundreds under Centarii.

The other holdings call'd Feodaux under Leudes, that is Lords, whose Lands were not contain'd in the Divisions of Countys, the first came to be call'd Allodial, the second Feudal Tenure, which name is continu'd to this day.

We must not however think that the Feudal System was in perfection among the Saxons, they only made approaches to it, both Prince & Nobles were too fond of their independant situations to make others equaly so under them, therefore few of the Grants made amongst the

Saxons were Hereditary, but for one, two, or three lives; so that the professors were rather Tenants, than real Vassals; therefore the infinite variety of rights arising from the strict Union between King & His Vassals, & between them again & subordinate Ranks, were still in its infancy in this Country, till the irruption of the Normans.

In Normandy the power of the Prince was great, & the power of the Feudal Service established; William introduc'd many of these Laws into this Country; He in the first place abolish'd the distinction between the Allodial & Charter holding; He alter'd the nature of the Land over a great part of the Kingdom, subjecting it to Military Tenures in which He included even Church Lands, & in imitation of his own Country

He attach'd the large districts of Lands to the titles of Earls, & made these Honours Hereditary, that were before Official; besides this the whole Fiefs of the Nation, & all the Subordinate Tenures were also made Hereditary, & the Rights of Real Vassals became as strongly establish'd, as those of the immediate Vassals of the Crown; the consequences of all this soon appear'd, such as Escheats, Wards, Marriages &c.

We have observ'd before that the possessions of the Husbandmen were rather Leases than Feudes; but in length of time Husbandry growing into more estimation, these People began to claim an inheritance in their Lands, & meeting with little opposition, Socage came to be look'd upon as a regular holding;

the Services these People paid at first was that of the Plough, they were call'd for that reason Socco Men, & their Tenures Soccage; they afterwards paid their Rent in Corn & Cattle; but Henry 1. having occasion for money, converted the Corn into pecuniary payments, which example was followed by many other Superiors, & the Soccage Tenures became so much more agreable in times of Peace, that many Military holdings were exchang'd into Soccage; thus in the original Feudal Constitution, the Nation appears to have been divided into two Classes, Soldiers & Husbandmen; for as to Settlements of Artificers there was little attention paid to them till Williams time, who as well as His Successors establish'd many Communitys, & the benefit of them appearing

visibly, procur'd them gradualy Magistrates of their own, & exclusive Jurisdictions; a new holding was likewise calculated for them call'd Burgage Tenure.

We have seen that the Normans at first exacted Military Services from the Clergy; this in peaceful times became unnecessary, & in Donations of the Church, nothing but prayers & Religious Exercises were demanded; this then produ'd a fourth holding call'd Frankalmoigne so call'd because the Lands were held as Free Alms in Libera Elleemosina on account of Religion; these three last Tenures having been the offspring of Peace, the same Genius produ'd great alteration in the first or Military Tenure.

Originaly Lands were subject to indefinite Military Services; the Normans apply'd them to

particular things; thus Lands granted for defending Castles were said to be held by Castle Guard, others for performing Military Services about the Kings person as carrying His Banner &c. were held by Grand Serjeanty; others for attending him abroad were call'd Escuage holding, of which last the greatest part of the Feudal property consisted.

All Vassals were originaly oblig'd to serve in person; by degrees the Custom came up of sending a Deputy, & even that was gradualy left off, & came to be commuted into money; Superiors on pretence of this, exacted great Sums from their Vassals; to elude which the Escuage certain was invented, whereby a certain Sum was fix'd; but this was by no means general, so that the Escuage uncertain

which was a composition left to the assessment of Parliament continu'd very common; this latter remain'd subject to the incidents of Ward & Marriage, & was so far a Military holding; but by the payment of money, it became a mixture of the Socage too.

As to the Escuage certain, it was altogether a Socage Tenure, & subject therefore to the Duty of it alone.

Originally when Lands were granted in Socage, the full value was receiv'd for the Grant; but Luxury coming in with the Feudal Manners, Superiors in want of money made these grants for Small Rents, in consideration of one large Sum paid, & at last the Rent came to be laid aside altogether, instead of which a Rose, a pair of Spurs, or some such thing was given; which produc'd <u>Blench holding</u>, most of the Lands

in the Island having been converted into this holding, the Regal power was lost over the Crown Vassals, & these again lost over the whole People.

After this general View of the different Species of Tenures, we shall take notice of some of the particular perquisites attending them.

Formerly when the Vassal could no longer perform this Service, the Land return'd to the Lord; but when these Grants came to be extended to Heirs, it still remain'd just that while those Heirs were from their Minority incapable of performing Service, the Fief should return to the possession of the Lord; this produc'd the right of Ward, which put not only the Estate, but the person of the Heir in the Lord's Custody, & as it would have been unjust for the Vassal to have brought into the

joint possession of the Fief one of a Family at enmity with His Lord, hence flow'd the right of the Lord to the Marriage of his Vassal.

Probably in the old strict Feudal times, the Lord had the Marriage of both Male & Female Heirs; but as there was a great difference between them, there was also a very great difference in the penalty, for a Man marrying his Daughter without his Lord's consent, forfeited his Fief; but for the Marriage of his Son, he paid a Sum of money; in time both were upon the same footing, paying the Value in money.

We said before that the property at first return'd to the Lord on the death or incapacity of the Vassal; but afterwards it descended to the Heir; but as the Heir's

right was not conceiv'd to be absolute, he made a present to the Lord for his Entry; this was at first call'd Redeeming the Fief; in after times a Renovation of it; in the first case the renewal was suppos'd to be a voluntary agreement, in the latter an absolute engagement upon the Lord to renew; but all this regards only the inferior Vassals; for the King's retain their Antient privileges.

Having tra'd the original of Tenures, & their original Fruits, we next come to the fate of both the one & the other.

We must observe that the basis of the Feudal System, consisted in the connection betwixt the Lord & the Vassal; as this connection grew weak, the Feudal System declin'd in proportion

Tenures by Frankalmoigne preserving too little connection between the Lord & Vassal, at a time when much was requir'd, they were early restrain'd, first by the Statutes of mortmain, & afterwards effectualy bar'd by the Statute Quia Emptores of Ed. 1. In Scotland the Glebes & Manses of the Clergy are the only remains of it in the Island.

Military Tenures fell at a later period, when the connection between Lord & Vassal became unnecessary.

Soccage & Burgage holding being a sort of medium between the two extremes, are in force to this day.

The perquisites of Wards & Marriage, supferable only in a Military age, were appropriate to Military holdings, but soon soften'd by several

Acts of Parliament, but finaly abolish'd by the extinction of the Court of Wards & Liveries.

The Right of demanding Aids from Vassals was put an end to by the Statute that abolish'd Knights Service; the only shadow of it now remaining is in the custom of Parliament to grant an Aid, for the Dowary of the King's Eldest Daughter; for as to the Landtax it has been long chang'd from a Feudal perquisite to a National Supply; the truth is, Taxes were originaly no part of the Gothick Constitution; the King's Court was supported by his own Demains & the produce of the Feudal Tenures, & the Kings to make it more palatable pretended to receive them as voluntary contributions; things could not long remain in this way; the

Kings Feudal emoluments were lessen'd by the declinement of the Feudal System, & the exigencys of Government not decreas'd; a Landtax therefore became necessary, & the Danger of leaving it in the King's power was apparent, tho' at last in the Reign of Ed. I. it was settl'd that no new Aid should be laid on the Subject without the consent of Parliament; it was the rise of the great Familys that thus deprivd the King of the power of laying on the Landtax; & we have since seen the House of Commons aquire so great a weight, that they have taken this most essential privilege both from the King & great Familys, & in reality the imposing taxes at present in Britain not only upon

Land, but other property, belongs not so properly to Parliament as to the Commons alone, & that by custom, much stronger than any Statute; Let us add that the power thus taken from the Crown & given to the Subject was the foundation of English Liberty, & is the noblest mark of distinction between the British Constitution & most of the Hereditary Sovereignty in Europe.

Such was the produce of Tenures, & such the fate of them; they draw their origin from the strong coalition between the Superior & Vassal, & were at first extremely severe; but lessen'd in their Severity as that connection decreas'd, & the military system weaken'd, & that both in the Nature of the Tenure, & the

perquisites of them; the People by their customs changing many of the Military into Feudes, effected the one, while the Judges by their interpretations adapted to the genious of the times effected the other; & the Statute Law came in aid of both, till at last they were finaly abolish'd in England in the 12th of Ch. II. & in Scotland in the 20th of G. II.

The only thing now remaining that can give any insight into the proceedings of the first Norman Princes, will appear upon examining the state of Parliaments at that period; we shall therefore in the next Chapter trace the History of Parliaments from their first origin to the Æra in which they acquir'd their present form & Constitution.

The Constitution of Parliament.

The origin & Constitution of Parliaments have furnish'd continual matter of dispute, for several Ages; warm Men have fallen into very opposite Sentiments, some endeavouring by their enquirys to exalt the power of the Crown, others that of the Commons, while neither side seem'd to have at all taken into their deliberation the Feudal system, which is the only thing can throw light upon this intricate question; for that System very extensive in its operations, & varying continualy its state, made the Constitution of Parliament follow its gradual Changes.

Parliaments are generaly said to have their origin from the obligation of the King's Vassals

to be Suitors in His Courts; but that seems too strong a conclusion, for it does not follow that a Man is entitl'd to be a Law Maker himself, or to controul his Sovereign in the administration of Government, because he attends in His Courts as an instrument of Justice.

A General Assembly of a Nation arises from the natural course of things, & their powers in that natural course must be very extensive.

Amongst unciviliz'd Nations the Chief Ruler is General in War from the dread of the Enemy, & Judge in time of Peace, to prevent continual disputes, & Scenes of bloodshed; but when things concerning Society in general come under consultation, the power of consulting or determining is conceiv'd to be in the Society itself,

or in the Leaders of the different Tribes; the chief person is allowd the right of preciding, but nothing more.

Now it is certain that the Feudal manners led to Oligarchy, & yet as by them the King was possessd of the Military Service of his Vassals, of the power of Judging them in his own Courts, & of applying most of the profits of these Courts to his own use; & he likewise enjoyd the colusive political right of Government, every power must have center'd in his Person, which would have form'd compleat Despotism.

In the Feudal settlements, the Persons composing the King's Great Council, were originaly his Companions, & became his Vassals; People attend little to the Nature of Feudes, who think there were no Parliaments in England during the

Norman Line, or even during the Saxon Government, or who on the other side can suppose the Commons part of that Parliament during these Reigns.

We have seen that in the Saxon times, the Nation was compos'd of Lords of Charter Lands, Civil & Ecclesiastical, & the People under them, who were either Tenants at Will, or for a few Lives, more Slaves therefore than Rulers; we also found Counts or Earls & the Allodial People under them; these were not even ty'd to them by the Feudal Band, & therefore could have no Suffrage in the Feudal Councils; so that the Lords Ecclesiastical & Civil, & Great Officers, call'd Proceres Regni as holding of the Crown, or in virtue of their Offices, with the Sages of the Law call'd Sapientes

were the only Constituent Members of the Saxon Parliaments.

During the Reigns of the first Norman Princes, the Commons were kept in the same Subjection, & tho' the Allodial People were brought into the Feudal System, yet by Doomsday Book it appears the Country was either the Demesne of the King, & work'd by His Slaves, or Tenants at Will, or held by the Great Barons, Counts, or the Church, & so were the Boroughs; We find in that Book that in the Norman time, the whole Lands of England exclusive of the Church, were possess'd by seven Hundred immediate Vassals of the Crown, with many Slaves under them, & a very few miserable Soccage Tenures, so all these who held of the King in capite sate in Parliament

the number was as great as at present; but then they did not represent the People, each Man sate in his own right, to preserve himself from Tyranny not to protect the People from Slavery.

In process of time however, as it was impossible that Seven Hundred Vassals should always keep their Fiefs entire, so that partitions were made in spite of all Feudal restraints, & the number of King's Vassals augmented in each County.

The Inhabitants of Towns & Boroughs grew also considerable under the Norman Kings, they received territorys in property, & many other valuable privileges, wherever these therefore were held immediately of the Crown, they attended in Parliament as Vassals to it, & from their great

number, found it convenient to elect Representatives, this also tended to augment the number of Crown Vassals.

A third source of their encrease was the custom the Crown came into, of granting its Demesne Lands in Fief.

These changes produc'd visible alterations in the orders of the State; for as all who held in capite had a right to come to Parliament, the numbers became very great, & many of them poor, instead of a few, & powerful Barons.

Attendance in Parliaments held more frequently than at present, was then instead of an advantage, a grievous burthen, & many methods taken to avoid it, & even Charters of exemption given contrary to Law.

To remedy this, it was ordain'd, that the

Great Barons only should attend in person, the small ones with the Burgesses by their Representatives; & here probably the custom we mention'd of chusing Representatives for Towns, gave a precident for the Lesser Barons; these last were summon'd only in General per Vice Comites; but the Greater Barons had each their summons per Littera Regis.

This great change probably happen'd in the Reign of K. John, tho' the Record of the Statute is lost, with the other Statutes of that Reign; the form of the summons however is preserv'd in Magna Charta, & we find in the time of His Son Henry III. that the Sheriffs are directed to return the Writs of the Knights of the Shires & Burgesses.

