XL. *Observations on Mr. Maseres's View of the ancient Constitution of the English Parliament, by Charles Mellish, Esquire. In a Letter to the Rev. Mr. Norris, Secretary to the Society of Antiquaries.*

Read at the SOCIETY of ANTIQUARIES, June 9, 1772.

I HAVE read with attention Mr. MASERES's *View of the ancient Constitution of the English Parliament*; and have received great information from the many ingenious remarks there made on a subject confessedly obscure and intricate.

BUT as I have occasionally ventured, while that Paper was in reading, to throw out some doubts with regard to particular doctrines there laid down, I have here collected, as more agreeable to the practice and wishes of the Society, the purport of what I then offered; not that I mean, or wish to be understood, to enter the lists with a gentleman of his superior abilities and knowledge; but only to suggest to his reflection some authorities which may possibly have escaped his observation, and to offer some opinions, which, however erroneous they may be, I have long since adopted; but which I shall always be ready to renounce, whenever the principles on which they are founded are shewn to be untenable.

As advocates for truth only, we are both aiming at the same goal; I hope therefore what I may here offer as a free discussion and examination of this subject and the doctrines laid down by Mr. Maseres will not be displeasing to him.

I PER-

I PERFECTLY agree with Mr. Maseres, that William the First claimed the crown by a pretendedly legal title, the will of Edward the Confessor [a]; to which he afterwards joined the consent of the land-holders; for so I interpret what he calls the principal men. The latter, no doubt, was his best title. But I cannot conceive that, though he should have attempted to alter the rights of property which had obtained here before his time, he could be able to effectuate it; nor that a measure so replete with oppression would be adopted, where no reason appears to justify it. I am therefore not inclined to believe this opinion, whatever the prejudices and representations of bigoted historians may have suggested. Let us take a view of the state of property before his time.

If we look into Tacitus [b], we shall there find the first traces of our ancient Saxon government. I say Saxon, because I think we need not go higher; though the laws of Howel Dhà seem to imply an imperfect feudal system subsisting even in the times of the Britons; concerning which Mr. Whitaker has written fully and learnedly in his History of Manchester.

THE Germans, from whom were derived our Saxon progenitors, were all warriors; all attendants on their prince, whose glory it was *magno semper electorum juvenum globo circumdari; in pace decus, in bello praesidium*; and the prince was most respected, *si numero et virtute comitatus emineat. Principes pro victoria pugnantes, comites pro principe. Principem defendere, tueri, sua quoque fortia facta gloriae ejus assignare, praecipuum sacramentum est* [c].

THIS is the earliest account I have met with relative to this matter; and it in good measure coincides with my idea of

[a] Hale's Hist. C. L. 5th ch.

[b] De Mor. Germ.

[c] Ibid.

fealty.

fealty. Tacitus continues, *magnum comitatum non nisi vi belloque tueare*; whence, as well as from the nature of things, I infer that the prince maintained his army; but it appears to have been by war and rapine, whilst it continued in Germany, a poor country, and overstocked with inhabitants; *materia munificentiae per bella et raptus*. But when the Saxons had gained a footing in this rich country, it is reasonable to suppose their services were no longer to be gratified and compensated with the liberality of their prince, confined to the *bellatorem equum*, the *cruentam victtricemque frameam*, as heretofore; they wanted more substantial marks of his favour; and, as in Germany, *magna erat comitum aemulatio, quibus primus apud principem suum locus*, that spirit could never subside by conquest. I conclude therefore, that where-ever the German forces made conquests in England, they enslaved the natives, and seized such part of the lands as they pleased. Hence appears to me the origin of our pure villenage; concerning which I shall speak hereafter. Thus Montesquieu observes [d], *Les Francs avoient conquis; ils prirent ce qu'ils voulurent, et ne firent des reglemens qu'entre eux*. And [e] *La resistance, la revolte, la prise des villes emportoient avec elles la servitude des habitans*. It would be too long a digression to enter minutely into the property of the crown at the different periods in which German forces came into this country. Suffice it to say, that the chief property in the several kingdoms belonged to the king of that kingdom, or his sub-tenants, and was consolidated under the monarchs of the Heptarchy. The conversion of allodial property into feudal increased in appearance, though not in fact, the power of the crown. More land it is true appeared to be holden on feudal principles, but the allodial people [f] were bound before to the civil

[d] L. xxx. c. 7. [e] C. 2. [f] Wilkins Ll. Alfred 4. Ll. Cnut 54

jurisdiction, and were punished with the loss of life, and forfeiture of estate, in case of high treason.

