

did not then exceed 125,000 persons (convicts as well as free) was equal to four-fifths of our commerce with the two Canadas, containing a population of one million ; to three-fourths of our commerce with Jamaica, containing a population of 361,000 ; to nearly double that with the Mauritius ; and to one-third of that with our Indian empire."

Again, "The extent of the market of these colonies for the products of the industry of this country may be inferred from the fact, that in 1836 the exports of British produce and manufactures to New South Wales and Van Diemen's Land were equal in value to about one-eighth of the whole of the exports to the colonial empire, whose population was nearly 100,000,000 ; to two-fifths of the exports to the North American colonies ; to three-sevenths of the exports to India ; they were nearly equal to the exports to the West Indian colonies, both insular and continental; and were four times as great as those to the Mauritius."

Another important feature in the present question is also, the rapid increase which has recently taken place, and is still going forward, in the number of its free population.

The penal character of the colony has been commonly urged as opposed to its possession of the free institutions of England. In this argument, however, has been entirely overlooked the fact that there has ever existed within it a considerable free and virtuous population. The latter term is used advisedly ; for it will be hereafter shown, upon the "State of Society and the State of Crime in the Colony," that those who are the unhappy objects of criminal justice during the period comprised in these observations, have been but very rarely of the class of free emigrants or of their children, and so rarely as to be a subject of very considerable interest and surprise, considering the great disadvantages under which they have laboured,* to those who have been born in the colony even of one or both convict parents.

In the census of 1828, the population was stated to consist of 36,598, of which number 13,400 males and females, of all ages, are stated to have "come free"† and to have been born in the colony ; and of the former class there were 4,673 persons, all of them encouraged to settle within it, and to carry their wealth thither, by the great inducement of free grants of land and of convict-labourers, at first, without regard to their capital, and

* For a statement of these disadvantages, as respects the deficiency of religious instruction, both for them and their parents, see the Writer's work on the "State of Religion and Education in New South Wales."

† Government Notices, 25th September, 1829, State *of*. Religion. and Education, p. 317.

during the latter part of this period, in proportion to the amount of capital possessed by the applicant. These might surely claim, as might the innocent offspring of those who were transported to the colony, for themselves and their posterity, that neither should be degraded by the loss of their civil rights. Their claim was, however, strengthened when those lands, formerly gratuitously given, came, under instructions from the crown, in the year 1831, to be sold to those who were already colonists, or were disposed to become so. The colony was then, at least, thrown open as a free settlement ; and its penal character, at first modified, has now become merged in that tide of free emigration which has, happily for its moral and commercial welfare, of late set so strongly towards its shores. Upwards of 50,000 free persons have, since the foundation of the colony, become settlers there ; of whom upwards of 43,000 have gone thither since the year 1820 ; and of them about 38,542 in and subsequent to the year 1832, under direct encouragement of the government, and under the Land Regulations of 1831.*

It is stated by the Committee on Transportation (Report, p. xxx.) respecting New South Wales that “from 1825 to 1836, there have been 45,029 immigrants into that colony.”

The rapid increase, indeed, which the colony is still receiving, especially in its free emigrant population, need only be shown, in order, it is presumed, to establish its claim to be no longer regarded as a penal settlement, and that of its colonists to a form of government more congenial to their habits and desires than that which they at present enjoy. Between the close of the year 1836 and the end of April, 1839, a period of two years and four months, there had arrived in the colony no less than 11,057 emigrants, and the whole increase of population within that short period, by transportation and emigration together, amounted to 23,424, or nearly one-fourth of the whole population of the colony. Nor is this all; for the number of emigrants who sailed for the colony during the years 1838 and 1839, (although all of them did not arrive in those years) is calculated to have been upwards of 25,000.

The legal basis of that system on which the government of the colony of New South Wales, in its executive and legislative branches, has been conducted, and justice administered, from the 1st of March,

* See Appendix to Reports on Emigration, at p. 6 ; and Return of Emigrants from the 1st of January to 31st of December, 1837 ; and Agent General's Report of 1839. .