The Laws therefore that brought the Representatives of Shires & Boroughs into Parliament, laid the

foundation of the power of the Commons.

The great number of Members in Parliament, & their perambulation from place to place made it difficult to find one Room large enough to hold them all; hence came the Division of the two Houses.

The alienation of Land property that brought the Commons into Parliament, produc'd a great alteration in the state of the Nobility entitl'd to sit there; Dukes, Earls, & Barons were formerly Officers appointed over certain Districts that gave them titles to certain emoluments & privileges with subjection to certain Duty;

Attendance in Parliament was one of these privileges & Duty; but these, Feudal Grants not being hereditary, when a Duty, Earl or Baron was removed from the district he had been appointed to, by ceasing to be an Officer, his attendance also

ceas'd in Parliament, & his place occupy'd by the person that succeeded to his Office.

When these Offices came afterwards to be hereditary, a person disposing of it, lost all the privileges attending it; hence it appears that the Feudal Peerage was anciently territorial, not personal; one instance of this old Custom is still said to remain, the Castle of Arundel conferring an Earldom on the Proprietor of it.

This Constitution probably lasted as long as there were powerful purchasers of the Fiefs to be disposed of; but when Luxury &c. made these alienations frequent & mean people came to be possess'd of them, the splendor of the Kingdom, & pride of the Nobility could never endure so unnatural a mixture; the Peerage therefore

ceas'd to pass with the Fief, & the King in order to prevent the Nobility from aspiring, created Peers himself; & this dignity from being Feudal, Territorial, & Official, became Allodial, Personal, & Honorary.

Let us sum up this progress; the first form of a creation of an Earl, was by grant of an Office over a County.

When Earldoms became more numerous than the Counties, the territorial dignity was bestow'd by erecting a particular Estate into an Earldom; afterwards when the idea of personal honour prevail'd, certain Solemnities, & personal honours were practic'd at the Creation of a Peer as girding him with a Sword, covering his head with a Cap of honour & Circle of Gold, & at present all ideas of territorial dignity being

long obsolete, an Earl's patent imports a mere personal honour, without relation either to Office or Land.

The House of Commons having rose upon the decay of the Nobility, their interests were very seperate from them, all tending to support the People, & the introduction of the new Nobility who owing their all to the Crown, were devoted to it, greatly weakenᵈ the power of the Patient Barons; in Henry VIII. time the Commons had rose immensly upon the Barons, but not sufficiently to sink them; these two bodys however by weakening each other made this Monarch the most absolute that ever sate upon the English Throne; in a later Era, when the Commons had risen entirᵉly on the

King & Peerage, Charles I. found himself in a weaker situation than any King of this Nation ever was reduced to; happily for us the ballance between these three great powers is pretty equal; no Law can be made without the consent of all; no Taxes raised without taking rise in the Commons, nor are they binding on the Nation, till the Lords concur, & the King assents; the Law is open to the meanest of the People equaly with the King who holds the scepter, & while things remain in this happy State, the dignity & honour of the Crown, the security of possessions, the liberty of person, & all rights civil & religious are secur'd & enjoy'd in this Country beyond any other in the World, & in a much greater degree than the History of any antient Nation can afford us an example of; all which will appear plainly in the next Chapter, where we shall treat of the Laws, Customs, Methods of proceeding &c. of Parliaments as at present Constituted.

Of the present State &c.
of Parliament

We have seen in the preceding pages that whatever disputes subsist about the origin of this great bulwark of Liberty before Henry III. yet in the 49th of that King's Reign there were Writs issu'd & still extant to the Knights, Citizens & Burgesses to assemble in Parliament which method has been continu'd unto this day; it now remains to enquire carefuly into this excellent Constitution as it stands at present, as it stood with very little alteration for above five hundred Years, & for the greater perspicuity we shall branch out our subject in the following Manner.

1. Of the manner & time of Parliaments assembling.
2. Of its Constituent parts.
3. Of the Laws & Customs relating to it as an Aggregate Body.

4. Of the Laws & Customs relating to the House of Lords.

5. Of the same relative to the Commons.

6. Of the methods of proceeding in both Houses.

7. Of the manner of Adjournments, Prorogations & Dissolutions of Parliaments.

1. The Manner & time of assembling

Parliaments are regularly summon'd by the King's Writ issu'd out of Chancery by the advice of the Privy Council, forty days at least before the opening of the Session.

From this it appears no Parliament can be convean'd by its own Authority or any other except that of the King.

Against this rule we have two exceptions in the Convention Parliaments after the Restoration & Revolution; but these were cases of absolute necessity, & in the last example the Throne

was declar'd vacant, so that it was necessary for the Great National Assembly to meet, as it would have been in the case of the Royal Line being totaly extinct; for a Convention must then assemble to put the sceptre in another family, unless some previous settlement were made, as that of the Act of Succession that brought the present Royal Family to the Crown.

We must observe however by an Act of Charles I.+ the King neglecting for three Years to call a Parliament, the Peers were to assemble & issue out Writs for chusing one; & in case they omitted it, the Constituents were to meet & Elect one themselves, but this was repealed by the 16th of Charles II.#

By the Antient Statutes of the Kingdom, the King is oblig'd to convoke a Parliament every Year or oftnerif need be, but this does not mean

+ A. 16. C. 1. # C. 1. # 11th Ed. III. C. 14. & 36th Ed. III. C. 10.

a new Parliament; but only the suffering them to sit annually for redress of Grievances, & dispatch of business, if need be. The extreme loose sense of these last Words, furnish'd a pretence to several of our Kings to propose, & with arbitrary Votes, to Govern without Parliaments, but to remedy this, it was enacted by the 16.th of Charles II. that the sitting & holding of Parliaments shall not be intermitted above three Years; & by the 1.st of William & Mary the holding of frequent Parliaments is declar'd to be one of the rights of the People; but as this term was still indefinite by the 6.th of Will. & Mary a new Parliament is to be call'd within three Years after the determination of the former.

+ C. 1. ‡ St. 2. C. 2. # C. 2.

2. Of the Constituent Parts of Parliament

These are the King, the Lords Spiritual & Temporal, & the Commons, call'd the three Estates of the Realm.

The King is therefore part of Parliament, with Him is vested the power of rejecting, for the Crown cannot begin of itself any alteration in the establish'd Laws, but may aprove or disaprove of the alterations resolv'd, & consented to by the two Houses.

The excellency of this constitution very much consists in the mutual check each part has upon the other, for the Commons are a check upon the Nobility, the Nobility upon the Commons, by the privilege either House enjoys

of rejecting what the other House has resolv'd, the King as we have seen is a check upon both Lords & Commons, which preserves the Executive power from encroachments, & lastly this very power is check'd & kept in proper bounds by the two Houses; thus while the two Houses naturaly draw in different directions, & the Prerogative is opposite to both, they mutualy prevent each other's exceeding their proper limits, while the whole is kept united together by the mixed nature of the Crown, which partakes of the Legislative, & is the sole Executive power.

We shall now take each of these parts singly.

The House of Lords.

§ 1. Of the Spiritual Lords

These consist of two Archbishops & twenty four Bishops, besides whom at the dissolution of Monasteries by Henry VIII. there were likewise twenty six Mitered Abbots,+ & two Priors, a body equal to the Temporal Nobility.

All these hold, or are supposed to hold certain antient Baronys under the Crown; for William the Norman charged the Spiritual Tenures of Frankalmoign or Free Alms (which was the Saxon Bishops holding) into the Feudal Tenure by Barony, by which their Estates became subject to all Civil Charges & Assessments they

+ Seld. Hist Hon. 2. 5. 27.

were exempt from before[+]; to these Barons, the Bishops owe their seats in the House of Lords[#]; notwithstanding this distinction of Lords spiritual by Law from the Temporal, they are in practice mix'd with the others, they Vote together, & the Majority of their united Votes bind the whole; tho' Lord Coke[#] seems to doubt of the Validity of a Bill carry'd or rejected by the Lords, where the Bishops were superior to the other Lords.

2. The Lords Temporal

They consist of all the Peers of the Realm; some of these sit by Discent, as all the Antient ones, some by Creation as the most recent ones; others by Election as the Sixteen Scotch Peers since the Union.

+ Gil. Hist. Exch. 55. Spel. Wir. 291. # Glan. 7. 1. Seld. tit Hon. 2. 5. 19.
# 4. Inst. 25.

The number of the Peerage is unlimited, & depends entirely on the will of the Crown; in the late King's Reign a Bill passed the Lords for fixing their number, the fate of which was singular, for tho' it certainly abridged the Prerogative, it was supported by the Ministry, & thrown out by the Commons, who were by no means desirous of having the Door of the House of Lord shut against them.

The Commons

These are the Representatives of all the People, the Nobility excepted; the Counties are represented by Knights who were formerly Landholders of such a particular Income; the

Citys by Citizens; the Universitys & other Boroughs by Burgesses, the number in all is 558.

Every Member of this House tho chosen by a particular County, Town, &c. when he has once taken his place, becomes a Member for the whole Country, & therefore is not bound like the Deputys of the Provinces in Holland to follow the instructions of the Place he serves for, but as far as he shall think proper, & the more general his Views are, & the less local, the better he acts in his public Capacity.

These therefore King, Lords, & Commons are the Constituent parts of Parliament, & without the concurrence of all three, no Bill can pass into a Statute.

The Laws & Customs of Parliament considered as an Aggregate Body

The Jurisdiction of Parliament is absolute; its power despotic; hence arose a very nice & delicate question that has had Advocates on both sides, Locke upon Government & other Theoritical Writers affirm that there remains inherent in the People a supreme power over the Legislative, to remove, or alter it when the Legislative Acts contrary to the trust reposed in them, for that trust abus'd becomes forfeited, & devolves on those that gave it; others again advance that however just this conclusion may be in Theory, it cannot be adapted under any

+ part 2d. Sec. 149, 227.

dispensation of Government actualy existing, for this devolution of power to the People at large carrys with it a dissolution of the whole form of Government establish'd by that People, reduces all the Members to their antient state of equality, for by anihilating the Sovereign power, the whole body of positive Laws before enacted become repealed; but no human Laws can suppose a case which at once destroys all Law, & compells Men to begin upon new foundations, nor can any provision be made for an event that must render all the Legal provisions void; from this it is infer'd that while the Constitution lasts, the power of Parliament is absolute & uncontroulable.

But setting aside this question that seems

to have more of curiosity than real utility, we shall observe that Parliament is the only Jurisdiction in the Nation capable of keeping the Executive power in due bounds, by punishing all Wicked instruments that assist in the illegal exertion of it, & tho' the Ordinary Courts of Justice may be illuded by pardons granted to Offenders, yet no pardon under the Great Seal can be pleaded to an impeachment by the Commons in Parliament; another great check upon the Executive power is the annual Supply that may be either granted or with held at pleasure.

To prevent the mischiefs arising from the too great Youth of Members, it is declar'd by an + Act that no one shall sit in either House unless he be twenty one Years of Age; &

+ 7th & 8th W. III. C. 25.

by another Act† no Member can sit or Vote in either House, till he has taken the Oaths of Allegiance, Supremacy, & Abjuration, & has subscrib'd the declaration against Transubstantiation, Invocation of Saints, & the Sacrifice of the Mass, & to prevent Foreign Connections, it is provided by another Act‡ that no Alien born out of the Dominions of Great Britain tho' afterwards Naturalized can be capable of sitting in either House of Parliament.

The Parliament has its own peculiar Law, the Lex & Consuetudo Parliamenti that Lord Coke declares should be examin'd by all, & yet of which most People are ignorant, indeed it is not easily describ'd, for the same Author affirms that it is to be learnt out of the Rolls, Records, & Precedents.

† 1st G. I. C. 13. ‡ 12th & 13th W. III. C. 2d.

This Law & Custom of Parliament is grounded upon the following maxims, that all matters arising concerning either House ought to be examin'd, discuss'd, & adjudg'd solely in the House to which it belongs; thus the Commons are not to interfere in the settling the Peerage, nor the Lords in Elections of Members in the House of Commons, nor will either House permit any Courts of Law to examine the merits of either case, in short the Parliamentary methods of proceeding are not defin'd by any particular stated law.

As Parliament is supreme, their privileges are indefinite; some general one's Common to both Houses are as follows.

Privilege of Speech declar'd to be one of the Liberty's of the People.+

+ 1st W. & M. C. 2.

Privileges of Person, Servants, Lands, & Goods, that we find as far back as the Laws of Edward the Confessor.

There are severe penalties against assaulting the Members of either House, or their Servants.

To prevent the Members from being distracted from public business by private concerns, they cannot be arrested, nor their menial Servants, nor can they be served with any process, no entry could be made upon their Lands, nor their Goods distrayd or seizd during the Session, & with regard to the Freedom of their own, & Servants persons, the privilege remains in Peers inviolable forever, a Commoner enjoys it forty Days after the Prorguing the Parliament, & forty before its assembling again, but this privilege cannot be pleaded by either Peer

+ C. 3. ‡ 3d H. IV. C. 6. 11th H. VI. C. 11.

or Commoner in notorious Criminal Cases, such as Treason, Felony, or breach of the Peace.