I DO not say that no acts of violence and oppression were committed by William the First. I believe with Ingulphus that there were many ; and that in the latter part of his reign he did not promote the natives to offices of trust, upon the general principle in Curtius, [g] *quos viceris, cave amicos tibi credas* ; because he found even Waltheof ungrateful, whom he had married to his niece. But as to their ancient property, it was left, for the most part, as he found it, except where they forfeited their lands by conspiring against him ; in which case the laws of Alfred and Canute seemed to him to be on his side [h]. Slavery was prior to the Conquest ; lands descended before the Conqueror's days ; and Doomſday Book is, to me, an authentic proof, that he altered not the rights of property ; it being, for the most part, an account of the lands belonging to the crown in the time of Edward the Confessor ; and he also confirmed the rights of his subjects by his 51st law.

INDEED, as the crown had so large a property of its own, increased by the forfeitures, mentioned by Mr. Maseres, and by the change of allodial into feudal lands, there seems less colour or necessity for an arbitrary alteration of property. However, tho' I may differ from this gentleman as to the origin of pure slavish villenage, which I conceive to have been grafted on the Saxon or Danish conquests ; and as to the introduction of our feudal tenures, which I take to have proceeded from the will of the lord of the soil, William I. who let the lands on the tenures of his country ; I agree with him that we are to date the compleat introduction and establishment of those *Norman* tenures from his time.

[g] Lib. vii.

[h] See Ll. Cnut 51, *et passim*, as to Slavery, and Ll. Alfred 37 as to Estates. See also Wilkins's account of the claim of the Sharburn Family, in his preface to the Laws of William I.

I CONCUR

Estate to A,
and his heirs.

I CONCUR in the idea that *an estate to a man and his heirs for ever* was an estate to him and his lineal descendants, and not his collateral relations; for, as a *feudum novum*, it could descend only to the blood of the first purchaser; and the numerous deeds of confirmation by heirs which we meet with, prove that the ancestor could not bar the heir. Indeed the laws of Alfred gave the heir this right [i]. Hence it followed, that where the parties meant to curtail the heir of such right, they inserted the clauses *heredibus, et heredibus heredum, vel cuicumque dare, vel vendere, vel legare, vel aliquo modo assignare voluerit*; which, putting it in the option of the first tenant to circumscribe, and to bar his heirs, rendered the right of the heir of no value; and then, by degrees, the courts of law interpreted the gift to be *to A alone*; and the words *and his heirs* to mean only the *quantum* of the estate given to A, which was for ever [k]. We are not to be surprized, if the heir thought he had a right *ex dono*; since I was asked my opinion once in the country by a man who did not want sense, whether, where an estate was given to A, and his heirs, A could bar his heirs.

Escheat and
Forfeiture
for Treason.

LITTLE difference, I observe, is made by Mr. Maseres between Escheat and Forfeiture for Treason. So says Fleta, *quoties per defectum vel delictum extinguatur sanguis tenentis*; and so I ever have thought: but the courts of law have attempted great distinctions in favour of prerogative, a word which had better be forgotten, being neither calculated for king nor people. It is too long a subject for discussion on the present occasion. I will only say, that I do not presume to argue against the distinction laid down in Lord Coke, and Salkeld, between the right of the king, holding as king, upon attainder for Treason; and his right, as lord, in other escheats. The case of the manor of Peverel, mentioned by Lord Coke, the opinion of so great a judge and lawyer, and the two later cases in

[i] See Ll. Alfred, 37. [k] See Plowden. [l] On 31 chap. of Magna Charta.

Salkeld, bar me from attempting such a plea ; but I am not precluded thereby from giving my opinion as to the first introduction of a prerogative under which Lord Huntingdon and divers of the ancient nobility at this day smart ; and which has occasioned the extraordinary case of *an elder brother, born before pardon by charter*, who, on the death of his father, cannot inherit his estate : neither can the younger take it, though he has inheritable blood, during the life of his elder brother ; but the estate remains in abeyance till the elder brother is pardoned, or dies. Indeed, during the prevalence of the Roman religion, if the younger brother could prevail on his elder to profess, and *mori civiliter*, he might succeed to the estate. I fear much that this distinction pays a compliment to the crown at the expence of the 31st ch. of Magna Charta. I wish the crown lawyers would consider, that the state of property among us is now quite altered ; we both give the produce of the land, which we hold, with more facility to the crown, than our ancestors gave theirs ; and hold the same land with more (if I may so call it) allodial independence. Monarchy is now properly tempered with liberty ; and the same severity, which formerly in a warlike enthusiastic people made the happiness of government, is now the bane of it. The king cannot secure his throne on a firmer basis than on the liberty of his subjects, which must insure their love ; and we may now, with safety to the state, revert to that excellent rule, I believe of the civil, I am sure of the common law, “ That no one shall suffer for a fault “ which he is not proved to have committed ; and till proof had, “ he shall be presumed innocent.”