1829, and during the whole period comprised within the scope of the present observations, has been the statute of the Imperial parliament, (9th Geo. IV. c. §3,) passed on the 25th July, 1828, entitled ‘ An Act ‘ to provide for the better administration of justice in New South Wales ‘ and Van Diemen’s Land, and for the more effectual government ‘ thereof, and for other purposes relating thereto.’ It will not be necessary, therefore, except for the purpose of occasional elucidation, to refer to the enactments of earlier periods, which had expired or were repealed, when that statute came into operation.

In the first clause of that act, the title occurs of “ The Governor of New South Wales,” as a person whose authority is thereby recognized ; and he is empowered, both in that and subsequent provisions of the act, to perform several important functions, which it required the power of the legislature to give him authority to perform ; these will be presently noticed. His appointment is by letters patent, under the great seal of the United Kingdom of Great Britain and Ireland ; and that of the present governor, Sir George Gipps, bears date the 5th of October, in the first year of Her Majesty’s reign.

His authority, therefore, is of two kinds ; first, that which he derives from the express terms of the statute ; and, secondly, that which he derives from his letters patent, issued in virtue of Her Majesty’s royal prerogative. The powers conferred on the governor by the statute, in so far as they relate to the system of government, are comprised in those sections which relate to the appointment of a legislative council, and its powers and duties.

That body, it is provided,* shall ‘ consist of such persons resident ‘ in the colony, not exceeding fifteen, nor less than ten, as His Majesty, ‘ his heirs and successors, shall be pleased to appoint.’

At all the meetings of the council so constituted, the governor being present in the colony, and not prevented by illness or other adequate cause-(and in either of these events, such other member of the council as His Majesty shall be pleased to appoint)-it is provided, shall preside ; and ‘ the governor or presiding member is entitled to vote upon all ‘ questions proposed at any such meeting, and when the votes are ‘ equally divided, also has an additional or casting vote.’

To the governor, with the advice of the legislative council, is delegated power and authority to make laws and ordinances for the peace, welfare, and good government of the colony, (such laws or ordinances not being repugnant to that act, or to any charter, or letters patent, or order in

* Sec. 20.

council which may be issued in pursuance thereof, or to the laws of England. And no law or ordinance can be made or passed, ‘ unless ‘ the same is first laid before the council by the governor.’ *

In case of the death, resignation, absence, or incapacity of any member of council, the governor is empowered to appoint a fit and proper person in his room, until the vacancy shall be filled up by His Majesty, his heirs and successors, in manner provided by the act. †

With respect to the objects of transportation, in the governor is vested, by the statute for the transportation of offenders from Great Britain, ‘ the property in the service of such offenders ;’ and he is empowered to assign that property to others. ‡ The statute now under notice further authorizes him to revoke any such assignments, and to grant to any offenders transported to the colony, such temporary or partial remissions of their sentences as may seem to him best adapted for their reformation ; and such temporary or partial remissions from time to time to revoke or renew as occasion may require. §

By his commission he is constituted and appointed to be “ Captain General and Governor in Chief,” (the definition of which terms must be sought for in what follows, since they convey of themselves no known authority,) in and over the said territory, and of all forts and garrisons erected and established, or which shall be erected and established within the said territory, or within any of the said islands, save and except that first part of the said territory therein before described, which is called and known by the name of “ the Province of South Australia.”

“ He is required and commanded to do and execute all things in due manner, that shall belong to his said command and the trust reposed in him, ‘ according to the several powers and directions’ granted or ‘ appointed him’ by that commission, and the ‘ instructions therewith’ given to him ; ‘ or according to such further powers, instructions, and ‘ authorities as should,’ at any time thereafter, be granted or appointed him under the royal sign manual and signet, or by Her Majesty’s ‘ order in her privy council, or by Her Majesty through one of her ‘ principal secretaries of state,” and according to such laws and ordinances as were then in force, or which might thereafter be made under and by virtue of the statue 9th Geo. IV. c. 83, continued by subsequent enactments to that time.

* Sec. 21.

‡ Stat. 5th Geo. IV.

† Sec. 31.

§ Stat. 9th Geo. IV. c. 83, sec. 9.