All other privileges derogating from the Common Law cease by Statute† immediately after the dissolution or prorogation of Parliament, or adjournment of the House above a fortnight & a Member of either House, may be sued during the recesses & in consequence of such suit, be strip'd of his Lands & Goods.

In these cases the King has also His Prerogative, for He may sue for His debts during the Session, tho' He cannot arrest the Person of a Member, & by a particular Act* a Member may be sued during the Session for any misdemeanour or breach of trust in a public Office.

† 4th. Inst. 25. & 12th. W. III. C. 3. 11th. G. II. C. 24. * 2d. & 3d. A. C. 18.

Laws & Customs relating to Peers

One very singular antient privilege is that a Peer passing by the King's Forests,+ may kill one or two of the King's Deer without Warrant, & that in view of the Forester or on blowing a horn in his absence.

The Peers are attended by the Judges,‡ Barons of the Exchequer that are Serjeants at Law, & by the Masters of Chancery for their advice in points of Law, formerly the Secretary of State, & King's Council also attended, but as they have been generaly of late in the other House, that Custom is fell into desuitude.

A Peer upon obtaining a Licence* from

+ Charta de Foresta confirm'd by the 9th H. III. C. 11. vid 4th Inst. 308, 346.
‡ 31st H. VIII. C. 10. 4th Inst. 4.
* vel. bar. C. 1st

the King may give his proxy to another Lord.

The Peers have privilege of entring Protests in the Journals.

Bills affecting the rights of the Peerage must by the Custom of Parliament have their rise in the House of Lords, & can suffer no change nor amendments in the other House.

Laws & Customs of the Commons

These relate principaly to the raising of Taxes, & Election of Members.

With regard to Taxes, all grants of Subsidys or Parliamentary Aids begin in this House by antient indisputable right, & yet the reason given for it seems insufficient viz. that the

supplys being rais'd on the body of the People it is just they should have the right of Taxing themselves; but a very large share of property is in the Lords, therefore they cannot be said to Tax themselves alone, the truth is, the Spirit of the Constitution supposes the Lords more likely to remain under the influence of the Crown than the Commons, & therefore not so proper to have this great trust reposed in them.

The Commons never permit the smallest alteration in a Money Bill, so that they must either reject entir'ly or pass them;

Hay on Parliaments points out one case where he thinks the Lords may alter a Money Bill viz. where the Commons have sent up a Bill for a

+ 63.466.

temporary Tax of four, five, or more Years; for he then thinks the Lords may alter it to a shorter term, & that the Bill so altered may receive the Royal Assent, without being sent back to the Commons.

With regard to Elections there are many salutary provisions that may be reduced to three points, the qualifications of the Electors, the qualifications of the Elected, the proceedings at Elections

As to the qualifications of Electors for Knights of the Shires, they are to be people dwelling in the same County, with forty Shillings Freehold within the County; this was established by the 9th. of H. VI. & by the 10th. of the same King, & by subsequent Statutes; this forty Shillings is to be clear of all deductions, Parliamentary & Parochial excepted

+ C. 7.
‡ C. 2.
* 7th. & 8th. W. III. C. 25. 10th. A. C. 23. 10th. G. II. C. 21. 18th. G. II. C. 18. 31st. G. II. C. 14.

We have many Statutes fixing the qualifications of less importance.

We may observe here, that this qualification of forty Shillings cuts off the poorer People who might be easier influenc'd to give their Votes for particular purposes, & considering the great difference betwixt the value of money when this sum was first settl'd & the rate it is at now, there is no doubt but the sum ought to be made much greater, but this is a point of so great delicacy, that it can hardly ever agitated without the utmost danger. Upon the whole this Constitution of Suffrages seems fram'd upon wiser principles than that of the Romans by Centurys & Tribes, for in Servius Tullius's institution of Centurys

property & not numbers turn'd the scale, which gave a great superiority to the Patricians, & Voting the Tribes introduced by the Tribunes, numbers only were regarded which level'd all distinction, & gave the People the upper hand.

Our Constitution holds the middle way, & would steer still better between the two extremes, were the qualifications made higher.

Cromwel attempted to remedy this in another manner viz. by regulating the number of Members in proportion to the quantum which their Constituents paid of the monthly Assessment or Land tax.

As to the Elections of Citizens & Burgesses, it was formerly left to the Crown to summon

Representatives from the most flourishing Towns, but unfortunately decay'd Boroughs continu'd to be summon'd equaly with those who had risen upon their ruins, except a few that petition'd to be exempted from being oblig'd to pay their Members, the daily pay of a Burgess Member being fix'd since Ed. III. at two Shillings, & four Shillings for a Knight; from all this proceeds the quadruple proportion that Borough Members bear to those of Countys, & indeed since the Reign of H. VI. the number of Parliament Men are encreas'd above two hundred, besides the Scotch Members.

The Universitys have sent Members regularly ever since James I. time

The second thing we proposed to take notice of was the qualification of those to be Elected, which depends upon the custom of Parliament,+ & many Statutes from the beginning of H. V. to the present time; from all these the following heads may be collected, that Clergymen, Returning Officers, Judges, Non Residents, certain inferior Placemen, & all who have Pensions under the Crown, are incapable of being Elected. & All Persons accepting an Office under the Crown vacate their seats, but are capable of being re-elected.

That every Knight of the Shire shall have a clear Estate of Freehold or Copy hold, to the Value of £600. per annum, & every Citizen & Burgess

+ 4th. Inst. 47.

to the Value of £300. except the Eldest Sons of Peers, & Persons qualify'd to be Knights of Shires, & the Members of the two Universitys.

With regard to our third point the Method of proceedings in Elections, this is also settl'd by the custom of Parliament, & Many Acts from the 7th of H. IV. to the present time; from all which the following general account is taken.

When the Parliament is summon'd, the Lord Chancellor, or during Parliament upon a Vacancy the Speaker by order of the House sends his Writ, or Warrant to the Clerk of the Crown in Chancery, who thereupon issues out Writs to the Sheriffs of every County for the Election of

Members to serve for each County with the Citys & Boroughs in it; within three days after the Receipt of the Writ the Sheriff sends his precept under his Seal to the proper Returning Officers in the Citys & Boroughs commanding them to Elect their Members, who are to proceed to Election within eight days, four days Notice being given, & to return the Persons chosen with the precept to the Sheriff.

The Sheriffs proceed in Person themselves to the Election of Knights of the Shire at the next County Court that shall happen after the delivery of the Writs things thus fix'd as Elections must be free, all Soldiers quarter'd in the place, are to be remov'd to the distance of two Miles

or more, at least one day before the Election, where they remain till a day after the closing of the Poll; no Peer or Lord Lieutenant have any right to interfere in the Election of Commoners, & by expresset of Parliament, the Warden of the Cinque Ports is not to recommend any Members there; Officers of the Excise, Customs, & other branches of the Revenue intermedling with Elections forfeit a hundred pound, & are disabled from holding Office.

With regard to Bribery & Corruption, it is enacted that no Candidate shall after the date of the Writ or after the Vacancy give or promise any money or entertainment to his

Electors, or to the place in general in order to his being Elected, on pain of being incapable to serve for that place in Parliament, & if any Money, Office, or Reward &c. be given or promised to any Voter at any time to influence his Vote, the Giver & Receiver forfeit £500. & are disabl'd from Voting or holding any Office in any Corporation unless before Conviction they discover some other Person equally guilty upon which they are indemnify'd for their own Offence.

The first instance of Election bribery we meet with, was the 13th of Eliz. at Westbury in Wiltshire, where the Candidate got himself Elected upon paying four pounds to the

+ 4th Inst. 23. Hale of Parl. 112.

Returning Officer; but he was remov'd, & the Officer fin'd & imprison'd.

The Candidates must swear as well as their Electors to their qualification if requir'd.

The Poll being clos'd, the Sheriff returns the Writs to the Clerk of the Crown in Chancery fourteen days after the Election if on a Vacancy or before the Meeting if on a new Parliament under a penalty of £500.

If he makes a false Return, he forfeits by the Old Statute of H. VI. £100. the Returning Officer of the Borough £40. for the like Offence; & by a late Statute of K. William, they are liable to an Action & Damages.

Any person bribing the Returning Officer forfeits £300. but in all these cases Members so

return have their Seat in the House untill the Return is Judg'd illegal upon Petition.

Method of Making Laws

A Bill brought into either House if of a private nature is by petition presented by a Member, in the Commons the Petition is refer'd to a Committee who report it to the House upon which leave is granted to bring in the Bill; but in public Bills, a Motion is made without any Petition.

The method of a Bill's passing the Commons is this, the Members order'd to bring it in present it to the House drawn up

upon Paper with many blanks to receive any
thing necessary to be settl'd by Parliament itself,
it is then read a first time & at a proper distance
a second, the substance of it being open'd by the
Speaker at each reading & the question put
whether it shall proceed, for if oppos'd with
success either at its first entrance or any of the
readings, it must be drop'd for that Session
after the second reading it is Committed, that
is referr'd to a Committee appointed by the House,
if the Bill is of great consequence, it is examin'd
by a Committee of the whole House which happens
whenever the Speaker leaves the Chair & takes
part in the Debate as a private Member, another
Member filling the Chair as Chairman of the

Committee; when it has gone through the Committee, the Chairman reports it with the amendments to the House, to which the House agree or disagree the question being put at every clause & amendment; this done the Bill is order'd to be writ in a strong Gross hand, that is to be engrossed upon long Rolls of Parchments, when it is read a third time, & the question put upon the passing, the Bill succeeds, a Member is directed to carry it up to the Lords for their Concurrence.

In the House of Lords it passes through the same forms except the Engrossing already done; the Lords send a Message by two Judges or Masters in Chancery, to acquaint the House of Commons with their agreement; if amendments

are made, the Bill is sent down with these amendments to have the concurrence of the Commons, who if they agree send it back again with a Message signifying their concurrence; if they disagree, a conference usually follows between Members appointed by each House to adjust the difference.

When the Bill begins in the House of Lords the same forms are observ'd mutatis mutandis.

The Royal Assent is given two ways, first by the King in person, who sending for the Commons to the bar of the House of Lords, the titles of all the Bills passed both Houses are read, & the King's Dissent or Assent declared

by the Clerk of Parliament in the well known terms of Norman French, or the Assent is given in the King's absence by His letters Patent under the Great Seal signed by His own hand, & a Bill thus receiving the Assent becomes a Statute, & is placed among the Records of the Kingdom.

Manner of Adjourning, Proroguing, & Dissolving Parliaments.

Adjournment is continuation of the Session from one day to another, & is done by the authority of each House; the adjournment of one having no effect upon the other.

Prorogation is the continuation of Parliament from one Session to another by

the authority of Parliament, & is the final ending of the Session.

Dissolution puts an end to the Parliament, which is done three ways, first by the King in person, or the Representative; the Second by the Demise of the Crown, tho' it is provided that it shall continue six Months, unless the Successor dissolve it before; for at the Demise, the Parliament tho' seperated by Adjournment or Prorogation assemble immediately, & if no Parliament is in being the Members of the last meet again; thirdly a Parliament expires by length of time viz. at the end of every Seventh Year, if not sooner Dissolv'd by the Royal Prerogative.

+ 1st G. I. C. 38.

History of the Jurisdictions

In treating of these we mean only to trace the different Courts as far as they are connected with the rise, progress & declension of the Feudal System in our Land property.

The first Tribunals were purely domestick, that of a Father over his Wife, Children, Servants that compose his Family.

When many Familys came to reside together, it could not be long before some head from his superior force or Wisdom, or both, gain'd Authority over the rest, & the power thus acquir'd must necessarily have been supported by prudence & activity, whence the first Chiefs united the Lawgiver & General in their persons.

Mankind encreasing this first rudiment of the State becomes a Monarchy, or a Republic; in either case the number of Inhabitants make it impossible for the Chief Magistrate to take cognizance of the different causes that may arise; his time will be absorb'd in War & Politics, & Law Jurisdictions must be entrusted to subordinate Magistrates, but that business not being in these early times sufficient to give full employment to these inferior Magistrates, the same People were enabl'd to act as Judges, Senators, Priests, Soldiers.

The particular people entrusted with these Jurisdictions vary'd in different Countrys, the Jews gave them to Age, the Romans to birth & high descent, the Germans to their Priests & Druids, but as the World grew more Civiliz'd & Society

more perfect, the Science of the Law grew a distinct Study, Lawgivers were seperated in a body, & out of them Judges were chosen.

All Historys confirm the truth of these progressions, & in Britain we find the first beginners of the Feudal System were at once Judges, & Generals; upon the settling of of their Conquests, their Officers join'd with them in a regular Jurisdiction, which has at last been taken from those that formerly enjoy'd it, & entrusted entirly to Judges; this last change from territorial to Feudal, which in reality constitutes the History of Feudal Jurisdictions in Britain, must be treated by itself.

In all the Conquests made by the Feudal Nations

the power of judging the Inhabitants was given to the Possessor of the Lands where they dwelt; this was the natural consequence of the fierce & independant turn of these People that would submit to no authority, but that which would immediately seize & punish; the want of police made this impossible for Kings & Judges, the power was therefore delegated to the Proprietors of the Lands; hence the Lords of Charter Lands among the Saxons had the power of judging of people in their own Courts call'd Hall mote from the Hall they sate in.