MR. Maseres, I observe, blames the division among the daughters in coparcenary. If I mistake not, Feuds originally descended to all the sons ; and the book of Feuds says so. Certainly lands descended in Gavel-kind among the ancient Britons ; and Mr. Whitaker [*m*]

[*k*] History of Manchester, p. 251.

thinks

thinks the plan of division of the estates among all the sons, whilst the crown was hereditary, was creative of absolute authority; as the crown could have been in no fear of opposition from the greatness or the exorbitancy of an overgrown fortune in any of the barons. Mr. Maseres, speaking of the Norman system, thinks it the most perfect and durable of all systems of monarchical government; and the best fitted to preserve the liberties of the people against the encroachments of the crown. For my part, though I agree with both writers in their observations, I must say, that the British and Kentish division of Gavel-kind was humane, though it may have been impolitic; and that the Norman system in its consequences, while it freed the people from the tyranny of one, served to make them slaves to many.

THE Conqueror's laws are published by Dr. Wilkins, as well as Dr. Gale; also by Lambert, and others, though Mr. Maseres may probably not have met with those editions.

MR. Whitaker is of a contrary opinion to Mr. Maseres; for Reliefs, &c. Mr. Whitaker thinks that Relief was known in England before William I, and founds that opinion on the laws of Howel Dha.

I AGREE that in the time of William I, parliaments were composed of tenants in chief to the king; but they were, I conceive, such tenants only in chief as held by military service. It is said, indeed, that tenants in chief who held in socage were members of the great council; but herein I must beg leave to differ; for, tho' I find in the time of the Britons, that the Feud (a British word for Estate) was held by military service, and also by socage rents; and though divers instances are given of such holdings, under the Norman kings, yet I think that they appeared in parliament for no other purpose but to do their duty of counsel, as military tenants, and to assess what should be paid by such as had been remiss in their duty; and I know not what business a socage tenant, merely as

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such,

Tenants in capite.

such, had to transact in parliament. When military tenures were in process of time changed into rents; when scutages supplied the place of personal service, and armies were raised by indentures in the Exchequer; when subinfeudations increased; when representation took place; the service by military tenure was, of course, ~~superseded~~ ^{superseded} ~~superseded~~; and there being scarce such a person as a tenant in chief by military service, and great alterations in property having been made in a civil war, the legislature thought fit to abolish the military service, 12 C. II.

Subinfeudations.

THE effect of Subinfeudations seems only to have made it difficult to know who ought to attend at parliaments; but this difficulty was removed by the Statute *Quia emptores terrarum* &c. and by the mode of representation, which fixed the rights of the voters.

The different parliaments.

MR. Maseres has made an accurate distinction with respect to parliaments; and I am firmly persuaded with him, that there was an essential difference between the *curia de more coadunata* (which met regularly at Christmas, Easter, and Whitsuntide, whether the king summoned them or not) and the *conventus principum ex edicto regis*. Could we ascertain the practices of antiquity, we should find perhaps that this *conventus principum* was the origin of that great council of peers which met in the times of Charles I, as Clarendon mentions.

Summons to parliament.

I will not take upon me to say that there was in those early days a constant regularity observed in summoning to parliament. I have read, though where I cannot at present recollect, that even women have been summoned to parliament.

IN those times the rights and prerogatives of the crown were not so rigorously examined; but if the king oppressed the nation, an insurrection ensued, which soon convinced him of his error.

As

As to Villenages, the proper division I apprehend should be into Villenage, those holden by *certain*, and those by *uncertain* services.

THE Villenages holden by certain base services are tenants in ancient demesne, or at present copyholders, holding according to the custom of the manor, but not at the will of the lord [1]. These Villains were known to the ancient Britons, and to the Irish; tho' Bracton says they arose from the Conquest. He proves they were freemen.

THE Villenages holden by uncertain base services were called Pure Villenages; and these were holden either by slaves, or freemen. Those holden by slaves arose, I conceive, principally from the Saxon and Danish conquests; though some such existed in the time of the Britons, as Mr. Whitaker has shewn; but pure Villenages holden by freemen may have arisen from the Norman conquests; and Bracton gives the following account of them;

*“ Item tenementum non mutat statum liberi magis quam servi.
 “ Poterit enim liber homo tenere purum villenagium faciendo quic-
 “ quid ad villanum pertinebit, et nihilo minus liber erit, cum hoc fa-
 “ ciat ratione villenagii et non personae suae, et ideo poterit quando-
 “ voluerit villenagium deserere, et liber discedere, nisi illaqueatus sit
 “ per uxorem nativam ad hoc faciendum, ad quam ingressus fuit in
 “ villenagium et quae praestare poterit impedimentum.”*

AND indeed it seems no way improbable that those villains whom Bracton takes notice of (where he is speaking of ancient demesne) who had been ousted of their tenements by William the Conqueror, might return, and become tenants upon base and certain services: but might, from necessity, take the lands upon the basest and most uncertain services.