“ **He** is required to take the usual oaths of office, and is required **and** empowered to administer the like oaths to the chief-justice and members of Her Majesty’s executive council.

“ He is authorized and empowered to keep and use the public seal appointed for the sealing of all things whatsoever that shall pass the seal of the said territory and its dependencies.

“ He is vested with full power and authority to suspend any of the members of the executive council from sitting, voting, or assisting therein, if he shall find cause for so doing : and if it shall at any time happen, by the death, resignation, or departure from the territory and its dependencies of any of Her Majesty’s executive councillors, that there shall be a vacancy or vacancies in the said executive council, he is authorized and required, by warrant or commission under the public seal of the territory and its dependencies, to appoint to be members of Her Majesty’s executive council, so many fit and proper persons as shall make up the number present to be four and no more. It being, nevertheless, Her Majesty’s will and pleasure, that he do signify to Her Majesty by the first opportunity, every such vacancy, with the occasion thereof, as also the names and qualifications of the persons appointed by him, to the intent that such appointments may be either disallowed or confirmed by Her Majesty. And until that disallowance or confirmation shall be made known to the governor, **it** is declared that the persons so appointed shall be to all intents and purposes executive councillors within the territory and its dependencies. And if in **consequence** of the suspension of any of the members of Her Majesty’s executive council, or their inability to attend from any temporary cause, there should not be a sufficient number of executive councillors to form **a** quorum, the governor is authorized (provided the nature of the case shall in his judgment render it necessary, to nominate, **from** time to time, under the public seal of Her Majesty’s said territory and its dependencies,) such persons as he shall deem best qualified to act during the temporary incapacity of such executive councillors, so that the number present may be two and **no** more, exclusive of himself, and in his absence, exclusive of the member presiding ; and the persons so nominated by him (it is declared) shall be, and be taken to be, executive councillors, until the members **origi-**nally appointed are enabled to resume their seats, or until others are appointed in their stead.

“ It is also recited, that whereas it has been deemed expedient, in pursuance of the statute 9th **Geo.** IV. continued as before mentioned,

to constitute and appoint a legislative council, ‘with whose advice,’ he is authorized and empowered to make laws and ordinances for the peace, welfare, and good government of the said territory and its dependencies. He is required and commanded to take especial care that, in making and passing such laws and ordinances, the provisions, regulations, and restrictions, made in the said act : ‘and also, in the ‘instructions which have from time to time been issued under the ‘royal sign manual and signet, or which may be hereafter issued by ‘Her Majesty in that behalf, be strictly complied with.’

“The governor is also empowered to administer and give such oaths as in the several acts therein mentioned contained (namely, an act, 1st Geo. I. for the further security of His Majesty’s person and government, and the succession of the crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince of Wales, &c. The 6th Geo. III. for altering the oath of abjuration, &c., and for amending the act of the 7th of Queen Anne, ‘for the improvement of the union of the two kingdoms ;’ or, in lieu thereof, the oath required to be taken by an act passed in the 10th year of the reign of His late Majesty King George IV., entitled, ‘An Act for the relief of His Majesty’s Roman Catholic Subjects,’ as shall be applicable to the case of the individual to whom the same shall be administered, to all and every such person or persons as he shall think fit, who shall hold any office or place of trust or profit, or who shall at any time or times pass into the said territory, or who shall be resident or abiding therein.

“The governor is also authorized and empowered to constitute and appoint justices of the peace, coroners, constables, and other necessary **officers** and ministers in the said territory and its dependencies, for the better -administration of justice, and for putting the law in execution, and to administer, or cause to be administered to them such oaths as are usually given for the due performance and execution of their offices and places,

“Her Majesty further gives and grants to the governor full power and authority, when he shall see cause, or shall judge any offender or offenders in any criminal matters, or for any fines or forfeitures to Her Majesty, fit objects of Her Majesty’s mercy, to pardon all such offenders, and to remit all such offences, fines, and forfeitures, treason or wilful murder only excepted ; in which cases, however, he is likewise empowered, upon extraordinary occasions, to grant reprieves to offenders until, and to the intent Her Majesty’s royal pleasure may be known thereon.