In like Manner the King appointed Judges over the People immediately subject to him, as also over the Allodial People as they were attach'd to no Lord, the name of this Judge in

each County was the Reeve or Sheriff, who had several Subordinate Officers under him according to the divisions of the County; the Court he there presided in was call'd the Reevemote; but when he Sate as Judge of a Borough it had the name of Burghmote.

The Kings & Lords Courts had their seperate limits, the first not medling with causes of the people of the latter, except in some few cases, as when the Lord was too poor to have a Court of his own; secondly when he refus'd Justice; thirdly when one Lord interfer'd in the Jurisdiction of another; Appeals however lay both from the Lords & Sheriffs Courts to the King in Council; but these were very rare.

On the Norman settlement the Allodial Lands being converted into Feudal, the Lords

acquir'd a new Jurisdiction over the Freemen now become their Vassals. The Sheriffs Courts were still retain'd, & render'd more considerable; they were made coordinate with the Lords Courts in most cases, & superior to them in many, receiving Appeals from them, & to raise the dignity of these Sheriffs Courts still more, both the Spiritual & Temporal Lords were oblig'd to attend them & further to curb the Provincial Jurisdictions, William the Norman establish'd a Constant Court in his own Palace call'd Aula Regia that executed the business at present divided among the four Courts viz the Chancery, Kings Bench, Commons Pleas, & Exchequer, but this we have treat'd of more fully in another place.

As these Territorial Jurisdictions & even Sheriffs Courts often under the Jurisdiction of the Lords were checks upon the Regal Power, we find the Kings generally uneasy under them; Henry II. therefore under pretence of the ignorance of the inferior Judges, the party & faction that prevail'd in these Courts, divided the Kingdom into six Circuits, & sent itinerant Judges into each of them; He also allotted part of the business of the Aula Regia.

Edward I. ascertain'd the boundarys of the Court of Exchequer which had been also tris'd out of the Aula Regia; He abridg'd the power of the Lords in their own Courts; He erected a new Jurisdiction viz that of the Justices of the Peace; His Successor took the nomination of

Sheriffs into his own hands, which Office had been often before granted in Fee, or left to the Election of the Freeholders.

Edward III. extended the Jurisdiction of the Court of Chancery, which by applying in numberless case the rule of equity, came in time to swallow up the whole Common Law.

Upon the dissolution of the Aula Regis & the erection of the four Great Courts out of its ruin, the House of Peers came to be the Supreme Court of Appeal; for the King's Great Council among the Saxons consisting chiefly of the Great Lords as well as the Aula Regis of the Normans, when they came to be sunk, & the Lords assembled by themselves, tho' a part of Parliament, yet they retain'd their antient

distinction & were consider'd as the great Court of Appeal of the Nation.

By all these methods the business of the Inferior Courts gradually decay'd, the Kings Courts by Statutes & Devices drawing it entirely to themselves, & in proportion as the Feudal Jurisdiction sunk, the Official one rose; the power indeed of the Court Palatines lasted considerably longer, but that also was in great measure put an end to in the Reign of Henry VIII.

Such was the progress of Jurisdictions in this Country; we shall next take a short View of the Manner of proceeding in these Courts.

Most barbarous Nations have been strongly tinctur'd with Superstition & for that reason have paid more regard to an Oath than others; the Saxons here made the first

determination of Lawsuits depend upon Oath; but as in Criminal Cases the temptation of Perjury was too strong, the Ordeal, Excorcism, & many other awful Ceremonys were introduc'd to discover truth.

After the Norman Invasion the mixture of Foreigners, the introduction of a new system, the convulsions in the old one, the great encrease of numbers, & mutual distrust & hatred made Oaths of all partys suspicious, the Norman method therefore of deciding Lawsuits by Combat was introduc'd in England; but when Government came to be more regularly settled, the uncertainty arising from such Rules of Judgement was evident; the Trial by Oath went into disuse, Henry III. prohibited the Ordeal, Henry II. tho' not able to prevent

duelling entirely, yet granted the Defendant the privilege either to fight or throw himself under an Assize of twelve Men; & in many of St. John's Charters to Boroughs, duelling was expressly forbidden; we meet with an instance as late as the Reign of Elizabeth of Trial by Jury; that of Oath remains to this day with regard to Wagers at Law; for here the Defendant where apparent proof is not brought by the Plaintiff is allow'd to clear himself by his Oath, & the Oaths of as many creditable persons attesting his Veracity as the Court shall appoint.

With these exceptions the form of procedure by Assize gain'd continually ground till it came to be firmly establish'd in this Country.

Having thus slightly touched upon the first erections of the different Courts of Justice, & pointed out the variations they have gone through since their original institution, we next propose to examine their present State, Power, & methods of proceeding; in the prosecution of this plan we may very probably repeat observations made before, but that is unavoidable in a subject of this Nature, & not entirely useless, as it will imprint particular facts stronger in the Mind.

Of the present Courts of Justice

For the speedy & impartial administration of Justice, our Laws have appointed a great variety of Courts differing extremely in their Jurisdictions; these may be distinguish'd into Courts of Record & not of Record.

All Acts & Judicial Proceedings are in Courts of Record enrol'd upon Parchment, which Roll is call'd the Record of the Court, & is of the highest Authority.

Courts not of Record are of an inferior Nature where the proceedings are not enrol'd, & may consequently be disputed.

In every Court there are atleast three

Constituent parts, the Judge, Plaintiff & Defendant, & in Superior Courts, there are usualy Attorneys & Counsel.

Attorneys are form'd into a regular body, & admitted to the execution of their Office, by the Superior Courts of Westminster Hall, & are Officers in the respective Courts to which they are admitted, & subject to their controul; hence no Attorney can practice in any Court but the one he has been admitted into, & to enable them to practice in Chancery, they must also be admitted there as Sollicitors.

Of Council there are two species or Degrees, Barristers & Serjeants, the former are

admitted after a considerable period of Study or standing in the Inns of Court, & are in our Old Books call'd the Apprentices of the Law; according to Fortescue Barristers after sixteen Years standing may be call'd to the degree of Serjeants, or Servants of the Law; out of these the Judges of the Courts of Westminster must be appointed.

Courts in general may be divided into those having Public & General Jurisdiction throughout the Realm, or only Private & Special Jurisdiction in some particular part of it; the former are either Courts of Common Law or Equity, Ecclesiastical Courts, Courts Military, or Courts Maritime.

Of Courts of Common Law or Equity

We shall trace these from the most inferior kind to those of the most extensive Jurisdiction.

1. The Court of Pied Poudre.

This is a Court of Record belonging to every Fair & Market, where the Steward or Owner of the Toll of the Market is Judge, & administers Justice for all injurys done during the day of the Fair; it was instituted to do Justice expeditiously, from this Court a Writ of Error lies by way of Appeal to the Courts of Westminster.

2. The Court Baron incident to every Manor in the Kingdom

This is of two kinds a Customary Court belonging entirely to the Copyholders, & relative to the Tenures only, the other a Court of Common Law, & held before the Freeholders, who owe a suit & service to the Manor, here the Steward acts rather as Register than Judge, the Free suitors being the Judges; from hence a Writ of false Judgement lies to the Courts of Westminster instead of a Writ of Error, this not being a Court of Record.

3. The Hundred Court

Is only a larger Court Baron held for all the Inhabitants of a particular hundred

instead of a Manour, & resembling the former in all points, except that of a more extensive territorial Jurisdiction.

4. The County Court

Is under the Jurisdiction of the Sheriff, it is no Court of Record, but may hold pleas of Debt or Damages under the value of forty shillings.

A County Court holds pleas of many Actions, & of all personal actions to any amount, the Sheriff here is only the Ministerial Officer, for the Freeholders are the real Judges; all popular Elections, as of Knights of the Shire, Coroners, & Verderers must be held here by the 2d. of Ed. VI.+

This Court can never be adjourned longer than for twenty eight days, & proceedings are

+ C. 25.

removable from hence by Writ into the King's Superior Courts, as from Court Barons, & Hundred Courts.

These are the several Species of Common Law Courts confin'd to particular districts throughout the Kingdom; but communicating with the Superior Courts whose Jurisdiction extends over the Whole Nation, of these are

1. The Court of Common Please

By the Antient Saxon Constitution the Witena Gemot was the only Superior Court of Justice for Civil & Spiritual Matters; at the Norman Invasion the Ecclesiastical

Jurisdiction was seperated, & a Court established in the King's Hall for transacting all Criminal, Civil, & Revenue Matters, over this was placed a Chief Justice, who was the principal Minister of State, the second Man in the Kingdom, & had the Guardianship of the Realm in the King's absence; this power became dangerous in a Subject, K. John dreading it as well as the Barons, willingly consented to the eleventh Article of Magna Charta, which enacts that the Common Pleas shall not follow the King's Court, but be held in a seperate fixed place; upon this it was established at Westminster Hall, & a Chief Justice & other Judges of the

Common Pleas appointed;

After this example several other Offices of the Justiciary were subdivided into distinct Courts under Ed. I. each serving as a check upon one another, the Court of Chancery issuing all original Writs under the Great Seal to the other Courts; the Common Pleas determining all causes between private Subjects, the Exchequer managing the King's Revenue, & the Court of King's Bench retaining all Jurisdictions not given to other Courts, particularly the superintendance of all the rest by way of Appeal, & the sole cognizance of Pleas of the Crown, or Criminal Causes.

The Common Pleas therefore including all Civil Actions between Subject & Subject are under the Jurisdiction of the Court of Common Pleas, which is a Court of Record with one Chief Justice & three Puisne Judges created by the King's Letters Patent, who sit every day in the four terms, from hence a Writ by way of an appeal lies to the King's Bench.

2. The <u>Court of King's Bench</u>.

So call'd from the King's sitting there in Person, (not that He ever could by Law determine any Cause Himself) is the Supreme Court of Common Law in the Kingdom, & from the nature & Constitution

of it just mention'd, is fix'd to no one particular place, but removable at the King's Command to any Town in the Kingdom; over this presides a Chief Justice, & three puisne Judges; the Jurisdiction of this Court is very great, it takes cognizance both of Criminal & Civil Causes, the former in what is call'd the Crown Side, or Crown Office, the latter in the Plea side of the Court, where it takes cognizance of all trespasses &c. Committed vi et Armis which being a breach of the Peace savors of a Criminal nature, tho' the action is brought for the Civil remedy.

This Court also takes cognizance of any other

Civil Action whatsoever, provided the Defendant be an Officer of the Court, or in the Custody of the Marshal or Prison Keeper of the Court for a breach of the Peace or any other offence, & it is upon this ground that Civil actions are now as frequently practic'd here as in the Court of Common Pleas; the Defendant being arrested for a suppos'd trespass he never committed, & thus under the Custody of the Marshal, the Plaintiff's at liberty to proceed against him for any other personal Injury, & sometimes this taking into Custody by the Marshal is only suppos'd, which fiction is said to be permitted

from the Court of Common Pleas not being able to dispatch the load of Civil Causes, & that Barristers who cannot practice in that Court may gain experience in the Court of King's Bench.

A Writ of Error lies from the Court of Common Pleas & all other inferior Courts to the King's Bench, as also from the Court of King's Bench in Ireland, & from the Judgement of this English Court of King's Bench lies an Appeal to the House of Lords, provided the suit began originaly in some other Court, & came hither by Appeal; but if the suit began originaly in this Court, it must go through

an intermediate examination before it goes to the House of Lords, which is declar'd to be in the Court of Exchequer Chamber, where a Writ of Error lies by the 27th of Elizabeth.

3. The Court of Exchequer, (different from that of the Exchequer Chamber)

Is an Antient Court of Record established by William the Norman, but considerably altered as it now stands by Ed. I. its chief business concerns the Revenue & consists of two divisions, the Receipts of the Exchequer, & the Judicial Courts; this last is again subdivided into a Court of Common Law, & a Court of Equity.

The Court of Equity is held before the Lord Treasurer, Chancellor of the Exchequer,

+ C.B

Chief Baron, & three puisne one's; these Barons are supposed to be call'd so by Selden from being entirely real Barons of the Kingdom.

The primary business of this Court was to adjust & recover the King's Revenue, but as all the Officers &c. have like those of the King's Bench the privilege of suing & being sued only in their own Court, so the King's Debtors, Farmers, & Exchequer Accountants may sue all manner of persons in this Court, & may likewise sue one another or any Stranger in the same Actions that are prosecuted in the Common Pleas.

And hence arises the Court of Common Law, held only before the Barons of the Exchequer; here

all proceedings are grounded upon a Writ call'd quo minus & any person may File a Bill against another upon a bare suggestion that he is the King's Accountant, the truth of which is never regarded; the Clergy generaly sue for their Tythes on the Equity side of this Court, but of late the Chancery has much engross'd that business.

An Appeal from this Court of Equity lies immediately to the House of Lords, but from the Common Law Court, there must first be a Writ of Error to the Court of Exchequer Chamber, & then another to the House of Lords.