I WOULD observe, that villains *ratione personae* might not only be intirely manumitted, but also partially privileged from the

[1] Whitaker's History of Manchester, p. 206e

seizure of the lord ; and this by being professed ; by being made a knight ; by being a priest in the king's chapel ; a niece marrying a freeman. &c. These privileges, however, did not absolutely manumit [o].

THE form of Manumission was thus [p] ;

Qui servum suum liberat in ecclesiâ, vel mercato, vel comitatu, vel hundredo, coram testibus, et palam faciat ; et liberas ei vias et portas conscribat apertas, et lanceam et gladium, vel qui liberorum arma ei ponat.

By Manumission and Infranchisement on the decision of courts, who were very astute in their interpretations, pure Villenage *ratione personae* is worn out in England, as in France. The villain acquiring a freedom of person soon acquired a property, with which he purchased from the lord various indulgences, and at last made even his tenure certain : for, having gained his freedom, he at first held, as before, by services of the basest and most uncertain tenure ; he then altered the tenure to base and certain services ; and then often changed them into a rent ; witness the Bickton-tenants, and most of the tenants by ludicrous services. Sanctuaries may, in the method Mr. Maseres mentions, have increased the number of Pure Villains.

Tenants for years.

BUT I cannot agree with him, that Tenants for Years were other than Freeholders.

Burgages.

I AM of opinion, that the right of the Clergy to taxes of servants arose from taxes on slaves ; and is not now to be maintained. Some Burgages may have been composed of Villains, *ratione tenementorum* ; but many, as I take it, *ratione personarum* ; and so far was Nottingham from being in that abject state, that the burgesses of Nottingham had slaves of their own. And by an attested copy in the hands of Thomas Aftle, Esquire, King John grants for sixty-six marks to the burgesses of Derby, a *Confirmation* of their liber-

[o] 1 Inst. p. 136. b. 137. b.

[p] 1 Instit. ib. from Lib. Ruber. c. 78.

ties ;

ties; an implication that they were free before King John's Charter. It refers also to the rights of Nottingham *tempore Henrici proavi*, or Henry I.

TAXES may have been raised, by arbitrary power, oftner on burgages, than on other tenures; but the burgesſes endeavoured to keep up appearances; they voted firſt whether they ſhould ſupply the king's wants, and then voted the *Quantum* of the ſupply.

THE privilege of incorporation was rarely granted to others than freemen; including in that idea the pure villains who held *ratione tenementorum*, under the word freeman, *quia potuit villenagium deferere*. Incorporation.

I ENTIRELY agree with Mr. Maſeres that great humanity was in this kingdom ſhewn to the villain *ratione personarum*.

IT is obſerved, that moſt of the infranchiſements of boroughs happened in the reign of H. II. R. I. John, and H. III. But this ſubject has been ſo amply treated by Dr. Brady, and ſtill more profeſſedly by that elaborate antiquary, Mr. Madox, in his *Firma Burgi*, that there is leſs occaſion to enter upon it here.

I TOTALLY agree with Mr. Maſeres, that a tenant of the 300th part of a barony was intitled to ſit in parliament; and that hence aroſe the diviſion into *Barones Majores*, and *Minores*; but I do not apprehend that the *Barones Minores* were ſummoned, generally, before Magna Charta; becauſe the grievance complained of ſeems to have been, that the king ſummoned eſpecially whom he pleaſed; and in that ſtatute it is expreſſly ſtipulated that the king ſhall ſend ſpecial writs to every greater baron; and ſhall ſummon the *Barones Minores* by a general writ directed to the ſheriff. Tenant of 300th part of Barony.

THE

THE remarks on the extent of manors in the appendix are very curious. I fear I need an apology for an intrusion, from which you are not likely to derive much information or pleasure ; but I thought the subject interesting, and wished that some gentleman of more adequate abilities might pursue the study, and throw fresh light upon this important subject.

TRUTH will ever bear the strictest scrutiny : and that excellent constitution, which has been refined and purified from its dross by the experience of ages, will come forth still more perfect when its ancient usages are inquired into under the inspection of this learned Society.

I am,

SIR,

Your obliged servant,

Charles Mellish.

XLI. *Drni-*