By the statute, however, * his power to remit or shorten the time or term of transportation of any felons or other offenders, in pursuance of the act of 3 Geo. 3. is so far limited, that all instruments in writing made for that purpose are required to be transmitted by him to His Majesty, his heirs and successors, for his and their approbation or allowance, and the assent of the pardon or remission is made to depend upon such approbation or allowance being signified to the governor through one of the principal secretaries of state.

“ The governor is empowered, with the advice and consent of Her Majesty’s executive council, to divide the territory and its dependencies into districts, counties, hundreds, towns, townships, and parishes, and to **affix** the limits thereof respectively.

“ He is empowered, with the advice and consent of Her Majesty’s executive council, to erect such and so many forts, platforms, castles, cities, boroughs, towns, and fortifications, as he, by the advice aforesaid, shall judge necessary, and then cause to fortify and furnish with ordnance, ammunition, and **all** sorts of arms fit and necessary for the security and **defence** of the same, and the same again, or any of them, to demolish or dismantle, as may be most convenient.

“ It is declared to be Her Majesty’s will and pleasure that all public monies which shall be raised be issued out by warrant from him for the support of the government, or for such other purposes as shall be particularly directed, and not otherwise.

“ Her Majesty gives and grants to the governor full power and authority, with the advice of Her Majesty’s executive council of the said territory and its dependencies, ‘ to agree for such lands, tenements, ‘ and hereditaments as shall be in Her Majesty’s power to dispose of, ‘ and them to grant to any person or persons, upon such terms and under ‘ such services and acknowledgments to be thereafter reserved to Her ‘ Majesty, **according** to such instructions as have from time to time ‘ issued under the royal sign manual and signet, or according to such ‘ further or other instructions as may hereafter be issued by Her ‘ Majesty in that behalf, through one of Her Majesty’s principal secretaries of state ;’ which grants (it is declared) are to pass and be sealed with the public seal of the territory and its dependencies ; and being entered upon record by such officer or officers as shall be appointed thereunto (it is declared) ‘ shall be good and effectual in law against ‘ Her Majesty, her heirs and successors.’

“ Power is given to the governor to appoint fairs, marts, and markets, ports, **harbours**, bays, havens, and other places for the convenience and security of shipping, and for the better loading and unloading of goods and merchandise within the said territory and its dependencies, as to the governor, with the advice of Her Majesty’s executive council, shall appear fit and necessary.

“ **All** officers and ministers, civil and military, and all other inhabitants of the territory and its dependencies, are required and commanded to be obedient, aiding and assisting the governor in the execution of that Her Majesty’s commission, and of the powers and authorities therein contained ; and in case of the governor’s death, or absence out of the territory and its dependencies, or in case, from any especial circumstance, Her Majesty shall judge it expedient, by warrant under Her Majesty’s royal sign manual and signet, or otherwise to provide for the civil administration of the government, notwithstanding his actual presence in the said territory and its dependencies, to be ready, aiding and assisting to such person as shall be appointed by Her Majesty to be lieutenant-governor or commander-in-chief, to administer the government of such territory and its dependencies to whom Her Majesty in either of such cases gives and grants all and singular the powers and authorities therein granted to be by him executed and enjoyed during Her Majesty’s pleasure ; and it is declared, that if, upon the governor’s death, or absence out of the said territory and its dependencies, there be no person upon the place commissioned or appointed by Her Majesty to be lieutenant-governor of the said territory and its dependencies, or especially appointed by Her Majesty to administer the government thereof, it is Her Majesty’s will and pleasure that the senior military officer in command of Her Majesty’s forces within the said territory and its dependencies, shall take upon him. the administration of the government, and that he or such other military officer as may **from** time to time succeed to the command of Her Majesty’s said forces, shall also execute that Her Majesty’s commission and the aforesaid instructions, and the several powers and authorities therein contained, in the same manner to all intents and purposes as other Her Majesty’s governor or commander-in-chief should or ought to do in **case** of the governor’s absence, or until his return, or in all cases until Her Majesty’s further pleasure shall be known therein.