4. <u>The Court of Chancery</u>

At this presides the Chancellor or Lord Keeper

who have the same Authority by the 5th. of Eliz.
the former being made by Patent, the latter by
delivery of the Great Seal, this is an Office of
the greatest Weight & power, Privy Councellor,
Speaker of the House of Lords by prescription,
Appointer of all Justices of the Peace throughout
the Kingdom, Visitor of all Royal Hospitals &
Colledges, Patron of all Crown Livings under
the value of twenty pounds per annum in the
King's Books, besides which he exercises the
most extensive Jurisdiction in the Court of
Chancery, & may refuse sitting the Great Seal
to any Grant or Patent of the King.

Two distinct Courts are included in the

+ C. 18.

Chancery, the one Ordinary, a Court of Law; the other Extraordinary being a Court of Equity.

The Ordinary Court call'd the Petty Bag Office

Is of much greater Antiquity than the other, its Jurisdiction is to repeal Letters Patent made against Law, or upon untrue Suggestions, to hold Pleas of petitions of right from the Subject to the King.

From this Court issues all original Writs that pass under the Great Seal, as Commissions for Charitable uses, Sewers, Bankruptcys, Lunacy &c.

This Court also holds Pleas of all Personal Actions where any Officer of the Court is a party; it is a great dispute whether a Writ of

Error in the Nature of an Appeal lyes out of this Ordinary Court into the King's Bench; Plowden, Coke, &c. affirm it, Lord Keeper North is of a contrary opinion.

The Court of Equity

Is of the greatest consequence, its power consists in mittigating the power of the Common Law, & giving relief in all other Cases where the subject has no other remedy.

Originaly application for redress in matters of Equity was by Petition to the King & his Council, from which arose the Jurisdiction of the Old Court of Requests abolish'd in the 16th Ch. I. the King often refer'd the affair to the consideration of the Chancellor, & sometimes to

him & a Committee of the Council; we meet with this in the Reign of Ed. I. & was the remains of that Judicial power vested in the King, which came to be distributed in His several Courts of Justice, He reserving to Himself only the right of moderating the rigour of the Law on extraordinary Occasions, this power the Chancellor exercises in the King's name, & His Jurisdiction seems to have been first regularly establish'd about the Reign of Ed. III. since which, & especialy within these last hundred Years, the power & business of this Court has encreas'd to an amazeing degree, in so much that all causes of property of any Consequence have first or last their determination here.

This like other Courts of Equity, is no Court of Record, because the sentence of the Judge is not tied down to be conformable to former presidents, which makes all Records useless; from this Court lies an Appeal to the House of Peers.

The Court of Exchequer Chamber

Hath no original Jurisdiction, but is only a Court of Appeal to correct the Errors of other Jurisdictions, it is branch'd into two The one erected by the 31.st of Ed. III. to determine Causes upon Writs of Error from the Common Law side of the Exchequer Court; it consists of the Lord Treasurer, Lord Chancellor, & the Justices of the King's Bench & Common Pleas,

+C. 12.

The second in imitation of this was erected by the 27th of Eliz. consisting of the Justices of the Common Pleas, & Barons of the Exchequer, before whom Writs of Error may be brought to reverse judgements generaly speaking in any suit originaly begun in the Court of King's Bench, there lyes a Writ of Error from both Branches of this Court to the House of Peers.

The House of Peers

Is the Supreme Court of Judicature in the Kingdom, but without any original Jurisdiction at present over Causes, they are the last resort upon Appeals & Writs of Error.

+ C. 8.

There are two other Courts that are derived from, & collaterally assist the foregoing,

The Courts of Assize & Nisi prius

These are composed of two or more Commissioners to whom are generaly added some of the twelve Judges, who are twice in every Year sent by the King's special Commission over the Kingdom to try by a Jury of the respective Countys the truth of the matters brought before them, that are under dispute in the Courts of Westminster Hall;

These Judges of Assize came in the room of the antient Justices in Eyre in the 22d. of H. II. with a Delegated power from the Aula Regia; they made their Circuit once

in seven Years, but by Magna Charta they were to be sent in every County once a Year to try certain actions the call'd, Recognitions, or Assize.

The present Justices of Assize & Nisi prius draw their origin from the 2d. Statute of Westminster+ explain'd by the 14th. of Ed. III.* & they must be two of the King's Justices or sworn Serjeants.

The Judges upon their Circuits act by virtue of five Commissions,

1. That of the Peace.
2. Of Oyer & Terminer.
3. Of General Goal Delivery.
4. Of Assize which is directed to the Judges & Clerk of Assize, to take Assizes, that is to summon a peculiar Species of Jury call'd an

+ C. 30.
* C. 16.

Assize for the Trial of landed disputes.

& 5. Of Nisi prius, directed also to the Judges & Clerk of Assizes, to try all other Causes Issuing out of the Courts at Westminster, the origin of this name demands explanation.

All Causes commenc'd in the Courts of Westminster are appointed to be try'd upon a fix'd day by a Jury return'd from the County, with this proviso <u>Nisi prius Justiciarii &c.</u> that is unless before the day prefix'd the Judges of Assize come into the County where the fact arose, which they generally do, & thereby save much trouble & expence to the Parties, Jury, & Witnesses.

Of Courts Ecclesiastical

In the time of our Saxon Ancestors there was no distinction between the Lay, & Ecclesiastical Jurisdiction, the same Judges presided, & the same Laws were in use amongst Clergy & Lay men; the Bishop of the Diocese & the Alderman or Sheriff of the County setting together in the County Court.

The Norman destroy'd this Union to oblige the Foreign Clergy, who every where affected independancy; things were however restor'd to their antient situation by H. 1. but the Clergy under Anselm vehemently

opposed it in their Synod at Westminster,+ after which this conjunction appears to have been entirely laid aside, & as in the Reign of Stephen the Contests beginning about the English & Roman Laws, the Temporal Courts naturally adhering to the former, & the Spiritual adopting the latter, the breach became too wide ever to admit of coalition, which would otherwise have probably been brought about at the Reformation.

We shall trace these Spiritual Jurisdictions from the lowest to the highest Court of Appeal as briefly as possible, referring for more particulars to Oughton Ordo Judiciorum & Woods Institutes, the latter having been

+ A. 3d H. 1.

himself an Ecclesiastical Judge.

1. The Arch Deacon's Court.

Held before a Judge appointed by the Arch Deacon, & call'd his Official, it has Jurisdiction sometimes in concurrence with the Bishops Court of the Diocess, & sometimes exclusive of it; but by the 24th. of H. VIII.+ there lyes an Appeal to the Bishop's Court.

2. The Consistory Court

Is held by the Bishop's Chancellor in the Cathedral of every Diocess, and Bishop, for the Trial of all Ecclesiastical Causes arising within the Diocess; from hence lyes an Appeal by the same Statute to the Arch bishop of the Province.

+ C. 12.

3. The Court of Arches

Is an Arch Bishop's Court of Appeal, the Judge is call'd the Dean of the Arches, & is employ'd in hearing Appeals from the inferior Courts, & by the 25th of H. VIII.+ there lyes an Appeal from hence to the King in Chancery as Head of the Church.

4. The Court of Peculiars

Is a branch of the Court of Arches, & annex'd to it, having a Jurisdiction over fifty seven Parishes dispers'd through the Province of Canterbury in the midst of other Dioceses, but subject to the Metropolitan only; from this Court lyes an Appeal to the King in Chancery by the 25th of H. VIII.

+ C. 19.

5. The Prerogative Court

Established for Trial of all Testamentary Causes where goods are left by Will in two different Dioceses, when the Probate of such Wills belongs to the Archbishop of the Province by way of special prerogative, & all Causes relating to the Wills, Administrations, or Legacys of such Testators are originaly cognizable here before a Judge appointed by the Archbishop, from whom an Appeal lyes by the 25th of H. VIII. to the King in Chancery.

6. The Court of Delegates.

These are appointed by the King's Commission under the Great Seal upon Dout

of Chancery to represent His person, & hear all Appeals made to Him by Virtue of the before mention'd Statutes of H. VIII. but in case the King Himself be a Party, the Appeal can no longer lye to Him, but to the Upper House of Convocation by the 24th of H. VIII.+

The Commission generaly consists of Lords Spiritual & Temporal, Judges, & Civilian Doctors; these Statutes notwithstanding the Papal encroachments were according to Lord Coke# only declaratory of the Antient Law of the Realm, & this appears by the Constitutions of Clarendon in the 11th of H. I.

+ C. 12.
# 4th Inst. 341.

7. A Commission of Review.

This is granted in particular cases to reverse the sentence of the Court of Delegates, this Commission is not a matter of right, but of favour only, therefore often denyd.

These are the principal Courts of Ecclesiastical Jurisdiction, none of which are of Record; there was indeed another with much more formidable powers viz

The High Commission Court erected by the 1st+ of Eliz. but very happily abolishd by the 16th‡ of Ch. I.

As to all those that are calld Voluntary Jurisdictions which are concerndin doing what

+ C. I.
‡ C. II.

no one opposes, as granting Dispensations, Licences, Faculty &c. they do not come within our present Plan.

Of Courts Military

The only one establish'd of this kind by the permanent Laws of the Land is the Court of Chivalry held before the Earl Marshal, this is at present grown almost in desuetude, as by our Constitution the Martial Law cannot be exercised in time of Peace, & therefore when as at present a Standing Military force is thought necessary & Voted Annually, an Annual Act also passes for regulating the Army by Court Martials & Marshal Law, but as these

sort of Annual Courts are not an essential part of our Constitution, we do not intend at present to take notice of them.

Of Maritime Courts

The Jurisdiction of these are extended only to Matters arising upon the sea, & out of the reach of the Common Law, of these there are only two, the Court of Admiralty & its Appeal.

The Court of Admiralty

Is held before the Lord High Admiral, or his Deputy call'd the Judge, & was first erected by Ed. III. it proceeds by the Civil Law, & is no Court of Record.

An Appeal from this Court always lay in ordinary course to the King in Chancery, & in case of such Appeal, the sentence of the

Delegates appointed by Commission is declar'd by the 4th of Eliz. to be final, but with regard to the Prizes taken in War, & condemn'd in the Court of Admiralty the Appeal lyes to the Privy Council, who are a Court of Appeal appointed under the Great Seal by the 22d of G. II to whom may be added the Judges, tho' not of the Priv Council, with a proviso that no sentence shall be valid unless a Majority of Actual Privy Counsellors are present;

This Court was establish'd in consequence of diverse Treatys with Foreign Nations by which similar Courts are fix'd in all the Maritime Countys in Europe for the decision of the question concerning Lawful prizes; for this being

+ C. 5.
* C. 3.

a matter between Subjects of different States, the case must be decided by Treaty, & the Laws of Nations, & not by the Municipal Laws of any one Country.

Courts of Private & special Jurisdiction confin'd to particular Sports & Instituted only to redress particular Injurys.

These are

1. The Forrest Courts

Established, for the Government of the King's Forrests, for the punishment of all injurys done to the Deer, to the Vert or Greensward, & to the Covert.

These are the Courts of Attachments, Regard, Swein Mote, & Justice Seat.

1. The Court of Attachments or forty days Court

It's to be held before the Verdurers once in every forty Days, & is to enquire into all Offenders against Vert & Venison, the Foresters bringing in their Attachments which the Verdurers are to enroll; but this Court cannot convict, for it's nothing more than the Grand Inquest of the Forrest.

2. The Court of Regard or Survey of Dogs.

It's to be holden every third Year for the expeditation of Mastiffs, done by cutting off the claws of the four Feet, to prevent their chasing the Deer.

3. The Court of Swein Mote

It's held before the Verdurer, by the Steward of the Swein Mote thrice Yearly, it is so call'd from Swein signifying in Saxon

a Justice, & Mote an Assembly the Sweins or Freeholders within the Forests appearing here to form a Jury;

This Court enquires into oppressions committed by the Officers of the Forests, it convicts also, but cannot give Judgement.

4 The Court of Justice Seat

Held before the Chief Justice in Eyre or Itinerant Justice or Deputy to hear & determine all trespasses within the Forest, all claims of Franchises, Liberties & privileges; it proceeds to try presentments in the inferior Forrest Courts, & gives Judgement upon conviction in the Swein Mote, it may be held every third Year upon Forty days notice; a

Writ of Error lyes from hence to the Court of King's Bench.

These Justices in Eyre were instituted by H. II. in 1184. The proceedings of this Court were very rigorous in Ch. I. time, one only has been held since the Restoration before Lord Bafford Chief Justice in Eyre, from which time the Forrest Laws are fallen into disuse.

The Second Species of private Courts is that of <u>Commissioners of Sewers</u>

This is a temporary Tribunal erected by permission under the Great Seal

pursuant to the 23d. of H. VIII.+ to overlook the repairs of Sea Banks, Sea Walls, the cleansing of Rivers, Public Streams, Ditches, & other Conduits for carrying off Water,

Its Jurisdiction is confin'd to the particular district mention'd in the Commission; the Commissioners proceed by Jury, or upon their own View; they remove Annoyances, Assess proper Rates on the owners of Lands, & upon refusal of payment levy by distress on Goods & Chattels, & sell the Lands &c. to pay such Assessments; but this Court is under the controul of the Court of King's Bench

+C.5

Romney Marsh is under the Law of Sewers, & of late Years the Commissioners for draining Bedford Level have been incorporated with great powers by Act of Parliament.

3. The Court of Marshalsea, & the Palace Court at Westminster

Are generally held together tho' distinct Courts, to hear & determine suits between those of the King's Household, & all others within twelve Miles round the Court.

They were founded originally upon the respect paid to the place of the King's Residence.

Their Jurisdiction is over all Causes tryd by Jury before the Steward of Marshal,

They are Courts of Record, & from them lyes a Writ of Error to the King's Bench by the 5th + & 10th ‡ of Ed. III. to which Court or the Common Pleas if the Case is of consequence it is generaly removed, upon its first commencement with the Custody of the Defendant, by a Writ call'd Habeas Corpus cum causa.

These Courts till lately had a great deal of petty business, which is almost gone by the new Courts of Conscience erected in Westminster, Southwark, Tower Hamlets, & the rest of Middlesex.

4. The Courts of the Principality of Wales

Which on the entire reduction of that Country were by the 34th, 35 H. VIII. * erected, the proportion

+ C. 2.
‡ C. 3.
* C. 26.

had been made for them before in the 12th Ed. I.
The same Courts are establish'd here as in England, & the Judges go a Circuit in every County twice a Year; Writs of Judgement lye from these Courts to the King's Bench.

3. The Court of the Dutchy of Lancaster

Is another special Jurisdiction held before the Chancellor of the Dutchy or his Deputy, concerning all pleas of Lands holden of the King in right of the Dutchy; this is so far distinct from the County Palatin that comprizes great tracts of Land distant from the County Palatin, particularly a large district within the City of Westminster; proceedings in this Court are the same as in

the Courts of Exchequer & Chancery, & indeed it has been affirm'd that the Court of Exchequer has a concurrent Jurisdiction with this of the Dutchy.

6 Another species of Private Courts are those belonging to the Royal Franchises or County Palatin of Lancaster, Chester, Durham & Ely.

All these Writs whereon Actions are founded must to have Authority be under the seal of the Respective franchises, for the King's Writ under the Great seal is of no force in these County Palatines, the two former of which are now annex'd to the Crown, the two latter remain under the Government of their Bishops.

Hither also may be referred the Courts of the Cinque ports, Dover, Sandwich, Romney, Hastings, & Rye, to which Winchelsea & Rye have since be added.

All these have in most respects Civil Jurisdiction, & Franchise with the County Palatin, they are held before the Mayor & Jurates of the Port, under the controul of the Lord Warden; all causes therefore arising in any of these, must be originaly commenced & ended there.

The Judges of Assize who preside in the County Palatin, sit by Virtue of a special Commission from the respective Owners of the Franchises, in some of them however particularly

Durham & Chester, a Writ of Error lyes to the King's Bench.

7. The Stannary Courts in Devonshire & Cornwal.

Are also of a private & exclusive Jurisdiction, they are held before the Lord Warden & his Substitutes, the Tinners having a privilege of suing & being sued only in their own Courts, that they may not be interrupted from their business; these privileges are explained by a private Statute of Ed. III. & by a public one of the 16th Ch. I.+

An Appeal lyes from the Steward of the Court to the Elder Warden, from him to the Lord Warden, & finaly to the Council of the Prince or Duke of Cornwal.

+ C. 15.

6. The Several Courts within the Citys of London & other Boroughs

Are of the same private & limited species; all these arose from the favour of the Crown, & were erected for the convenience of the Inhabitants like the Hundred Courts &c.

The Courts of Westminster have for the most part a Concurrent Jurisdiction with them & either party desiring it the Cause may be removed to these Courts at Westminster.

To enumerate all their different Jurisdictions would be beyond the compass of our present Work; but there is one Species established by Parliament in London & other populous districts, which differing

in its proceedings from the Course of the Common Law, demands our particular attention; We mean the Courts of Requests or Conscience for the recovery of small Debts.

The first of these was established by an Act of the Common Council in H. VIII. Reign, which was however illegal till confirm'd by the 3rd J. I. & has since been amended by the 14th G. II.

It is composed of two Aldermen & four Commoners, who sit twice a Week to hear all Causes of Debt not exceeding forty Shillings; They examine in a Summary Way by the Oath of parties as others; the expence of receiving redress here, is very inconsiderable which makes it very beneficial to Trade, so that the

+ C. 15.
‡ C. 10.

example has been follow'd by many Towns & districts within these few Years past who have in like manner obtain'd Courts of Conscience by Act of Parliament on nearly the same plan.

The great desire the Nation has shown for these Courts arises from the disuse of the Antient County & Hundred Courts, wherein Causes of small value were formerly decided, & there is one inconvenience in the Courts of Conscience that did not exist in these, which is the departing in the Proceedings from the Common Law, which may obliterate by degrees in the Minds of the People their most Valuable privilege the Trial by

Jury, which is already excluded in too many instances; it were therefore much to be wish'd that the County & Hundred Courts were again to be rear'd, & the inconveniences remov'd that occasion'd their disuse; this was chiefly owing to the power either party had of removing their suits to the Courts of Westminster; this experiment has been already try'd with success in Middlesex, for by the 23d. of G. II. a County Court is to be held once a month in every Hundred of Middlesex by the County Clerk, twelve Freeholders of the Hundred qualify'd to serve on Juries & struck by the Sheriff are to be summon'd to appear at this Court by rotation, that none may be call'd above

+ C. 33.

once a Year that there & the County Clerk are to proceed in a summary Way examining upon Oath in all Causes not exceeding forty shillings Value, & that their determinations shall be final, lastly it is declar'd that if any action is brought into the superior Courts against one resident in Middlesex wherein the Jury shall find less than forty shillings damages, the Plaintiff instead of recovering shall pay the Defendant double costs, & a table of very moderate fees is prescrib'd by the Act not to be exceeded upon any Account.

A regulation like this has also taken place in two Courts Baron in Yorkshire by the 29th G. II.

+C. 37.

This Plan is most congenial to the Constitution, would prevent many Vexatious Suits, & enable honest Creditors to recover small sums that the great expence at present deters them from attempting.

9. The Courts of the two Universities.

These are the last species of private Courts we shall here mention; the Chancellors have the sole Jurisdiction in exclusion of the King's Courts in all Civil Actions when either a Scholar or Privileged Person is one of the Partys, except where the right of Freehold is preserved, when they are at liberty to proceed according to the Common Law, or their own Customs as they please;

The Judge of this Court is the Vice Chancellor or Deputy, from whom an Appeal lyes to Delegates appointed by the Congregation, from thence to other Delegates of the House of Convocation; if they all agree, the Sentence is final, but if there be any Variation in the three Sentences an appeal lyes in the last resort to Delegates appointed by the Crown under the Great Seal in Chancery.

Of Criminal Causes & first of those of a Public & General Jurisdiction

In treating of Civil Courts the nature of Appeals from the inferior to the superior Jurisdiction led us to consider those of the former kind in the first place, from whence rose gradually to the most exalted of the latter; but as no man can be tryd in different courts for the same Crime, & that there can consequently lye no Appeal, we shall now begin with the highest Jurisdiction, which is

1. The High Court of Parliament.

This is the supreme Court for trial of great Offenders by Parliamentary impeachments

here the Impeachments by the Commons may be look'd upon as a Bill of Indictment presented by the Grand Inquest of the whole Kingdom, & try'd by the Lords, who are not only their own Peers, but the Peers of the whole Nation; this is so solemn that by the 12.th & 13.th W. III no pardon under the Great Seal can be pleaded to an Impeachment of the Commons in Parliament.

With regard to another species of Parliamentary Jurisdiction, the passing Acts for Attainting particular persons of Treason or Felony, or to inflict pains or penalties, that comes not under our consideration

+C2.

they being to all intents & purposes new Laws enacted pro re nata, to serve particular purposes, & by no means the execution of such as are already in being.

2. The Court of the Lord High Steward

Is instituted for the trial of Peers in Capital Offences, this Office is very antient & was formerly Hereditary, or at least quam diu se bene gesserit, but now it is granted only upon the occasion, when the King creates a Lord of Parliament Lord High Steward by Commission under the Great Seal, when an Indictment is therefore found in the King's Bench, or before the Justices of Oyer & Terminer, a Peer cannot plead Guilty or not Guilty, or use any

other Plea, unless that of a pardon which they have a power to allow.

When therefore the Indictment is Capital, it is to be remov'd by a Writ of certiorari into this Court, which done, the Lord High Steward directs a precept to the Serjeant at Arms to summon the Lords to attend the Trial, this precept was formerly ipsa'd to summon only eighteen or Twenty Peers, afterward the number was left to the Lord High Steward's discretion, which was a dreadful weight flung into the Crown; but by the 7th W. III. all Peers having a right to Vote in Parliament are to be summon'd twenty days at least before the Trial, which during the Session of Parliament

may be more properly said to be in the House of Peers, than in the Court of the Lord High Steward, He being more a Chairman of the Court, than the Judge of it, & having a Vote only with the rest for the Peers are the Judges both of Law & fact, whereas in the recess of Parliament the Lord High Steward is the sole Judge in matters of Law as the Lords Triers are in matters of Fact; so that they having no right to regulate the proceedings of the Court, He has none to give a Vote upon the Trial; this was ~~decl~~d in the case of Lord Delamere+

It has been much controverted how far

+ State Trials Vol: 4th 232.

Bishops have a right to try Capital Causes, the Statute of King William goes to all Peers that Vote & have a right to sit in Parliament, under which words some imagine Bishops included; but tho' Bishops on account of their Baronys are Lords of Parliament, yet are not universaly allow'd to be Peers with the Temporal Nobility; however there is no instance of their sitting on Trial of Capital Offences, for they with drawe entring a Protest declaring their right to stay.

The Constitutions of Clarendon particularly excludes them from Trial of Life & Limb, & the observation does not seem improper,

+ C. II.

that they ought not to be Judges in a Court where they have no right to be try'd themselves; this privilege depending upon Nobility of blood, & not a seat in the House, as appears from the trials of Popish Lords, Minor Lords, Scotch Peers not in Parliament, & Female Peeresses & Dowagers, unless by marrying a Commoner in second Marriage they lose their rank.

Much more relating to this & the other Criminal Courts may be seen in the Authors quoted in the margin.+

3. <u>The Court of King's Bench</u>

We formerly divided this Court into the Crown side & Plea side; the Crown

+ 4th. Ins. C. 4. Hales 2. C. 2. Hawkins 2. C. 44.

side or Crown Office takes cognizance of all Criminal Causes, & receives also the Indictments from all Inferior Courts removed to it by a Writ of Certiorari, which are tryed either at the Bar, or at Nisi prius by a Jury out of the County from which the Cause is brought; the Judges of this Court are the Supreme Coroners of the Kingdom, & the Court itself held the principal one of Criminal Jurisdiction known by the Laws of England; for which reason, on the Court of King's bench being carryed into any County, as it was to Oxford in 1665. all Commissions of Oyer & Terminer, Goal Delivery & all Criminal

Tribunals are at once absorb'd & determined ipso facto.

4. The Court of Chivalry

We formerly mention'd to be held before the Earl Marshal, becomes a Criminal Court when held jointly by him & the High Constable, having Jurisdiction over Pleas of life & limb in matters of Arms & deeds of War, as well out of the Kingdom as within it but all this is fell into disuse there having been no permanent High Constable since Stafford Duke of Buckingham executed in the 13th of H. VIII.

5. The High Court of Admiralty

Is not only a Court of Civil but Criminal Jurisdiction & that over all Crimes committed on the Sea, & on the Coast by the 15th of R. II. as this Court proceeded without Jury their Criminal Jurisdiction was in reality contrary to Magna Charta as an innocent man might suffer death by the opinion of a single Judge, & notorious Offenders in the same manner escape condign punishment, this brought on a Statute in the 26th of H. VIII. which directs that all Offences are to be tryd by Commissioners nam'd by the Chancellor, these are the Admiral & his Deputy, & three or four more, amongst

* C.3.
‡ C.15.

which are generaly two Common Law Judges; the Indictment to be first found by a Grand Jury of twelve, & afterwards try'd by another Jury at Common Law, & all the proceedings to be according to the Laws of the Land; this therefore is the manner now of trying Marine Felons in the Court of Admiralty.

These five Courts We have mention'd may be held in any part of the Kingdom, & their Jurisdiction extend over the whole Nation; these that follow are indeed of a general nature & diffus'd over all England, but they are of a local Jurisdiction, & therefore confin'd to particular Districts.

6. The Court of Oyer & Terminer or General Goal Delivery

Is held before two of the King's Judges usually of the Courts at Westminster twice yearly in every County of the Kingdom except the four Northern one's where it is held but once, & Middlesex where it is held eight times a Year.

In explaining the Nature of the Court of Assize, we formerly mention'd that the Judges sate by Virtue of five Commissions two of these, the Assize & Nisi prius being of a Civil Nature we then explain'd, the third is the Commission of the Peace

of which hereafter.

The fourth Commission is that of Oyer & Terminer which we are at present treating of, the Words of this Commission are to enquire hear & determine, from whence it follows that they can only proceed upon an Indictment found at the same Assize, for they must first have leave of the Grand Jury before they are empowered to hear & determine by help of the Petty Jury; therefore they have a fifth Commission of General Goal Delivery by which they try & deliver every Prisoner in the Goal wherever indicted, or for whatever crime committed; by this means the Goals are

clear'd & all Offenders try'd, punish'd, or acquitted twice in every Year.