“ Finally, it is declared, ordained, and appointed that the said governor shall and may hold, execute, and enjoy the office and place of Her Majesty’s captain-general and governor-in-chief in and over the said territory and its dependencies, together with all and singular

the powers and authorities thereby granted unto him for and during her Majesty's pleasure."

The executive council of government, described in the governor's commission as 'Her Majesty's executive council,' consists of four persons, holding office in the colony, viz.—1. The senior officer of Her Majesty's land-forces for the time being ; 2. The Bishop of Australia ; 3. The Colonial Secretary of New South Wales for the time being ; 4. The Colonial Treasurer of New South Wales for the time being.—They are appointed by letters patent under the great seal, and their powers and duties are such as may be committed to them by virtue of the royal prerogative, and are executed according to such instructions as may **from** time to time be issued by Her Majesty. It is a council of 'advice,' to which the governor may resort upon all occasions, and of 'restraint' in some matters specially mentioned in his commission, as requiring both 'the advice and consent' of the council, and is also a council of restraint in **all** cases in which he may be directed or instructed to follow the advice of the council.

The legislative council, constituted and appointed under the power contained in the statute, consists of fifteen persons, including the governor, seven of whom hold office under the government, during Her Majesty's pleasure, viz. :—The chief justice for the time being ; the bishop of Australia ; the commander-in-chief of the forces ; the colonial secretary for the time being ; the attorney-general for the time being ; the collector of customs for the time being ; the auditor-general for the time being ; and seven other persons who do not hold office under the government, but are nominated by it.

Such are the principles **upon** which the colony of New South Wales is governed ; and it cannot fail to be remarked how **ill** adapted they are for the government of so vast a territory lying at so great a distance from the parent state, and how little calculated to give satisfaction to its inhabitants.

The leading principle of the government of the colony is, in fact, the royal prerogative, exercised by and in the person of the governor, under instructions issued by Her Majesty, and transmitted **through** one of Her Majesty's principal secretaries of state.

“ The appointment of a governor (it is notified* in the public

* Rules and Regulations for the Information and Guidance of the Principal Officers and others in His Majesty's Colonial Possessions. London : printed by W. Clowes and Sons, Duke-street, Stamford-street, 1837.

regulations of the colonial department) is considered to be limited in its duration to a *period of six years* from the time of his assumption of his functions : but *Her Majesty's government reserves* to itself the power (under special circumstances) of prolonging that period."

The period thus prescribed scarcely admits of the officer appointed to so important a charge in a distant colony becoming acquainted with the nature and extent of it, renders the tenure of his office dependent upon any of those political changes which may occur in the government, and converts an appointment, which should be made and continued solely on the principle of the person filling it being well adapted to govern the colony with advantage to it, into a merely political appointment, dependent upon no such principle, but upon the contingency, which of the political parties at home constitutes for the time "Her Majesty's government"-a principle which it is obvious should have no place in any colonial appointment under the crown, where the fitness of the person to serve the Queen and her people should be the only qualification for office.

Instead then of the tenure of office being during "Her Majesty's pleasure," it comes by a direct regulation of the department to be "during the pleasure of Her Majesty's government ;" neither is this principle objectionable merely in theory, it is practically evil. Independent of those fluctuations which are introduced by the frequent change of governors, and proceed from causes arising in the tendency of men in such stations, rather to affect originality in their measures than to pursue the course of a predecessor, there are others proceeding from causes even more reprehensible, and equally injurious to the public.

The **governor** of a political party in England, who has succeeded to one of the opposite part, looks to the officers of his government, who hold their appointments upon the same tenure, for a change in their views and principles corresponding with his own ; these must adapt themselves, by a continual change of principle, to every political change, or become obnoxious to the governor who exacts that dereliction from them ; and whose inquiry, when appointing to an office of trust, or seeking the removal of one already holding it, comes to be, not whether the man will best serve the Queen and her people in his station, whatever it be, but whether "**he is prepared to support the views of the governor**" in some particular object which he may strongly desire to effect ; and this may be merely a theory of his party, or may be such as the governor honestly considers to be calculated for the