By the 15th. of R. II. & 33d. of VIII. no Judge or other Lawyer could Act in the Commission of Oyer & Terminer or Goal Delivery in the County where he was born or inhabited, but this was thought unnecessary in Criminal Causes, & the prohibition was taken away by the 12th. of G. II.

7. The Court of General Quarter Sessions

To held in every County once a quarter, the terms appointed by the 2d. of H. V. are the first Weeks after Michaelmas, Epiphany, Easter, & the 7th. of July; this Court is held before two or more Justices of the Peace, one of which

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must be of the Quorum; their Jurisdiction extends to Felony, but they seldom try any thing but petty larceny.

The Records or Rolls of the Session are committed to the Custody of an Officer called Custos Rotulorum, who is always a Justice of the Quorum, & appointed by the Kings Sign Manual, to him belongs the nomination of the Clerk of the Peace.

In most Corporation Towns, there is a Quarter Session kept before the Justices of the Roll that have the same authority as the Quarter Sessions of the County except in a few instances, one of the most considerable of which is in matter of Appeals from orders

for removal of the Poor, which must be made to the County Sessions.

In both of these there is sometimes kept a Special or Petty Sessions by a few Justices for dispatching small business between the times of General Sessions; as for Licences, the Houses, passing the Accounts of Parish Officers &c.

Q. The Sheriff's Tourn or Rotation

Is a Court of Record held twice a Year, a month after Easter & Michaelmas in different parts of the County; this is realy the turn of the Sheriff to keep a Court Leet in each respective Hundred, it being the Great Court Leet of the County, as the County Court is the Court Baron.

9. The Court Leet or view of Frankpledge

This is a Court of Record held once a Year within a particular Hundred, Lordship, or Manor, before the Steward of the Leet, being the King's Court granted by the King's Charter to the Lords of these Hundreds, its original intent was to View the Frankpledges, that is the Freemen within the Liberty, who according to Alfred's Institutions were all mutual pledges for the good behaviour of each other, the other objects are the preservation of the Peace, the punishing divers small offences, & in all other respects excercising

the same Jurisdiction with the Sheriff's Court, that only extending over a larger Territory than theirs.

All Freeholders within the precinct are oblig'd to attend both these Courts, but they have long been in a declining way, which has been in part owing to the discharge granted by the Statute of Marlborough to all Prelates, Peers, & Clergymen from their attendance, so that most of the business devolves upon the Quarter Sessions, which in particular cases it was directed to do by the 1st of Ed. IV.

10. The Court of the Coroner

Is to enquire into the manner & cause of sudden & Violent deaths.

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II. The Court of the Clerk of the Market

Is incident to all Fairs & Markets in the Kingdom, to punish misdemeanours, to examine all Weights & measures &c.

There are a few other Criminal Courts of greater dignity than many of these, but of a more confin'd & partial Jurisdiction, belonging to one spot as well as to a determinate species of Causes, which have been establish'd by the Royal favour, & confirm'd by Act of Parliament.

I. The Court of the Lord Steward, Treasurer, or Comptroller of the Household

This was establish'd by the 3d of H. VII. to enquire into Felonys committed by any of the

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King's servants of the Household, in compassing &c. the life of the King, or any of His Majesty's Privy Councellors, the enquiry & trial to be by twelve chosen out of the King's Household.

2. The Court of the Lord Steward of the King's Household, or in his absence, of the Treasurer, Comptroller, or Steward of the Marshalsea

Was erected by the 33d of H. VIII. to enquire & determine all Treasons, Murders, bloodsheds &c. in any of the King's Houses or Palaces, these proceedings are also by Grand & Petty Juries chosen out of the King's Household.

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3. The Chancellors Courts of the two Universitys

That of Oxford hath power to try & determine all Criminal Offences or misdemeanors under the degree of Treason, Felony or Maihem, which are by a particular Charter under the Court of the Lord High Steward of the University, but the Lord Steward cannot claim the cognizance of a Criminal Cause till an Indictment has been found at the Assizes or elsewhere against the person, who must be a Scholar or privileg'd in the University; the privileges of the Cambridge University Courts are equally large & extensive, the last instance we find of an Indictment challeng'd by the Vice

Chancellor of Oxford at the Assizes, was in the Reign of Ch. I.

Of Subordinate Magistrates who have a Jurisdiction dispersd throughout the Kingdom.

These are Chiefly Sheriffs, Coroners, Justices of the Peace, Constables, Surveyors of Highways, & Overseers of the Poor.

1. The Sheriff

Is an Officer of great Antiquity the name derivd from two Saxon words, Shire & Reve the Bailiff of the Shire.

Sheriffs were formerly chosen by the Inhabitants of the several Countys where they were not Hereditary as in the North, & in Westmoreland to this day, & in Middlesex which belongs to the City of London; this appears by the 28th of Ed. I.

These Popular Elections were put an end to by the 9th of Ed. II. since which Sheriffs have been chosen annualy by the Lord Chancellor, Treasurer, & twelve Judges; At present the Judges meet in the Exchequer Chamber on the 12th of Nov. & nominate three persons for each County to the King, who afterwards appoints one of them to be Sheriff, these so

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‡C. 2.

chosen continue in their Office for a Year after which they cannot be compell'd to serve again for two Years to come; the Sheriff Acts in four different capacitys.

As Judge He is to hear & determine all Causes of forty Shillings & under in the County Court, besides a Judicial power in many Civil Cases enumerated by Dalton upon Sheriffs.+

He decides the Elections of Knights, Coroners, & Verderers, of the qualification of Voters, & makes the Returns.

As Keeper of the King's Peace, He is the first man in the County during his Office.

He pursues & commits all Criminals & summons the Posse Comitatus of the County,

+ c. 4th.

when every person under a Peer, & above fifteen Years old, are bound to attend; but in all this he is only the Executioner of Justice, & cannot any Criminal Offence, nor can He act whilst in Office as an ordinary Justice of the Peace.

In his Ministerial Capacity, he executes all process issuing from the Courts of Justice; he returns the Juryes as well in Criminal as in Civil Matters, & in this last has the custody of the Delinquent, & sees the punishment put in execution.

As the King's Bailiff he preserves the Rents of the King within the Bailiwick, a name frequently given to the County; he seizes for the King's use all Taxes, Forfeitures &c.

unless granted to some Subject, & collects the Kings Rents if commanded by process from the Exchequer.

For the execution of these Various Offices he has as Substitutes to him, Under Sheriffs, Bailiffs, & Goalers.

Under Sheriffs

Perform all the Duty as above, some few excepted, as at Elections, & the Execution of some particular Writs which the Sheriff must do in person.

Bailiffs or Sheriff Officers

Are employ'd by the Sheriff to serve Writs, make Arrests, & Executions, collect Fines, Summon Juryes, & attend the Judges & Justices.

The Office of Goalers is too well known to demand any explanation.

2. The Coroner

Is a very antient Officer at Common Law, the name proceeds from his having principaly to do with the Pleas of the Crown, in which light the Chief Justice of the King's Bench is the principal Coroner of the Kingdom; there are usualy four Coroners, sometimes six for every County.

Their Office was establish'd with that of the Sheriff to keep the Peace when the Earls gave up the Wardships of the Countys.

He is still chosen by all the Freeholders in the County Court as the Sheriffs formerly were.

The Coroner ought to have an Estate

sufficient to maintain the dignity of his Office, but it has of late got into low & indigent hands, who are chosen only for the sake of the perquisites; he is for life, unless chosen Sheriff or Verderer.

The Office of Coroner is chiefly Judicial & ascertain'd by the 4th of Ed. I. this consists in enquiring concerning the manner of sudden deaths, for which purpose he must sit upon the body, & in the place where the death happen'd; the enquiry is made by a Jury of four, five, or six of the Neighbouring Town; if any be brought in guilty by this Inquest of Murder, the Coroner is to commit him to Prison for further Trial, & to examine into their personal

Estate &c. which enquiry he is to report to the Court of King's Bench, or to the next Assizes.

He is also to enquire concerning Shipwrecks & Treasure Trove.

In his Ministerial Office he supplys the Duty of Sheriff, when the last is suspected of partiality or of being interested in a suit brought before him.

Justices of the Peace

Were formerly elected by the People, but after the dethroning of Ed. II. & the placing his Son Ed. III. on the Throne, they were appointed by the King's Commission, but they were still only called Conservators of the Peace till the 34th of Ed. III. when they had the power

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given them of trying Felonys; by which they acquir'd the names of Justices, the Words of the Commission are thus, Quorum Aliquem Vestrum A. B. or C. Unum esse Volumus, the persons so nam'd in this Clause are call'd Justices of the Quorum; these were formerly few, but Custom has at present introduc'd into it almost all Justices of the Peace.

By Statutes of Q. A. a Gentleman must declare upon Oath his having £100. per Annum before he can accept that Office, & by the same Laws no Attorney, Sollicitor or Doctor is capable of enjoying it.

This Office is only during the King's pleasure, & the power of it consists in keeping the Peace.

We shall next consider Officers of a lower Rank

1. Constables

There are of two sorts High & Petty Constables, the first ordain'd by the Statute of Winchester 13th Ed. 1. where it is declar'd that two Constables are to be put over every Hundred, the last are inferior Constables subordinate to the High Constable, first instituted in the Reign of H. III. These are two Offices united, the one of Headborough, Tything Man, or Borseholder, as old as Alfred, the other the mere Office of Constable; tho' in many places these continue distinct Offices from the Constable.

+C.6.

All Constables &c. are by the 14th & 15. Ch II.
chosen by the Jury at the Court-leet or in
default of that by two Justices of the Peace.

The General Office of Constable &c.
is to keep the Peace, for which purpose they
may arrest, imprison, break open Houses &c.
they are to keep watch & ward in their
different districts, to apprehend Robbers &c.
the Hundred being answerable for all
Robberys committed therein by day light,
they being in that case supposed to have
kept negligent Guard.

2. Surveyors of the Highways

Were order'd to be chosen in every Parish by the Constable & Churchwardens, this by the 2.d & 3.d Ph. & M.

But by the ‡3.d of W. & M. they are appointed by two neighbouring Justices out of Inhabitants who are either worth £100. or have £10. per Annum, or Rent £30. a Year.

Their Office consists in putting in execution various Statutes relating to the Highways, these are principaly the 13.th Ed I. *2.d & 3.d Ph. & M. ‡5.th & 14.th Eliz. ‡22.d Ch. II. ‡3.d W. & M. ‡7.th & 8.th W. III. & ‡1.st G. I.

By all these they are empower'd to

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‡ C. 12.
C.
* C. 8.
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‡ C. 10.
‡‡ C. 12.
‡‡ C. 12.
‡‡ C. 29.
+ C. 52.

Summon all the Inhabitants of the Parish six days in the Year, & if that is not sufficient, may with the consent of the Quarter Sessions levy a Rate of six pence in the pound on the Parish.

This is generally very much neglected, & becomes of less use every day, on account of the number of Turnpike Bills.

We come now to the last Office We shall mention

The Overseers of the Poor

Till H. VIII. the Poor in this Country were supported entirely upon private Charity as they are at present in Scotland; the Monasteries indeed were their principal Support; but upon

the dissolution of these, the situation of the Poor became so deplorable that it was absolutely necessary to make some provision for them; this was attempted by various Statutes in the Reign of H. VIII. but all proving insufficient, Overseers of the Poor were appointed in every Parish by the 43d. of Eliz. these were to be nominated yearly within a month after Easter by Justices of Peace dwelling in the Neighbourhood.

Their Office is to raise competent sums for the relief of the Poor, to provide Work for such as are able, which last duty is shamefully neglected; for these purposes they are empowered to make Rates & levy them upon the several Inhabitants by the same Statute, further explained

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& enforc'd by the 17th G. II.

This Poor's Rate is come at length to be one of the most terrible Grievances this Country labours under, in some parts of England as Gloucester Shire &c. where Trade has deserted the different Towns & Villages, the Poor's Rate is known to have amounted in some Years to above eight Shillings in the pound, & it is reckon'd to bring in communibus annis over all the Kingdom above a Million consequently more than a two Shillings in the pound Land Tax, here therefore are the Materials for the greatest instance of reformation this Country is capable of; it is a business of the most delicate nature, & therefore demands mature

+C.308

deliberation, & the utmost care; but if ever a Prince comes to be seated on this Throne whose person & Government are thoroughly beloved, & entirely confided in, & in whose Counsels the People shall repose real trust; such a Prince, & such a Government will undoubtedly find out some method of effectually supplying the wants of the Poor, & by that means save a double Land tax to the People.

This follows the Constt. of Parl. that ends at page 41.

History of the Jurisdictions

In treating of these we mean only to trace the different Courts as far as they are connected with the Rise, Progress, & Declension of the Feudal System in our Land property.

The first Tribunals were purely Domestick, that of a Father over his Wife, Children, Servants, that compose his Family;

When many Families came to reside together, it could not be long before some lead from his superior force, or Wisdom, or both, gain'd Authority over the rest, & the power thus acquir'd must necessarily

have been supported by prudence & activity, whence the first Chiefs united the Lawgiver & General in their persons.

Mankind encreasing this first rudiment of the State becomes a Monarchy, or a Republic; in either case the number of Inhabitants make it impossible for the Chief Magistrate to take cognizance of the different causes that may arise; his time will be absorb'd in War & Politics, & Law Jurisdiction must be entrusted to subordinate Magistrates, but that business not being in these early times sufficient to give full employment to these inferior Magistrates, the same

people were enabl'd to act as Judges, Senators, Priests, Soldiers.

~~The World grew people'd~~ ~~more civilized~~ But the Science of the Law grew a distinct Study, Lawyers were seperated in a body, & out of them Judges were chosen.

The particular people entrusted with these Jurisdictions varyd in different Countrys, the Jews gave them to Age, the Romans to birth & high discent, the Germans to their Priests & Druids. but as the world grew more civilizd & Society more perfect +

All Historys confirm the truth of these progressions, & in

Britain we find the first beginners of the Feudal System were at once Judges, & Generals; upon the settling of their conquests, their Officers join'd with them in a regular Jurisdiction, which has at last been taken from those that formerly enjoy'd it, & entrusted entirely to Judges. This last change from territorial to Feudal ~~which~~ ~~which~~ ~~in reality~~ ~~happened gradually~~ constitutes the History of Feudal Jurisdictions, in Britain, must be treated by itself.

In all the Conquests made by the Feudal Nations, the power of Judging the Inhabitants was given to the Possessors of the Lands where they dwelt, this was the natural consequence

of the fierce & independant Race of these People that would submit to no authority, but that which would immediately seize & punish; the want of police made this impossible for Kings or Judges, the power was therefore delegated to the Proprietors of the Lands; hence the Lords of Charter Lands among the Saxons had the power of Judging of People in their own Courts call'd Hallmote from the Hall they sate in.

In like manner the King appointed Judges over the People immediately subject to him, as also over the Allodial People as they were attach'd to no Lord, the name of this

Judge in each County was the Earl or Sheriff, who had several subordinate Officers under him according to the divisions of the County; the Court he there presided in was called the Hundred-mote; but when he sate as Judge of a Borough it had the name of Burghmote.

The Kings & Lords Courts had their seperate limits, the first not medling with Causes of the People of the latter except in some few cases, as when the Lord was too poor to have a Court of his own, secondly when he refused Justice, thirdly when one Lord interfered in the Jurisdiction

of another; appeals however lay both from the Lords & Sheriffs Courts, to the King in Council; but these were very rare.

On the Norman settlement the Allodial lands being converted into Feudal the Lords ~~obtained~~ acquired a new Jurisdiction over the Freemen now become their Vassals. The Sheriff Courts were still retain'd & rendered more considerable; they were made coordinate with the Lords Courts in most cases, & superior to them in many, receiving appeals from them, & to raise the dignity of these Sheriff Courts still more, both the Spiritual & temporal Lords were obliged to attend them ~~to~~

further to curb the Provincial Jurisdictions William the Norman established a constant Court in his own Palace call'd Aula Regis that executed the business at present divided among the four Courts viz. the Chancery King's Bench, Common Pleas, & Exchequer; but this we have treated of more fully in another place.

As these Territorial Jurisdictions & even Sheriffs Courts often under the Jurisdiction of the Lords were checks upon the Regal Power; we find the Kings generally uneasy under them H. II. therefore under pretence of the ignorance of the inferior Judges, the

party & faction that prevail'd in these Courts, divided the Kingdom into six Circuits, & sent itinerant Judges into each of them; He also ~~[illegible]~~ allotted part of the business of the Aula Regia;

Edward I. ascertain'd the boundarys of the Court of Exchequer which had been also raiz'd out of the Aula Regis. He abridg'd the power of the Lords in their own Courts; He erected a new Jurisdiction viz. that of the Justices of the Peace, His Successor took the nomination of Sheriffs into his own hand, which Office had been often before granted in Fee, or left to the Election of the Free holders

Edward III. extended the Jurisdiction of the Court of Chancery, which by applying in numberless cases the rule of Equity, came in time to swallow up the whole common Law.

Upon the dissolution of the Aula Regis, & the Erection of the four Great Courts out of its Ruin, the House of Peers came to be the Supreme Court of Appeal for the King's Great Council among the Saxons consisting chiefly of the Great Lords as well as the Aula Regis of the Normans, when they came to be sunk, & the Lords assembled by themselves tho' a part of Parliament

yet they retain'd their antient distinction & were considered as the great Court of Appeal of the Nation.

By all these methods the business of the inferior Courts gradualy decay'd, the King's Courts by Statutes & devices drawing it entirely to themselves, & in proportion as the Feudal Jurisdiction sunk, the Official one rose; the power indeed of the Court Palatines lasted considerably longer; but that also was in a great measure put an end to in the Reign of H. VIII.

Such was the progress of Jurisdictions in this Country; we shall next take a short view of the manner of proceeding in these Courts

Most barbarous Nations have been strongly tinctur'd with Superstition & for that reason have paid more regard to an Oath than others; the Saxons here, made the first determination of Lawsuits depend upon Oath; but as in Criminal Cases the temptation of Perjury was too strong, the Ordeal, Excorcism, & many other awful Ceremonys were introduc'd to discover truth.

After the Norman Invasion the mixture of Foreigners, the introduction of a new system, the convulsions in the State, the great increase of numbers, & mutual distrust & hatred made Oaths of all parts

suspicious, the Norman method therefore of deciding Lawsuits by Combat, was introduced ~~the~~ England; but when Government came to be more regularly settled the uncertainty arising from such Rules of Judgement was evident. The Trial by Oath went into disuse, Henry III. prohibited the Ordeal, Henry II. tho' not able to prevent duelling entirely yet granted to the Defendant the privilege either to fight or throw himself under an Assize of twelve Men; & in many of St. John's Charters to Boroughs duelling was expressly forbidden; we meet with an instance

as late as the Reign of Elizabeth of Trial by Jury, that of Oath remains to this day with regard to Wagers at Law, for here the Defendant where apparent proof is not brought by the Plaintiff is allowed to clear himself by his Oath, & the Oaths of so many creditable persons asserting his Veracity as the Court shall appoint.

With these exceptions the form of procedure by Assize gain'd continually ground, till it came to be firmly establish'd in this Country.

Having thus slightly touch'd upon the first erections of the different Courts of Justice, & pointed out the Variations they have gone through since their original

institution, we next propose to examine their present state Power, & methods of proceeding; in the prosecution of this plan we may very probably repeat observations made before, but that is unavoidable in a subject of this Nature, & not entirely useless, as it will imprint particular facts stronger in the mind.

Next follows the Modern Courts of Justice

was followed by many other superiors, & the socage tenures became so much more agreable in times of Peace that many military holdings were exchang'd into socage; thus in the original Feudal constitution the Nation appears to have been divided into two Classes Soldiers & Husbandmen, for as to settlements of artificers their was little attention paid to them till William's time who as well as his successors establish'd many Communities & the benefit of them appearing visibly, procur'd them gradualy Magistrates of their own, & exclusive Jurisdictions; a new holding was likewise calculated for them

call'd Burgage Tenure.

We have seen that the Normans at first exacted Military Services from the Clergy; this in peaceful times became unnecessary, & in Donations of the Church, nothing but prayers & Religious Exercises were demanded; this then produ'd a fourth holding call'd Frankalmoigne so call'd because the Lands were held as Free Alms in Liberam Eleemosynam on account of Religion; these three last Tenures having been the Offspring of Peace the same Genius produ'd great alteration in the first or Military Tenure. &c.

Originaly Lands were subject to indefinite Military services; the Normans apply'd them to particular things; thus Lands granted for defending Castles were said to be held by Castle Guard, others for performing Military services about the King's person as carrying his Banner &c. were held by Grand Serjeanty, others for attending him abroad were call'd Escuage holding, of which the greatest part of the Feudal property consisted.

All Vasals were originaly oblig'd to serve in person, by degrees the Custom came up of sending a

Deputy, & even that was gradually
left off, & came to be commuted into
money; Superiors on pretence of this
exacted great sums from the Vassals,
to elude which the Escuage
certain was invented whereby a
certain sum was fixed; but this
was by no means general, so that the
Escuage uncertain which was a
composition left to the Agreement
of Parliament continued very
common; this latter continued
subject to the incidents of Ward
& Marriage, & was so far Military
holding; but by the payment of
Money, it became a Mixture of
the Socage too.

As to the Escuage certain, it was altogether a Soccage Tenure & subject therefore to the duty of it alone.

Originally when Lands were granted in Soccage, the full Value was received for the Grant, but Luxury coming in with the Feudal Manners, Superiors in want of Money made these grants for small Rents, in consideration of one large sum paid, & at last the Rent came to be laid aside altogether, instead of which a Shoe, a pair of Spurs, or some such Thing was given; which produced Bench holding most of the Lands in the Island

having been converted into this holding, the Regal power was lost over the Crown Vassals, & there again lost over the whole People.

After this general View of the different species of Tenures, we shall take notice of some of the particular perquisites attending them.

Formerly when the Vassal could no longer perform this service, the Land return'd to the Lord; but when these Grants came to be extended to Heirs it ~~seems~~ still remain'd that while those Heirs were from their Minority incapable of performing service, the Fief should return to the possession of the Lord; this produc'd the

right of Ward, which put not only the Estate, but the person of the Heir in the Lord's Custody, & as it would have been unjust for the Vassal to have brought into the joint possession of the Fief one of a family at enmity with his Lord, hence flowed the right of the Lord to the Marriage of his Vassal.

Probably in the old strict Feudal Times the Lord had the Marriage of both Male & Female Heirs, but as there was a great difference between them, there was also a very great difference in the penalties, for a Man marrying his

Daughter without Her Lords Consent, forfeited his Fief; but for the Marriage of Her Son He paid a sum of Money; in time both were upon the same footing paying the Value in Money.

We said before that the property at first return'd to the Lord on the death or incapacity of the Vasal; but afterwards it descended to the Heir; but as the Heirs right was not conceiv'd to be absolute, He made a present to the Lord for his entry; this was at first call'd Redeeming the Fief, in after times a Renovation of it; in the first case the renewal was

supposed to be a voluntary agreement, in the latter an absolute engagement upon the Lord to renew; but all this regards only the inferior Vassals; for the King's retain their ancient Privileges

Having treated the original of Tenures & their original nature, we next come to the fate of both the one & the other.

We must observe that the basis of the Feudal System, consisted in the Connection between the Lord & the Vassal; as this connection grew weak, the Feudal System declined in proportion.

Tenures by Frankalmoign preserving too little connection between the Lord

& Vassal at a time when much was
requir'd, they were early restrain'd,
first by the Statutes of mortmain, &
afterwards effectually bar'd by the
Statute Quia Emptores of Ed. I. in
Scotland the Glebe & Manses of the
Clergy, are the only remains of it
in the Island.

Military Tenures fell at a later period
when the connection between Lord &
Vassal became unnecessary.

Soccage & Burgage holding being
a Sort of medium between the two
extremes, are in force to this day.

The perquisites of Wards &
Marriage tolerable only in a
military age were appropriated to
military holdings, but soon softened by

several Acts of Parliament, but finally abolished by the extinction of the Court of Wards & liveries; the

The Right of demanding Aids from Vassals was put an end to by the Statute that abolish'd Knight's Service; the only shadow of it now remaining is in the Custom of Parliament to grant an aid for the Dowary of the King's Eldest Daughter; for as to the Land tax it has been long chang'd from a Feudal perquisite to a National supply; the truth is Taxes were originaly no part of the Gothick constitution; the King's Court was supported by his own Domain & the revenue of the Feudal Services, & the King to make it more palatable

pretended to receive them as voluntary contributions; things could not long remain in this way; the Kings Feudal Emoluments were lessened by the declinement of the Feudal System, & the exigencies of Government not decreased; a Land tax therefore became necessary, & the danger of leaving it in the King's power was apparent, tho' at last in the Reign of Ed. 1. it was settled that no new Aid should be laid on the subject, without consent of Parliament; it was the rise of the great Families that thus deprived the King of the power of laying on the Land tax; & we have since seen the House of Commons acquire to

great a ~~weight~~, that they have taken
this most essential privilege, both from
the King & great Families, & in reality
the imposing taxes at present in
Britain, not only on land, but other
property, belongs not so properly
to Parliament as to the Commons alone,
that by Custom, much stronger than
any Statute. Let us add that the
power thus taken from the Crown
& given to the Subject was the
foundation of English Liberty, &
is the noblest mark of distinction
betwixt the British Constitution &
most of the Hereditary Sovereignties
in Europe.
Such was the produce of Tenures

& such the fate of them; they drew their origin from the strong coalition between the Superior & Vassal, & were at first extremly severe, but lessen'd in their severity as that connection decreas'd, & the military system weaken'd, & that both in the nature of the Tenure, & the perquisites of them; the People by their Customs changing many of the Military into Feudes effected the one while the Judges by their interpretations adapted to the Genions of the Times effected the other, & the Statute Law came in Aid of both, till at last they were finaly abolish'd in England in the 12th. of Ch. II. & in Scotland in the 20th. of G. II.